

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 May 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

**Decision on Defence request seeking reconsideration of the 'Decision on the
Prosecution request for redactions'**

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 Stéphane Bourgon
Mr Luc Boutin

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**

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') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64 and 67 of the Rome Statute ('Statute'), issues the following 'Decision on Defence request seeking reconsideration of the "Decision on the Prosecution request for redactions"'.

I. Procedural history

1. On 7 April 2015, the Chamber issued its 'Decision on the Prosecution request for redactions' ('Impugned Decision'),¹ whereby it, *inter alia*, authorised the non-disclosure of the identifying information of non-trial witnesses: (i) P-0087 and P-0125, noting that the Office of the Prosecutor ('Prosecution') could not contact them in order for them to express or negate their willingness to be part of the Court's proceedings; and (ii) P-0876, noting that this witness's location was unknown and that he/she had declined cooperating further with the Prosecution.²
2. On 17 April 2015, the defence team for Mr Ntaganda ('Defence') filed a request seeking reconsideration of this discrete portion of the Impugned Decision ('Request').³
3. On 29 April 2015, the Prosecution filed a response, opposing the Request ('Prosecution Response').⁴

II. Submissions and Analysis

4. The Defence submits that – in light of the Chamber's obligation to keep the authorised non-disclosure under review and the Prosecution's related obligation to inform the Chamber of any changed circumstances – the lack of any explicit direction to the Prosecution to contact witnesses P-0087, P-0125 and P-0876 within

¹ ICC-01/04-02/06-545-Conf-Exp. Confidential redacted (ICC-01/04-02/06-545-Conf-Exp-Red) and public redacted (ICC-01/04-02/06-545-Red2) versions were issued on the same day.

² ICC-01/04-02/06-545-Red2, paras 30-34, 47-50 and page 24.

³ Motion on behalf of Mr Ntaganda seeking reconsideration of a discrete portion of the "Decision on the Prosecution request for redactions", ICC-01/04-02/06-562.

⁴ 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), ICC-01/04-02/06-576.

a specific timeframe in the Impugned Decision constitutes a clear error, warranting reconsideration.⁵

5. The Defence consequently submits that the Prosecution should be ordered to:
 - (i) take all feasible steps to locate and contact these individuals in order to inform them of disclosure and provide them with relevant security information; and
 - (ii) inform the Chamber and the Defence of the outcome of the measures taken within two months.⁶
6. The Prosecution avers that the Request should be dismissed⁷ arguing that:
 - (i) there is no clear error of reasoning in the Impugned Decision, as the Chamber already noted the Defence's submissions that a periodical review mechanism be put in place and decided that no automatic review was warranted, thus following the Appeals Chamber's jurisprudence;⁸ and (ii) it has explicitly undertaken to inform the Chamber should it manage to obtain contact information, consent to disclosure and current security information.⁹
7. As the Chamber previously held,¹⁰ the Statute does not provide guidance on reconsideration of interlocutory decisions,¹¹ 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*.¹² Reconsideration is exceptional, and should only be

⁵ Request, ICC-01/04-02/06-562, para. 11.

⁶ Request, ICC-01/04-02/06-562, para. 13.

⁷ Prosecution Response, ICC-01/04-02/06-576, paras 3 and 16.

⁸ Prosecution Response, ICC-01/04-02/06-576, para. 13.

⁹ Prosecution Response, ICC-01/04-02/06-576, paras 14-15.

¹⁰ Decision on the Defence request for reconsideration and clarification, 27 February 2015, ICC-01/04-02/06-483, para. 10; Decision on the Prosecution's request for reconsideration or, in the alternative, leave to appeal, 18 March 2015, ICC-01/04-02/06-519, para. 12.

¹¹ See Article 84 of the Statute expressly permitting revision of a final conviction or sentence in light of, *inter alia*, new evidence.

¹² Article 64(2) and (3) of the Statute; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705; Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the request to present views and concerns of victims on their legal representation at the trial phase, 14 December 2012, ICC-01/09-01/11-511, para. 6; Trial Chamber V(B), *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, ICC-01/09-02/11-863.

done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.¹³

8. The Chamber considers that the Request does not meet this standard. In alleging that the Chamber should have set a periodical review mechanism, the Defence appears to be merely attempting to re-litigate an argument already made in the context of the Defence's response to the 'Prosecution request for redactions',¹⁴ which the Chamber took into consideration when rendering the Impugned Decision.¹⁵ In deciding that the Prosecution 'should assist [it] in bringing to its attention factors that may cause it to reconsider its ruling on non-disclosure',¹⁶ the Chamber has considered, in line with the Appeals Chamber's jurisprudence, that such a direction was sufficient to ensure that the non-disclosure authorised is kept under review should circumstances change.
9. The Chamber considers it to have been evident that in order to comply with the aforementioned direction, the Prosecution is required to take all reasonable measures to locate and contact the witnesses for whom non-disclosure of identifying information has been granted, but nonetheless stresses that point here for the sake of clarity. Any new information that may lead to the reassessment of the Chamber's decision shall be reported as the Prosecution becomes aware of it.

¹³ See Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-1813, para. 19; ICTR, Appeals Chamber, *Jean Uwinkindi v. The Prosecutor*, Decision on Uwinkindi's Motion for Review or Reconsideration of the Decision on Referral to Rwanda and the Related Prosecution Motion, 23 February 2012, ICTR-01-75-AR11bis, para. 11; ICTR, Appeals Chamber, *Juvénal Kajelijeli v. the Prosecutor*, Judgement, ICTR-98-44A-A, para. 203; ICTY, Appeals Chamber, *Prosecutor v. Zdravko Mucić et al.*, Judgment on Sentence Appeal, 8 April 2003, IT-96-21-Abis, para. 49. For similar criteria, see also *Kenyatta* Reconsideration Decision, ICC-01/09-02/11-863, para. 11; *Lubanga* Reconsideration Decision, ICC-01/04-01/06-2705, para. 18 (the Chamber may reconsider past decisions when they are 'manifestly unsound and their consequences are manifestly unsatisfactory').

¹⁴ Consolidated response on behalf of Mr Ntaganda to Prosecution Application and Prosecution Request and seven additional related submissions, ICC-01/04-02/06-502-Conf, paras 61-65. A first (ICC-01/04-02/06-502-Conf-Corr) and second (ICC-01/04-02/06-502-Conf-Corr2) corrigendum were notified on 11 and 17 March 2015, respectively. A public redacted version (ICC-01/04-02/06-502-Corr2-Red) was notified on 17 March 2015, removed from circulation (Email from Legal Officer of Chamber to parties and participants on 19 March 2015, 11.14), and filed anew on 19 March 2015 (ICC-01/04-02/06-502-Corr2-Red).

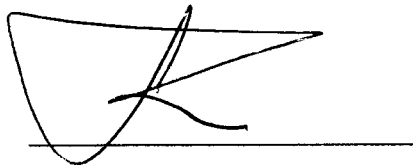
¹⁵ Impugned Decision, ICC-01/04-02/06-545-Red2, para. 20.

¹⁶ See Impugned Decision, ICC-01/04-02/06-545-Red2, para. 20 [footnotes omitted].

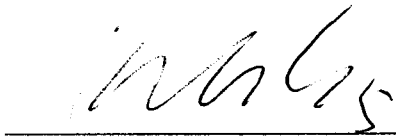
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

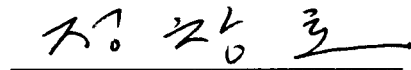
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, featuring a series of fluid, connected loops and strokes, resting on a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, with distinct, somewhat blocky characters, resting on a horizontal line.

Judge Chang-ho Chung

Date 21 May 2015

At The Hague, The Netherlands