

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: **14 December 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
with confidential Annexes A and B**

**Public redacted version of 'Decision on Defence request seeking the Chamber to
order [REDACTED] to lift redactions applied to [REDACTED]'**

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 Christopher Gosnell

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

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case' or 'case'), having regard to Articles 57(3)(b), 61(11), 64, 67 and 68 of the Rome Statute ('Statute'), and Rules 77, 81 and 116 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Defence request seeking the Chamber to order [REDACTED] to lift redactions applied to [REDACTED]'.

I. Procedural history and submissions

1. On 21 November 2016, the defence team for Mr Ntaganda ('Defence') filed an urgent request seeking the Chamber to order the non-governmental organisation [REDACTED] ('NGO') to lift certain redactions applied to its report entitled [REDACTED] ('Report'), disclosed by the Office of the Prosecutor ('Prosecution') under the Evidence Reference Number [REDACTED] ('Request').¹ Specifically, the Defence requested the lifting of redactions applied to the Report [REDACTED], except for any information that would reveal the current whereabouts or place of residence of witnesses in the case.²
2. In support of its Request, the Defence submitted, *inter alia*, that: (i) the Report provides an account [REDACTED], and which are therefore of 'high forensic interest' as being close in time to the events described;³ (ii) the redactions do not fall into the categories of redactions that would normally be permitted under the Redaction Protocol,⁴ since they appear to conceal names of places

¹ Urgent request on behalf of Mr Ntaganda seeking the Chamber to order [REDACTED] to lift the redactions applied to [REDACTED], ICC-01/04-02/06-1641-Conf. A courtesy copy was submitted after the filing of the Request: Email from the Defence to the Chamber, parties and participants on 21 November 2016 at 09:07.

² Request, ICC-01/04-02/06-1641-Conf, para. 11.

³ Request, ICC-01/04-02/06-1641-Conf, para. 2.

⁴ Referring to Decision on the Protocol establishing a redaction regime, 12 December 2014, ICC-01/04-02/06-411 and AnxA ('Redaction Protocol').

and persons relevant to the events at the time;⁵ and (iii) the information in question is material, in particular since it includes locations and names of people mentioned by a witness in this case.⁶

3. On the same day, the Defence provided the Chamber with a chain of email exchanges it had with the [REDACTED] of the NGO ('NGO Representative'), preceding and following the filing of the Request.⁷
4. Also on 21 November 2016, in line with the shortened time limit set by the Chamber,⁸ the Chamber received a response from the Prosecution ('Response'),⁹ as well as a notice from the Legal Representative of former child soldiers that she did not intend to respond to the Request.¹⁰
5. According to the Prosecution, the Request includes two issues for determination: first, whether the redacted information is material to the Defence's preparation, and second, if the information is considered material, whether the Chamber has the 'power to compel [its] production'. On the first issue, the Prosecution agreed that the information *may* be material, and therefore proposed that the information be provided to the Chamber 'on an *ex parte* basis for a final determination on materiality and on whether the Redaction Protocol is applicable to redact information that impacts on the security of certain witnesses or innocent third parties'. On the second issue, should the Chamber find that the information may be material, the Prosecution submitted that the Chamber has the authority to either (i) invite

⁵ Request, ICC-01/04-02/06-1641-Conf, para. 3.

⁶ Request, ICC-01/04-02/06-1641-Conf, paras 3 and 7.

⁷ Email from the Defence to the Chamber, Prosecution and participants on 21 November 2016 at 18:14.

⁸ Upon receipt of the courtesy copy, the Chamber shortened the deadline for any responses to the Request until the end of the day on 21 November 2016, indicating that email submissions would be permitted in the circumstances: Email from a Legal Officer of the Chamber to the parties and participants on 21 November 2016 at 09:44.

⁹ Email from the Prosecution to the Chamber, parties and participants on 21 November 2016 at 18:41.

¹⁰ Email from the Legal representative of former child soldiers to the Chamber, parties and participants on 21 November 2016 at 14:32.

the NGO to lift the redactions; or (ii) transmit a request for assistance to the competent national authorities to compel the NGO to provide the requested information.

6. On account of the urgency resulting from the relevance of the Request to ongoing testimony, the relevant submissions and decisions were communicated via email, and are placed on the record through the present decision and its confidential annexes.
7. On 22 November 2016, the Chamber issued a first ruling, by e-mail, in which it indicated that it was unable to make a determination without knowing the nature of the information which is redacted in the relevant portions of the Report. Pursuant to Articles 57(3)(b), 61(11), 64, 67 and 68 of the Statute, and Rule 116 of the Rules, the Chamber invited the NGO to provide it, on an *ex parte* basis, through the Registry, with details of that information. The Chamber further indicated that if, upon review of the information, it would find the redacted information to be material to the preparation of the Defence in the *Ntaganda* case, it may, having weighed the relevant risks, make the information available to the parties and legal representatives of victims in the case.¹¹
8. On 23 November 2016, having received¹² and reviewed details of the information redacted in the relevant portions of the Report, the Chamber issued a second ruling, also via email, in which it: (i) found the redacted information to be material to the preparation of the Defence; (ii) considered

¹¹ Email from a Legal Officer of the Chamber to the parties, participants and the Registry on 22 November 2016 at 09:16.

¹² Emails from the NGO Representative to the Registry on 22 November at 11:32, 12:28 and 15:42, respectively transmitted to the Chamber at 11:45, 12:32, and 15:43. It is noted that in the email of 15:42, the NGO Representative, due to difficulties in locating the full unredacted version of the Report, submitted two unredacted [REDACTED] reported to respond fully and directly to the Chamber's request and provided clarification as to the methodology adopted by the NGO and explaining minor differences between the redacted report and the attached unredacted [REDACTED].

that all but three discrete redactions can be lifted; and (iii) noting that the information underlying the redactions was not provided in the form of an unredacted version of the Report, provided tables, based on its understanding of the content of the redactions, for the purpose of making the relevant information available to the parties and participants.¹³

9. This ruling, and the reasons therefor, are placed on the record by way of this decision.

II. Analysis

10. In issuing its ruling, the Chamber noted that the Report, in a redacted version, was initially transmitted [REDACTED].¹⁴ It was then filed as a confidential *ex parte* annex to the Prosecution's application under Article 58 in the situation of the Democratic Republic of the Congo,¹⁵ and pursuant to instructions of Pre-Trial Chamber II respectively dated 10 and 20 May 2013, transferred into the record of the *Ntaganda* case, and reclassified as confidential. The redactions were therefore applied by the NGO which authored the Report, and, as such, are not under the control of the Prosecution, which, as indicated in its Response, did not have access to the underlying information.

11. In line with its obligation to ensure that the trial is conducted with full respect for the rights of the accused and with due regard to the protection of victims and witnesses,¹⁶ the Chamber reviewed the redactions at issue in order to determine: (i) whether the information is material to the preparation of the Defence; and (ii) whether the redactions are necessary to ensure the protection

¹³ E-mail from a Legal Officer of the Chamber to the parties and participants on 23 November 2016 at 9:40. A copy of the e-mail and the tables provided is attached as confidential Annex B to this decision.

¹⁴ [REDACTED].

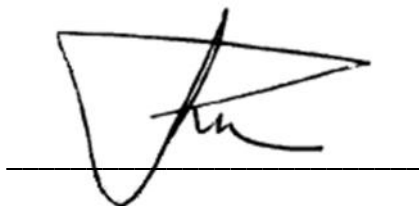
¹⁵ Second Corrigendum of the Public Redacted Version of Prosecutor's Application under Article 58 filed on 14 May 2012 (ICC-01/04-611-Red), 16 May 2012, ICC-01/04-611-Red-Corr2.

¹⁶ See Article 64(2), (6)(c) and (e), as well as Articles 67 and 68(1) of the Statute.

of witnesses, victims or other individuals at risk on account of the activities of the Court.

12. Further, although due to the aforementioned source of the redactions, the relevant redactions are not directly governed by the regime set out in the Redaction Protocol, the Chamber was guided by the principles set out therein in ruling on the matter.
13. The relevant portions of the Report include a total of 25 redactions [REDACTED]. Having identified the information covered by the redactions on the basis of the information communicated by the NGO Representative, the Chamber found the material to be relevant to the preparation of the Defence, since it refers to persons and places mentioned by witnesses in the case, as well as to the accused. In assessing potential risk arising from disclosure, the Chamber took into account, *inter alia*, the fact that most of the information in question was already known to the parties on the basis of other documents which had been previously disclosed.
14. In the case of one discrete redaction [REDACTED], the Chamber found it to be justified under category A.1 of the Redaction Protocol. Another discrete redaction [REDACTED] was found to be a standard redaction under the Redaction Protocol relating to 'innocent third parties or family members which have no known relevance to issues in the case'. Finally, a third redaction [REDACTED] refers to a location for which, in the absence of more comprehensive information in relation to the location in question, and considering the limited relevance of it to any known issue, the Chamber found that the redaction should be maintained.
15. In view of the above, the Chamber found that with the exception of the three discrete redactions identified in paragraph 14, all other redactions in the relevant portions should be lifted.

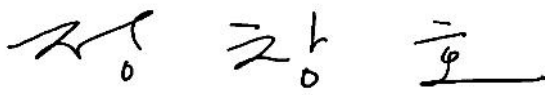
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'K. Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of stylized Korean characters, written over a horizontal line.

Judge Chang-ho Chung

Dated this 14 December 2016

At The Hague, The Netherlands