



Original: **English**

No.: **ICC-01/04-02/06**
Date: **29 November 2019**

TRIAL CHAMBER VI

Before: **Judge Chang-ho Chung, Presiding Judge**
Judge Robert Fremr
Judge Olga Herrera Carbuca

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

**Decision on Defence request seeking an order to the Prosecution to disclose additional
information in relation to category 'F' redactions**

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:**The Office of the Prosecutor**

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Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to the protocol adopted by way of its 'Decision on the Protocol establishing a redaction regime'¹ ('Redaction Protocol'), issues this 'Decision on Defence request seeking an order to the Prosecution to disclose additional information in relation to category 'F' redactions'.

I. BACKGROUND AND PROCEDURAL HISTORY

1. On 12 December 2014, the Chamber adopted the Redaction Protocol, which defines category 'F' redactions as those redactions that have been authorised by another chamber and which are retained in these proceedings by reason of Regulation 42 of the Regulations and are not covered by other categories approved in the Redaction Protocol.²
2. On 9 June 2016, the Chamber found that the Office of the Prosecutor ('Prosecution') had breached its disclosure obligations through the late disclosure to the Defence of a lesser redacted version of the statement of a person interviewed by it, the initially disclosed version of which contained more extensive category 'F' redactions ('June 2016 Ruling').³
3. On 23 August 2016, following submissions from the parties in relation to the application of category 'F' redactions,⁴ the Chamber noted that there appeared to be some disagreement between the parties regarding the scope of the information to be provided to the Defence in relation to category 'F' redactions and invited the parties to attempt to resolve such disagreements through *inter partes* discussions and return

¹ 12 December 2014, ICC-01/04-02/06-411 (with the Redaction Protocol contained in Annex A, ICC-01/04-02/06-411-AnxA).

² Redaction Protocol, para. 8.

³ T-99, pages 11-12.

⁴ Request on behalf of Mr Ntaganda seeking an order enjoining the Prosecution to provide further information related to the Prosecution's violation of its disclosure obligations concerning Witness P-0115's statement, 23 June 2016, ICC-01/04-02/06-1420-Conf; email from the Prosecution to the Chamber on 13 July 2016, at 13:07; email from the Defence to the Chamber, the Prosecution, and the participants on 18 July 2016, at 13:52; email from the Prosecution to the Chamber, the Defence, and the participants on 12 August 2016, at 15:11; and email from the Defence to the Chamber, the Prosecution, and the participants on 22 August 2016, at 12:05.

to the Chamber by way of written submissions should any irreconcilable differences still remain ('August 2016 Direction').⁵

4. In recent submissions before the Chamber,⁶ the parties reported that on 29 August 2016 and 14 October 2016, respectively, the Defence requested the Prosecution by email to inform it of: (i) the origin of all category 'F' redactions applied by it, the type of information redacted, and the justification for the application of such redactions; and (ii) which category 'F' redactions the Prosecution would seek to lift.⁷ They further reported that the Prosecution responded that, in its view, it had already fulfilled its obligations under Regulation 42 of the Regulations by indicating that the nature of the protective measures were the redactions themselves and that all of the applied redactions had been approved under Rule 81(4) of the Rules and were justified by the security and/or protection of victims and witnesses.⁸ However, it nonetheless provided the Defence, by email, a chart listing the decisions in which the existing category 'F' redactions had been authorised by other chambers of the Court and indicated that no request for the lifting of 183 out of the 241 applied category 'F' redactions was to be submitted.⁹
5. On 25 September 2019, the Defence filed a request seeking the Chamber to order the Prosecution to disclose certain information related to category 'F' redactions applied in this case, namely: (i) when, in which case and before which chamber each category 'F' redaction was requested along with details concerning the decision in which the redaction was authorised; (ii) the type of information redacted; and (iii) the justification for the application of each category 'F' redaction.¹⁰

⁵ Email from the Chamber to the parties and participants on 23 August 2016, at 13:56.

⁶ Request on behalf of Mr Ntaganda seeking an order to the Prosecution to disclose further information related to category 'F' redactions pursuant to Regulation 42(2), ICC-01/04-02/06-2419-Conf ('Request'); and Prosecution's response to the "Request on behalf of Mr Ntaganda seeking an order to the Prosecution to disclose further information related to category 'F' redactions pursuant to Regulation 42(2)", 25 September 2019, ICC-01/04-02/06-2419-Conf, ICC-01/04-02/06-2433-Conf (with confidential Annex A, 'Response').

⁷ Request, paras 2, 22, 25; and Response, para. 4, both referring to email correspondence between the parties.

⁸ Request, para. 23; and Response, paras 5, 11, both referring to email correspondence between the parties.

⁹ Request, paras 2, 23-24, 26-27; and Response, paras 5-7, 11, both referring to email correspondence between the parties. The latest chart appears to have been provided by the Prosecution to the Defence on 26 October 2016, *see* Request, para. 27 and Response, para. 7, and the email referred to therein.

¹⁰ Request, paras 4-5, 46.

6. On 7 October 2019, the Prosecution responded to the Request, opposing it.¹¹

II. SUBMISSIONS

7. The Defence submits that it is not sufficient for the Prosecution to apply category ‘F’ redactions without providing a defence team in subsequent proceedings, who thus was not a party to the proceedings in which such redactions were litigated, with the necessary information and understanding of the *rationale* behind such redactions.¹² It avers that the requested information is necessary in order for it to be able to properly assess the scope of the applied redactions, whether any superfluous or unnecessary redactions have been applied, and/or whether an application should be made for any such redactions to be lifted.¹³ The Defence points to the June 2016 Ruling and the fact that all versions of the relevant statement were disclosed by the Prosecution under Rule 77 of the Rules although, in its submission, they ought to have been disclosed as potentially exculpatory material.¹⁴ It also refers to two instances in August 2016 and October 2016, respectively, where certain category ‘F’ redactions were initially erroneously applied by the Prosecution.¹⁵ In relation to these instances, the Defence argues that, had it obtained additional information concerning the nature of such redactions, it would have been in a better position to identify any errors which may have occurred.¹⁶
8. The Prosecution argues that the Request constitutes a ‘fishing expedition’, as there is no indication that any remaining category ‘F’ redactions have been erroneously applied by it.¹⁷ It further submits that it has complied with its obligation pursuant to Regulation 42(2) of the Regulations to provide the Defence with information regarding the nature of the redactions by informing it that the redactions constituted protective measures, justified by the security and/or protection of victims and witnesses as approved by other chambers at the Court, and by providing the Defence with the chart listing the decisions in which the redactions had been approved.¹⁸ The

¹¹ Response, paras 1, 9, 15.

¹² Request, paras 2, 28-29, 32-33, 44.

¹³ Request, paras 3-4, 30-31, 38, 44.

¹⁴ Request, paras 1, 8-9, 34-37.

¹⁵ Request, paras 40-42.

¹⁶ Request, para. 43.

¹⁷ Response, paras 2, 10.

¹⁸ Response, paras 2, 11.

Prosecution further avers that the Defence failed to abide with the August 2016 Direction on how disagreements between the parties regarding the scope of information to be provided ought to be resolved as, following the aforementioned ruling, the Defence took no steps to obtain further information from the Prosecution and did not approach the Chamber for an order in a timely manner.¹⁹ Lastly, it argues that the Defence misrepresents the amount of information already in its possession concerning category ‘F’ redactions, as out of a total of 55 decisions approving category ‘F’ redactions, the Defence has full access to 19 public or confidential decisions and to redacted versions of 14 *ex parte* decisions issued by other chambers which provide it with additional information on the redactions that they relate to.²⁰

III. ANALYSIS

9. At the outset, the Chamber notes that two years and eleven months have passed between the Defence receiving an updated chart of documents containing category ‘F’ redactions from the Prosecution, and the filing of the Request. During this time, the Chamber, *inter alia*, declared the presentation of evidence closed pursuant to Rule 141(1) of the Rules²¹ and delivered its Judgment on the charges against Mr Ntaganda.²²
10. The Chamber further notes that, based on the information set out by the parties in the Request and the Response, the Defence did not comply with the August 2016 Direction and did not attempt to resolve the issue concerning the scope of the information to be provided to it in relation to category ‘F’ redactions through *inter partes* discussions, only seising the Chamber in case of any irreconcilable differences. Specifically, following the parties’ email exchange between 29 August 2016 and 26 October 2016, as set out in paragraph 4 above, the Defence did not further specify to the Prosecution what additional information it wished to be provided with in relation to the remaining category ‘F’ redactions and/or how the information it had been provided with did not satisfy its request and the requirements of Regulation 42(2) of the Regulations.

¹⁹ Response, paras 2, 12-13.

²⁰ Response, paras 2, 14 and Annex A, *annexed to* ICC-01/04-02/06-2433-Conf.

²¹ Decision closing the presentation of evidence and providing further directions, 16 March 2018, ICC-01/04-02/06-2259.

²² Judgment, 8 July 2019, ICC-01/04-02/06-2359 (with public Annexes A, B, and C).

11. Noting the stage of the proceedings in which the Defence made the Request and that it did not exhaust the *inter partes* process set up by the Chamber, the Chamber considers the Request to be untimely. The Chamber further notes that at present there is no indication that any existing category 'F' redactions were erroneously applied. The Chamber therefore, and without prejudice to any consideration of the merits following *inter partes* discussions, rejects the Request.

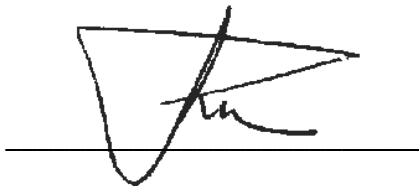
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

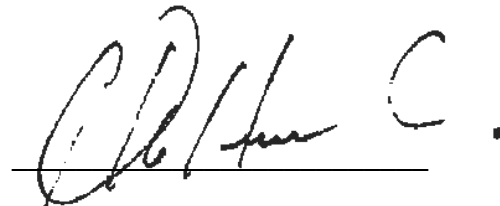
Done in both English and French, the English version being authoritative.



Judge Chang-ho Chung, Presiding Judge



Judge Robert Fremr



Judge Olga Herrera Carbuccion

Dated 29 November 2019

At The Hague, The Netherlands