

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 9 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

**Decision on Prosecution's request to authorise redactions to medical records of
Witness P-0912**

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****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* ('Ntaganda case'), having regard to Article 68(1) of the Rome Statute ('Statute') and Rules 77 and 81(4) of the Rules of Procedure and Evidence ('Rules'), issues this 'Decision on Prosecution's request to authorise redactions to medical records of Witness P-0912'.

I. Procedural history and submissions

1. Witness P-0912 ('Witness') was originally scheduled to testify during the fourth evidentiary block, but her testimony was rescheduled, to a date yet to be confirmed, due to her current personal circumstances.¹
2. On 8 April 2016, the Office of the Prosecutor ('Prosecution') requested the Chamber to authorise proposed non-standard redactions to parts of the Witness's medical records ('Medical Records') received from the Victims and Witnesses Unit ('VWU') on 14 March 2016 ('Request').² The Prosecution indicated that on 22 March 2016 it disclosed the Medical Records, with the proposed redactions, to the defence team for Mr Ntaganda ('Defence') as 'they include information about a medical condition that is potentially related to the rapes suffered by P-0912' at the time of the alleged events, and '[t]his will be relevant to P-0912's upcoming testimony'.³ It did so, prior to receiving the Chamber's authorisation, in order 'to avoid prejudice' to the Defence.⁴ According to the Prosecution, the proposed redactions refer to an 'unrelated medical condition' and should be maintained: (i) as this information is not relevant or material to the Defence preparations pursuant to Rule 77 of the Rules; and (ii) in order to protect the Witness's psychological well-being, dignity

¹ Email from the Office of the Prosecutor to the Chamber, 12 April 2016, at 14.34.

² Prosecution's proposed redactions to P-0912's medical records, notified on 11 April 2016, ICC-01/04-02/06-1260-Conf-Exp, with confidential, *ex parte* Annexes A and E – only available to the Prosecution and VWU and confidential Annexes B to D. A confidential redacted version was filed on the same day (ICC-01/04-02/06-1260-Conf-Red).

³ Request, ICC-01/04-02/06-1260-Conf-Exp, para. 1.

⁴ Request, ICC-01/04-02/06-1260-Conf-Exp, para. 7.

and privacy, pursuant to Article 68(1) of the Statute.⁵ The Medical Records also include redactions applied by the VWU to the names of the medical practitioner and the medical facility where the examinations were conducted.⁶

3. On 3 May 2016, the Defence filed a response, opposing the Request.⁷ The Defence argues that the Medical Records should be disclosed in their entirety, as the Prosecution failed to demonstrate an objectively justifiable risk to the 'safety' of the Witness, and the proposed redactions make it 'difficult to appreciate the internal structure of the Medical Records with a view to understanding *inter alia* the exact chronology of the [Witness]'s medical examination as well as the full diagnosis reached as to her medical condition'.⁸ The Defence does not object to the redactions applied by the VWU.⁹ It also submits that: (i) in light of the late disclosure of the Medical Records, the Chamber should find that the Prosecution has violated its disclosure obligations;¹⁰ and (ii) it was unable to provide meaningful observations as it did not have access to the chart attached to the Request indicating the location of the redaction, its category and the justification ('Chart'), and, in this regard, that the Chamber should direct the Prosecution to provide, for any future application for non-standard redactions, a redacted version of its Chart.¹¹

II. Analysis

4. As a preliminary matter, the Chamber considers that in light of the information provided by the Prosecution in its Request and the fact that the Defence had access to all redacted underlying material, the Defence had sufficient

⁵ Request, ICC-01/04-02/06-1260-Conf-Exp, paras 1 and 8.

⁶ Request, ICC-01/04-02/06-1260-Conf-Exp, paras 6 and 9.

⁷ Response on behalf of Mr Ntaganda to "Prosecution's proposed redactions to P-0912's medical records", ICC-01/04-02/06-1305-Conf ('Response').

⁸ Response, ICC-01/04-02/06-1305-Conf, paras 2-8.

⁹ Response, ICC-01/04-02/06-1305-Conf, para. 2.

¹⁰ Response, ICC-01/04-02/06-1305-Conf, paras 9-13 and 18 (b).

¹¹ Response, ICC-01/04-02/06-1305-Conf, paras 14-16 and 18 (c).

information to meaningfully respond to the Request. In this regard, the Chamber notes that the redactions which would have been required to be applied to the Chart in order to provide it to the Defence would have meant it would not have been of any additional utility.

5. Turning to the merits of the Request, the Chamber recalls the relevant applicable law as set out in its decision adopting a protocol establishing a redaction regime in the *Ntaganda* case.¹²
6. For the purpose of the present decision, it is recalled, in particular, that ‘any redactions need to be justified and authorised individually under the provisions of the Statute’.¹³ Under Rule 81(4) of the Rules, where the disclosure of information may compromise the safety of victims, witnesses, their families, or any ‘other person at risk on account of activities of the Court’, the Prosecution is entitled to request redactions.¹⁴ Each redaction sought on this basis shall be assessed on a case-by-case basis by the Chamber, with due regard to the competing interests at stake. To this end, a number of criteria, recalled in previous decisions,¹⁵ need to be applied, including the existence of an ‘objectively justifiable risk’ to the safety of the person concerned.
7. In the present case, the Chamber notes that, as acknowledged by the Prosecution, the Medical Records contain information potentially related to the alleged rapes suffered by the Witness at the relevant time, and are therefore relevant in view of the forthcoming Witness’s testimony. The Chamber considers that the Prosecution has failed to demonstrate that the specific information contained in

¹² Decision on the Protocol establishing a redaction regime, 12 December 2014, ICC-01/04-02/06-411 (‘12 December 2014 Decision’), paras 12-15; and public annex ICC-01/04-02/06-411-AnxA (‘Redaction Protocol’), paras 48-50. *See also*, Decision on the Prosecution request for redactions, ICC-01/04-02/06-545-Red2, 7 April 2015 (‘7 April 2015 Decision’), paras 14-16.

¹³ 12 December 2014 Decision, ICC-01/04-02/06-411, para. 13 and footnote 18.

¹⁴ *See* 12 December 2014 Decision, ICC-01/04-02/06-411, para. 14; 7 April 2015 Decision, ICC-01/04-02/06-545-Red2, para. 15.

¹⁵ *See for example*, 12 December 2014 Decision, ICC-01/04-02/06-411, para. 15; 7 April 2015 Decision, ICC-01/04-02/06-545-Red2, para. 16.

the Medical Records it seeks to maintain redacted does not fall under Rule 77 of the Rules, or that there is an 'objectively justifiable risk to the safety' of the Witness warranting the maintenance of the proposed redactions. Accordingly, the Request is rejected and the Prosecution is directed to disclose to the Defence as soon as practicable the Medical Records without the Prosecution's proposed redactions.

8. Finally, with regard to the Defence's claim that the Prosecution breached its disclosure obligations the Chamber notes that the Prosecution should conduct ongoing reviews of material in order to ensure that any item, including those recently entered into its possession, is timely disclosed to the Defence. The Chamber takes note of the circumstances detailed by the Prosecution in relation to disclosure of the material in question, in particular the lack of clear indication as to the materiality of the Medical Records before the point in time at which they had been received and reviewed, as well as the fact that the Prosecution received the Medical Records only on 14 March 2016 and disclosed them promptly thereafter.¹⁶ The Chamber finds that in the circumstances the Prosecution did not breach its disclosure obligations. Also, in light of the limited volume of the documents disclosed, the limited nature of the redactions applied and the fact that the Prosecution has not yet indicated a date for the testimony of Witness P-0912, the Chamber is satisfied that no undue prejudice resulted from the disclosure of the Medical Records at this stage.

¹⁶ Request, ICC-01/04-02/06-1260-Conf-Exp, paras 3-7.

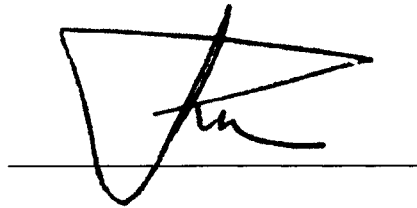
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request;

REJECTS all other requests; and

DIRECTS the parties to file public redacted versions of their respective filings within two weeks from notification of the present decision.

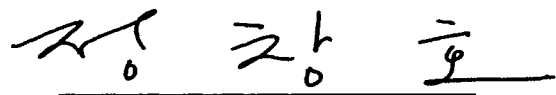
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

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Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated 9 June 2016

At The Hague, The Netherlands