

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 3 April 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA**

Confidential

With confidential *Ex Parte* Annex, Prosecutor and VWU only

**Decision on the "Prosecution's Urgent Application for Redactions and for a
Variation of Protective Measures Applied by Trial Chamber I"**

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Defence

Marc Desalliers

Legal Representatives of the Victims

Legal Representatives of the 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 & Deputy Registrar
Herman Von Hebel, Registrar

Defence Support Section

Victims and Witnesses Unit
Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court")¹ hereby issues this decision on the "Prosecution's Urgent Application for Redactions and for a Variation of Protective Measures Applied by Trial Chamber I" (the "Request").²

I. PROCEDURAL HISTORY

1. On 22 August 2006, Pre-Trial Chamber I, to which this case had originally been assigned, issued the "Decision on the Prosecution Application for a Warrant of Arrest",³ along with a corresponding warrant of arrest for Bosco Ntaganda ("Mr. Ntaganda").⁴
2. On 15 March 2012, the Presidency re-assigned the situation in the Democratic Republic of the Congo to this Chamber.⁵
3. On 13 July 2012, the Chamber issued the "Decision on the Prosecutor's Application under Article 58", with which a second warrant of arrest was issued against Mr. Ntaganda.⁶
4. On 26 March 2013, the suspect, who had voluntarily appeared before the Court, made his initial appearance before the Chamber.⁷

¹ Pre-Trial Chamber II, "Decision Designating a Single Judge", 21 March 2013, ICC-01/04-02/06-40, p. 4.

² ICC-01/04-02/06-288-Conf-Exp and its confidential *ex parte* annexes.

³ Pre-Trial Chamber I, "Decision on the Prosecution Application for a Warrant of Arrest", 22 August 2006, ICC-01/04-02/06-1-US-Exp-tEN; a redacted version was filed in the record of the case on 6 March 2007 and the decision was made public on 1 October 2010, ICC-01/04-02/06-1-Red-tENG.

⁴ Pre-Trial Chamber I, "Warrant of Arrest", 22 August 2006, ICC-01/04-02/06-2-Anx-tENG; a corrigendum was filed into the record of the case on 7 March 2007, see ICC-01/04-02/06-2-Corr-tENG-Red.

⁵ Presidency, "Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situations", 15 March 2012, ICC-01/04-02/06-32.

⁶ Pre-Trial Chamber II, "Decision on the Prosecutor's Application under Article 58", 13 July 2012, ICC-01/04-02/06-36-Conf-Exp; and public redacted version, ICC-01/04-02/06-36-Red.

⁷ Pre-Trial Chamber II, Transcript of Hearing, 26 March 2013, ICC-01/04-02/06-T-2-ENG ET, p. 12, lines 2-3.

5. On 12 September 2013, the Single Judge issued the "Redacted Third Decision on the Prosecutor's Requests for Redactions", in which she granted, *inter alia*, the redactions proposals in respect of witness P-0758.⁸

6. On 10 February 2014, the confirmation of charges hearing commenced.⁹ Before the closing of said hearing, the Chamber granted 100 pages to the Prosecutor and 50 pages each to the two common legal representatives of the victims admitted to participate to submit their final written observations on issues discussed during the confirmation of charges hearing by 7 March 2014.¹⁰ The Chamber also granted the Defence 100 pages to submit its observations by 4 April 2014 for the same purpose.¹¹

7. On 7 March 2014, the Prosecutor¹² and the two common legal representatives of victims submitted their final written observations.¹³

8. On 3 April 2014, the Chamber received the Request, in which the Prosecutor requests the Single Judge to vary some protective measures authorized by Trial Chamber I in respect of witness P-0758's applications for participation as a victim in those proceedings (the "Applications"). In addition, the Prosecutor requests the Single Judge to grant authorization to redact some other information in these documents, which are contained in Annex A to the Request, in order to match with the redactions granted by the Single Judge to the material provided by witness P-0758 in the present case.¹⁴

⁸ ICC-01/04-02/06-165-Conf-Red, p. 20 and ICC-01/04-02/06-165-Conf-Exp-AnxII, pages 170-236, 237-267, 316-333 and 451-470.

⁹ ICC-01/04-02/06-T-7-FRA ET WT.

¹⁰ ICC-01/04-02/06-T-11-ENG ET WT, p. 11.

¹¹ ICC-01/04-02/06-T-11-ENG ET WT, p. 11.

¹² See ICC-01/04-02/06-276-Conf and its annexes.

¹³ ICC-01/04-02/06-273; ICC-01/04-02/06-275.

¹⁴ ICC-01/04-02/06-288-Conf-Exp, para. 9.

9. Also on 3 April 2014, the Defence requested, in accordance with regulation 37(2) of the Regulations, an extension of page limit for its final written observations (the "Request for Extension of Pages").¹⁵

10. The Single Judge notes articles 21(1)(a), (3) and 68(1) of the Rome Statute, rule 81(2) and (4) of the Rules of Procedure and Evidence (the "Rules") and regulation 34, 37(2) and 42 of the Regulations of the Court (the "Regulations").

11. The Single Judge will hereunder address the two limbs of the Request submitted by the Prosecutor, namely the request to vary protective measures applied by Trial Chamber I and the request to redact certain information in the material contained in Annex A. Subsequently, the Single Judge will address the Request for Extension of Pages.

II. THE REQUEST TO VARY PROTECTIVE MEASURES

12. According to regulation 42 of the Regulations:

1. Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.

2. When the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.

3. Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.

4. Before making a determination under sub-regulation 3, the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.

13. At the outset, the Single Judge notes that Trial Chamber I is no longer seized of the proceedings in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, in which protective

¹⁵ E-mail sent to the Senior Legal Adviser of Pre-Trial Division.

measures were ordered for witness P-0758.¹⁶ Accordingly, this Chamber is competent to address the Request, in accordance with regulation 42(3) of the Regulations.

14. Having reviewed the Request in light of the other requirements imposed by regulation 42 of the Regulations, the Single Judge finds that the Prosecutor provided sufficient relevant information in relation to witness P-0758. The Single Judge notes, however, that the Prosecutor has not provided any information as to whether or not P-0758 consented to the proposed variation of protective measures applied by Trial Chamber I. Nevertheless, the Single Judge observes that regulation 42(4) of the Regulations states that such consent shall be sought "whenever possible". Accordingly, the Single Judge considers that the urgency of the Request, in light of the approaching deadline for the Defence's final written submissions, as well as the nature of the redactions sought, justify the variation of the protective measures without the consent of witness P-0758. In regard to the latter argument, the Single Judge more specifically takes into consideration that the information in the Applications from the proceedings before Trial Chamber I to be disclosed to the Defence, following the variation of the protective measures, is not of such a nature to put the witness at risk.

15. In light of the foregoing, the Single Judge grants the request to vary the protective measures authorized by Trial Chamber I in respect of the Applications contained in Annex A to the Request.

III. THE REQUEST FOR REDACTIONS

16. For the purpose of this limb of the Request, the Single Judge recalls her interpretation of rule 81(2) and (4) of the Rules, which govern the restrictions to disclosure.¹⁷

17. Having reviewed the redactions proposed and the justifications in support thereof, and taking into consideration the redactions previously granted by the Single

¹⁶ ICC-01/04-01/06-1339-Conf-Anx29.

¹⁷ Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests", ICC-01/04-02/06-117-Conf-Red, 1 October 2013, paras 14-24.

Judge to the material related to witness P-0758, the Request can be granted. In addition, the Single Judge orders, *proprio motu*, the Prosecutor to redact a piece of information in the Applications, in order not to defeat the purpose of redactions previously granted by Trial Chamber I in the same documents. The determination by the Single Judge in respect of each specific request for redaction as well as the *proprio motu* redactions is provided in the confidential *ex parte* Annex to the present decision, only available to the Prosecutor and the Victims and Witnesses Unit.

18. Considering the potential relevance for the Defence of the Applications of witness P-0758 as well as the proximity of the deadline to file its final written submissions, the Single Judge orders the Prosecutor to disclose the Applications contained in Annex A to the Request, after lifting and applying the redactions, as authorized by the present decision, by 3 April 2014.

IV. THE REQUEST FOR EXTENSION OF PAGES

19. In its Request for Extension of Pages, the Defence seeks an additional 40 pages beyond the 100 pages granted by the Chamber to file its final written submissions on issues discussed during the confirmation of charges hearing. The Defence adduces that the required extension of pages is necessary: (i) to respond to the arguments made by the Prosecutor in her submissions; (ii) to respond to a series of arguments made by the common legal representatives of victims; and (iii) in light of the charges and the evidence presented against the suspect.¹⁸

20. The Single Judge considers that the Defence has demonstrated the existence of exceptional circumstances to justify the required extension of pages, as required by regulation 37(2) of the Regulations. In particular, although the Single Judge does not find that exceptional circumstances exist on account of the arguments put forward by the Defence and summarized above, she considers that the Request for Extension of Pages is warranted in light of different considerations. The Single Judge takes into due account the fact that an extension of 20 pages was granted to the Prosecutor for the

¹⁸ E-mail sent to the Senior Legal Adviser of Pre-Trial Division.

purpose of her final written observations,¹⁹ which should equally be granted to the Defence. In addition, the Single Judge is of the view that the Defence may intend to use the Applications of witness P-0758, to be disclosed to it only on 3 April 2014, for the purposes of its final written submissions, which justifies granting an additional 20 pages. In light of the foregoing considerations, 40 pages are granted pursuant to the Request for Extension of Pages, making the total amount allocated to the Defence 140 pages.

21. Lastly, taking into consideration the Applications related to witness P-0758 and the fact that they will be disclosed just hours before the expiry of the deadline for the Defence, the Single Judge considers it necessary to set Tuesday, 8 April 2014, as the new time limit for the submission of the final written observations by the Defence. This will allow the Defence to review said Applications and consider them, if need be, for the purpose of the final written submissions.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **grants** the Request to the extent specified in paragraphs 12-18;
- b) **orders** the Prosecutor to disclose the Applications contained in Annex A to the Request by 3 April 2014;
- c) **grants** the Defence an additional 40 pages, for a total of 140 pages, for its final written submissions on issues discussed at the confirmation of charges hearing; and
- d) **grants** the Defence up until 8 April 2014 at 16h00 to file its final written submissions on issues discussed at the confirmation of charges hearing.

¹⁹ E-mail sent by the Senior Legal Adviser of Pre-Trial Division.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 3 April 2014

At The Hague, The Netherlands