

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 3 July 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***

Public

**Redacted Decision on the “Prosecution’s Provision of Information further to
Decision ICC-01/04-02/06-58-Conf-Exp and Request for Variation of Protective
Measures”**

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Defence

Marc Desalliers

Legal Representatives of the Victims

Sarah Pellet

Dmytro Suprun

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

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 Provision of Information further to Decision ICC-01/04-02/06-58-Conf-Exp and Request for Variation of Protective Measures” (the “Request”).²

1. On 26 March 2013, before the closure of the hearing on the initial appearance the Single Judge issued an oral decision convening a status conference on Monday 15 April 2013, for the purpose of discussing “issues related to the disclosure of evidence”.³

2. On 15 April 2013, the status conference took place during which the Single Judge ordered the Prosecutor, if possible, to immediately “make available” to the Defence the two applications for warrants of arrest against Bosco Ntaganda (“Mr. Ntaganda”).⁴ According to this order, should redactions to these applications be deemed necessary, proposals for redactions should have been submitted to the Chamber no later than Thursday 25 April 2013.⁵

3. On 2 May 2013, following submission of the proposed redactions,⁶ the Prosecutor filed the “Prosecution’s Update to its Request for Redactions to Applications for Warrants of Arrest and Request for a Variation of Protective Measures”, in which she “withdr[ew] her request for temporary non disclosure of the annexes to the second arrest warrant application relevant to witnesses P-0017, P-0038 and P-0041 and,

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/04-02/06-40, p. 4.

² ICC-01/04-02/06-59-Conf-Exp.

³ Pre-Trial Chamber II, Transcript of Hearing, 26 March 2013, ICC-01/04-02/06-T-2-ENG ET, p. 12, lines 11-13.

⁴ Pre-Trial Chamber II, Transcript of Hearing, 15 April 2013, ICC-01/04-02/06-T-3-ENG ET, p. 13, lines 15-18.

⁵ Pre-Trial Chamber II, Transcript of Hearing, 15 April 2013, ICC-01/04-02/06-T-3-ENG ET, p. 13, lines 20-22.

⁶ ICC-01/04-02/06-51-Conf-Exp and ICC-01/04-02/06-51-Red.

pursuant to Regulation 42, s[ought] a variation of the protective measures imposed by Trial Chamber I during the trial testimony of these witnesses”.⁷

4. On 7 May 2013, the Single Judge approved the redactions proposed by the Prosecutor to the article 58 applications and the relevant annexes appended thereto and requested the Prosecutor, *inter alia* “to provide the Chamber with all relevant information regarding the protective measures imposed in relation to witness P-0016, P-0017, P-0030, P-0038 and P-0041, from the proceedings of Trial Chamber I”.⁸ The Single Judge also requested sufficient information on whether Trial Chamber I ordered the redactions in document ICC-01/04-611-Conf-Exp-Anx25.2, and the circumstances and reasons for the redactions contained in that document.⁹

5. On 10 May 2013, the Prosecutor filed the Request, in which she provided the Single Judge with all relevant information concerning, *inter alia*, the protective measures adopted in respect of witnesses P-0016, P-0017, P-0030, P-0038 and P-0041.¹⁰ The Prosecutor has also provided information on the protective measures relevant to two further witnesses namely, P-0012 and P-0014.¹¹ Accordingly, the Prosecutor requested the Single Judge to vary the protective measures in respect of the above witnesses, save for P-0016 and P-0030,¹² in order to disclose to the Defence the confidential portions of their trial testimony rendered before Trial Chamber I.¹³ In addition the Prosecutor submitted information with respect to the redactions contained in document ICC-01/04-611-Conf-Exp-Anx25.2.¹⁴

6. The Single Judge notes articles 21(1), (3) and 68(1) of the Rome Statute (the “Statute”) and regulation 42 of the Regulations of the Court (the “Regulations”).

⁷ ICC-01/04-02/06-56-Conf-Exp, p. 4.

⁸ Pre-Trial Chamber II, “Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest”, 7 May 2013, ICC-01/04-02/06-58-Conf-Exp, p. 17.

⁹ ICC-01/04-02/06-58-Conf-Exp, p. 17.

¹⁰ ICC-01/04-02/06-59-Conf-Exp, paras 5-11.

¹¹ ICC-01/04-02/06-59-Conf-Exp, paras 14-16.

¹² [REDACTED]

¹³ ICC-01/04-02/06-59-Conf-Exp, paras 11, 17.

¹⁴ ICC-01/04-02/06-59-Conf-Exp, paras 12-13.

7. According to regulation 42(3) and (4) of the Regulations:

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.

8. At the outset, the Single Judge wishes to highlight that regulation 42 of the Regulations must be read and applied subject to article 68(1) of the Statute. According to the latter, the Single Judge has the responsibility to take “appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”, having due regard to the rights of the suspect under article 67 of the Statute.

9. Turning to the requirements of regulation 42(3) and (4) of the Regulations, the Single Judge takes notes of the fact that Trial Chamber I is no longer seized of the proceedings against Thomas Lubanga Dyilo (the “*Lubanga* case”), in which protective measures were ordered with respect to witnesses P-0012, P-0014, P-0017, P-0038 and P-0041. Accordingly, this Chamber is competent to address the Request *sub judice*.

10. In the decision of 7 May 2013, the Single Judge stated that:

[R]egulation 42(3) and (4) of the Regulations imposes two cumulative requirements. First, that the Chamber receiving a request for variation of protective measures “shall obtain all relevant information from the proceedings in which the protective measures was first ordered”; and second, that the Chamber “shall seek to obtain, whenever possible, the consent of the person of whom the application to [...] vary [...] protective measures has been made”.¹⁵

11. Having reviewed the Request in light of the requirements of regulation 42 of the Regulations, the Single Judge finds that the Prosecutor has provided sufficient relevant information in relation to witnesses P-0012, P-0014, P-0017, P-0038 and P-

¹⁵ Pre-Trial Chamber II, ICC-01/04-02/06-58-Conf-Exp, para. 29.

0041. Moreover, the Prosecutor has also managed to obtain the consent of said witnesses for the requested variation.

12. In particular, the Single Judge notes that the protective measures (voice and image distortion and assignment of a pseudonym) were ordered by Trial Chamber I in the *Lubanga* case towards the public, but not towards the accused. The Prosecutor seeks to disclose the identity of those witnesses, with their agreement, to Mr Ntaganda. Since the witnesses' consent has also been obtained, the Single Judge sees no reason to withhold this information from the suspect.

13. With regard to the redactions contained in document ICC-01/04-611-Conf-Exp-Anx25.2, the Single Judge takes note of the fact that those redactions were not authorized by Trial Chamber I. These redactions were directly implemented by the [REDACTED] when it submitted this document as an annex to a public filing before Trial Chamber I.¹⁶ The Prosecutor states that she "is not aware of a different level of risk for disclosure of the same redacted information to Mr. Ntaganda".¹⁷ The Single Judge, therefore, authorizes disclosure of this document to Mr. Ntaganda in the same form in which it was initially submitted to Trial Chamber I.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

a) grants the Request;

b) orders the Prosecutor to immediately disclose to the Defence the relevant annexes related to witnesses P-0012, P-0014, P-0017, P-0038 and P-0041 (annexes 1.1, 2.1 to 2.4, 4.1 to 4.3; 5.1 to 5.14; 6.1 to 6.2 attached to the second application for a warrant of arrest) and document ICC-01/04-611-Conf-Exp-Anx25.2.

¹⁶ ICC-01/04-02/06-59-Conf-Exp, paras 12-13.

¹⁷ ICC-01/04-02/06-59-Conf-Exp, para. 13.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 3 July 2014

At The Hague, The Netherlands