

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 Request to Redact Information in
Supplementary Submissions related to the First Arrest Application and to Vary
Protective Measures for Three Witnesses”**

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

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, 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 Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses” (the “Application”).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 for his alleged responsibility for the war crimes of conscripting, enlisting children under the age of fifteen and using them to participate actively in hostilities under either article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Rome Statute (the “Statute”).⁵
2. On 15 March 2012, the Presidency re-assigned the situation in the Democratic Republic of the Congo (the “DRC”) to this Chamber.⁶
3. On 13 July 2012, the Chamber issued its “Decision on the Prosecutor's Application under Article 58”.⁷ In this decision the Chamber issued a second warrant of arrest against Mr. Ntaganda for his alleged responsibility for the crimes against humanity of murder, rape, sexual slavery and persecution based on ethnic grounds under articles

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

² ICC-01/04-02/06-74-Conf-Exp and its two 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 *Ibid.*, paras 4-5.

⁶ 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.

⁷ 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(1)(a), 7(1)(g) and 7(1)(h) of the Statute; and the war crimes of murder, intentional attacks against civilians, pillaging, rape and sexual slavery under articles 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v) and 8(2)(e)(vi) of the Statute.⁸

4. On 22 March 2013, the Single Judge issued the “Decision on Setting the Date for the Initial Appearance and Related Issues”,⁹ in which she, *inter alia*, noted Mr. Ntaganda’s voluntary surrender to the Court¹⁰ and decided to convene a hearing for his initial appearance,¹¹ which took place on 26 March 2013.¹²

5. On 15 April 2013, a status conference¹³ took place for the purpose of discussing “issues related to the disclosure of evidence”.¹⁴ In the course of it, the Single Judge ordered the Prosecutor, if possible, to immediately “make available” to the Defence the two applications for warrants of arrest against Mr. Ntaganda.¹⁵ According to this order, should redactions to these applications be deemed necessary, proposals to this effect had to be submitted to the Chamber no later than Thursday, 25 April 2013.¹⁶

6. On 2 May 2013, following requests for proposed redactions,¹⁷ 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”,¹⁸ 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, pursuant to [r]egulation 42 [of the Regulations of the Court], s[ought] a variation of

⁸ *Ibid.*, p. 37.

⁹ Pre-Trial Chamber II, ICC-01/04-02/06-41.

¹⁰ *Ibid.*, p. 4.

¹¹ *Ibid.*, p. 5.

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

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

¹⁴ Pre-Trial Chamber II, Transcript of Hearing, 15 April 2013, ICC-01/04-02/06-T-3-ENG ET.

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

¹⁶ Pre-Trial Chamber II, Transcript of Hearing, 15 April 2013, ICC-01/04-02/06-T-3-ENG ET, p. 13, lines 20-22.

¹⁷ ICC-01/04-02/06-51-Conf-Exp; and public redacted version ICC-01/04-02/06-51-Red.

¹⁸ ICC-01/04-02/06-56-Conf-Exp; and public redacted version ICC-01/04-02/06-56-Red.

the protective measures imposed by Trial Chamber I during the trial testimony of these witnesses".¹⁹

7. On 7 May 2013, the Single Judge issued the "Decision on the Prosecutor's Request and Amended Request for Redactions to Applications for Warrants of Arrest" (the "7 May 2013 Decision")²⁰ in which she approved the redactions proposed by the Prosecutor to the two 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 witnesses P-0016, P-0017, P-0030, P-0038 and P-0041, from the proceedings of Trial Chamber I".²¹

8. On 10 May 2013, the Prosecutor filed the "Prosecution's Provision of Information further to Decision ICC-01/04-02/06-58-Conf-Exp and Request for Variation of Protective Measures",²² in which she provided the Single Judge with all relevant information concerning, *inter alia*, the protective measures in place with respect to witnesses P-0016, P-0017, P-0030, P-0038 and P-0041.²³ The Prosecutor also provided information on the adopted protective measures relevant to two further witnesses namely, P-0012 and P-0014.²⁴ Accordingly, the Prosecutor requested the Single Judge to vary the protective measures in respect of the above witnesses,²⁵ save for P-0016 and P-0030,²⁶ in order to disclose to the Defence the confidential portions of their trial testimony rendered before Trial Chamber I.²⁷

¹⁹ ICC-01/04-02/06-56-Conf-Exp, p. 4.

²⁰ Pre-Trial Chamber II, ICC-01/04-02/06-58-Conf-Exp.

²¹ *Ibid.*, p. 17.

²² ICC-01/04-02/06-59-Conf-Exp.

²³ ICC-01/04-02/06-59-Conf-Exp, paras 5-11.

²⁴ ICC-01/04-02/06-59-Conf-Exp, paras 14-16.

²⁵ Even though the Prosecutor requested variation of protective measures in relation to witnesses P-0012 and P-0014 (see ICC-01/04-02/06-59-Conf-Exp, para. 17), the Single Judge understands that this request includes witnesses P-0017, P-0041 and P-0038 as well (see ICC-01/04-02/06-59-Conf-Exp, para. 11).

²⁶

²⁷ ICC-01/04-02/06-59-Conf-Exp, paras 11 and 17.

9. On 17 May 2013, the Single Judge issued the “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 “17 May 2013 Decision”),²⁸ in which, *inter alia*, she granted the request for variation of protective measures and ordered 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).²⁹

10. On 21 June 2013, the Prosecutor filed the Application, in which she requests the Single Judge to:

(a) authorise the proposed redactions pursuant to Articles 54(3)(f) and 68 and Rules 81(2) and 81(4) to these filings to permit a confidential redacted version to be transmitted to Mr Ntaganda;

(b) vary the protective measures authorized by Trial Chamber I to allow disclosure of the identities of three witnesses and their trial testimony to Mr Ntaganda; and

(c) authorise CMS [Court Management Section] to reclassify the two supplementary filings in the record of the case against Mr Ntaganda and, thereafter, to register and notify the confidential redacted versions submitted by the Prosecution.³⁰

11. On 4 July 2013, the Defence provided observations to the Application.³¹

II. APPLICABLE LAW

12. The Single Judge notes articles 21(1)(a), (3), 54(3)(f), 57(3)(c), 67 and 68(1) of the Statute, rules 81(2) and (4) of the Rules of Procedure and Evidence (the “Rules”) and regulation 42 of the Regulations of the Court (the “Regulations”).

13. The Prosecutor requests that certain information be withheld from the Defence by way of redaction of information in or non-disclosure of documents. In addressing the Prosecutor’s Application, the Single Judge is guided by the principles enunciated in

²⁸ Pre-Trial Chamber II, ICC-01/04-02/06-63-Conf-Exp.

²⁹ *Ibid.*, p. 6.

³⁰ ICC-01/04-02/06-74-Conf-Exp, pp. 12-13.

³¹ ICC-01/04-02/06-76.

the 7 May 2013 Decision.³² Suffice to mention that the right of the Defence to be informed promptly and in detail of the nature, cause and content of all charges, as set out in article 67(1)(a) of the Statute and rule 121(1), second sentence, of the Rules, entails as a matter of principle *full* access to filings and documents in the record of the case.³³ Any restriction of “the [right] of the Defence to have access to filings or documents in the record of the case (...) or applying redactions to these documents” must be authorized by the Chamber following the same guiding principles as for restriction of disclosure of evidence under rule 81 of the Rules.³⁴

14. It is briefly recalled that rule 81(4) of the Rules aims to protect, on the one hand, “confidential information in accordance with articles 54, 72 and 93” of the Statute and, on the other hand, identifying information relating to witnesses, victims and members of their families as well as any other person put at risk on account of the activities of the Court³⁵ so as to ensure their safety. Such restriction may be decided by the Chamber on its own motion³⁶ or following a request by, *inter alia*, the Prosecutor.

15. In case the Prosecutor wishes to restrict access to filings and documents, she is expected to justify properly each of her proposals. In particular, redactions to be authorized must be accurately indicated and the relevant justifications properly substantiated.³⁷ The same holds true for the request to withhold documents from the Defence, or parts thereof, by way of imposing a certain level of classification.

³² Pre-Trial Chamber II, 7 May 2013 Decision, paras 11-14.

³³ See also Pre-Trial Chamber II, 7 May 2013 Decision, para. 21; in the same vein, Pre-Trial Chamber III, “Decision Requesting the Prosecutor, the Victims and Witnesses Unit and the Registry to Submit Observations on the Re-classification of Certain Documents”, 17 November 2008, ICC-01/05-01/08-257, paras 3-4.

³⁴ *Ibid.*, para. 14.

³⁵ Appeals Chamber, “Judgment on the Appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, ICC-01/04-01/07-475, para. 56.

³⁶ Rule 81(4) of the Rules. See also articles 57(3)(c) and 68(1) of the Statute.

³⁷ Pre-Trial Chamber II, 7 May 2013 Decision, para. 18; see also, for example, Pre-Trial Chamber III, “PUBLIC REDACTED VERSION OF ICC-01/05-01/08-135-Conf – Second Decision on the Prosecutor’s requests for redactions, 1 October 2008, ICC-01/05-01/08-135-Red”, paras 29-30.

16. The Single Judge will assess each of the proposed measures on a case-by-case basis³⁸ with due regard to the “relevant protected interest” and the rights of the Defence.³⁹ The adopted measure must be necessary to reduce the danger involving an objectively identifiable risk for the protected interest and must be proportionate to the rights of the Defence, i.e. the measure is not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial.⁴⁰ The risk to the relevant protected interest must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large.⁴¹ When these requirements are met, the requested measure under rule 81 of the Rules is justified. Accordingly, the Single Judge shall address the Application in light of the above guiding principles.

III. DETERMINATION BY THE SINGLE JUDGE

1. *Introductory Remarks*

17. The present decision is classified as confidential *ex parte* as it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential, *ex parte* Prosecutor and Victims and Witnesses Unit (the “VWU”) only. The Single Judge considers that the references made in the present decision are required by the principle of judicial reasoning as well as fairness of proceedings *vis-à-vis* the Defence which will receive this decision in a confidential redacted form. Moreover, those references are not

³⁸ See also, for example, Pre-Trial Chamber III, “PUBLIC REDACTED VERSION OF ICC-01/05-01/08-135-Conf – First Decision on the prosecutor’s request for redactions”, 31 August 2008, ICC-01/05-01/08-85, para. 13; Pre-Trial Chamber III, “Second Decision on the Prosecutor’s requests for redactions”, 1 October 2008, ICC-01/05-01/08-135-Red, para. 24.

³⁹ See also, for example, Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 29 June 2011, ICC-01/09-01/11-145-Conf-Exp, para. 22; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para 24.

⁴⁰ Pre-Trial Chamber II, 7 May 2013 Decision, para. 14.

⁴¹ Appeals Chamber, “Judgment on the Appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, ICC-01/04-01/07-475 (OA), para. 71.

inconsistent with the nature of the documents referred to and have been kept to a minimum.

18. The Single Judge observes the *ex parte* nature⁴² of proceedings relating to the non-disclosure of information and documents as enunciated in previous cases before this Chamber.⁴³ This has also been acknowledged as a guiding principle by the Appeals Chamber which has left it to the discretion of chambers to take a more flexible approach in, for example, keeping, where appropriate, applications *ex parte* or *inter partes*.⁴⁴ Therefore, the Single Judge does not expect any observations from other participants unless she finds it necessary to receive further information in order to take her decision on a fully informed basis. Should this not be the case, the Single Judge is vested with the authority to determine the application concerned “on its own specific facts and consistently with internationally recognized human rights standards”.⁴⁵ Finally, it is incumbent on the Chamber to organize properly the proceedings in such a way so as to comply with the principle of expeditiousness and the right of the suspect to be tried without undue delay pursuant to article 67(1)(c) of the Statute.

19. The Single Judge notes with some concern that the Prosecutor at times did not provide sufficient or any justification for the non-disclosure of information. The Single Judge emphasises that the burden lies with the Prosecutor to present proper

⁴² Appeals Chamber, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”, 14 December 2006, ICC-01/04-01/06-773, para. 22; Appeals Chamber, “Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, ICC-01/04-01/07-476, para. 54.

⁴³ Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Redactions and Related Requests”, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 32; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Redactions and Related Requests”, 8 July 2011, ICC-01/09-02/11-165-Conf-Exp, para. 33.

⁴⁴ Appeals Chamber, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence’”, 13 October 2006, ICC-01/04-01/06-568, paras 66 and 67.

⁴⁵ Appeals Chamber, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence’”, 13 October 2006, ICC-01/04-01/06-568, para. 67.

justifications establishing that protective measures are warranted. In particular in light of the upcoming disclosure process, the Single Judge stresses that the Prosecutor devote special care, diligence and thoroughness during the preparation of the proposals for redactions and non-disclosure of information, both with regard to the legal and factual basis, *before* they are submitted to the Chamber. This includes also comprehensive information on the security situation of witnesses and protective measures already imposed by other chambers. This will assist the Chamber in addressing the requests on an informed basis and in an expeditious manner.

20. Following the criteria for redactions rehearsed above, the Single Judge, where necessary, will order *proprio motu* the non-disclosure of information in the exercise of her statutory duties and powers under articles 57(3)(c) and 68(1) of the Statute.

2. Application of the Prosecutor

21. The Single Judge notes that the Prosecutor's Application contains mainly two parts. First, the Prosecutor requests, pursuant to articles 54(3)(f) and 68 of the Statute in conjunction with rules 81(2) and (4) of the Rules, the authorization of a limited number of redactions in documents contained in annex A (the "First Supplementary Submission")⁴⁶ and annex B (the "Second Supplementary Submission")⁴⁷ to the Application.⁴⁸ Second, the Prosecutor seeks the variation of the protective measures adopted by Trial Chamber I pursuant to regulation 42 of the Regulations in respect of witnesses P-0016, P-0031 and P-0055, in order to disclose to Mr. Ntaganda the witnesses' identity and the confidential versions of their trial testimony in the case of the *Prosecutor v Thomas Lubanga Dyilo* (the "*Lubanga case*").⁴⁹ Consequently, the Prosecutor requests the Single Judge to authorize the Court Management Section to reclassify the First Supplementary Submission and the Second Supplementary

⁴⁶ Annex A contains a filing of the Prosecutor together with annexes 1-3.

⁴⁷ Annex B contains a filing of the Prosecutor together with annexes 1-10.

⁴⁸ ICC-01/04-02/06-74-Conf-Exp, paras 14-24.

⁴⁹ ICC-01/04-02/06-74-Conf-Exp, paras 25-31.

Submission in the record of the present case and to register and notify the confidential redacted versions of the relevant transcripts to the Defence.⁵⁰

(a) Requests related to the First Supplementary Submission (annex A)

22. The Prosecutor seeks redactions, pursuant to article 54(3)(f) of the Statute and rule 81(4) of the Rules, to paragraphs 8-15 and 22(i) and related footnotes of the filing contained in annex A, in order “to protect confidential and private information”, on the basis that this information “is solely relevant to the arrest of [...] Thomas Lubanga Dyilo” and that, therefore, it is not relevant to Mr. Ntaganda and “there is no reason why he should have access [to it]”.⁵¹

23. The Single Judge must assess whether disclosure of this particular information to the Defence, as opposed to the public at large, poses an objectively identifiable risk to the relevant protected interest, such as the safety of a person or the confidentiality of information. Having reviewed carefully the proposals for redaction, the Single Judge is not persuaded that disclosure of the information contained in paragraphs 8, 9, 10 (sentences 1 and 2), 11, 12 and the first two sentences of paragraph 13, including related footnotes⁵² of the filing contained in annex A, would pose a risk to any relevant protected interest as this is information which has been in the public domain for a long time. The “Ndoki incident” is a notorious event which, as the Prosecutor suggests, had attracted attention from, *inter alia*, the United Nations and civil society. The same holds true regarding the arrest of Thomas Lubanga Dyilo in 2005 which, in the present circumstances, cannot be considered as “private information” any longer. Moreover, no justification has been provided as to what extent the excerpt of a publicly available report by Human Rights Watch contains confidential information which warrants redaction. Lastly, lacking any justification, the same holds true for generalized references to DRC legislation and criminal procedure in connection with the national criminal proceedings against Thomas Lubanga Dyilo.

⁵⁰ ICC-01/04-02/06-74-Conf-Exp, para. 2 and p. 13.

⁵¹ ICC-01/04-02/06-74-Conf-Exp, para. 14.

⁵² This concerns footnotes 9, 10, 12, 13, 14, and 15.

24. In the view of the Single Judge, it is not sufficient to aver generally that the information concerned is “not relevant” for the suspect and that therefore “he should not have access to [it]”.⁵³ Rather, in light of the overriding principle of full disclosure of information to the Defence, public information cannot be withheld from the Defence. If not, pertinent justification must be provided by the Prosecutor which will demonstrate that disclosure of this *public* information to the Defence will entail a danger. The Prosecutor’s submission proves inadequate in this respect. In light of the principle of full disclosure of information, and in light of the above finding, the Single Judge does not grant the redactions as requested.⁵⁴

25. Conversely, the last sentence of paragraphs 10⁵⁵ and 13 and paragraphs 14, 15⁵⁶ and 22(i)⁵⁷ of the filing in annex A contain confidential information which falls within the ambit of article 54(3)(f) of the Statute. It relates to national investigatory steps and the Prosecutor’s past strategic considerations at the time, as well as communications between the Office of the Prosecutor and third parties which concerns generally the confidentiality and effectiveness of the investigations of the Prosecutor. The proposed limited redaction is necessary and not prejudicial to the rights of the Defence as the confidentiality of the Prosecutor’s investigation outweighs the relevance of this information for the Defence. Based on rule 81(4) of the Rules, in conjunction with article 54(3)(f) of the Statute, the Single Judge grants the Prosecutor’s proposal to redact this information.

26. Secondly, the Prosecutor requests specifically the redaction of the dates of meetings between the Prosecutor and the competent authorities of the DRC in footnotes 19 and 21 of the filing contained in annex A. She contends that the

⁵³ ICC-01/04-02/06-74-Conf-Exp, para. 14.

⁵⁴ This includes footnotes 9, 10, 12, 13, 14 and 15.

⁵⁵ This includes footnote 11.

⁵⁶ This includes footnote 16.

⁵⁷ This includes footnote 20. Footnote 19 is addressed in paragraph 27 below.

information concerned “may impact on the security of witnesses, or, as in this case, on the confidentiality of [the Prosecutor’s] operations”.⁵⁸

27. The Single Judge has not been provided with any information which demonstrates that disclosure of this particular information in footnotes 19 and 21 “may impact the security of witnesses” and can, therefore, not consider the proposed redaction in light of this justification. Rather, the Single Judge is of the view that this information falls within the ambit of rule 81(4) of the Rules in conjunction with article 54(3)(f) of the Statute as it reveals specificities of the meetings between the Office of the Prosecutor and the competent DRC military prosecutors having taken place in the context of the Prosecutor’s past investigatory operations. The proposed redaction is not prejudicial to the rights of the Defence as information termed more general is disclosed to the Defence in paragraphs 21 and 23 of the same filing. Based on rule 81(4) of the Rules, in conjunction with article 54(3)(f) of the Statute, the Single Judge grants the Prosecutor’s proposal to redact this information.

28. Thirdly, the Prosecutor requests the non-disclosure of annexes 1 and 3 appended to the filing contained in the First Supplementary Submission, on the basis that none of these documents “are relevant to Mr. Ntaganda or to issues known in this case”.⁵⁹ In this respect, the Prosecutor argues that although this information was not [REDACTED]

[REDACTED]

[REDACTED]⁶⁰

29. The Single Judge has carefully reviewed the content of annexes 1-3. Annexes 1 and 3 contain judicial documents relating to national criminal proceedings against Thomas Lubanga Dyilo [REDACTED] While these documents are relevant for the *Lubanga* case and, consequently, were part of the respective case record, the Single Judge fails to see the relevance of these documents to the present proceedings against Mr. Ntaganda and, thus, the need to introduce them into this case

⁵⁸ ICC-01/04-02/06-74-Conf-Exp, paras 3, 15.

⁵⁹ ICC-01/04-02/06-74-Conf-Exp, para. 16.

⁶⁰ ICC-01/04-02/06-74-Conf-Exp, para. 16.

record. According to rule 15(1) of the Rules, the case record shall contain “all the particulars of each case brought before the Court” which presupposes some kind of *relevance* of the documents for the proceedings. This is not the case here. As the annexed documents concerned can easily be separated from the cover filing, the Single Judge authorizes the Prosecutor not to introduce these documents from the *Lubanga* case record into the present case record.

30. Lastly, the Single Judge observes that the Prosecutor also seeks redactions in paragraphs 17 and 18 of the filing in annex A for which no justification has been put forth in the Application. The Single Judge recalls her findings in paragraph 13 above. Therefore, she will assess the appropriateness of these protective measures in exercising her duties *proprio motu* under articles 57(3)(c) and 68(1) of the Statute in conjunction with rule 81(4) of the Rules.

31. After careful review of the information concerned, the Single Judge is not convinced that redactions in paragraph 17 are warranted. The Single Judge cannot discern any risk in disclosing to the Defence the fact that when Thomas Lubanga Dyilo was interviewed he denied all allegations. In light of the proceedings in the *Lubanga* case before this Court, the Single Judge holds the view that this argumentation pertains also to the last sentence in paragraph 18. In light of the principle of full disclosure of information, the Single Judge does not authorize the redactions indicated by the Prosecutor.

32. Conversely, the Single Judge opines that the information contained in the first sentence of paragraph 18 of the filing in annex A relates to national investigatory activities at the time, which fall within the ambit of article 54(3)(f) of the Statute. The proposed redaction is necessary and not prejudicial to the rights of the Defence as the confidentiality of the national investigations outweighs the relevance of this information for the Defence. Based on rule 81(4) of the Rules, in conjunction with article 54(3)(f) of the Statute, the Single Judge orders *proprio motu* the Prosecutor to redact this information.

(b) Requests related to the Second Supplementary Submission (annex B)

33. The Prosecutor requests temporary redactions to identifying information of witness P-0010 and witness P-0030 in the Prosecutor's filing contained in annex B, including the temporary non-disclosure of the statement of witness P-0010, which is to be found in annex 5⁶¹ to the Prosecutor's filing contained in the Second Supplementary Submission.

34. With regard to witness P-0010, the Single Judge makes reference to the reasoning already given in the 7 May 2013 Decision for redacting identifying information of this witness.⁶² Consequently, she considers that the redactions of identifying information sought in paragraphs 3, 4, 4(v), 5, 24 and 26, 26(iv) and the headings on pages 2 and 11 of the Prosecutor's filing contained in annex B as well as the temporary non-disclosure of the statement of this witness⁶³ are justified. The Single Judge grants the Prosecutor's proposal to redact this information. For the same reasons, the Prosecutor is authorized to withhold temporarily the witness statement of witness P-0010.

35. Concerning witness P-0030, the Single Judge recalls that in the 7 May 2013 Decision she had authorized "the temporary non-disclosure of [...] the testimon[y] of witness [...] P-0030 [...] until a determination on the variation of the protective measures imposed can be made by the Single Judge".⁶⁴ [REDACTED]

[REDACTED]⁶⁵ The Prosecutor informed the Single Judge that, to date, witness P-0030, who is [REDACTED] [REDACTED] for whom protective measures had been ordered by Trial

⁶¹ [REDACTED]

⁶² Pre-Trial Chamber II, 7 May 2013 Decision, paras 15, 16, 22 and 23.

⁶³ [REDACTED]

⁶⁴ Pre-Trial Chamber II, 7 May 2013 Decision, para. 30.

⁶⁵ Pre-Trial Chamber II, 7 May 2013 Decision, para. 27; Pre-Trial Chamber II, 17 May 2013 Decision, para. 5.

Chamber I,⁶⁶ [REDACTED]

[REDACTED]⁶⁷

36. Consequently, the protective measures in respect of witness P-0030, which includes the redaction of any identifying information, continue to have full force and effect in accordance with regulation 42(1) of the Regulations. The Single Judge sees no reason to vary the protective measure as ordered by Trial Chamber I and, therefore, in line with such measures grants the request for redactions of the information in paragraphs 10(ii) and 10(iii), including footnote 10 of the Prosecutor's filing in annex B.

37. Secondly, the Prosecutor seeks redactions to the place of residence of family members of five witnesses mentioned in the Prosecutor's filing contained in annex B, namely in paragraphs 4(i), (ii), (iii), (iv) and (vi), on the basis that such information "is not relevant to the present case and they are innocent third parties for whom the Court owes a duty of protection".⁶⁸

38. The Single Judge considers it appropriate to authorize the redactions requested for the following reasons. It is recalled that according to rule 81(4) of the Rules, family members of witnesses may be protected by way of redacting identifying information, such as their place of residence. Family members are often not involved in the Court's activities and may even ignore that a member of their family cooperated with the Court. That said, disclosure of identifying information would pose an objectively identifiable risk to their safety. Redacting in a limited manner this information is adequate to minimize the risk they might face at this stage. The redaction is also necessary and not prejudicial to the rights of the Defence as this information is not material to the preparation for the defence. The Defence will still have access to the substantial information contained in the document.

⁶⁶ They include voice and image distortion and the assignment of a pseudonym during the trial proceedings in the *Lubanga* case, see ICC-01/04-02/06-59-Conf-Exp, paras 5-6.

⁶⁷ ICC-01/04-02/06-74-Conf-Exp, para. 33.

⁶⁸ ICC-01/04-02/06-74-Conf-Exp, para. 19.

39. In this context, the Single Judge observes that only the [REDACTED] is proposed to be redacted. The Single Judge believes that this redaction is not adequate to minimize the risk for the following two reasons: first, the name of the witness is disclosed to the Defence which could make the identification of his/her family members easier in any event; second, [REDACTED] is redacted in paragraph 4 but not in its sub-paragraphs. Hence, the Single Judge, while granting the Prosecutor's request, also orders *proprio motu* that further information be redacted in paragraphs 4(i) (namely, [REDACTED]); 4(ii) (namely, [REDACTED]); 4(iii) (namely, [REDACTED] and [REDACTED]); 4(iv) (namely, [REDACTED] and [REDACTED]); and 4 (vi) (namely, [REDACTED] and [REDACTED]).

40. Thirdly, the Prosecutor requests the Single Judge to authorize redactions to the "close net of permanent security checks set up to monitor the safety of certain witnesses", which is referred to in paragraphs 6(i) and 6(ii) of the Prosecutor's filing in annex B.⁶⁹ According to the Prosecutor, the proposed redactions are necessary in order "to keep confidential the security processes that the Prosecut[or] utilizes to protect witnesses at risk."⁷⁰ The Prosecutor also contends that such information "does not impact on known issues in the case and does not detract from the information that is relevant to Mr Ntaganda."⁷¹ She also requests redaction of [REDACTED] [REDACTED], which is referred to in paragraph 8 of said filing.⁷² The Prosecutor contends that this information [REDACTED] [REDACTED] [...] [and it] is irrelevant to the identifiable issues in the case and the redactions will not impact on the portions that are relevant to the charges against Mr Ntaganda".⁷³

⁶⁹ ICC-01/04-02/06-74-Conf-Exp, para. 22.

⁷⁰ ICC-01/04-02/06-74-Conf-Exp, para. 22.

⁷¹ ICC-01/04-02/06-74-Conf-Exp, para. 22.

⁷² ICC-01/04-02/06-74-Conf-Exp, para. 23.

⁷³ ICC-01/04-02/06-74-Conf-Exp, para. 22.

41. With reference to the information relating to the Court's protection system and related procedures, the Single Judge considers that the request for redaction is justified pursuant to articles 54(3)(f) and 68(1) of the Statute in conjunction with rule 81(4) of the Rules. The disclosure of such information to the Defence would put at risk the witnesses who have been [REDACTED]⁷⁴

Further, it would expose and endanger the effectiveness of the system of protection [REDACTED]. The proposed limited redaction is necessary and not prejudicial to the rights of the Defence as this information is immaterial to the preparation of the Defence. Based on rule 81(4) of the Rules, in conjunction with article 54(3)(f) of the Statute, the Single Judge grants the Prosecutor's proposal to redact this information.

(c) Variation of protective measures in relation to witnesses P-0055, P-0016 and P-0031

42. As regards the variation of protective measures, the Single Judge recalls the 7 May 2013 Decision and 17 May 2013 Decision in which she laid down her understanding of regulation 42 of the Regulations and its requirements.⁷⁵

43. Turning to the requirements of regulation 42(3) and (4) of the Regulations, the Single Judge takes note of the fact that Trial Chamber I is no longer seized of the proceedings in the *Lubanga* case, in which protective measures were ordered for witnesses P-0016, P-0031 and P-0055.⁷⁶ Accordingly, this Chamber is competent to address the request in this regard.

44. Having reviewed the Application in light of the two cumulative requirements of regulation 42 of the Regulations, the Single Judge finds that the Prosecutor provided sufficient relevant information in relation to witnesses P-0016, P-0031 and P-0055. Moreover, the Prosecutor has also succeeded in obtaining the consent of said witnesses for the requested variation.

⁷⁴ ICC-01/04-02/06-74-Conf-Exp, para. 22.

⁷⁵ Pre-Trial Chamber II, 7 May 2013 Decision, paras 28-29; *id.*, 17 May 2013 Decision, paras 7-10.

⁷⁶ ICC-01/04-02/06-59-Conf-Exp, paras 5-8 ; ICC-01/04-02/06-74-Conf-Exp, paras 27-29.

45. 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 suspect. The Prosecutor seeks to disclose the identity of those witnesses, with their agreement, to Mr. Ntaganda. Since the witnesses' consent has been obtained, the Single Judge sees no reason to withhold this information from the suspect.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **grants** the Application to the extent specified in this decision;
- b) **orders** the Prosecutor to apply redactions to the information as identified by the Single Judge *proprio motu* in this decision;
- c) **orders** the Prosecutor to file in the record of the case the confidential redacted versions of annex A and annex B to the Application;
- d) **orders** the Court Management Section to register annex 2 contained in annex A to the Application and annexes 1, 2, 3, 4, 6, 7, 8, 9 and 10 contained in annex B to the Application in the record of the present case and to re-classify them as "confidential".

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