



Original: **English**

No.: ICC-01/04-02/06
Date: 7 December 2017

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 request for variation of protective measures

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

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*, having regard to Articles 54(3)(e), 64(2) and (6)(f) and 68 of the Rome Statute ('Statute'), Rules 77, 81, 82 and 87(1) of the Rules of Procedure and Evidence ('Rules'), and Regulation 42 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Prosecution request for variation of protective measures'.

I. Background and submissions

1. On 16 November 2017, after being approached by the defence team for Mr Ntaganda ('Defence') on the issue, the Office of the Prosecutor ('Prosecution') sought a variation of protective measures ordered by Trial Chambers I and II in the cases of *The Prosecutor v. Thomas Lubanga Dyilo* ('Lubanga case') and *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ('Katanga and Ngudjolo case') ('Request').¹
2. Specifically, the Prosecution requests the *lifting* of redactions applied in three documents² provided by a non-governmental organisation ('NGO' and 'Documents', respectively) to identifying information relating to certain individuals ('Prosecution Request to Lift Redactions'). The Prosecution argues that the safety of the relevant individuals would not be put at risk by the disclosure of their identities to the Defence, because the individuals are not staff members of the NGO, but individuals who provided information about alleged crimes committed by groups opposed to the UPC.³ The Prosecution further

¹ ICC-01/04-02/06-2118-Conf-Exp and confidential *ex parte*, only available to the Prosecution and the VWU, Annexes 1 to 3. The Request was initially submitted via email to the Chamber on 14 November 2017, at 12:11, and subsequently, pursuant to the Chamber's direction communicated via email on 15 November 2017, at 09:36, submitted by way of a formal filing. A confidential redacted version was filed on 20 November 2017 as ICC-01/04-02/06-2118-Conf-Red.

² The relevant items are DRC-OTP-0037-0204, containing redactions ordered by Trial Chamber I; DRC-OTP-0037-0206, containing redactions ordered by Trial Chamber II, and DRC-OTP-0037-0451, containing redactions ordered by Trial Chamber I.

³ Request, ICC-01/04-02/06-2118-Conf-Red, paras 8-14.

requests *maintaining* redactions to information revealing the identities of the NGO and apparent staff members.⁴

3. On 23 November 2017, in line with the time limit set by the Chamber,⁵ the Defence responded to the Request ('Response'), supporting the lifting of redactions, and requesting that redactions to the identities of the NGO and its apparent staff members be also lifted ('Defence Request to Lift Further Redactions').⁶
4. On 28 November 2017, the Prosecution responded to the Request to Lift Further Redactions ('Response to Request to Lift Further Redactions'), opposing it.⁷

II. Analysis

Applicable law

5. The Chamber notes that the Request relates to redactions ordered by Trial Chambers I and II in the *Lubanga* and *Katanga and Ngudjolo* cases.⁸
6. The Chamber further notes that while Regulation 42(1) refers to protective measures ordered 'in respect of a victim or witness', Rule 87(1) of the Rules also permits protective measures for 'another person at risk on account of testimony given by a witness'. The Chamber considers that Regulation 42 of the Regulations

⁴ Request, ICC-01/04-02/06-2118-Conf-Red, paras 12 and 15.

⁵ Email communication from the Chamber to the parties and the participants on 21 November 2017, at 11:03.

⁶ Response on behalf of Mr Ntaganda to the "Prosecution request for variation of protectives measures for three documents", ICC-01/04-02/06-2129-Conf.

⁷ Prosecution's response to the Defence "Response, on behalf of Mr Ntaganda to the 'Prosecution request for variation of protectives measures for three documents'", 23 November 2017, ICC-01/04-02/06-2129-Conf, ICC-01/04-02/06-2132-Conf.

⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision issuing Annex accompanying Decision lifting the stay of proceedings of 23 January 2009, 23 March 2009, ICC-01/04-01/06-1803 and confidential Annex 1, page 99 and public annex 3, pages 94-95 (relating to DRC-OTP-0037-0451); *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the Prosecution's Request for Non-Disclosure of Information in Six Documents, 25 July 2011, ICC-01/04-01/06-2763-Red, paras 29-35 (relating to DRC-OTP-0037-0204); and *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Application to Redact Information under Article 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence (ICC-01/04-01/07-902), 7 April 2009, ICC-01/04-01/07-1036-Conf-Exp-tENG (relating to DRC-OTP-0037-0206).

extends to variations of protective measure for any person ordered pursuant to Rule 87 of the Rules. The parties do not dispute that Regulation 42 is the correct legal basis for analysing the Request, but it is also noted that Rule 81(4) of the Rules authorises non-disclosure to protect ‘other persons at risk on account of the activities of the Court’,⁹ and that Rule 81(3) allows disclosure of previously redacted information when the basis for restricting disclosure no longer exists.

7. Regulation 42(3) of the Regulations provides, in relevant part, that if the chamber which issued the order for protective measures ‘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 [...] which shall obtain all relevant information from the proceedings in which the protective measure was first ordered’.
8. Given that Trial Chambers I and II are no longer seized of the proceedings in which the relevant redactions were ordered, it is upon this Chamber to rule on the Request.

Prosecution Request to Lift Redactions

9. The Chamber notes the Defence’s submission that the names of the authors and the provenance of the Documents are relevant, notably ‘as part of its analysis to have these documents admitted or not from the bar table’.¹⁰ While noting that the Documents are already included, with the current redactions, in the ‘Defencerequest for admission of evidence from the bar table’,¹¹ the Chamber considers that lifting the redactions pertaining to the identities of the relevant

⁹ *The Prosecutor v. Germain Katanga*, 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, paras 54 to 56.

¹⁰ Response, ICC-01/04-02/06-2129-Conf, para. 2.

¹¹ 23 November 2017, ICC-01/04-02/06-2128-Conf and confidential Annex A.

individuals, as referred to in the Prosecution Request to Lift Redactions, may further assist the Defence in its preparations.

10. The Chamber further accepts the Prosecution's submission that redactions to the identities of certain individuals are no longer necessary.
11. Lastly, the Chamber recalls that pursuant to Regulation 42(4) of the Regulations, before making a determination on a request for a variation of protective measures, it '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'. While it follows from the wording 'shall' and 'whenever possible' that obtaining prior consent is not mandatory, it has been found that the relevant chamber should 'at a minimum, attempt to seek the witnesses' consent to the requested variation' in order for Regulation 42(4) of the Regulations not to be rendered meaningless.¹²
12. In the present case, the Chamber notes that the relevant individuals did not appear as witnesses before the Court and there is no indication that they were consulted in relation to the relevant redactions initially applied to the Documents pursuant to the Prosecution's requests in the relevant cases. The Chamber further notes the Prosecution's submission that it is not in contact with any of these individuals, and, with the exception of one individual, whose email address, dating back to 2004, is included in the relevant document,¹³ no other contact details are available in the Documents. Noting further that the variation involves disclosure to the Defence, rather than to the public, as well as the Prosecution's submission that the individuals' safety will not be put at risk by the disclosure of their identities to the Defence, the Chamber considers that, in the present

¹² *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding", 12 March 2014, ICC-01/05-01/08-3014, para. 18.

¹³ DRC-OTP-0037-0204, at page 0204.

circumstances, the redactions may be lifted without seeking the prior consent of the affected individuals.

13. In view of the above, the Chamber finds that lifting of the redactions referred to in the Prosecution Request to Lift Redactions is appropriate.

Defence Request to Lift Further Redactions

14. Turning to the Defence Request to Lift Further Redactions, the Chamber notes the Defence's submission that 'the identity of an NGO being the source of a document obtained by the Prosecution is relevant to assess its reliability'.¹⁴ The Chamber further notes the Prosecution's submission that the relevant redactions must remain pursuant to Regulation 42(1) in accordance with Trial Chamber I's decision, and its assessment that 'the risk remains to the safety of the staff who are [collaborating] and have collaborated with [the NGO]'.¹⁵
15. On the basis of the information available to it, the Chamber observes that the redactions to the identity of the NGO who transmitted document DRC-OTP-0037-0451 were authorised pursuant to Article 54(3)(e).¹⁶ As such, they are subject to the regime set out in Rule 82 of the Rules and may not be lifted in the present proceedings.
16. Noting further that the redactions are of a confined nature, as well as the Prosecution's submission, accepted by the Chamber, that the NGO is not the source of the information contained in the Documents and that the Documents contain information reported by other individuals whose names are proposed to be disclosed to the Defence,¹⁷ as well as the Defence's submissions in support of

¹⁴ Response, ICC-01/04-02/06-2129-Conf, para. 5.

¹⁵ Request, ICC-01/04-02/06-2118-Conf-Red, para. 15.

¹⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision issuing Annex accompanying Decision lifting the stay of proceedings of January 2009, 23 March 2009, ICC-01/04-01/06-1803 and confidential *ex parte* Annex 1, page 99.

¹⁷ See also Response to the Request to Lift Further Redactions, ICC-01/04-02/06-2132, para. 15.

the reliability of the information contained therein,¹⁸ the Chamber is of the view that the redactions do not compromise the Defence's preparations, that alternative means of providing the redacted information are not necessary,¹⁹ and, as such, the rights of the accused are not adversely affected. Accordingly, the redactions to the identity of the NGO shall be maintained.

17. Concerning the redactions to the identities of the NGO's apparent staff members in document DRC-OTP-0037-0206, the Chamber notes that they are confined to the last names of two individuals referred to as recipients of further reports, and were granted, on the basis of the information available to the Chamber,²⁰ pursuant to Rule 81(4) of the Rules. The Chamber further notes the Defence's submissions on the reliability of the document containing these redactions.²¹
18. Having balanced the limited relevance of these two individual names to the Defence's preparations against the risk that lifting redactions of the names of its apparent staff members may reveal the identity of the NGO itself, which is protected under Article 54(3)(e), the Chamber finds that the redactions shall be maintained.

¹⁸ ICC-01/04-02/06-2128-Conf and confidential Annex A.

¹⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486.

²⁰ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1036-Conf-Exp-tENG.

²¹ ICC-01/04-02/06-2128-Conf-AnxA, page 54.

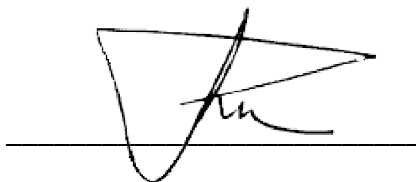
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Prosecution Request to Lift Redactions;

REJECTS the Defence Request to Lift Further Redactions; and

DIRECTS the Prosecution to prepare lesser redacted versions of the Documents in accordance with the directions provided in the present decision, and to make them available to the Chamber, the Defence and the participants in eCourt.

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

A handwritten signature in black ink, appearing to be 'R. Fremr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'K. Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, appearing to be 'Chang-ho Chung', written over a horizontal line.

Judge Chang-ho Chung

Dated 7 December 2017

At The Hague, The Netherlands