

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-01/04-02/06  
Date: 18 December 2013

**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Cuno Tarfusser

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public Redacted Version**

**With Confidential, *Ex Parte* – Prosecution Only Annexes 1 and 2**

**Prosecution's Observations on the "*Requête de la Défense aux fins de levée de certaines expurgations et communication de documents*" (ICC-01/04-02/06-164)**

**Source:** Office of the Prosecutor

**Document 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 the Defence**

Mr Marc Desalliers  
Ms Caroline Buteau  
Ms Andrea Valdivia

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**Other**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Defence Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

## Introduction

1. The Prosecution provides observations on the Defence's request for the lifting of certain redactions and access to certain *ex parte* filings, as requested by the Single Judge.

## Confidentiality

2. The present filing is classified as "Confidential, *ex parte*" given that it refers to the content of *ex parte* or *under seal* documents to which it seeks to maintain certain redactions. Providing the information to the Defence in advance of a determination by the Single Judge would render moot the existing redactions as well as those that the Prosecution seeks to maintain. The Prosecution will file a public redacted version of this filing.

## Procedural Background

3. On 22 August 2006, Pre-Trial Chamber I issued the first arrest warrant under seal against Mr Ntaganda.<sup>1</sup> On 28 April 2008, Pre-Trial Chamber I issued a public warrant of arrest against Mr Ntaganda.<sup>2</sup> On 13 July 2012, Pre-Trial Chamber II issued a second public arrest warrant against Mr Ntaganda.<sup>3</sup>
4. On 20 March 2013, Mr Ntaganda met a representative of the Court at the United States Embassy in Kigali, Rwanda and confirmed his surrender to the Court.<sup>4</sup> He was transferred to the Court on 22 March 2013.<sup>5</sup>

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<sup>1</sup> ICC-01/04-02/06-2.

<sup>2</sup> ICC-01/04-02/06-18.

<sup>3</sup> ICC-01/04-02/06-36-RED-tFRA.

<sup>4</sup> ICC-01/04-02/06-44-Conf-Exp, para.1.

<sup>5</sup> ICC-01/04-02/06-44-Conf-Exp, paras.3-4.

5. On 05 December 2013, the Defence filed a request for the lifting of certain redactions and access to *ex parte* filings.<sup>6</sup> On 06 December 2013, the Senior Adviser of the Pre-Trial Division, on behalf of the Single Judge of the Chamber, requested the Prosecution provide observations on the reclassification of documents by Monday 16 December 2013.<sup>7</sup>

### **Prosecution's Observations**

#### **A. Request for lifting of certain redactions**

6. The Prosecution addresses each of the Defence requests in turn, in the order in which they appear in the Defence filing.

#### *1st Defence Request: Prosecutor's Application for Warrant of Arrest, Article 58<sup>8</sup>*

7. The Defence requests the lifting of certain redactions to the Prosecution's first application for a warrant of arrest.<sup>9</sup> The existing redactions pertain to: (i) the identity of Prosecution witness DRC-OTP-P-0010 whose identity has now been disclosed to the Defence;<sup>10</sup> and (ii) the arrest of Bosco Ntaganda.<sup>11</sup> The Prosecution does not object to the lifting of these redactions and a confidential, unredacted version of this document can be provided to the Defence.<sup>12</sup>

#### *2<sup>nd</sup> Defence Request: Prosecution's Submission of Further Information and Materials<sup>13</sup>*

8. The Defence requests the lifting of certain redactions in both Annexes A and B to the Prosecution's Submission of Further Information and Materials.<sup>14</sup> The Prosecution acknowledges that, as it is the case here, where information that is

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<sup>6</sup> ICC-01/04-02/06-164.

<sup>7</sup> E-mail from the Senior Legal Adviser to the Pre-Trial Division dated 9 December 2013 at 19:52.

<sup>8</sup> ICC-01/04-02/06-51-Conf-Exp-AnxA.

<sup>9</sup> ICC-01/04-02/06-164, para. 12.

<sup>10</sup> Redactions on pp. 2, 6, 36-38 and 53.

<sup>11</sup> Redactions on pp. 50-51.

<sup>12</sup> The public redacted version is at ICC-01/04-01/06-39-AnxC.

<sup>13</sup> ICC-01/04-02/06-74-Conf-Exp-AnxA.

<sup>14</sup> ICC-01/04-02/06-164, paras. 13-18.

the subject of a redaction is available in a public redacted version of the same filing in the *Lubanga* case, such a redaction can be lifted.

9. With regards to Annex A, the Prosecution does not object to the lifting of the redactions in paragraphs 10 (last sentence and footnote 11), 13 (last sentence), 14 (with the exception of one phrase as set out below), 15 (including footnote 16), 18 (first sentence), 22(i) (with the exception of one phrase as set out below) and footnotes 19 and 20, since these are public in the *Lubanga* case. The Prosecution notes, however, that there is one redaction remaining in paragraph 14 (third line) and in paragraph 22(i) (fourth line) of the public redacted version of the filing in the *Lubanga* case. The Prosecution seeks to maintain the two limited redactions in paragraphs 14 and 22(i) and in footnote 21 in the present case as ordered by the Single Judge.<sup>15</sup>
10. With regards to Annex B, the redactions pertain, first, to the identity of Prosecution witnesses DRC-OTP-P-0010<sup>16</sup> and DRC-OTP-P-0030<sup>17</sup> whose identity has now been disclosed to the Defence. Second, the redactions pertain to an intermediary whose identity has now been disclosed to the Defence.<sup>18</sup> The Prosecution does not object to the lifting of these redactions in a confidential version of the filing.
11. The Prosecution seeks to maintain the redactions in paragraph 8 (third and fourth line) given they were ordered by the Single Judge.<sup>19</sup>

3<sup>rd</sup> Defence Request: Decision concerning the Hearing on 2 February 2006<sup>20</sup>

12. The Defence requests the lifting of certain redactions to the decision concerning a hearing on 2 February 2006.<sup>21</sup> The Prosecution does not object to the lifting of the

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<sup>15</sup> ICC-01/04-02/06-78-Conf-Exp, paras. 25-27.

<sup>16</sup> Redactions in Annex B: pp. 2-4 and 11-13.

<sup>17</sup> Redactions in Annex B: p. 6.

<sup>18</sup> Redactions in paragraph 6(ii) and footnotes 6 and 7.

<sup>19</sup> ICC-01/04-02/06-78-Conf-Exp, para. 41.

<sup>20</sup> ICC-01/04-108-Conf-Exp.

<sup>21</sup> ICC-01/04-02/06-164, para. 19.

redactions in paragraphs 7, 11(a) and 13(c) as the information relates to evidence that has been disclosed to the Defence in this case. The Prosecution seeks to maintain the redaction in paragraph 11(c) as ordered by Single Judge.<sup>22</sup>

4<sup>th</sup> Defence Request: Prosecution's Document in Support of Appeal<sup>23</sup>

13. The Defence requests the lifting of a redaction in the Prosecution's Document in Support of Appeal at footnote 162.<sup>24</sup> The Prosecution does not object to the lifting of this redaction. The Prosecution notes that this is a redaction that would ordinarily have been authorized by the Appeals Chamber; accordingly, under regulation 42(3) of the Regulations of the Court, the Single Judge may vary the order if the Chamber is no longer seized of the proceedings.

5<sup>th</sup> Defence Request: Decision on the Prosecution Application for a Warrant of Arrest<sup>25</sup>

14. The Defence requests the lifting of certain redactions in the decision on the Prosecution's application for a warrant of arrest in paragraph 44 and in footnotes 28, 31-38, 40, 54.<sup>26</sup> These redactions pertain to witnesses whose names and witness statements have now been disclosed to the Defence. The Prosecution does not object to the lifting of these redactions.

6<sup>th</sup> Defence Request: Corrigendum to "Prosecution's Application under Article 58 with Confidential Ex Parte Annex A and Annexes 1.1 to 26.6" filed on 14 May 2012<sup>27</sup>

15. The Defence requests the lifting of one redaction to the Prosecution's second application for a warrant of arrest at paragraph 90.<sup>28</sup> The redaction is to the name of [REDACTED]. Accordingly, the Prosecution does not seek to retain the redaction to the name [REDACTED] in paragraph 90. The Prosecution

<sup>22</sup> ICC-01/04-02/06-78-Conf-Exp, para. 41.

<sup>23</sup> ICC-01/04-120-US-Exp.

<sup>24</sup> ICC-01/04-02/06-164, para. 20.

<sup>25</sup> ICC-01/04-02/06-1-US-EXP-tEN.

<sup>26</sup> ICC-01/04-02/06-164, paras. 21-23.

<sup>27</sup> ICC-01/04-02/06-51-Conf-Exp-AnxB.

<sup>28</sup> ICC-01/04-02/06-164, paras. 21-23.

[REDACTED]. The Prosecution therefore seeks to maintain the redaction to [REDACTED] in paragraph 90 [REDACTED].

7<sup>th</sup> Defence Request: Transcript of hearing dated 23 April 2008<sup>29</sup>

16. The Defence requests the lifting of certain redactions in the transcript of a hearing held on 23 April 2008.<sup>30</sup> The transcript is currently under seal. The Prosecution notes that the [REDACTED]. In that regard, the Prosecution observes that redactions may be required to the following information provided [REDACTED]: (i) on page 8, lines 4-5 regarding [REDACTED]; (ii) on page 18, lines 4-8 and from line 18 to page 19, line 4 [REDACTED]; and (iii) on page 10, lines 10-13 [REDACTED].

17. Otherwise, the Prosecution has reviewed the transcript and does not object to the unsealing of the transcript, but requests that redactions be applied to the confidential version. The Prosecution requests redactions to information provided during the hearing that pertains to [REDACTED],<sup>31</sup> [REDACTED]<sup>32</sup> and [REDACTED]<sup>33</sup> which the Prosecution maintains should remain confidential pursuant to article 54(f) of the Statute. The Prosecution attaches a version of this document with proposed redactions as Annex 1.

8<sup>th</sup> Defence Request: Transcript of hearing dated 2 February 2006<sup>34</sup>

18. The Defence requests the lifting of redactions to the transcript of the hearing dated 2 February 2006.<sup>35</sup> The hearing was held further to the Prosecution's application for the first warrant of arrest. The existing redactions relate, generally,

<sup>29</sup> ICC-01/04-02/06-T-1-US-ENG ET.

<sup>30</sup> ICC-01/04-02/06-164, paras. 24-25.

<sup>31</sup> Page 6, line 15 to p. 7, line 5; p.9, lines 2-9.

<sup>32</sup> Page 12, line 13 to page 13, line 9.

<sup>33</sup> Page 14, lines 15-21; page 15, lines 4-5; page 20, lines 16-17 [REDACTED].

<sup>34</sup> ICC-01/04-T-US-EXP-EN[2Feb2006 ET].

<sup>35</sup> ICC-01/04-02/06-164, paras. 24-25.

to the Prosecution's [REDACTED]. The Prosecution does not object to lifting certain redactions in a confidential version available only to the Defence.<sup>36</sup>

19. The Prosecution seeks to maintain redactions to the transcript at page 66, line 24 to page 76, line 14 and from page 76, line 23 to page 79, line 7. The discussion on these pages centres on the Prosecution's [REDACTED]. The Prosecution also seeks to maintain redactions in the transcript to page 86, line 16 to page 87, line 11 regarding the [REDACTED]. The non-disclosure of the above-referenced information is not prejudicial to the rights of the Suspect.

20. The Prosecution attaches a revised version of the transcript with the proposed redactions it seeks to maintain pursuant to article 54(3)(f) of the Statute as Annex 2 to the present filing.

9<sup>th</sup> Defence Request: Annexes HNE 4<sup>37</sup> and HNE 5<sup>38</sup>

21. The Defence requests the lifting of redactions to documents at annexes HNE 4 [REDACTED] and HNE 5 [REDACTED],<sup>39</sup> tendered as exhibits during the hearing on 2 February 2006. The Prosecution notes that HNE 4 has already been disclosed to the Defence and can be found at DRC-OTP-0151-0051. The Prosecution does not object to the disclosure of HNE 5 to the Defence.

**B. Request for access to *ex parte* communications**

22. The Defence seeks access to a number of filings and/or decisions that are currently classified as *ex parte*.<sup>40</sup> Of the filings referred to by the Defence that

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<sup>36</sup> The Prosecution does not object to lifting of redactions at: page 6, lines 13-16; page 7, lines 13-15 and lines 19-25; page 9, lines 24-25; page 10, line 1; page 11, lines 1-4 and 6-25; page 12, lines 2-4 and 7; page 20, lines 11 and 13; page 21, line 6; page 26, lines 8-9; page 35, lines 7-11; page 41, lines 19-23; page 45, lines 10-11 and 24; page 46, lines 1, 4, 7 and 20; page 47, lines 7-8, 17, 21-23 and 25; page 48, lines 2, 6-8, 16, 21 and 24; page 54, line 20 to page 55, line 11; page 65, line 21; page 66, lines 5-8 and 11-12; page 81, line 24 to page 82, line 6; page 85, lines 15-21.

<sup>37</sup> ICC-01/04-115-US-Exp.

<sup>38</sup> ICC-01/04-114-US-Exp.

<sup>39</sup> ICC-01/04-02/06-164, paras. 24-25.

<sup>40</sup> ICC-01/04-02/06-164, paras. 32-34.



emanate from the Prosecution, the Defence has in fact received the confidential redacted version of filing ICC-01/04-02/06-131-Conf-Exp.

23. The Prosecution notes that ICC-01/04-02/06-59-Conf-Exp is a response to a filing containing the same classification level pursuant to regulation 23*bis* of the Regulations of the Court. Should the Single Judge order the Prosecution to file a confidential or public redacted version of the filing, it will do so.
24. The Prosecution observes that the following filings relate to requests for redactions or other protective measures and are, by their nature, *ex parte*: ICC-01/04-02/06-93-Conf-Exp; ICC-01/04-02/06-98-Conf-Exp; ICC-01/04-02/06-101-Conf-Exp; ICC-01/04-02/06-124-Conf-Exp; ICC-01/04-02/06-126-Conf-Exp; ICC-01/04-02/06-134-Conf-Exp; ICC-01/04-02/06-136-Conf-Exp; ICC-01/04-02/06-142-Conf-Exp; and ICC-01/04-02/06-149-Conf-Exp.
25. The Single Judge has held that the classification of proceedings are “left to the discretion of chambers to take a more flexible approach in, for example, keeping, where appropriate, applications *ex parte* or *inter partes*.”<sup>41</sup> The Single Judge has, moreover, accepted the Prosecution’s justification for the *ex parte* filings. Should the Single Judge order the Prosecution to file a confidential or public redacted version of any of these filings, it will do so.

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<sup>41</sup> ICC-01/04-02/06-78-Conf-Exp, para. 24.

### Conclusion

26. The Prosecution requests that the Chamber maintain the requested redactions to certain filings and transcripts of hearings, as set out herein.



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Fatou Bensouda, Prosecutor

Dated this 18<sup>th</sup> Day of December 2013  
At The Hague, the Netherlands