

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

No.: ICC-01/04-02/06  
Date: 28 November 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***

**Confidential**

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

**Source:** Office of the Prosecutor

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

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**REGISTRY**

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**Victims Participation and Reparations  
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## **Introduction**

1. Pursuant to regulation 24(1) of the Regulations of the Court ("Regulations"), the Prosecution responds to the new Defence request to lift redactions to the source of three documents (DRC-OTP-0037-0204, DRC-OTP-0037-0206 and DRC-OTP-0037-0451) and to two of the source's staff members.<sup>1</sup> The Prosecution opposes lifting of these redactions.
2. Regulation 42 provides that protective measures ordered in any proceedings continue to have full effect in other proceedings before the Court, subject to a Chamber's decision on an application to vary such measures. The Defence's request to lift redactions ordered by another Chamber constitutes an application under regulation 42(3). As the applicant, the Defence is required to provide the legal basis and grounds justifying a variation of the protective measures, but it failed to do so.

## **Confidentiality**

3. This filing is classified as "Confidential" pursuant to regulation 23*bis*(1) and (2) of the Regulations, since it responds to a filing which is classified as Confidential.

## **Background**

4. On 23 March 2009, Trial Chamber I approved redactions to be applied to document DRC-OTP-0037-0451.<sup>2</sup>
5. On 8 April 2009, Trial Chamber II approved redactions to be applied to document DRC-OTP-0037-0206.<sup>3</sup>

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<sup>1</sup> ICC-01/04-02/06-2129-Conf ("Defence Request").

<sup>2</sup> ICC-01/04-01/06-1803-Conf-Exp-Anx1, page 99 and public annex 3, pages 94-95.

<sup>3</sup> ICC-01/04-01/07-1036-Conf-Exp, the document was referenced in the Prosecution's original request as ICC-01/04-01/07-902-Conf-Exp-AnxM.

6. On 21 June 2011, Trial Chamber I approved redactions to be applied to document DRC-OTP-0037-0204.<sup>4</sup>
7. On 9 November 2017, the Defence requested the Prosecution to review the need for the redactions applied to documents DRC-OTP-0037-0204, DRC-OTP-0037-0206 and DRC-OTP-0037-0451.<sup>5</sup>
8. On 16 November 2017,<sup>6</sup> the Prosecution filed a request, on an *ex parte* basis, to lift certain redactions to documents DRC-OTP-0037-0204, DRC-OTP-0037-0206 and DRC-OTP-0037-0451.<sup>7</sup> The application did not include a request to lift redactions imposed to the name of the NGO that provided the items and two of its staff members. A confidential version of this request, available to the Defence, was filed on 20 November 2017.<sup>8</sup>
9. On 23 November 2017, the Defence filed a Response in which it made a new request to lift the additional redactions applied pursuant to regulation 42(1) to the three documents.<sup>9</sup>

### Prosecution Submissions

10. The redactions to documents DRC-OTP-0037-0204, DRC-OTP-0037-0206 and DRC-OTP-0037-0451 were ordered in the *Lubanga* and *Katanga and Ngudjolo* cases.<sup>10</sup> Pursuant to regulation 42(1), protective measures ordered in the *Lubanga* and the *Katanga and Ngudjolo* cases continue to have “full force and effect” in the case against Bosco Ntaganda. Regulation 42(1) does not require any further justification to maintaining previously ordered protective measures.<sup>11</sup> Regulation

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<sup>4</sup> ICC-01/04-01/06-2763-Conf-Exp and ICC-01/04-01/06-2763-Red.

<sup>5</sup> Email sent by the Defence to the Prosecution at 15:59.

<sup>6</sup> Not on 9 October 2017, as erroneously stated in the Defence Request, page 3.

<sup>7</sup> ICC-01/04-02/06-2118-Conf-Exp.

<sup>8</sup> ICC-01/04-02/06-2118-Conf-Red.

<sup>9</sup> Defence Request.

<sup>10</sup> ICC-01/04-01/06-1803-Conf-Exp-Anx1, page 99 and public annex 3, pages 94-95; ICC-01/04-01/07-1036-Conf-Exp; ICC-01/04-01/06-2763-Red.

<sup>11</sup> *Contra*, Defence Request, para. 4.

42(3) does, however, require that a party seeking to lift protective measures ordered by another Chamber provide the grounds for such a request.

11. The Defence fails to set out the legal basis or provide sufficient factual justification for its request to lift redactions to the name of the NGO that provided the documents and to the names of two individuals believed to be staff members or persons collaborating with the NGO, as it was required to do pursuant to the third paragraph of regulation 42.
12. The Defence provides no submissions or justification for lifting of redactions to document DRC-OTP-0037-0204.
13. As for document DRC-OTP-0037-0206, the Defence solely states that the Prosecution has not justified maintaining the redactions to the names of staff members of the NGO and then requests, with no further justification, the identity of the NGO because it is the source of the document.<sup>12</sup> This is an insufficient basis for the Chamber to lift protective measures ordered by another Chamber.
14. As for document DRC-OTP-0037-0451, the Defence states that it cannot determine whether the Prosecution has sufficiently justified maintaining redactions to the document. Again, this is a misunderstanding of regulation 42(1), which does not impose the need for any additional justification to maintain authorised protective measures.
15. Thereafter, the Defence simply states that “the identity of an NGO being the source of a document obtained by the Prosecution is relevant to assess its reliability”.<sup>13</sup> Not only is the justification insufficient to lift protective measures, the NGO is not the source of the information contained in the documents. Rather, the documents contain information reported by other individuals whose names the Prosecution proposes to disclose to the Defence should the Chamber vary the

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<sup>12</sup> Defence Request, para. 4.

<sup>13</sup> Defence Request, para. 5.

protective measures imposed.<sup>14</sup> The NGO appears to have merely been in possession of documents authored by third parties. Accordingly, lifting redactions to the name of the NGO who provided the documents to the Prosecution, but who did not author them, will not allow any further assessment of their reliability.

16. Any impact of the non-disclosure of the name of the NGO on the reliability of the documents, if any, is extremely limited and is outweighed by the Court's duty to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

17. The Prosecution reiterates the reasons it provided to the Chamber on an *ex parte* basis in support of the redactions to the name of the NGO that provided the documents to the Prosecution and to its staff members pursuant to regulation 42(1),<sup>15</sup> in accordance with Trial Chamber I's decision.<sup>16</sup>

### Conclusion

18. For the foregoing reasons, the Prosecution requests that the Chamber reject the Defence Request to lift authorised protective measures to the name of the NGO that provided the three documents and to the name of its staff members.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 28<sup>th</sup> day of November 2017

At The Hague, The Netherlands

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<sup>14</sup> ICC-01/04-02/06-2118-Conf-Red, paras. 9-14.

<sup>15</sup> ICC-01/04-02/06-2118-Conf-Exp, paras. 12 and 15.

<sup>16</sup> ICC-01/04-01/06-1803-Conf-Exp.