

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **1 October 2019**

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 the Defence's request for a variation of protective measures and lifting of
category "F" redactions**

Decision 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 Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber VI of the International Criminal Court (‘Chamber’), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 67(2) and 68 of the Rome Statute (‘Statute’), Rules 77 and 81 of the Rules of Procedure and Evidence (‘Rules’), Regulation 42 of the Regulations of the Court (‘Regulations’) and the protocol adopted by way of its ‘Decision on the Protocol establishing a redaction regime’¹ (‘Redaction Protocol’), issues this ‘Decision on the Defence’s request for a variation of protective measures and lifting of category “F” redactions’.

I. PROCEDURAL HISTORY

1. On 12 December 2014, the Chamber adopted the Redaction Protocol. Under this protocol, category ‘F’ redactions are those redactions that have been authorised by another chamber and which are retained in these proceedings by reason of Regulation 42 of the Regulations (and are not covered by other categories approved in the Redaction Protocol).²
2. On 18 September 2019, the Defence filed a request seeking the Chamber’s authorisation to lift category ‘F’ redactions to document DRC-OTP-0197-0296-R02 (‘Document’) applied to the identity of the non-governmental organisation (‘NGO’) at its origin, that were authorised by Trial Chamber I during *The Prosecutor v. Thomas Lubanga Dyilo* (‘Lubanga case’) and carried over to the current proceedings pursuant to Regulation 42(1) of the Regulations (‘Request’).³ The Defence submits that NGO’s identity is necessary to assess the document’s probative value,⁴ that the content of the document is exculpatory, and that the document is material for the preparation of the Defence, in particular in the context of the present sentencing phase.⁵ The Request indicated that there had already been some *inter partes* correspondence in relation to the disclosure request.⁶

¹ 12 December 2014, ICC-01/04-02/06-411, and AnxA.

² Redaction Protocol, para. 8.

³ Request for a variation of protective measures and lifting of category “F” redactions in relation to document DRC-OTP-0197-0296-R02, ICC-01/04-02/06-2410-Conf.

⁴ Request, paras 3, 10-11.

⁵ Request, paras 2, 10.

⁶ Request, paras 6-7.

3. On 20 September 2019, in accordance with the deadline set by the Chamber,⁷ the Office of the Prosecutor ('Prosecution') filed its response to the Request ('Response'), opposing it on the basis of, *inter alia*, its assessment of the relevant safety risk.⁸
4. On 24 September 2019, the Chamber noted by way of email that the Prosecution's assessment of the current safety risk in its Response appeared to be based on extremely limited information, and instructed the Prosecution to, *inter alia*, contact the NGO in question to ascertain if it consented to the disclosure of its identity in the context of the Document to the Defence and to report back thereon to the Chamber by noon on 26 September.⁹
5. On 26 September 2019, the Prosecution indicated by email that it had been able to contact the representative of the NGO, and that this representative 'consented to the disclosure of the identity of the NGO to the Defence and the Legal Representatives of victims in this case and in the context of this document'.¹⁰
6. That same day, the Chamber communicated by email that it would vary Trial Chamber I's decision as regard the redaction of the NGO's identity in relation to the Document in a written decision to be issued in due course. Mindful of the 30 September 2019 deadline for the parties' and participants' written submissions in relation to sentencing,¹¹ the Chamber instructed the Prosecution in the said email to already disclose the identity of the NGO to the Defence and the LRVs.¹²

⁷ Email from the Chamber to the Prosecution, 18 September 2019, at 18:12.

⁸ Prosecution's response to the "Request for a variation of protective measures and lifting of category 'F' redactions in relation to document DRC-OTP-0197-0296-R02", 18 September 2019, ICC-01/04-02/06-2410-Conf, ICC-01/04-02/06-2414-Conf-Exp (confidential *ex parte* only available to the Prosecution and the Victims and Witnesses Unit; with confidential *ex parte* Annex 1 only available to the Prosecution and the Victims and Witnesses Unit; a confidential redacted version was filed on the same day, ICC-01/04-02/06-2414-Conf-Red).

⁹ Email from the Chamber to the parties and participants, 24 September 2019, at 10:32.

¹⁰ Email from the Prosecution to the Chamber and the parties and participants, 26 September 2019, at 11:55.

¹¹ Transcript of Hearing of 20 September 2019, ICC-01/04-02/06-T-268, page 53.

¹² Email from the Chamber to the parties and participants, 26 September 2019, at 15:02.

II. ANALYSIS

7. The Chamber incorporates by reference the applicable law set out in its previous decisions on the lifting of category ‘F’ redactions.¹³ In particular, the Chamber recalls that Regulation 42(4) of the Regulations provides for a chamber to seek to obtain, whenever possible, the consent of the person in respect of whom an application to rescind, vary or augment protective measures has been made, before making its determination under Regulation 42(3).¹⁴
8. The Chamber notes that, as stated by the Prosecution,¹⁵ Trial Chamber I authorised redactions to the Document during the *Lubanga* proceedings under Rule 81(4) of the Rules to ensure the ongoing security of, *inter alia*, the NGO operating in the region that is the source of the document and the identity of a source who provided information to the NGO.¹⁶ In doing so, Trial Chamber I considered that the redactions did not affect the substance of the document, and that the information, overall, was usable and intelligible.¹⁷ The Chamber further notes that Trial Chamber I understood the Document to have been the subject of a confidentiality agreement between the Prosecution and an information provider pursuant to Article 54(3)(e) of the Statute.¹⁸
9. The Chamber notes that, according to the Defence, it intends to rely on the Document in a way that makes relevant not only the content material, but also the status and reliability of the organisation that produced the content.¹⁹ Therefore, and notwithstanding the Prosecution’s initial opposition to disclosure and its submission that it was no longer in contact with the NGO, the Chamber, noting that the NGO had

¹³ *E.g.* Decision on Prosecution’s requests for authorisation to lift Category ‘F’ redactions, 6 December 2016, ICC-01/04-02/06-1671-Conf-Exp (confidential *ex parte* only available to the Prosecution and the Victims and Witnesses Unit; confidential redacted and public redacted versions were filed on 12 December 2016, ICC-01/04-02/06-1671-Conf-Red and ICC-01/04-02/06-1671-Red2 respectively), paras 1-8.

¹⁴ ICC-01/04-02/06-1671-Red2, para. 5.

¹⁵ Response, para. 1.

¹⁶ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Annex 1 to the Decision issuing Annex accompanying Decision lifting the stay of proceedings of 23 January 2009, 23 March 2009, ICC-01/04-01/06-1803-Conf-Exp-Anx1 (confidential *ex parte* only available to the Prosecution; a public version of Annex 1 was filed on the same day, ICC-01/04-01/06-1803-Anx3), pages 107-108, referring to item 91.

¹⁷ ICC-01/04-01/06-1803-Anx3, page 102.

¹⁸ *See e.g.*, Trial Chamber I, *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, paras 1, 6, 11.

¹⁹ Request, para. 11.

recently made public submissions before the Court,²⁰ considered it appropriate to order the Prosecution to contact the NGO to check whether the NGO consented to disclosure of its identity.

10. Given that the NGO consents to disclosure of its identity to the Defence and the LRVs in the context of the Document, the Chamber varies Trial Chamber I's decision of 23 March 2009 in the *Lubanga* case with regards to the Document, in relation to the identity of the NGO.²¹

11. The Chamber regrets that the Prosecution first opposed the disclosure of the identity of the NGO, and that it appears to have done so on the basis of incomplete and inaccurate information. Given the Chamber's consistent practice of ordering the Prosecution to consult with information providers on consent to disclosure,²² it would have been more expeditious had the Prosecution contacted the NGO, instead of opposing the Request on the basis of an assumption about any ongoing safety concerns of the NGO's staff; especially in a situation where – as the Prosecution itself noted – the NGO had recently not considered it problematic to make public submissions as part of another case before the Court.²³

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

VARIES Trial Chamber I's decision with filing number ICC-01/04-01/06-1803, as concerns item DRC-OTP-0197-0296-R02, in respect of the identity of the NGO at the origin of the Document;

ORDERS the Prosecution to disclose the requested information to the Defence and LRVs; and

²⁰ Response, para. 3.

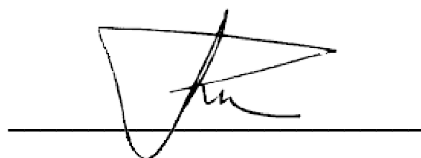
²¹ The Document is listed as item 91 in ICC-01/04-01/06-1803-Conf-Exp-Anx1 and ICC-01/04-01/06-1803-Anx3.

²² *E.g.*, Decision on Prosecution request for authorisation of non-disclosure of five documents, 11 June 2015, ICC-01/04-02/06-637.

²³ Response, para. 3.

ORDERS the Defence and the Prosecution to file public redacted versions of the Request and the Response, respectively.

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

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a smaller, cursive 'r', positioned above a horizontal line.

Judge Robert Fremr, Presiding Judge

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

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of three distinct, stylized characters, positioned above a horizontal line.

Judge Chang-ho Chung

Dated 1 October 2019

At The Hague, The Netherlands