

**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 Sixth Decision on the Prosecutor's Requests for Redactions

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

Counsel for the 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

Other

REGISTRY

Registrar
Herman von Hebel

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,¹ hereby renders the decision on the “Prosecution’s Sixth Application for Redactions” (the “Application”).²

I. Procedural History

1. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “Disclosure Decision”)³ in which she, *inter alia*, gave the following interpretation to the disclosure of exculpatory evidence pursuant to article 67(2) of the Rome Statute (the “Statute”):

[I]t is significant to make particular reference to exculpatory evidence which, according to article 67(2) of the Statute, shall be disclosed ‘as soon as practicable’. In this regard, the Single Judge notes that the Statute or the Rules do not provide for particular time limits for the disclosure of exculpatory evidence to the Defence. However, in the view of the Single Judge, the reference to the phrase ‘as soon as practicable’ must be understood as being the earliest opportunity after the evidence comes into the Prosecutor’s possession. Therefore, the Prosecutor shall disclose such evidence, unless some justifiable reasons prevent her from doing so. Indeed, the Defence must receive such evidence sufficiently in advance prior to the commencement of the confirmation hearing in order to make effective use of the right provided in article 61(6) of the Statute.⁴

2. On 17 May 2013,⁵ 17 June 2013,⁶ and 1 October 2013,⁷ the Single Judge issued a set of decisions reiterating her interpretation of article 67(2) of the Statute. In the “Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties”,⁸ the Single Judge also addressed the underlying meaning of rule 77 of the Rules of Procedure and Evidence (the “Rules”). In that decision, the Single Judge decided that “for inspection of said material, [she] sets up the same deadlines

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

² ICC-01/04-02/06-204-Conf-Exp, with 32 confidential *ex parte* annexes.

³ Pre-Trial Chamber II, ICC-01/04-02/06-47.

⁴ Pre-Trial Chamber II, ICC-01/04-02/06-47, para. 17.

⁵ Pre-Trial Chamber II, “Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties”, ICC-01/04-02/06-64, para. 28.

⁶ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence Between the Parties”, ICC-01/04-02/06-73, p. 20.

⁷ Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and other Related Requests”, ICC-01/04-02/06-117-Conf-Red, para. 24.

⁸ Pre-Trial Chamber II, ICC-01/04-02/06-64.

established for the two batches (...). The criterion is again the time when the material has been collected and has come into the Prosecutor's possession".⁹

3. On 10 January 2014, the Prosecutor submitted the Application in which she requested redactions to information in material falling under article 67(2) of the Statute and rule 77 of the Rules.

4. On 20 January 2014, the Victims and Witnesses Unit (the "VWU") submitted the "Victims and Witnesses Unit's Observations on the Prosecution's Sixth Application for Redactions (ICC-01/04-02/06-204-Conf-Exp)".¹⁰

5. On 23 January 2014, the Chamber received the "Prosecution's withdrawal of a request for redactions and notification of lifting of 81(2) redactions in the statement of DRC-OTP-P-0300" (the "23 January 2014 Application").¹¹

6. On 24 January 2014, the Chamber received the "Communication de l'inventaire des preuves que la Défense entend déposer dans le cadre de l'audience de confirmation des charges et du tableau analytique relatif à ces éléments de preuve" (the "Defence Communication")¹² with which the Defence presented its list of evidence and related in-depth analysis chart pursuant to article 61(6) of the Statute in conjunction with rule 121(6) of the Rules. In this filing, the Defence notes that in light of further disclosure of evidence under article 67(2) of the Statute or rule 77 of the Rules, it indicates the possibility that "*la Défense pourrait être appelée à solliciter l'autorisation d'ajouter des éléments additionnels à la liste des éléments de preuve qu'elle entend déposer à l'audience de confirmation des charges*".¹³

⁹ *Ibid.*, para. 27.

¹⁰ ICC-01/04-02/06-221-Conf-Exp.

¹¹ ICC-01/04-02/06-224-Conf-Exp.

¹² ICC-01/04-02/06-227 with two confidential *ex parte* annexes.

¹³ ICC-01/04-02/06-227, para. 5.

7. On 27 January 2014, the Single Judge convened a status conference on, *inter alia*, the issue of disclosure.¹⁴

II. Preliminary Remarks

8. The Single Judge clarifies that this decision is made subsequent to and in line with the previous decisions on redactions. Most importantly, the Single Judge recalls the principles as set out, in particular, in the “First Decision on the Prosecutor’s Requests for Redactions and other Related Requests” (the “First Decision on Redactions”).¹⁵

9. The present decision is classified as confidential *ex parte*, considering that the references herein pertain 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 VWU only. In line with the previous practice of the Chamber, this decision is shared with the Defence for reasons of fairness, albeit in confidential redacted form. The references, required by the principle of judicial reasoning, have been made without endangering the interests concerned and defeating the very purpose of redactions.

III. The Prosecutor’s Application

10. The Single Judge notes articles 21, 57(3)(c), 67(1) and (2), and 68(1) and (5) of the Statute, rules 81(2) and (4) and 121 of the Rules, and article 8 of the Code of Professional Conduct for counsel.

11. In the present decision, the Single Judge will only address those issues which require further explanation. According to usual practice, Annex I, filed confidential, *ex parte* Prosecutor and VWU only, contains a detailed individual security assessment of witness ██████ whose identity is sought to be redacted pursuant to

¹⁴ Pre-Trial Chamber II, “Decision Convening a Status Conference on Disclosure Issues and on the Organisation of the Confirmation Hearing”, 24 January 2014, ICC-01/04-02/06-225.

¹⁵ Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Other Related Requests”, 1 October 2013, ICC-01/04-02/06-117-Conf-Red, paras 33-64.

rule 81(4) of the Rules.¹⁶ Annex II, filed confidential, *ex parte* Prosecutor and VWU only, contains the Single Judge's analysis and conclusions with respect to each proposed redaction.

Lifting of Redactions

12. The Prosecutor requests authorization to lift redactions to the names of two individuals contained in two documents upon which the Prosecutor will rely for the purposes of the confirmation of charges hearing.¹⁷ As a justification, the Prosecutor asserts that she "has now obtained consent to disclose those two names".¹⁸

13. The Single Judge notes that pursuant to rule 121(3) of the Rules the Prosecutor was obliged to disclose any incriminating piece of evidence 30 days prior to the commencement of the confirmation of charges hearing. In the First Decision on Redactions it was made clear that:

in case evidence must be re-disclosed due to the lifting of redactions, the Single Judge cautions that this must be done in compliance with the Prosecutor's obligations under the Statute and the Rules. For incriminating evidence this must be concluded *no later than 30 days* before the commencement of such hearing pursuant to rule 121(3) of the Rules. This means that all related steps, such as the Prosecutor's request for lifting the redactions, the Single Judge's related decision and the Prosecutor's implementation of the Single Judge's decision must take place sufficiently in advance to the 30-day deadline established by rule 121(3) of the Rules. The Single Judge holds that redactions may not be lifted thereafter so as to ensure fairness of the proceedings and meet the requisite that the Defence is put on sufficient notice for its preparation.¹⁹

14. In light of the foregoing, the Single Judge grants, on an exceptional basis, the lifting of these redactions as they are very limited in number and beneficial for the Defence in the proceedings. Accordingly, the Single Judge finds that the Prosecutor may re-disclose to the Defence the pieces of evidence concerned containing the names of the two individuals. However, the Prosecutor is not allowed to amend her

¹⁶ Redactions to the identity of the remaining witnesses whose identities are withheld from the Defence were either ordered in other proceedings by another chamber or are sought under rule 81(2) of the Rules. In both instances, an individual security assessment of the witnesses is not required.

¹⁷ ICC-01/04-02/06-204-Conf-Exp, para. 11.

¹⁸ ICC-01/04-02/06-204-Conf-Exp, para. 11.

¹⁹ Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests", 1 October 2013, ICC-01/04-02/06-117-Conf-Red, para. 24.

list of evidence and rely on the re-disclosed pieces of evidence for the purposes of the confirmation of charges hearing.

15. In the 23 January 2014 Application, the Prosecutor explains that while the identity of witness P-0121 was revealed in DRC-OTP-0150-0259 to the Defence on 7 October 2013,²⁰ a request was made on 18 October 2013 to redact the witness' name in the statement of witness P-0300.²¹ Consequently, as the name of witness P-0121 is known to the Defence, the Prosecutor requests that the Single Judge authorize the lifting of the rule 81(2) redaction of the name of witness P-0121²² in the statement of witness P-0300.²³ The Single Judge observes that the statement of witness P-0300 was disclosed to the Defence as incriminating evidence on 25 November 2013.

16. As held above, the Single Judge grants, on an exceptional basis, the lifting of these redactions as they are very limited in number and beneficial for the Defence in the proceedings. Accordingly, the Single Judge finds that the Prosecutor may re-disclose to the Defence the statement of witness P-0300 with fewer redactions. However, the Prosecutor is not allowed to amend her list of evidence and rely on the re-disclosed statement of witness P-0300 for the purposes of the confirmation of charges hearing.

Specific Redaction Requests

17. The Prosecutor requests that the identity of witness [REDACTED] be withheld from the Defence at this stage of the proceedings. She purports that the witness [REDACTED]
[REDACTED]
[REDACTED].²⁴ The Single Judge is informed that the witness [REDACTED]

²⁰ ICC-01/04-02/06-224-Conf-Exp, footnote 10.

²¹ ICC-01/04-02/06-124-Conf-Exp-AnxA.5, pp. 9 and 10.

²² Pre-Trial Chamber II, "Second Decision on the Prosecutor's Requests for Redactions", 15 November 2013, ICC-01/04-02/06-145-Conf-Exp-AnxII, pp. 64 and 65.

²³ ICC-01/04-02/06-224-Conf-Exp, paras 8 and 9.

²⁴ ICC-01/04-02/06-204-Conf-Exp-AnxB, p. 20.

authorized³¹ while the redaction of [REDACTED]³². Following the approach set out in the First Decision on Redactions,³³ the Single Judge authorizes that the location [REDACTED] are redacted in the material subject to this Application.

20. Moreover, the Single Judge observes that the Prosecutor requests redactions of the name and signature of the witness (category A) and the name and signature of an investigator (category D) on two documents which are purportedly attached to the statement of witness [REDACTED] (DRC-OTP-2062-0240 and DRC-OTP-2062-0241).³⁴ However, the Prosecutor did not submit those two documents together with the statement concerned in the Application. Nevertheless, given the information provided in the justification table and the standard type of redaction sought, the Single Judge accepted to rule on those redactions without having seen the attachments concerned, while mindful of the principled approach set out in the First Decision on Redaction.³⁵

21. Lastly, the Single Judge observes that the Prosecutor has also submitted redaction proposals to the metadata accompanying the evidence. It is clarified that in case the Single Judge authorizes redactions, the authorization for redactions extends to the corresponding information in the metadata linked to the evidence concerned.

IV. The Defence Communication

22. The Single Judge notes articles 21(3), 61(6) and 67(1)(b) and (2) of the Statute and rules 77 and 121(3) and (6) of the Rules.

³¹ Pre-Trial Chamber II, "First Decision on the Prosecutor's Requests for Redactions and Other Related Requests", 1 October 2013, ICC-01/04-02/06-117-Conf-Exp, para. 60; Pre-Trial Chamber II, "Second Decision on the Prosecutor's Requests for Redactions", 15 November 2013, ICC-01/04-02/06-145-Conf-Exp, para. 28; Pre-Trial Chamber II, "Third Decision on the Prosecutor's Requests on Redactions", 5 December 2013, ICC-01/04-02/06-165-Conf-Exp, paras 32-33.

³² Pre-Trial Chamber II, "Second Decision on the Prosecutor's Requests for Redactions", 15 November 2013, ICC-01/04-02/06-145-Conf-Exp, paras 29-31.

³³ Pre-Trial Chamber II, "First Decision on the Prosecutor's Requests for Redactions and Other Related Requests", 1 October 2013, ICC-01/04-02/06-117-Conf-Exp, para. 60; see also *ibid.*, paras 38 and 47.

³⁴ ICC-01/04-02/06-204-Conf-Exp-AnxA26, pp. 26-28.

³⁵ Pre-Trial Chamber II, "First Decision on the Prosecutor's Requests for Redactions and Other Related Requests", 1 October 2013, ICC-01/04-02/06-117-Conf-Exp, paras 37 and 57-58.

23. The Single Judge notes with concern that the Prosecutor submitted the Application only on 10 January 2014, the day on which she presented the document containing the charges and the list of evidence, on which she intends to rely for the purposes of the confirmation of charges hearing, notwithstanding the Single Judge's clear directions in regard of the disclosure of exculpatory evidence under article 67(2) of the Statute³⁶ as well as material falling under rule 77 of the Rules.³⁷ The Single Judge further observes that redaction requests for incriminating evidence were submitted in time and according to the calendar established by the Chamber, while redaction requests for material falling under rule 77 of the Rules and article 67(2) of the Statute are submitted only after the 30-day deadline established by rule 121(3) of the Rules. The Single Judge recalls that the redaction process is time consuming as (i) the redaction requests must be decided upon first by the Chamber; (ii) the decision be thereafter implemented by the Prosecutor; and (iii) the evidence must be subsequently disclosed to the Defence which requires, in turn, sufficient time to prepare for the confirmation of charges hearing.

24. However, considering that the Defence did not raise any general objection to the submission of the Application but indicated its preference to be allowed, if deemed necessary, to amend its list of evidence pursuant to article 61(6)(c) of the Statute,³⁸ the Single Judge finds in the present circumstances that to remedy the belated disclosure of exculpatory evidence and material falling under rule 77 of the Rules, it is necessary that the Defence be authorized to amend its list of evidence, if deemed

³⁶ See, for example, as early as in Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 12 April 2013, ICC-01/04-02/06-47, para. 17.

³⁷ In this context, it is noted that a large number of the material subject to the present Application was collected as early as 2005, see, for example, material contained in Annexes A4, A5, A8, A9, A10, A11, A12, A13, A14, A15, A16, A17, A18, A19, A20, A21, A22, A23 and A27 of the Application. While the Single Judge accepted on an earlier occasion the argument of the "dormancy" of the case for a period of five years (see Pre-Trial Chamber II, "Decision on the 'Prosecution's Urgent Request to postpone the Date of the Confirmation Hearing' and Setting a New Calendar for the Disclosure of Evidence Between the Parties", 17 June 2013, ICC-01/04-02/06-73, para. 20), this cannot explain the Prosecutor's recent procedural conduct, namely after the suspect's voluntary surrender to the Court in March 2013 and thereafter, bearing in mind that she is under the obligation to investigate both incriminating *and* exonerating circumstances *equally* pursuant to article 54(1)(a) of the Statute and disclose exculpatory evidence "*as soon as practicable*" in accordance with article 67(2) of the Statute.

³⁸ ICC-01/04-02/06-227, para. 5.

necessary, in light of the upcoming disclosure of the material subject to this Application.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **grants** the non-disclosure of the identity of witness [REDACTED];
- b) **partly grants** the Prosecutor's requests for redactions, as specified in Annex II of the present decision, including their extension, as the case may be, to any translation and related metadata;
- c) **authorizes** the Defence, if deemed necessary, to amend its list of evidence in light of the upcoming disclosure of evidence under article 67(2) of the Statute and rule 77 of the Rules;
- d) **orders** *proprio motu* redactions to the material subject to this Application, as specified in Annex II to the present decision, including their extension, as the case may be, to any translation;
- e) **orders** the Prosecutor to disclose to the Defence the redacted evidence subject to this decision within **two days** as of the notification of the present decision;
- f) **orders** the Prosecutor to continuously assess the risk to the safety and well-being of witnesses and to immediately inform the Chamber of any changes in the current situation of the witnesses;
- g) **orders** the Defence to keep the information disclosed confidential and to ensure that it is not passed on to third parties and the public.

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