

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

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 Decision on the “Prosecution’s Ninth Application 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 (the “Court”),¹ hereby renders this decision on the “Prosecution’s Ninth Application for Redactions” (the “Application”).²

I. Procedural History

1. On 22 August 2006³ and on 13 July 2012,⁴ two warrants of arrest were issued against Bosco Ntaganda (“Mr. Ntaganda”).
2. On 22 March 2013, Mr. Ntaganda voluntarily surrendered to the Court⁵ and on 26 March 2013, the initial appearance of the suspect⁶ took place.
3. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”.⁷
4. On 17 May 2013, the Single Judge rendered the “Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties”.⁸

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

² ICC-01/04-02/06-302-Conf-Exp, with confidential *ex parte* annexes.

³ Pre-Trial Chamber I, “Decision on the Prosecution Application for a Warrant of Arrest”, 22 August 2006, ICC-01/04-02/06-1-US-Exp-tENG; a redacted version is also available, see Pre-Trial Chamber I, “Decision on the Prosecution Application for Warrant of Arrest”, 6 March 2007, ICC-01/04-02/06-1-Red-tENG. A warrant of arrest was issued alongside this decision, see Pre-Trial Chamber I, “Mandat d’arrêt”, ICC-01/04-02/06-2; and “Warrant of Arrest”, ICC-01/04-02/06-2-Anx-tENG. The warrant of arrest was initially issued under seal. On 28 April 2008, Pre-Trial Chamber I decided to unseal the warrant of arrest, see “Decision to unseal the warrant of arrest Against Bosco Ntaganda”, ICC-01/04-02/06-18. A redacted version of the initially under seal warrant of arrest had also been issued by Pre-Trial Chamber I at the time. The redacted warrant of arrest was made public upon instruction of Pre-Trial Chamber I dated 29 September 2010, see “Mandat d’arrêt – Corrigendum”, 7 March 2007, ICC-01/04-02/06-2-Corr-Red; an English version is also available, see “Warrant of arrest – Corrigendum”, ICC-01/04-02/06-2-Corr-tENG-Red.

⁴ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application under Article 58”, 13 July 2012, ICC-01/04-02/06-36-Conf-Exp; a public redacted version is also available, see Pre-Trial Chamber II, “Decision on the Prosecutor’s Application under Article 58”, 13 July 2012, ICC-01/04-02/06-36-Red.

⁵ Pre-Trial Chamber II, “Decision on Setting the Date for the Initial Appearance and Related Issues”, 22 March 2013, ICC-01/04-02/06-41, para. 7.

⁶ Pre-Trial Chamber II, Transcript of Hearing, 26 March 2013, ICC-01/04-02/06-T-2-ENG ET.

⁷ Pre-Trial Chamber II, ICC-01/04-02/06-47.

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

5. On 17 June 2013, the Single Judge issued the “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”,⁹ in which she, *inter alia*, established a new calendar for the disclosure of evidence between the parties.
6. On 1 October 2013, the Single Judge issued the “First Decision on the Prosecutor’s Requests for Redactions and Other Related Requests” (the “First Decision on Redactions”), in which she, *inter alia*, summarized the guiding principles with respect to the non-disclosure of information, including redactions.¹⁰
7. On 10 January 2014, the Prosecutor filed the Document Containing the Charges,¹¹ together with the list of evidence,¹² and, on 17 January 2014,¹³ the Prosecutor filed the consolidated in-depth-analysis chart.¹⁴
8. On 24 January 2014, the Defence filed its list of evidence¹⁵ and in-depth analysis chart,¹⁶ as amended on 7 February 2014.¹⁷
9. The confirmation of charges hearing (the “Hearing”), took place from 10 until 14 February 2014.¹⁸

⁹ Pre-Trial Chamber II, ICC-01/04-02/06-73.

¹⁰ Pre-Trial Chamber II, ICC-01/04-02/06-117-Conf-Exp, with two confidential *ex parte* annexes. A confidential redacted version of the decision is also available: ICC-01/04-02/06-117-Conf-Red.

¹¹ ICC-01/04-02/06-203-AnxA.

¹² ICC-01/04-02/06-203-AnxB.

¹³ Pre-Trial Chamber II, “Decision on the Defence Urgent Request of 14 January 2014”, 14 January 2014, ICC-01/04-02/06-209.

¹⁴ ICC-01/04-02/06-217-Conf-AnxC.

¹⁵ ICC-01/04-02/06-227-AnxA.

¹⁶ ICC-01/04-02/06-227-Conf-AnxB.

¹⁷ ICC-01/04-02/06-253 with one public and one confidential annex.

¹⁸ 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, p. 19. Pre-Trial Chamber II, Transcript of Hearing, 10 February 2014, ICC-01/04-02/06-T-7-ENG ET; Pre-Trial Chamber II, Transcript of Hearing, 10 February 2014, ICC-01/04-02/06-T-7Bis-ENG ET; Pre-Trial Chamber II, Transcript of Hearing, 11 February 2014, ICC-01/04-02/06-T-8-ENG ET; Pre-Trial Chamber II, Transcript of Hearing, 11 February 2014, ICC-01/04-02/06-T-8Bis-Red-ENG ET; Pre-Trial Chamber II, Transcript of Hearing, 12 February 2014, ICC-01/04-02/06-T-9-Red-ENG ET; Pre-Trial Chamber II, Transcript of Hearing,

10. On 7 March 2014, the Prosecutor¹⁹ and the legal representatives acting on behalf of the 1,120 participating victims²⁰ lodged their final written submissions. On 8 April 2014, the Chamber also received the final written submissions of the Defence.²¹

11. On 14 May 2014, the Prosecutor filed the Application in which the Prosecutor requests authorisation to redact information in documents that she intends to disclose in accordance with article 67(2) of the Rome Statute (the “Statute”) and rule 77 of the Rules of Procedure and Evidence (the “Rules”).²²

II. The Applicable Law

12. The Single Judge notes article 57(3)(c), 67(1) and (2) and 68(1) of the Statute, rules 77, 81 and 121 of the Rules and regulation 53 of the Regulations of the Court (the “Regulations”).

III. The Prosecutor’s Application

13. The Prosecutor informs the Single Judge that she intends to disclose to the Defence of Mr. Ntaganda the draft transcripts of a re-interview of witness [REDACTED], which took place between [REDACTED], as she believes this material contains information which falls under “rule 77 [of the Rules] and/or article 67(2) [of the Statute]”.²³ The final version (quality controlled) transcripts of the interview is

13 February 2014, ICC-01/04-02/06-T-10-Red-ENG ET; Pre-Trial Chamber II, Transcript of Hearing, 14 February 2014, ICC-01/04-02/06-T-11-ENG ET. See also the presentations of evidence of the parties at the Hearing as filed in the case record, see ICC-01/04-02/06-258 with twenty-three public annexes and four confidential annexes; ICC-01/04-02/06-263 with two public annexes and four confidential annexes.

¹⁹ ICC-01/04-02/06-276-Conf with confidential annexes A, B and C. A public redacted version was filed on 24 March 2014, see ICC-01/04-02/06-276-Red.

²⁰ ICC-01/04-02/06-273; ICC-01/04-02/06-275.

²¹ ICC-01/04-02/06-292-Conf-Exp. A confidential redacted version is also available, see ICC-01/04-02/06-292-Conf-Red; a public redacted version of said document was filed on 14 April 2014, see ICC-01/04-02/06-292-Red2.

²² ICC-01/04-02/06-302-Conf-Exp, paras 1 and 25.

²³ ICC-01/04-02/06-302-Conf-Exp, para. 2.

said to be completed by the end of this week.²⁴ The Prosecutor also states that an audio recording of the interview of witness [REDACTED] is available.²⁵

14. Prior to the disclosure of the above mentioned material, the Prosecutor requests that redactions under categories "A (witness identity and location)", "B (identity and location of family members)" and "D (staff of the Office of the Prosecutor ('OTP') and persons who are contracted to work for the OTP)" be authorized therein.²⁶ She also states that redactions to other material related to the same witness have been authorized in the First Decision on Redactions.²⁷

15. At the same time, the Prosecutor informs the Single Judge that she intends to disclose [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].²⁹

IV. Determinations by the Single Judge

16. At the outset, the Single Judge wishes to point out that the evidentiary discussion in this case was closed with the filing of the final submissions of the Defence. Further, the 60-day time limit pursuant to regulation 53 of the Regulations has commenced on 8 April 2014 with the filing of said final submission of the Defence. Accordingly, the Chamber is currently deliberating whether the charges, based on the evidence submitted within the time limits provided for in rules 121(3) and (6) of the Rules and discussed during the Hearing, should be confirmed against Mr. Ntaganda pursuant to article 61(7) of the Statute. In addition, rule 121(8) of the Rules dictates that the Chamber "shall not take into consideration [...] evidence presented after the time limit [...] has expired".

²⁴ ICC-01/04-02/06-302-Conf-Exp, para. 2.

²⁵ ICC-01/04-02/06-302-Conf-Exp, para. 2.

²⁶ ICC-01/04-02/06-302-Conf-Exp, para. 5.

²⁷ ICC-01/04-02/06-302-Conf-Exp, para. 6.

²⁸ ICC-01/04-02/06-302-Conf-Exp, para. 3.

²⁹ ICC-01/04-02/06-302-Conf-Exp, para. 3.

17. Therefore, the Application must be considered in the context of the present stage of the proceedings and, in particular, having regard to the rights of the Defence to make *effective* use of the evidence disclosed. It is worth noting in this respect that the Prosecutor remained silent as to how Mr. Ntaganda may benefit from this belated disclosure of potentially exculpatory evidence. Providing now the Defence with rule 77 and/or article 67(2) material is of no benefit to Mr. Ntaganda for the purposes of the confirmation of charges decision as the Chamber cannot consider new evidence for the purposes of the article 61(7) determination. Any other hypothetical benefit for the Defence would need to be premised on the assumption that the case will proceed to trial. At this point in time, any such assumption is premature, speculative and accordingly inappropriate.

18. Moreover, the Single Judge recalls her previous decisions in which she established a calendar for disclosure and related requests for redactions so as to organize the proper conduct of the proceedings leading to the Hearing in this case as well as the fairness of the proceedings with due respect for the interests of the suspect. As the Defence cannot make effective use of the rule 77 and/or article 67(2) material, as stated above, the Single Judge opines that the treatment of the request for redactions is meaningless at the current stage of the proceedings.

19. However, in case that the Chamber confirms all or some of the charges and commits Mr. Ntaganda to trial, provided that the Chamber is still seized of this case, the Prosecutor could approach the Chamber with the Application. In that situation, the Pre-Trial Chamber may rule on the redaction requests in relation to evidence which the Defence could use in the next stages of the proceedings in this case.

20. Lastly, the Single Judge takes note of the Prosecutor's expressed intention to disclose [REDACTED]

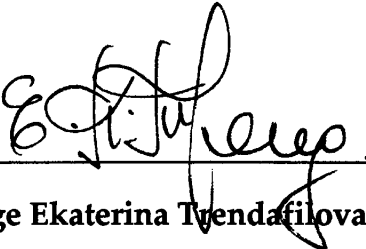
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

rejects the Application.

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