

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

With confidential annexes *ex parte*, Prosecutor and VWU

Redacted Second 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 second decision on the Prosecutor’s requests for redactions.

I. Procedural History

1. At the outset, the Single Judge clarifies that this decision is rendered subsequent to, *inter alia*, the “First Decision on the Prosecutor’s Requests for Redactions and Other Related Requests” (the “First Decision on Redactions”).² The Single Judge therefore makes reference and hereby incorporates the procedural history set out in the First Decision on Redactions and recalls for the purposes of this decision only relevant procedural steps.

2. On 17 May 2013, the Single Judge issued the “Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties” for the purpose of providing the parties with a precise timetable for disclosure and requests for redactions or translation of evidence.³

3. 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”,⁴ in which the Single Judge, *inter alia*, postponed the commencement of the confirmation of charges hearing, initially scheduled to take place on 23 September 2013, until Monday, 10 February 2014.⁵ In the same decision, the Single Judge established a new calendar for the disclosure of evidence, including the submission, if any, of requests for

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

² Pre-Trial Chamber II, 1 October 2013, 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.

³ Pre-Trial Chamber II, ICC-01/04-02/06-64.

⁴ Pre-Trial Chamber II, ICC-01/04-02/06-73.

⁵ 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.

redactions.⁶ More specifically, proposals for redactions in evidence collected until 13 July 2012 had to be submitted until 2 September 2013; proposals for redactions in evidence collected between 13 July 2012 and 1 November 2013 had to be submitted to the Chamber until 1 November 2013.⁷

4. On 21 August 2013, the Single Judge issued the “Decision Ordering the Parties to Provide Risk Assessment with Respect of Witnesses and the Victims and Witnesses Unit to Submit Observations Thereupon”.⁸

5. On 1 October 2013, the Single Judge rendered the First Decision on Redactions in which she, *inter alia*, summarized the guiding principles with respect to the non-disclosure of information, including redactions, and addressed the Prosecutor’s proposals for non-disclosure of information. More specifically, the Single Judge granted the request to withhold the identity of witnesses P-0018, P-0019 and P-0113 from the Defence. Further, the Prosecutor was authorized to disclose the redacted statements of witnesses P-0290 and P-0027 no later than 1 November 2013.

6. On 18 October 2013, the Prosecutor submitted the “Prosecution’s Second Application for Redactions” (the “Second Application”)⁹ in which she requested redactions to information in several witness statements and other material.

7. On 25 October 2013, the Single Judge rendered the “Decision on the Prosecutor’s Request for Additional Redactions to the Statements of Witness P-0290”¹⁰ in which she granted additional redactions to the statement of said witness. The Single Judge also ruled that the Prosecutor inform the Chamber of the existence of any translation

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”, 17 June 2013, ICC-01/04-02/06-73, pp. 19-22.

⁷ 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, pp. 19 and 20.

⁸ Pre-Trial Chamber II, ICC-01/04-02/06-88.

⁹ ICC-01/04-02/06-124-Conf-Exp with confidential *ex parte* annexes A.1-A.9 and B.

¹⁰ Pre-Trial Chamber II, ICC-01/04-02/06-129-Conf-Exp. A confidential redacted version is also available, ICC-01/04-02/06-129-Conf-Red.

of witness statements or other material and request the Chamber to authorize that the redactions sought be extended to any translation.¹¹

8. On 28 October 2013, the Victims and Witnesses Unit (the "VWU") submitted the "Victims and Witnesses Unit's Observations on the Prosecution's Second Application for Redactions (ICC-01/04-02/06-124-Conf-Exp)".¹²

9. On 31 October 2013, the Single Judge issued the "Decision on the 'Prosecution's Request Pursuant to Regulation 35 to Vary the Time Limit for Two Items of Evidence'"¹³ and authorized the Prosecutor to submit redaction proposals in relation to two witnesses on 6 November 2013 and 15 November 2013 respectively.

10. On 1 November 2013, the Prosecutor submitted the "Prosecution's Third Application for Redactions" (the "Third Application").¹⁴

11. On 6 November 2013, the Prosecutor submitted the "Prosecution's application for redactions to the statement of witness DRC-OTP-P-0002" (the "6 November 2013 Request").¹⁵

12. On 8 November 2013, the VWU presented the "Victims and Witnesses Unit's Observations on the Prosecution's Third Application for Redactions (ICC-01/04-02/06-134-Conf-Exp)".¹⁶

13. On 13 November 2013, the VWU submitted the "Victims and Witnesses Unit's Observations on the Prosecution's application for redactions to the statement of witness DRC-OTP-P-0002 (ICC-01/04-02/06-136-Conf-Exp)".¹⁷

¹¹ Pre-Trial Chamber II, "Decision on the Prosecutor's Request for Additional Redactions to the Statements of Witness P-0290", 25 October 2013, ICC-01/04-02/06-129-Conf-Red, para. 10, and p. 5.

¹² ICC-01/04-02/06-130-Conf-Exp.

¹³ Pre-Trial Chamber II, ICC-01/04-02/06-133-Conf-Exp. A confidential redacted version is also available, ICC-01/04-02/06-133-Conf-Red.

¹⁴ ICC-01/04-02/06-134-Conf-Exp with confidential *ex parte* annexes A1-A17, B and C. Corrigenda of annexes A5 and A15 were filed on 8 November 2013.

¹⁵ ICC-01/04-02/06-136-Conf-Exp with two confidential *ex parte* annexes.

¹⁶ ICC-01/04-02/06-138-Conf-Exp.

¹⁷ ICC-01/04-02/06-139-Conf-Exp.

II. Preliminary Remarks

14. The Single Judge clarifies that this decision is made subsequent to and in line with the previous First Decision on Redactions. The Single Judge, therefore, recalls by reference the principles set out in the First Decision on Redactions.

15. The Prosecutor's various requests for redactions will be dealt with in a set of decisions in order to facilitate the timely application of redactions to the evidence by the Prosecutor and thus "ensure that disclosure takes place under satisfactory conditions".¹⁸ Accordingly, the present decision is taken with respect to all witness statements and material submitted by the Prosecutor in the Second Application, the 6 November 2013 Request and annex A13 to the Third Application. The relevant authorization of the redactions granted is separately set out in Annex II to the present decision.

16. The present decision is classified as confidential *ex parte* as it refers 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. For reasons of fairness of proceedings *vis-à-vis* the Defence, this decision is shared with it, albeit in confidential redacted form. To this end, the Single Judge considers that the references made in the present decision are required by the principle of judicial reasoning. They have been kept to a minimum and are made without endangering the interests concerned and defeating the very purpose of redactions.

III. The Prosecutor's Request for Redactions

17. The Single Judge notes articles 21, 57(3)(c), 67 and 68(1) and (5) of the Rome Statute (the "Statute"), rules 81(2) and (4) and 121 of the Rules of Procedure and

¹⁸ Rule 121(2)(b) of the Rules of Procedure and Evidence; Pre-Trial Chamber, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 12 April 2013, ICC-01/04-02/06-47, para. 9.

Evidence (the “Rules”), and article 8 of the Code of Professional Conduct for counsel.

18. The present decision covers the statements of and material relating to witnesses 2, 17, 18, 19, 38, 46, 105, 127, 300 and 800. It is recalled that in the First Decision on Redactions, the Single Judge assessed the security situation of witnesses 18, 19, 105, 127 and 300 individually and separately.¹⁹ Absent any new information to support changed circumstances, the individual risk assessments of those witnesses as stipulated in the First Decision on Redactions remain valid. Accordingly, the Single Judge provides her assessment in relation to the security situation of witnesses 2, 38 and 800 who have not been treated previously.²⁰ Their individual risk assessment is set out individually and separately in Annex I to this decision.

19. Redactions of different types of information are sought in the witness statements and material pursuant to rules 81(2) and (4) of the Rules. It is recalled that the Single Judge previously categorized the information for which redactions are sought in the First Decision on Redactions (categories A, B, C and D).²¹ These redaction categories continue to be applied to the evidence subject to this decision.²²

20. In light of the principles set out in the First Decision on Redactions, the Single Judge grants in part and orders *proprio motu* the redactions as specified in Annex II to the present decision. They also extend to (i) any corresponding text in any translation; (ii) any corresponding information in the metadata linked to the

¹⁹ ICC-01/04-02/06-117-Conf-Exp-AnxI.

²⁰ The Single Judge clarifies that a security assessment of witness 46 is not provided in this decision as the redactions sought in the evidence relating to this witness only relate to information which would fall under rule 81(2) of the Rules. By the same token, the Single Judge does not provide an individual risk assessment of witness 17 as the limited amount and nature of the redactions sought do not call for a specific individual risk assessment in this case. See also the findings of the Single Judge under para. 27 below.

²¹ 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-Red, paras 37, 44, 50 and 55.

²² The Single Judge clarifies that certain information designated by the Prosecutor as “source/lead”, is treated under category D.

evidence concerned; and (iii) any corresponding audiotapes related to the material concerned²³.

21. In this context, the Single Judge noticed the Prosecutor's unusual approach to "request" redactions of information in the individual risk assessment of a particular witness *without*, however, highlighting the relevant text element in the witness statement or material concerned and indicating a justification in the "overview chart".²⁴ Despite this irregularity in approach, the Single Judge will, based on the information and justification provided in the individual risk assessment, proceed with assessing the Prosecutor's redaction proposals. The Prosecutor is, however, reminded in future applications to highlight precisely the text elements which she seeks to redact in a piece of evidence and to provide in the "overview charts" the relevant justification.

22. The Prosecutor submitted a renewed request for non-disclosure of the identity of witnesses 18 and 19 and their locations in the statements which formed part of the second batch of evidence "until after the confirmation of charges proceedings".²⁵ The Single Judge recalls that she has already ruled on the request for anonymity for witnesses 18 and 19 in the First Decision on Redactions.²⁶ It is therefore not necessary to render a ruling on this specific request again. Consequently, the Single Judge's authorization of redactions of identifying information, including locations, in the statements of witnesses 18 and 19 and related metadata is set out in Annex II of the present decision.

23. The Single Judge also notes the Prosecutor's request for non-disclosure of the identity of witness P-0800.²⁷ As explained above, the security situation for witness

²³ ICC-01/04-02/06-124-Conf-Exp, footnote 18.

²⁴ This has been noticed in relation to witness P-0127, see ICC-01/04-02/06-124-Conf-Exp-AnxA.9, p. 21.

²⁵ ICC-01/04-02/06-124-Conf-Exp, paras 10, 21 and 23.

²⁶ 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. 36.

²⁷ ICC-01/04-02/06-134-Conf-Exp, para. 20. The statement is contained in annex A13 to the Third Application.

P-0800 is individually and separately set out in Annex I to this decision. However, as this basis for the Single Judge's assessment is confidential *ex parte* Prosecutor and VWU only, it is of importance that the following minimum information be shared with the Defence. The Prosecutor purports that the witness worked [REDACTED] [REDACTED] at the time of the attack of the *Union des Patriotes Congolais* on [REDACTED]. [REDACTED], the witness provides particular testimony with regard to those events. It is alleged that the witness "is identifiable [REDACTED] [REDACTED] [REDACTED].²⁸ Additionally, the witness [REDACTED] [REDACTED]. The Single Judge is also informed of the Prosecutor's intention to disclose the identity of this witness at the trial stage, should the charges be confirmed.²⁹

24. Upon careful review of all the information available, the Single Judge considers that the non-disclosure of the identity of witness P-0800 is justified as disclosing the identity of this witness to the Defence, at this stage, may put the witness at risk. The Single Judge furthermore believes that, in light of the limited scope of the confirmation hearing, the anonymity is necessary and not prejudicial to or inconsistent with the rights of the suspect and fair and impartial proceedings as the Defence will have access to the relevant information contained in the witness statements and have the possibility to challenge them. More detailed reasons are contained in Annex I to this decision. As held in the First Decision on Redactions,³⁰ the non-disclosure of information must be kept under review. It may be subsequently disclosed within reasonable time prior to the commencement of the confirmation of charges hearing should circumstances change.

²⁸ [REDACTED]

²⁹ ICC-01/04-02/06-134-Conf-Exp, para. 23.

³⁰ 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-Red, para. 24.

25. Having ruled upon the anonymity of witness P-0800, the Single Judge now turns to the redactions sought in the statement. Having carefully reviewed the content of the statement and the extent of the redactions sought, the Single Judge is of the view that the redactions, as requested, will not serve the purpose of protecting the witness adequately. More specifically, the Single Judge believes that the remaining un-redacted text still reveals identifying information about the witness. However, if further redactions are applied, they would render the entire statement incomprehensible. Therefore, the Single Judge authorizes the Prosecutor to refrain from disclosing the statement of witness P-0800 (ICC-01/04-02/06-134-Conf-Exp-AnxA13) and orders the Prosecutor to submit a meaningful summary thereof, in case she wishes to rely on this evidence for the purposes of the confirmation of charges hearing.

26. Lastly, the Single Judge wishes to address the Prosecutor's request to redact certain interview locations, particularly [REDACTED]

[REDACTED] To this end, the Prosecutor argues that "[r]evealing this information would prejudice further or ongoing investigations by making it impossible, and certainly more dangerous to the witnesses and staff, for the OTP to use the same locations for future interviews".³¹ More specifically, [REDACTED]

27. As the Single Judge explained in the First Decision on Redactions, she takes note of the size of the location when assessing whether revealing the name of the

³¹ ICC-01/04-02/06-124-Conf-Exp, para. 42.

³² [REDACTED]

³³ [REDACTED]

interview location could entail that the “further or ongoing investigation” is endangered. This factor influences the question whether the disclosure of the name of the location constitutes an “objectively identifiable risk” to the protected interest.

The Single Judge clarified:

The Single Judge accepts that the difficulties in securing a safe location for interviews warrant the redaction of such location so as to protect the ongoing investigation. However, the Single Judge takes into consideration the size of the location when assessing whether revealing the name of the location would lead to the identification of the exact location of interview. In other words, while it is obvious that villages or smaller cities may not offer many safe locations to conduct interviews, it is less obvious for large cities, provinces or districts. Bearing in mind that the authorization of non-disclosure of information is the exception, the Single Judge has assessed each redaction proposal related to the location of interview on a case-by-case basis.³⁴

28. Thus, in the First Decision on Redactions, the Single Judge accepted that [REDACTED] be redacted in the evidence. The Single Judge is of the view that following this rationale, the interview location [REDACTED] must also be redacted.

29. The Single Judge is, however, not persuaded by the Prosecutor’s argumentation in relation to the interview locations [REDACTED]. At the outset, it is recalled that it is for the Prosecutor to provide proper justification for each of the redactions sought, explaining that an “objectively identifiable risk” arises from the disclosure of particular information to the Defence, as opposed to disclosing it to the public at large.³⁵ [REDACTED]

³⁴ 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.

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 18 and 21.

³⁶ ICC-01/04-02/06-124-Conf-Exp, para. 42.

30. The same reasoning applies for [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Without more, it is difficult for the Single Judge to accept that revealing the fact that the interview took place [REDACTED]

[REDACTED]³⁷ [REDACTED]
[REDACTED]

[REDACTED] considering also that other crucial information may be redacted in the evidence concerned, if necessary.

31. In light of the foregoing, the Single Judge does not grant the Prosecutor's request to redact the interview locations [REDACTED] in the witness statements and related documents.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **partly grants** the Prosecutor's requests for redactions, as specified in Annex II to this decision, including their extension, as the case may be, to any translation, audiotape and related metadata;
- b) **orders *proprio motu*** redactions to the witness statements, transcripts of witness interviews and related documents, as specified in Annex II to this decision;
- c) **authorizes** the Prosecutor to refrain from disclosing the statement contained in ICC-01/04-02/06-134-Conf-Exp-AnxA13 and **orders** the Prosecutor to disclose a meaningful summary thereof, in case she wishes to rely on this evidence for the purposes of the confirmation of charges hearing;
- d) **orders** the Prosecutor to disclose to the Defence the redacted versions of the material within five days as of the notification of the present decision;

³⁷ [REDACTED]

- e) **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 these witnesses;
- f) **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