

**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 request pursuant to Regulation 35 to vary the time limit for submission of an updated expert report on satellite image analysis”

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, Registrar

Defence Support Section

Victims and Witnesses Unit

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 request pursuant to Regulation 35 to vary the time limit for submission of an updated expert report on satellite image analysis” (the “Request”).²

I. PROCEDURAL HISTORY

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

2. 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” (the “17 June 2013 Calendar Decision”),⁴ in which the Single Judge, *inter alia*, postponed the commencement of the confirmation of charges hearing, originally scheduled to take place on 23 September 2013, until Monday, 10 February 2014 and established a new calendar for the disclosure of evidence between the parties. In this context, the Prosecutor was ordered, *inter alia*, “to disclose to the Defence, no later than Friday, 1 November 2013, the evidence from the second batch on which she intends to rely for the purposes of the confirmation hearing, collected between 13 July 2012 and 1 November 2013, and which does not require redactions or other protective measures”.⁵

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

² ICC-01/04-02/06-166-Conf.

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. 20.

3. On 6 December 2013, the Prosecutor submitted the Request in which she seeks the variation of the 1 November 2013 deadline for the submission of an “updated version of the expert satellite image analysis report”.⁶

4. On 11 December 2013, the Defence responded to the Request.⁷

II. THE REQUEST

5. The Prosecutor provides details on the preparation of the expert report⁸ which was disclosed to the Defence on 1 November 2013. The report contains a series of satellite images of locations relevant to the charges:⁹ twenty-five “long-range” and twenty-one “close-range” satellite images.¹⁰ The Prosecutor requests that she be authorized to disclose an updated version of the report for the following reasons.

6. The Prosecutor explains that she had provided the expert in July 2013 with a “list of places of interest and their coordinates”¹¹ which “were based on a number of open-source databases”¹². She realized on 31 October 2013, when the expert provided a draft report,¹³ that “it would be necessary to confirm the accuracy of the coordinates and place names” for nine “close-range” images by “obtaining coordinates for these locations in the field”.¹⁴ As a precautionary measure, therefore, nine of those “close-range” pictures were disclosed on 1 November 2013 “without identifying the location of the image or providing a more detailed explanation of the methodology used by the expert”.¹⁵ Instead, in the disclosed report the locations are referred to as “X1, X2 and so forth” and the in-depth analysis on these images is not included.¹⁶

⁶ ICC-01/04-02/06-166-Conf, para. 1.

⁷ ICC-01/04-02/06-172-Conf.

⁸ ICC-01/04-02/06-166-Conf-, paras 13-20.

⁹ ICC-01/04-02/06-166-Conf, para. 2.

¹⁰ ICC-01/04-02/06-166-Conf, paras 2 and 6.

¹¹ ICC-01/04-02/06-166-Conf, para. 14.

¹² ICC-01/04-02/06-166-Conf, para. 15.

¹³ ICC-01/04-02/06-166-Conf, para. 18.

¹⁴ ICC-01/04-02/06-166-Conf, para. 3; see also para. 18.

¹⁵ ICC-01/04-02/06-166-Conf, para. 3.

¹⁶ ICC-01/04-02/06-166-Conf, para. 19.

7. As a result [REDACTED]

[REDACTED] the accuracy of the coordinates and place names pertaining to the nine “close-range” images in question could be confirmed.¹⁷ A meeting with the expert also took place on [REDACTED].¹⁸ Accordingly, she requests to be authorized to disclose an updated version of the expert report “with updated titles for the locations in the [c]lose-range [i]mages (...) and the expert’s explanation of the methodology he used when analysing the [c]lose-range [i]mages”.¹⁹ The Prosecutor also indicates that no redactions will be required in the updated expert report.²⁰

8. In light of the above submissions, the Prosecutor alleges that there is “good cause” to vary the time limit, as set by the 17 June 2013 Calendar Decision. She avers that her Office “made reasonable and diligent efforts to submit the Updated Report before 1 November 2013, but was unfortunately unable to do so for reasons beyond its control”.²¹

9. The Defence seeks the rejection of the Request.²² It argues, in essence, that the Prosecutor submitted the Request thirty-nine days after the 1 November 2013 deadline²³ and failed to demonstrate that she was unable to submit it before, in accordance with regulation 35(2) of the Regulations.²⁴

III. APPLICABLE LAW

10. The Single Judge notes articles 61 and 67 of the Rome Statute (the “Statute”), rule 121 of the Rules of Procedure and Evidence (the “Rules”), and regulation 35 of the Regulations of the Court (the “Regulations”). In particular, regulation 35(2) of the Regulations stipulates:

¹⁷ ICC-01/04-02/06-166-Conf, para. 20.

¹⁸ ICC-01/04-02/06-166-Conf, para. 20.

¹⁹ ICC-01/04-02/06-166-Conf, para. 21.

²⁰ ICC-01/04-02/06-166-Conf, para. 21.

²¹ ICC-01/04-02/06-166-Conf, para. 5.

²² ICC-01/04-02/06-172-Conf, paras 4 and 14.

²³ ICC-01/04-02/06-172-Conf, paras 9 and 16.

²⁴ ICC-01/04-02/06-172-Conf, para. 6.

The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.

IV. DETERMINATION BY THE SINGLE JUDGE

11. The Single Judge must first ascertain whether the Prosecutor “was unable to file the [Request] within the time limit [specified in the 17 June 2013 Calendar Decision] for reasons outside (...) her control”, pursuant to regulation 35(2), second sentence, of the Regulations. Based on the Prosecutor’s own submission, she determined on 31 October 2013 that the coordinates and place names pertaining to nine “close-range” images would need to be verified. She therefore must have been aware of the need that an application for an extension of time must be lodged. However, the Single Judge accepts that the tardiness of the Request may be owed to the circumstances at the time, in particular the upcoming 1 November 2013 deadline for disclosure of evidence and submission of justified proposals for redactions and other protective measures. In view of the foregoing, the Single Judge is of the view that the Prosecutor was unable to file the Request within the time limit. Finally, the Single Judge recalls that a similar request of the Defence was granted.²⁵

12. In assessing whether “good cause” has been shown by the Prosecutor, the Single Judge notes that the expert report was disclosed on 1 November 2013 which included the underlying twenty-five “long-range” images and twenty-one “close-range” images in relation to twelve of which the coordinates and names of twelve places have been provided. With the Request the Prosecutor seeks to provide the Defence with the accurate coordinates and location names, including the methodology applied by the expert, in relation to only nine “close-range” images. This minor amendment to the report will assist the Defence in (i) understanding better the disclosed expert report and (ii) challenging the evidence at the

²⁵ Pre-Trial Chamber II, “Decision on the Defence Request for Extension of Time for the Purpose of Requesting Translation of Witness Statements into Kinyarwanda”, 13 November 2013, ICC-01/04-02/06-140, para. 18.

confirmation of charges hearing, as foreseen in article 61(6)(b) of the Statute. The Single Judge is also attentive to the fact that the disclosure of the updated report, which requires no redactions, can take place within two days²⁶ after notification of this decision. The Single Judge is thus satisfied that disclosure of the updated version of the expert report will take place within the confines of the 30-day deadline pursuant to rule 121(3) of the Rules and without compromising the rights of the Defence.

13. Having carefully considered all of the above, the Single Judge accepts that “good cause” was shown by the Prosecutor and grants, on an exceptional basis, the request to disclose an updated version of the expert report.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) grants** the Prosecutor’s request for extension of time for the disclosure of an updated version of the expert report;
- b) orders** the Prosecutor to disclose the updated version of the expert report within two days after notification of the present decision.

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

²⁶ ICC-01/04-02/06-166-Conf, para. 1.