

**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 Seventh 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 (the “Court”),¹ hereby renders the decision on the Prosecutor’s further requests for redactions.²

I. Procedural History

1. The present decision is rendered subsequent to a set of decisions on the Prosecutor’s requests for redactions dated 1 October 2013,³ 25 October 2013,⁴ 15 November 2013,⁵ 5 December 2013,⁶ 16 December 2013,⁷ 20 December 2013,⁸ and 28 January 2014⁹. The Single Judge therefore makes reference to and hereby incorporates the procedural history recapitulated in those decisions and recalls only relevant procedural steps for the purposes of this decision.

2. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”¹⁰ 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”):

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

² ICC-01/04-02/06-234-Conf-Exp, with confidential *ex parte* annexes; ICC-01/04-02/06-240-Conf-Exp with confidential *ex parte* annexes; ICC-01/04-02/06-241-Conf-Exp, with confidential *ex parte* annexes.

³ 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 with two confidential *ex parte* annexes; a confidential redacted version is also available, see ICC-01/04-02/06-117-Conf-Red.

⁴ Pre-Trial Chamber II, “Decision on the Prosecutor’s Requests for Additional Redactions to the Statements of Witness P-0290”, 25 October 2013, ICC-01/04-02/06-129-Conf-Exp with one confidential *ex parte* annex; a confidential redacted version is also available, see ICC-01/04-02/06-129-Conf-Red.

⁵ Pre-Trial Chamber II, “Second Decision on the Prosecutor’s Requests for Redactions”, 15 November 2013, ICC-01/04-02/06-145-Conf-Exp with two confidential *ex parte* annexes; a confidential redacted version is also available, see ICC-01/04-02/06-145-Conf-Red.

⁶ Pre-Trial Chamber II, “Third Decision on the Prosecutor’s Requests for Redactions”, 5 December 2013, ICC-01/04-02/06-165-Conf-Exp with two confidential *ex parte* annexes; a confidential redacted version is also available, see ICC-01/04-02/06-165-Conf-Red.

⁷ Pre-Trial Chamber II, “Fourth Decision on the Prosecutor’s Requests for Additional Redactions and Submissions of Corrected Translation”, 16 December 2013, ICC-01/04-02/06-180-Conf-Exp; a confidential redacted version is also available, see ICC-01/04-02/06-180-Conf-Red.

⁸ Pre-Trial Chamber II, “Fifth Decision on the Prosecutor’s Requests for Redactions”, 20 December 2013, ICC-01/04-02/06-189-Conf.

⁹ Pre-Trial Chamber II, “Sixth Decision on the Prosecutor’s Requests for Redactions”, 28 January 2014, ICC-01/04-02/06-233-Conf-Exp with two confidential redacted annexes; a confidential redacted version is also available, see ICC-01/04-02/06-233-Conf-Red.

¹⁰ Pre-Trial Chamber II, ICC-01/04-02/06-47.

[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.¹¹

3. On 17 May, the Single Judge rendered the "Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties",¹² in which she also addressed the underlying meaning of rule 77 of the Rules of Procedure and Evidence (the "Rules"). It was decided that "for inspection of said material, [she] sets up the same deadlines 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".¹³

4. 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",¹⁴ 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 and established a new calendar for the disclosure of evidence between the parties.

5. On 28 January 2014, the Prosecutor submitted the "Prosecution's Seventh Application for Redactions" (the "Seventh Application") in which she requested redactions to information in material falling under article 67(2) of the Statute and rule 77 of the Rules.¹⁵

¹¹ Pre-Trial Chamber II, ICC-01/04-02/06-47, para. 17.

¹² Pre-Trial Chamber II, ICC-01/04-02/06-64.

¹³ *Ibid.*, para. 27.

¹⁴ 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.

¹⁵ ICC-01/04-02/06-234-Conf-Exp with confidential *ex parte* annexes.

6. On 30 January 2014, the Chamber received the "Prosecution's Amended Request for Redactions to the Document of [REDACTED]"¹⁶ (the "Amendment Request") with which the Prosecutor amended in part the Seventh Application.

7. On 31 January 2014, the Prosecutor submitted the "Prosecution's Eighth Application for Redactions"¹⁷ (the "Eighth Application") in which the Prosecutor seeks redactions in article 54(3)(e) material for which the information provider "authorised lifting of the conditions of receipt".¹⁸

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").¹⁹

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.

¹⁶ ICC-01/04-02/06-240-Conf-Exp with confidential *ex parte* annexes.

¹⁷ ICC-01/04-02/06-241-Conf-Exp with confidential *ex parte* annexes.

¹⁸ ICC-01/04-02/06-241-Conf-Exp, para. 2.

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, paras 33-64.

III. Applicable Law

10. The Single Judge notes articles 21, 57(3)(c), 67(1) and (2), and 68(1) and (5) of the Statute, rules 76, 77, 81(2) and (4) and 121 of the Rules, regulation 42 of the Regulations of the Court (the “Regulations”), and article 8 of the Code of Professional Conduct for counsel.

IV. The Prosecutor’s Seventh Application and Amendment Request

11. In the present decision, the Single Judge will only address those issues which require further explanation. The Annex, filed confidential, *ex parte* Prosecutor and VWU only, contains the Single Judge’s analysis and conclusions with respect to each proposed redaction.²⁰

12. At the outset, the Single Judge notes that in relation to a number of pieces of evidence subject to the Seventh Application the Prosecutor herself assesses that it is “predominantly incriminating”.²¹ Nevertheless, due to limited information contained in the evidence concerned, which is claimed to be material for the preparation of the defence, the Prosecutor decided to seek redactions and, accordingly, disclose the material, at this advanced stage of the proceedings. The Single Judge accepts that this material may contain information which is exculpatory or otherwise beneficial for the Defence. However, she disapproves of the Prosecutor’s tardy submission of the Seventh Application, shortly before the commencement of the confirmation of charges hearing given the clear provision of article 67(1)(b) of the Statute. The Single Judge stressed the timely submission of redaction proposals several times in her decisions.

²⁰ Redactions to the identity of the witnesses subject to the Seventh Application and the Amendment Request are based on either (i) rule 81(2) of the Rules; (ii) category C within the meaning of rule 81(4) of the Rules; or (iii) have been ordered in other proceedings by another chamber (regulation 42(1) of the Regulations of the Court) which does not necessitate a risk assessment of the individual concerned.

²¹ See, for example, ICC-01/04-02/06-234-Conf-Exp, paras 11, 16, 19, 24, 29, 34, 39 and 40.

Regulation 42 of the Regulations

13. The Prosecutor informs the Chamber that in material related to witnesses P-0267 and P-0163, which she intends to disclose under rule 77 of the Rules, redactions had been approved by Trial Chamber II in another case under rule 81(2) of the Rules. In the Seventh Application, the Prosecutor seeks to redact the same information either under rule 81(2) or rule 81(4) of the Rules.

14. Regulation 42(1) of the Regulations stipulates that “protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court (...)”. It must first, therefore, be clarified whether the redactions previously authorised by Trial Chamber II under rule 81(2) of the Rules can be considered as protective measures “in respect of a victim or witness” within the meaning of regulation 42(1) of the Regulations. The Single Judge is of the view that the primary aim of rule 81(2) redactions is to protect the Prosecutor’s “further or ongoing investigation” and protects, as the case may be, only incidentally witnesses or victims. Moreover, the Prosecutor’s investigation may unfold differently in the various cases before the Court and, consequently, it cannot be assumed that redactions in the evidence have full force and effect in relation to any other proceedings. The Prosecutor’s approach was therefore correct in requesting anew authorisation. This becomes even more compelling in case the legal basis for redacting particular information is changed to rule 81(4) of the Rules.

Material pertaining to [REDACTED]

15. The Prosecutor requests authorisation to disclose anonymous summaries of the statements of [REDACTED], which contain rule 77 information²² extracted from the statements. [REDACTED] gave a statement in [REDACTED] which is deemed to be “predominantly incriminating”;²³ [REDACTED] provided a statement in [REDACTED]

²² ICC-01/04-02/06-234-Conf-Exp, paras 20, 22, 24 and 28.

²³ ICC-01/04-02/06-234-Conf-Exp, para. 19.

which contains “important incriminating information”²⁴. The proposed summaries do not contain any redactions.

16. In relation to [REDACTED] the Prosecutor states that she has been “unable to regain contact” with the individual concerned with a view to obtaining consent for disclosure and updated security information.²⁵ Consequently, the Prosecutor requests that the identity of [REDACTED] be withheld from the Defence at this stage of the proceedings “until such time as [she] is able to contact the witness, obtain consent for disclosure and obtain complete and current security information”.²⁶ In relation to [REDACTED], the Prosecutor informs the Single Judge that the individual concerned [REDACTED]
[REDACTED].²⁷ She therefore requests authorisation “pursuant to article 68(5) to disclose a summary of the relevant rule 77 information from the statement”.²⁸ In the justification tables accompanying the Seventh Application, the Prosecutor categorizes the non-disclosure of the identity of the individuals concerned to fall under categories A and D.

17. To start with, the Single Judge recalls that it is not necessary for the Prosecutor to secure judicial authorisation for the use of summaries instead of statements. It is the choice of the Prosecutor to select the pieces of evidence which prove best, in her assessment, the factual allegations raised against the suspect. Article 61(5) of the Statute explicitly allows the Prosecutor to rely on summary evidence which does not need prior approval by the Chamber.

18. Further, it is also not the responsibility of the Pre-Trial Chamber to review the accuracy of the summary by comparing it with the related statement. Rather, as the Appeals Chamber confirmed, this also remains the responsibility of the Prosecutor.

²⁴ ICC-01/04-02/06-234-Conf-Exp, paras 23 and 24.

²⁵ ICC-01/04-20/06-234-Conf-Exp, para. 19.

²⁶ ICC-01/04-02/06-234-Conf-Exp, para. 22.

²⁷ ICC-01/04-02/06-234-Conf-Exp, para. 23.

²⁸ ICC-01/04-02/06-234-Conf-Exp, para. 28.

Neither the Statute nor the Rules of Procedure and Evidence foresee that such summaries must be approved by the Pre-Trial Chamber prior to their presentation at the confirmation hearing.²⁹

19. However, should the Prosecutor seek authorization for the non-disclosure of the names of individuals who provided the statement, the Single Judge reverts to the Appeals Chamber which further clarified:

The use of summaries pursuant to article 61(5) of the Statute leaves the disclosure obligations of the Prosecutor pursuant to article 61(3)(b) of the Statute and rules 76 et seq. of the Rules of Procedure and Evidence unaffected.³⁰

20. The Single Judge therefore concludes that the Prosecutor must receive prior authorization to use *anonymous* summaries which do not reveal the identity of the witnesses concerned from the Chamber. This interpretation stays in line with the overall principle that exceptions to disclosure pursuant to rule 81 of the Rules must be judicially authorized.³¹

21. With regard to [REDACTED], the Prosecutor acknowledges that she has lost contact with this individual. At this moment, while it is unclear whether the person will indeed become a witness in this case, the Single Judge is of the view that this person must be considered at present as a “potential prosecution witness” (category D) since the Prosecutor apparently seeks to re-establish contact with [REDACTED].³² When assessing the redaction request, the Single Judge is also mindful of the information that [REDACTED].³³ In light of the principles guiding requests for redactions,³⁴ the Single Judge accepts that disclosing the name of [REDACTED], who has not been reached yet and may be re-interviewed, may put [REDACTED] at risk by being perceived as “potential prosecution witness” or

²⁹ Appeals Chamber, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”, ICC-01/04-01/06-773, para. 43.

³⁰ *Ibid.*

³¹ See also, for example, Pre-Trial Chamber II, „Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 81.

³² See also the explanations given in footnote 23 of the Seventh Application.

³³ ICC-01/04-02/06-234-Conf-Exp, para. 21.

³⁴ Pre-Trial Chamber II, „Redacted First Decision on Redactions and Other Related Requests”, 1 October 2013, ICC-01/04-20/06-117-Conf-Red, paras 21 and 23.

collaborator of the Court. [REDACTED]

[REDACTED] the Single Judge accepts that [REDACTED], if [REDACTED] name would be disclosed, could be interfered with in a manner that could render [REDACTED] unable to cooperate further with the Prosecutor. The Single Judge furthermore believes that, in light of the limited scope of the confirmation of charges 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 rule 77 information contained in the summary. In light of the foregoing, the Single Judge authorises that the name of [REDACTED] be withheld from the Defence at this stage of the proceedings on the basis of rule 81(2) of the Rules.

22. With regard to [REDACTED], it is unclear from the submission of the Prosecutor, whether this person will indeed become a witness in this case. However, considering that [REDACTED] has given already a statement to the Prosecutor, the Single Judge infers that this person is still within the scope of the Prosecutor's investigation. As a result, the Single Judge is of the view that this person must be considered at present as a "potential prosecution witness" (category D). When assessing the redaction request, the Single Judge is also mindful of the information that [REDACTED]

[REDACTED],³⁵ [REDACTED]
[REDACTED]³⁶ [REDACTED]³⁷ [REDACTED]. In light of the principles guiding requests for redactions,³⁸ the Single Judge therefore accepts that disclosing the name of [REDACTED] to the suspect may put [REDACTED] at risk by being perceived as "potential prosecution witness" or collaborator of the Court. [REDACTED]

[REDACTED] the Single Judge accepts that [REDACTED], if [REDACTED] name would be disclosed, could be interfered with in a manner that could render [REDACTED] unable to cooperate further with the Prosecutor. The Single Judge furthermore believes that, in light of the limited scope of the confirmation of charges

³⁵ ICC-01/04-02/06-234-Conf-Exp, para. 27.

³⁶ ICC-01/04-02/06-234-Conf-Exp, para. 25.

³⁷ ICC-01/04-02/06-234-Conf-Exp, para. 26.

³⁸ Pre-Trial Chamber II, „Redacted First Decision on Redactions and Other Related Requests“, 1 October 2013, ICC-01/04-20/06-117-Conf-Red, paras 21 and 23.

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 rule 77 information contained in the summary. In light of the foregoing, the Single Judge authorises that the name of [REDACTED] be withheld from the Defence at this stage of the proceedings on the basis of rule 81(2) of the Rules.

23. Finally, insofar as the Prosecutor includes also incriminating information into the summary of [REDACTED],³⁹ the Single Judge clarifies that this information cannot be used by the Prosecutor for the purposes of the upcoming confirmation of charges hearing as this information has not been disclosed in conformity with rule 121(3) of the Rules.

Material pertaining to [REDACTED]

24. The Defence requested disclosure of the (incriminating) statement of [REDACTED] which was referred to in the Prosecutor's second application for the issuance of a warrant of arrest.⁴⁰ The Prosecutor maintains that she has been "unable to re-establish contact with this individual to re-interview him, to gain his consent to be involved in these proceedings, to obtain updated security information (...) and to [REDACTED]".⁴¹ The Prosecutor also informs the Single Judge that the information brought by [REDACTED] [REDACTED] [REDACTED].⁴² Consequently, the Prosecutor requests authorisation not to reveal the identity of [REDACTED] and not to disclose either the statement or an anonymous summary thereof.⁴³ In the justification tables accompanying the Seventh Application, the Prosecutor categorizes the non-disclosure of the identity of [REDACTED] to fall under categories A and D. The Prosecutor does not allege that the statement of the witness contains any rule 77 or article 67(2) information.

³⁹ DRC-OTP-0164-0281, at 0281.

⁴⁰ ICC-01/04-02/06-234-Conf-Exp, paras 29 and 31.

⁴¹ ICC-01/04-02/06-234-Conf-Exp, para. 30.

⁴² ICC-01/04-02/06-234-Conf-Exp, para. 31.

⁴³ ICC-01/04-02/06-234-Conf-Exp, paras 31 and 32.

25. The Single Judge recalls that in a decision dated 7 May 2013 the Prosecutor was granted the temporary non-disclosure of the statement of, *inter alia*, [REDACTED] for security reasons while she assured that “the Prosecutor will make the necessary undertakings in order to lift said temporary non-disclosure”.⁴⁴ The Single Judge is mindful of the Prosecutor’s assertion that she repeatedly but unsuccessfully attempted to reach [REDACTED] since then.⁴⁵ Since the security concerns could not be addressed by the Prosecutor in the meantime, the initial security assessment underlying the Single Judge’s decision of 7 May 2013 continues to be valid. Hence, in light of the principles guiding requests for redactions,⁴⁶ the Prosecutor is authorised to continue to withhold the name of [REDACTED] from the Defence and, by implication, is authorised not to disclose the statement. [REDACTED], the Single Judge agrees that, at this stage of the proceedings, a summary may also not be disclosed to the Defence.

Material pertaining to [REDACTED]

26. The Defence requested disclosure of the “predominantly incriminating”⁴⁷ statement of [REDACTED] which was referred to in the Prosecutor’s second application for the issuance of a warrant of arrest.⁴⁸ The Prosecutor contends that she has been “unable to re-establish contact with this individual for the purpose of re-interviewing him, to gain his consent to be involved in these proceedings, and to obtain updated security information”.⁴⁹ The Prosecutor specifies that the statement does not contain any rule 77 information and adds that she does not consider herself “to be under an obligation to disclose this statement simply because it was referred

⁴⁴ Pre-Trial Chamber II, “Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest”, 7 May 2013, ICC-01/04-02/06-58-Conf-Exp, para. 32. See also Pre-Trial Chamber II, “Redacted Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest”, 16 July 2013, ICC-01/04-02/06-58-Conf-Red, para. 32.

⁴⁵ ICC-01/04-02/06-234-Conf-Exp, para. 30.

⁴⁶ Pre-Trial Chamber II, “Redacted First Decision on Redactions and Other Related Requests”, 1 October 2013, ICC-01/04-20/06-117-Conf-Red, paras 21 and 23.

⁴⁷ ICC-01/04-02/06-234-Conf-Exp, para. 34.

⁴⁸ ICC-01/04-02/-60234-Conf-Exp, para. 34.

⁴⁹ ICC-01/04-02/06-234-Conf-Exp, para. 35.

to in the second application for a warrant of arrest”.⁵⁰ Nevertheless, in light of the specific Defence request, the Prosecutor seeks authorisation to withhold the identity of witness [REDACTED] at this stage of the proceedings, “until such time as [she] is able to contact this witness, obtain consent for disclosure, obtain complete and current security information [REDACTED] [REDACTED]”.⁵¹ In the justification tables accompanying the Seventh Application, the Prosecutor categorizes the non-disclosure of the identity of [REDACTED] to fall under categories A and D.

27. With regard to [REDACTED], the Prosecutor acknowledges that she has lost contact with this individual. At this moment, while it is unclear whether the person will indeed become a witness in this case, the Single Judge notes that in the justification tables the Prosecutor indicated [REDACTED] to be a “potential witness” and marked identity-related redaction proposals in blue.⁵² Accordingly, the Single Judge is of the view that this person must be considered, at present, as a “potential prosecution witness” (category D), since the Prosecutor apparently seeks to re-establish contact with [REDACTED].⁵³ In light of the principles guiding requests for redactions,⁵⁴ the Single Judge accepts that disclosing the name of [REDACTED], who has not been reached yet and may be re-interviewed, may put [REDACTED] at risk by being perceived as “potential prosecution witness” or collaborator of the Court. As this witness has not been contacted recently, the Single Judge accepts that [REDACTED], if [REDACTED] name would be disclosed, could be interfered with in a manner that could render [REDACTED] unable to cooperate further with the Prosecutor. The Single Judge furthermore believes that, in light of the limited scope of the confirmation of charges 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 statement. In light

⁵⁰ ICC-01/04-02/06-234-Conf-Exp, para. 36.

⁵¹ ICC-01/04-02/06-234-Conf-Exp, para. 36.

⁵² See also the explanation given in footnote 23 of the Seventh Application.

⁵³ Accordingly, redaction requests for identifying information of family members of this potential prosecution witness are assessed under category D.

⁵⁴ Pre-Trial Chamber II, “Redacted First Decision on Redactions and Other Related Requests”, 1 October 2013, ICC-01/04-20/06-117-Conf-Red, paras 21 and 23.

of the foregoing, the Single Judge authorises that the name of [REDACTED] be withheld from the Defence at this stage of the proceedings on the basis of rule 81(2) of the Rules.

Material pertaining to [REDACTED]

28. In the Amendment Request, the Prosecutor requests the non-disclosure of the identity of [REDACTED]⁵⁵ in a screening note which the Prosecutor assesses to fall under rule 77 of the Rules.⁵⁶ Following updated information about [REDACTED]⁵⁷ the Prosecutor informs the Single Judge that [REDACTED]
[REDACTED]
[REDACTED]⁵⁸ [REDACTED]
[REDACTED]. It is alleged that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁶⁰ [REDACTED] does not consent to the disclosure of [REDACTED] identity⁶¹ and [REDACTED] is not a witness in the case.⁶² Redactions are requested under category C.⁶³

29. The Single Judge agrees with the categorization of the redaction sought to fall under category C as, in the words of the Prosecutor, this individual is not a witness or potential witness in this case. The Single Judge accepts that revealing this information could suggest that [REDACTED] continues to cooperate with the Court. She also takes into consideration that [REDACTED] does not consent to the disclosure of [REDACTED] identity in these proceedings. Considering [REDACTED]
[REDACTED] the disclosure of [REDACTED] name may expose [REDACTED] to an

⁵⁵ ICC-01/04-02/06-240-Conf-Exp, paras 3 and 9.

⁵⁶ ICC-01/04-02/06-240-Conf-Exp, para. 12.

⁵⁷ ICC-01/04-02/06-240-Conf-Exp, paras 3, 9 and 15.

⁵⁸ ICC-01/04-02/06-240-Conf-Exp, paras 10 and 13.

⁵⁹ ICC-01/04-02/06-240-Conf-Exp, para. 16.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² ICC-01/04-02/06-240-Conf-Exp, para. 19.

⁶³ ICC-01/04-02/06-240-Conf-Exp, para. 18.

objectively identifiable risk. The Single Judge considers that the limited redactions are necessary to minimize the risk [REDACTED] may face. The Single Judge furthermore believes that, in light of the limited scope of the confirmation of charges 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 content of the screening note. In light of the foregoing, the Single Judge authorises that identifying information of [REDACTED] be withheld from the Defence at this stage of the proceedings on the basis of rule 81(4) of the Rules (category C).

Disclosure of material under rule 76 of the Rules

30. The Prosecutor reiterates that in the upcoming confirmation of charges hearing, she relies on witnesses P-0100 and P-0792.⁶⁴ With the Seventh Application, she seeks authorisation to redact certain information in the material relating to those two witnesses which, she announces, will be disclosed under the provision of rule 76 of the Rules.⁶⁵ In relation to witness P-0100 this concerns the disclosure of a statement (DRC-OTP-2062-2252), an investigator's note (DRC-OTP-2063-0272) and a sketch (DRC-OTP-2062-2258). With regard to witness P-0792 this concerns the disclosure of a statement (DRC-OTP-0077-0002) and an investigator's note (DRC-OTP-2063-0274).

31. The Single Judge makes reference to rule 76(1) of the Rules which stipulates that the Prosecutor "shall provide the defence with the names of the witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence." Rule 121(3) of the Rules expressly states that the Prosecutor is under the obligation to disclose any (incriminating) evidence, upon which she intends to rely, no later than 30 days before the commencement of the confirmation of charges hearing. In light of the clear wording of the abovementioned rules, the Single Judge opines that the fact that other material relating to the witnesses concerned has been disclosed within the deadline established by rule

⁶⁴ ICC-01/04-02/06-234-Conf-Exp, paras 39 and 40.

⁶⁵ *Ibid.*

121(3) of the Rules cannot justify the belated disclosure of the material subject to the Seventh Application under rule 76 of the Rules, and by implication, the amendment of the Prosecutor's list of evidence. Considering that the 30-day deadline pursuant to rule 121(3) of the Rules expired on 10 January 2014, and that this material does not appear to contain any article 67(2) or rule 77 information, the Single Judge holds that the Prosecutor's request for redactions/non-disclosure and amendment of her list of evidence as submitted on 10 January 2014 must be dismissed.

Contact details of a potential witness who provides rule 77 information

32. The Single Judge notes throughout the justification tables that the Prosecutor requests the redaction of the telephone number of a potential prosecution witness who provides rule 77 information, while the identity of the same person can be revealed to the suspect.⁶⁶ The Single Judge pays special attention to the fact that this individual provides allegedly information which is deemed "material to the preparation of the defence" within the meaning of rule 77 of the Rules. Thus, in principle, this information should assist the suspect in the preparation of his defence, which includes being able to contact the person. Moreover, the Single Judge has not been provided with appropriate justification that revealing the telephone number of a potential witness, whose name is given to the Defence, will prejudice the Prosecutor's further or ongoing investigation. Lacking any proper justification and mindful of the principle of full disclosure, the Single Judge does not authorise the redaction of the telephone number of the individual who provides rule 77 information and whose name is provided to the Defence.

Location of witness interviews

33. The Prosecutor requests that the [REDACTED]
[REDACTED]⁶⁷ be redacted as locations of witness interviews, pursuant to rule 81(2) of the Rules. In line with the Single Judge's

⁶⁶ See Annex A2 to the Seventh Application.

⁶⁷ ICC-01/04-02/06-234-Conf-Exp, para. 52.

previous rulings, in particular by taking into consideration the size of the interview locations,⁶⁸ this request is granted.

V. The Prosecutor's Eighth Application

34. With the Eighth Application, the Prosecutor seeks authorisation to redact certain information in material which was hitherto covered by article 54(3)(e) agreements and for which the information providers lifted the conditions of confidentiality. As was stated in the context of the Seventh Application, insofar as incriminating evidence is disclosed to the Defence, the Prosecutor cannot rely on it for the purposes of the confirmation of charges hearing as it is submitted past the 30-day deadline established by rule 121(3) of the Rules.

35. The Prosecutor requests email addresses of third persons who are mentioned in a series of email exchanges to be redacted.⁶⁹ The Prosecutor states that those individuals are not witnesses of the Court or otherwise related to the case and are "likely unaware that they are referred to in material before the Court".⁷⁰

36. The Single Judge, having reviewed carefully the redaction proposals in light of the principles guiding requests for redactions,⁷¹ accepts that those individuals regularly do not know that their personal contact details are subject to disclosure in judicial proceedings and may be perceived to collaborate with the Court. Considering that those persons do not benefit from any other form of protection, disclosure to the suspect could expose them to an objectively identifiable risk. The Single Judge is also of the view that those limited redactions are necessary to ensure the safety of those individuals. In light of the limited scope of the confirmation of

⁶⁸ 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; Pre-Trial Chamber II, "Sixth Decision on the Prosecutor's Requests for Redactions", 28 January 2014, ICC-01/04-02/06-233-Conf-Exp, para. 19.

⁶⁹ ICC-01/04-02/06-241-Conf-Exp, paras 4(b), and 10-12.

⁷⁰ ICC-01/04-02/06-241-Conf-Exp, para. 10.

⁷¹ Pre-Trial Chamber II, "Redacted First Decision on Redactions and Other Related Requests", 1 October 2013, ICC-01/04-20/06-117-Conf-Red, paras 21 and 23.

charges hearing, the redactions are not prejudicial to or inconsistent with the rights of the suspect and fair and impartial proceedings as the Defence will have access to the entire content of the email exchanges. In light of the foregoing, the Single Judge authorises, pursuant to rule 81(4) of the Rules, the redactions as proposed.

37. The Prosecutor further requests that the email address of [REDACTED] and [REDACTED] identity in the metadata be redacted.⁷² She informs the Single Judge that the [REDACTED].⁷³

38. The Single Judge recalls that [REDACTED]
[REDACTED]
[REDACTED] Having reviewed the redaction proposals carefully in light of the principles guiding requests for redactions,⁷⁴ the Single Judge accepts that the email address [REDACTED]
[REDACTED] may be redacted in the documents subject to the Eighth Application, especially in light of the fact that [REDACTED]
[REDACTED] be disclosed to the suspect. With regard to the [REDACTED] being redacted in the metadata relating to the documents subject to the Eighth Application, the Single Judge equally agrees that absent the [REDACTED] shall be redacted as the source of the documents concerned. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The redaction sought is strictly limited to what is necessary and is not prejudicial to or inconsistent with the rights of the suspect and fair and impartial proceedings as the Defence will have access to the entire content of the document concerned.

⁷² ICC-01/04-02/06-241-Conf-Exp, paras 4(a) and 8-9.

⁷³ ICC-01/04-02/06-241-Conf-Exp, para. 8.

⁷⁴ Pre-Trial Chamber II, "Redacted First Decision on Redactions and Other Related Requests", 1 October 2013, ICC-01/04-20/06-117-Conf-Red, paras 21 and 23.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **grants** the non-disclosure of the identity of witnesses [REDACTED], [REDACTED], [REDACTED] and [REDACTED];
- b) **grants** the continued non-disclosure of the identity of [REDACTED] and that of [REDACTED] statement or any summary thereof;
- c) **partly grants** the Prosecutor's requests for redactions, as specified in the Annex of the present decision, including their extension, as the case may be, to any translation and related metadata;
- d) **grants** the redactions sought in the Eighth Application as referred to in paragraphs 36 and 38;
- e) **authorizes** the Defence, if deemed necessary, to amend its list of evidence and amended in-depth analysis chart in light of the upcoming disclosure of evidence under article 67(2) of the Statute and rule 77 of the Rules up until the commencement of the confirmation of charges hearing on Monday, 10 February 2014;
- f) **orders *proprio motu*** redactions to the material subject to this Application, as specified in the Annex to the present decision, including their extension, as the case may be, to any translation;
- g) **orders** the Prosecutor to disclose to the Defence the redacted evidence subject to this decision within **24 hours** as of the notification of the present decision;
- h) **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;
- i) **orders** the Defence to keep the information disclosed confidential and to ensure that it is not passed on to third parties and the public;

- j) **dismisses** the Prosecutor's requests for redactions/non-disclosure of the material set out in paragraph 30 which pertains to witnesses P-0100 and P-0792, as well as the Prosecutor's implicit request to amend the list of evidence.

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