

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 21 November 2013

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***

**Confidential
Urgent**

**Decision on the Prosecutor's "urgent application for extension of a previously
authorized rule 81(2) redaction to an annex to witness DRC-OTP-P-0017's
statement"**

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

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 Prosecutor's "urgent application for extension of a previously authorized rule 81(2) redaction to an annex to witness DRC-OTP-P-0017's statement" ("the Application").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" for the purpose of providing the parties with a precise timetable for disclosure and 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, 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 redactions.⁶ More specifically, proposals for redactions in evidence collected until 13 July 2012 had to be submitted no later than 2 September 2013; proposals for redactions in evidence collected between 13 July

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

² ICC-01/04-02/06-149-Conf-Exp.

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.

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.

2012 and 1 November 2013 had to be submitted to the Chamber no later than 1 November 2013.⁷

3. 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.⁸

4. 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, including the transcribed interview of witness DRC-OTP-P-0017 and several handwritten notes of witness DRC-OTP-P-0017 appended thereto, as well as other material.

5. On 15 November 2013, the Single Judge rendered the Second Decision on the Prosecutor's Requests for Redactions (the "Second Decision on Redactions") in which, she, *inter alia*, addressed the Prosecutor's proposals for non-disclosure of information.¹⁰ More specifically, the Single Judge granted redactions to the name of a potential prosecution witness in the transcribed interview of witness DRC-OTP-P-0017 under rule 81(2) of the Rules of Procedure and Evidence (the "Rules"), considering that revealing this information can prejudice further or ongoing investigations.¹¹

6. On 19 November 2013, the Prosecutor submitted the Application, in which a variation of the 1 November 2013 Deadline in relation to witness DRC-OTP-P-0017's

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, 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.

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, "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 of the decision is also available, ICC-01/04-02/06-145-Conf-Red.

¹¹ ICC-01/04-02/06-145-Conf-Exp-Anx2, pp. 106-116.

handwritten notes, appended to the transcribed interview of witness DRC-OTP-P-0017 as Annex V ("Handwritten Notes"), is requested, along with a request to authorize to redact the name of a potential prosecution witness or "lead" appearing in the Handwritten Notes.¹² Although authorization to redact the name of the person concerned was granted in relation to the transcribed interview of witness DRC-OTP-P-0017, no such redaction proposal was put forward by the Prosecutor in her Second Application.

II. PRELIMINARY REMARKS

7. The present decision is classified as confidential although 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*. The Single Judge considers that the references to the said documents are required by the principle of judicial reasoning as well as the fairness of proceedings *vis-à-vis* the Defence. To this end, they have been kept to a minimum and have been made without endangering the interests concerned and defeating the very purpose of redactions.

III. THE APPLICATION

8. The Prosecutor advances that the Single Judge has been enabled to consider the merits of her request for redaction of the name of the potential prosecution witness in question in a timely manner in the Second Decision on Redactions and that, on the basis of the present Application, she merely seeks to extend this redaction to an additional piece of evidence in which the same information appears.¹³

9. The Prosecutor asserts, in addition, that varying the time limit is the only way to uphold the Second Decision on Redactions in relation to this aspect of the evidence of witness DRC-OTP-P-0017 as "[d]isclosing the Handwritten Notes without

¹² ICC-01/04-02/06-149-Conf-Exp, p. 7.

¹³ ICC-01/04-02/06-149-Conf-Exp, para. 7.

redacting the name of the lead would reveal the information for which the Single Judge has authorized non-disclosure”.¹⁴

10. Furthermore, the Prosecutor contends that an extension of only two weeks of the 1 November 2013 deadline is sought and, should authorisation to redact be granted, she will be “able to disclose them together with the rest of witness DRC-OTP-P-0017’s materials within five days of the Second Decision on Redactions”.¹⁵

11. Finally, the Prosecutor avers that “[r]evealing names of individuals whom the Prosecution intends to investigate further would endanger ongoing investigations”.¹⁶ In this regard, the Prosecutor submits that “there are no less restrictive protective measures that can be taken” and “[t]he redaction is not prejudicial to or inconsistent with the rights of the Defence and the requirements of a fair and impartial trial because it is limited and does not affect the intelligibility of the information”.¹⁷

IV. APPLICABLE LAW

12. The Single Judge notes articles 21(1)(a) and (3), 61 and 67 of the Rome Statute (the “Statute”), rules 81(2) and 121 of the Rules, regulation 35(2) of the Regulations of the Court (the “Regulations”) and article 8 of the Code of Professional Conduct for counsel.

V. DETERMINATION BY THE SINGLE JUDGE

13. The Application concerns, at its core, an additional redaction to a piece of information appearing in Handwritten Notes of witness DRC-OTP-P-0017. Redaction proposals concerning the identical piece of information have already been assessed with respect to the transcribed interview of DRC-OTP-P-0017 by the Single Judge in the Second Decision on Redactions.¹⁸ Accordingly, all redaction proposals concerning this piece of information should have been submitted by the Prosecutor

¹⁴ ICC-01/04-02/06-149-Conf-Exp, para. 9.

¹⁵ ICC-01/04-02/06-149-Conf-Exp, para. 10.

¹⁶ ICC-01/04-02/06-149-Conf-Exp, para. 12.

¹⁷ ICC-01/04-02/06-149-Conf-Exp, para. 13.

¹⁸ Pre-Trial Chamber II, ICC-01/04-02/06-145-Conf-Exp-Anx2, pp. 74, 115-116.

by 1 November 2013, under the terms of the 17 June 2013 Calendar Decision. The Single Judge regrets that the Prosecutor has not complied with the time limits established by the Single Judge in accordance with her duty to ensure that disclosure takes place under satisfactory conditions. Accordingly, the Single Judge considers that the Prosecutor has neither shown good cause nor has she demonstrated that she was unable to put forward her request within the time limit for reasons outside her control.

14. In this regard, the Single Judge wishes to point out that the parties and participants are under an obligation to comply with any time limit prescribed. Nevertheless, the non-compliance with a time limit for the submission of a redaction request does not necessarily mean that the parties are in principle precluded from seeking protective measures in certain circumstances. On the basis of her powers and obligations in relation to the process of disclosure, as provided for in article 61(3) of the Statute and rule 121(2) of the Rules, the Single Judge shall consider the consequences of the non-compliance with the time limit, and accordingly, decide on the protective measure sought depending on the circumstances of the particular case.¹⁹

15. In this context, the Single Judge notes the specific circumstances of the present Application. The proposed redaction is limited to one piece of information in one annex to the transcribed interview of witness DRC-OTP-P-0017. Moreover, the Single Judge has already ruled upon, and authorised, the Prosecutor's request to redact the identical piece of information in relation to the transcribed interview of witness DRC-OTP-P-0017. Thus, the omission to submit a request to redact this piece of information in the Handwritten Notes of witness DRC-OTP-P-0017 appears to constitute a mere oversight on the part of the Prosecutor.

¹⁹ See also, Pre-Trial Chamber I, "Decision on the "Prosecution's request pursuant to Regulation 35 for the extension of time for disclosure and for variation of time limit to submit a request for redactions", 2 October 2013, ICC-02/11-01/11-520, paras 15-16.

16. Furthermore, non-redaction of the name of the person concerned in the Handwritten Notes would defeat the purpose of the redactions authorized in the Second Decision on Redactions. In this regard, the Single Judge considers that, should the name of the person concerned be disclosed, he could be perceived as a potential prosecution witness or a collaborator of the Court, which could, in turn, prejudice further or ongoing investigations. The Single Judge is also of the view that, at this stage of the proceedings, there is no less intrusive alternative measure that can be taken to achieve the goal of protecting the further or ongoing investigation by the Prosecutor.

17. Finally, the remainder of the redaction proposals concerning the transcribed interview of witness DRC-OTP-P-0017 has been ruled upon in the Second Decision on Redactions, and this document is due to be disclosed in accordance with the findings in the Second Decision on Redactions.²⁰ Therefore, the additional redaction to the name of the person concerned in the Handwritten Notes 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 transcribed interview of witness DRC-OTP-P-0017 well in advance of the confirmation of charges hearing and have the possibility to challenge them.

18. Accordingly, the Single Judge is of the view that it would be disproportionate to preclude the Prosecutor from requesting redactions prior to the disclosure of the Handwritten Notes. Moreover, the Single Judge takes note of the Prosecutor's submission that, should authorization to redact be granted, the Prosecution will be able to disclose the Handwritten Notes "together with the rest of witness DRC-OTP-P-0017's materials within five days of the Second Decision on Redactions".²¹

²⁰ Pre-Trial Chamber II, ICC-01/04-02/06-145-Conf-Exp, p. 12.

²¹ ICC-01/04-02/06-149-Conf-Exp, para. 10.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **grants** the Application as specified in paragraphs 14-18 of this decision; and
- b) **orders** the Prosecutor to disclose the redacted version of the Handwritten Notes of witness DRC-OTP-P-0017 within five days of the Second Decision on Redactions, together with the redacted versions of the remainder of witness DRC-OTP-P-0017's materials.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 21 November 2013

At The Hague, The Netherlands