

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 16 December 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

**Redacted Fourth Decision on the Prosecutor's Requests for Additional Redactions
and Submission of Corrected Translation**

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, Registrar

Defence Support Section

Victims and Witnesses Unit

Patrick Craig

Detention Section

**Victims Participation and Reparations Other
Section**

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 Urgent Request pursuant to Regulation 35 for Additional Redactions in two witness statements and for submission of a corrected translation" (the "Application").²

I. Procedural History

1. At the outset, the Single Judge clarifies that the present decision is rendered subsequent to, *inter alia*, the "Third Decision on the Prosecutor's Requests for Redactions" (the "Third Decision on Redactions") dated 5 December 2013.³ The Single Judge, therefore, makes reference to and hereby incorporates the procedural history set out in the Third Decision on Redactions and recalls only relevant procedural steps for the purposes of this decision.

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 submit to the Chamber, no later than Friday, 1 November 2013, justified proposals for redactions or other protective measures, if

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

² ICC-01/04-02/06-178-Conf-Exp with confidential, *ex parte* annex.

³ 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 of the decision is also available, see ICC-01/04-02/06-165-Conf-Red.

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

any, in relation to the evidence from the second batch, collected between 13 July 2013 and 1 November 2013".⁵

3. On 5 December 2013, the Single Judge issued the Third Decision on Redactions in which she, *inter alia*, ruled on redaction proposals to the statements of witnesses P-0768 and P-0804.

4. On 13 December 2013, the Prosecutor submitted the Application in which she seeks, in two discrete requests, the variation of the time limit for (i) submitting redaction proposals in relation to the statements of witnesses P-0768 and P-0804 (the "Redaction Request");⁶ and (ii) disclosing a corrected translation of a document" (the "Disclosure Request").⁷

II. Preliminary Remarks

5. 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" dated 1 October 2013.⁸

6. 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 Victims and Witnesses Unit 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

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.

⁶ ICC-01/04-02/06-178-Conf-Exp, paras 7-11.

⁷ ICC-01/04-02/06-178-Conf-Exp, paras 14-17.

⁸ 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, see ICC-01/04-02/06-117-Conf-Red.

been kept to a minimum and have been made without endangering the interests concerned and defeating the very purpose of redactions.

III. The Application

7. 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 Evidence (the “Rules”), regulation 35 of the Regulations of the Court (the “Regulations”) and article 8 of the Code of Professional Conduct for counsel. In particular, regulation 35(2) of the Regulations stipulates:

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.

1. Redaction Request

8. The Prosecutor requests to be authorized to apply additional redactions to the statements of witnesses P-0768 and P-0804 in addition to those authorized and ordered in the Third Decision on Redactions. With regard to witness P-0804, the proposed redactions concern the name of an investigator within the Office of the Prosecutor in the metadata.⁹ With regard to witness P-0768, limited redactions as to the number of children [REDACTED] are sought in a particular section of the audiotape (DRC-OTP-2058-0676, track 1).¹⁰ While the draft transcription, which had been submitted to the Single Judge for the purposes of the Third Decision on Redactions, reflected the word “incomprehensible” for this particular section in the audiotape, a review of the tape revealed that the utterances of the investigator and the witness are actually audible and comprehensible.¹¹ Redactions are also sought to the corresponding corrected official version of the transcription when finalized.¹²

⁹ ICC-01/04-02/06-178-Conf-Exp, para. 7.

¹⁰ ICC-01/04-02/06-178-Conf-Exp, paras 9 and 11.

¹¹ ICC-01/04-02/06-178-Conf-Exp, para. 8.

¹² ICC-01/04-02/06-178-Conf-Exp, paras 9 and 10.

9. The Prosecutor submits that “good cause” is shown to vary the time limit set out in the 17 June 2013 Calendar Decision as (i) the Single Judge already authorized previously similar redaction requests; (ii) other redactions in the statements would be rendered moot if the redactions concerned were not to be applied; and (iii) there is no prejudice to the Defence.¹³

10. The Single Judge must first ascertain whether the Prosecutor “was unable to file the [Application] 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. According to the Prosecutor’s own submission, the abovementioned instances constitute “inadvertent errors” on her part.¹⁴ She concedes that she omitted to request in time the non-disclosure of the name of the investigator in the metadata concerning witness P-0804¹⁵ and realized only upon closer evaluation of the audiotape containing the interview of witness P-0768 that sensitive information was audible.¹⁶ From the submissions made, the Single Judge understands that the “inadvertent errors” were detected in the course of the implementation of the Third Decision on Redactions. Considering the foregoing, and despite the Prosecutor’s omission, it may be said that the Prosecutor was “unable” to file the Application within the appropriate time limit.

11. In assessing whether “good cause” has been shown by the Prosecutor, the Single Judge is of the view that an extension of time is necessary so as to ensure that disclosure of evidence duly takes place on 16 December 2013 while sensitive information is protected comprehensively and consistently across the evidence to be disclosed.

¹³ ICC-01/04-02/06-178-Conf-Exp, para. 13.

¹⁴ ICC-01/04-02/06-178-Conf-Exp, para. 13.

¹⁵ ICC-01/04-02/06-178-Conf-Exp, para. 2.

¹⁶ ICC-01/04-02/06-178-Conf-Exp, paras 2 and 8.

12. As previously held, the Single Judge is bound to take into account further factors which have a bearing on the matter *sub judice*, including the rights of the Defence.¹⁷ In this context, the Single Judge is attentive to the Prosecutor's submission that the evidence concerned will be disclosed on 16 December 2013.¹⁸ She is thus satisfied that disclosure of the statements of witnesses P-0768 and P-0804 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. As regards the actual authorization of the proposed redactions pursuant to rule 81(2) and (4) of the Rules, the Single Judge recalls that the names of investigators, falling under category D, have been authorized previously to be redacted, including in the metadata.¹⁹ Equally, the redaction of the number of children of witness P-0768, falling under category B, has also been authorized to be redacted at other sections in the draft transcript of the interview concerned.²⁰ It is, therefore, only logical that this particular information be redacted at another section of the audiotape which was allegedly incorrectly reflected in writing. Consequently, in light of her earlier findings, the Single Judge does not deem it necessary to make a new case-by-case assessment of the proposed redactions. The Single Judge clarifies that the redactions granted in the particular sections of the audiotape extend also to the corresponding corrected official version of the transcription when finalized.

14. Having carefully considered all of the above, the Single Judge accepts that the redactions sought are warranted and, taking into consideration their limited extent and the fact that the Defence will not be prejudiced, grants, on an exceptional basis, the request to apply additional redactions to the statements of the abovementioned witnesses.

¹⁷ Pre-Trial Chamber II, "Decision on the 'Prosecution's Request pursuant to Regulation 35 to Vary the Time Limit for Two Items of Evidence'", 31 October 2013, ICC-01/04-02/06-133-Conf-Red, para. 11.

¹⁸ ICC-01/04-02/06-178-Conf-Exp, para. 18.

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 56-58 and 62-64.

²⁰ See Pre-Trial Chamber II, "Third Decision on the Prosecutor's Requests for Redactions", 5 December 2013, ICC-01/04-02/06-165-Conf-Exp-AnxII, pp. 279 and 280.

2. Disclosure Request

15. The Prosecutor seeks to disclose after the relevant deadline established in the 17 June 2013 Calendar Decision a corrected translation of a handwritten order, signed by the suspect, in the Swahili language.²¹ A translation of said document was disclosed on 11 July 2013.²² An error in the translation was purportedly noted “during an internal analysis of the document”.²³ In justifying her request, the Prosecutor alleges that “good cause” is shown as (i) the original and first translation was already disclosed to the Defence “in good time”;²⁴ (ii) the corrected version concerns “several words contained in the document”;²⁵ (iii) there is no prejudice to the Defence as the document will be disclosed approximately two months prior to the commencement of the conformation of charges hearing;²⁶ (iv) and it is in the interest of justice that the suspect be provided with an accurate translation of the Swahili language document²⁷.

16. According to the wording of regulation 35(2), second sentence, of the Regulations, the Single Judge must first ascertain whether the Prosecutor “was unable to file the [A]pplication within the time limit [specified in the 17 June 2013 Calendar Decision] for reasons outside (...) her control”. According to the Prosecutor, the error lies on her part as the incorrect translation originated from her Office. But, at the same time, the Single Judge is mindful of the fact that the translation error was detected during an internal analysis of the document which took place after the disclosure of said document. Consequently, it may be said that the Prosecutor was “unable” to file the Application before the relevant deadline established in the 17 June 2013 Calendar Decision.

²¹ ICC-01/04-02/06-178-Conf-Exp, para. 14. The original document holds the ID number DRC-OTP-00029.255.

²² *Ibid.* The translation of said document holds the ID number DRC-OTP-0161-0002.

²³ ICC-01/04-02/06-178-Conf-Exp, para. 17.

²⁴ ICC-01/04-02/06-178-Conf-Exp, para. 15.

²⁵ ICC-01/04-02/06-178-Conf-Exp, para. 15.

²⁶ ICC-01/04-02/06-178-Conf-Exp, paras 15 and 17.

²⁷ ICC-01/04-02/06-178-Conf-Exp, para. 16.

17. In assessing whether “good cause” has been shown by the Prosecutor, the Single Judge observes that the Prosecutor seeks to provide the Defence with an accurate translation of a document. As both the original and current translation of the document was already disclosed to the Defence on 11 July 2013, the Defence has been in possession of essential information contained therein. Significantly, the extent of the corrections in the translation of the document concerned is very limited. Most importantly, the corrected translation will assist the Defence in challenging the evidence at the confirmation of charges hearing, as foreseen in article 61(6)(b) of the Statute. Finally, the Single Judge is satisfied that the disclosure of said document, on which the Prosecutor intends to rely at the confirmation hearing, 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.

18. Having carefully considered all of the above, the Single Judge accepts that “good cause” was shown by the Prosecutor and authorizes, on an exceptional basis, the request to disclose a corrected translation of said document.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) grants** the Application;
- b) grants** the Prosecutor’s requests for redactions, as specified in paragraph 13 of the present decision;
- c) authorizes** the disclosure of a corrected translation of document DRC-OTP-00029.255;
- d) orders** the Prosecutor to disclose the material to the Defence on 16 December 2013;
- e) 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 Monday, 16 December 2013

At The Hague, The Netherlands