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**International  
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Date: 17 January 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 *ex parte*, Prosecution Only Annex A and  
Confidential *ex parte*, Prosecution Only Annexes 1-116**

**Prosecution's Response to the "*Réponse de la Défense de M. Bosco Ntaganda à la  
'Prosecution's Information of the Status of Disclosure' transmise le 9 janvier 2014*"  
(ICC-01/04-02/06-208)**

**Source: Office of the Prosecutor**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Ms Nicole Samson

**Counsel for the Defence**

Mr Marc Desalliers  
Ms Caroline Buteau  
Ms Andrea Valdivia

**Legal Representatives of Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**Legal Representatives of 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**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section Other**

## Introduction

1. In its response to the Prosecution's provision of information on the status of disclosure, the Defence submits that the Prosecution's disclosure of Rule 77 and information under article 67(2) is unjustifiably late and it makes certain requests related to the material collected under article 54(3)(e).
  
2. First, the Prosecution acknowledges that it disclosed a large volume of material on 10 January 2014, due in part to: (i) the Defence's own requests for disclosure of certain material; (ii) the security situation of witnesses; (iii) the Prosecution's decision, based on the evidence, to present additional charges and modes of liability and the re-evaluation of material that may be material to the Defence as a result; and (iv) final checks through its evidence using multiple search terms to identify any items of potential relevance. In terms of material falling under article 67(2), the Prosecution disclosed nine *new* items on 10 January 2014 as one had been disclosed by email on 20 December 2013. The nine items, totaling 85 pages, are not a prejudicial amount of material to review a full 30 days prior to the confirmation hearing.
  
3. Second, the Defence's request for relief related to the 54(3)(e) materials is based, at least in part, on a misunderstanding of the Prosecution's submissions in relation to the evidence collected under article 54(3)(e). The Prosecution has assessed that over 900 of the items collected under article 54(3)(e), and which respond to keyword search terms, contain information that is either incriminating, material to the Defence's preparation, or falls within the meaning of article 67(2). The remaining items do not, based on its current assessment, contain such information. Accordingly, the Prosecution sent requests to lift restrictions on the over 900 documents but did not submit requests for documents that do not contain disclosable information. To date, almost 600 of the over 900 items have been disclosed already. The Prosecution is awaiting a response from source providers for the approximately 300 documents that remain (from the initial pool of over 900 documents) and has prioritized the request for certain documents. It is

this collection of documents for which the Prosecution needed to make lifting requests, which it has.

4. Third, the Defence has failed to justify how a list of registration numbers of any of these documents, without the documents themselves, will assist it in any way in the preparation of its defence.
5. Lastly, the Prosecution provided the most updated information to the Single Judge on the status of pending article 54(3)(e) lifting requests at a time when it could reasonably foresee that there would be difficulty in disclosing. While it could have alerted the Single Judge earlier to *the possibility* of a difficulty in disclosure, until such time as the Prosecution could concretely indicate that such a difficulty existed, the information would have been entirely speculative and of little assistance to the Single Judge, who may have had to decide on alternative measures for a large number of documents where such measures would later turn out to be unnecessary.

### **Background**

6. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”.<sup>1</sup>
7. On 9 January 2014, the Prosecution informed the Chamber and the Defence of the status of disclosure to date, including on pending requests to lift restrictions in documents collected under article 54(3)(e).<sup>2</sup> The Single Judge ordered the Defence to provide its response by 14 January 2014.<sup>3</sup> On 14 January 2014, the Defence submitted its response and made requests for relief.<sup>4</sup>
8. On 15 January 2014, the Single Judge granted the Defence’s request in part (ordering the Prosecution to transmit to the Single Judge the 115 items of

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<sup>1</sup> ICC-01/04-02/06-47.

<sup>2</sup> ICC-01/04-02/06-201.

<sup>3</sup> Email from the Senior Legal Advisor to the Pre-Trial Division, 10 January 2014 at 13:39.

<sup>4</sup> ICC-01/04-02/06-208.

evidence by 17 January 2014) and ordered the Prosecution to submit observations on the Defence's response and on the Defence's request for relief by 17 January 2014.<sup>5</sup>

### **Prosecution's Submissions**

9. As ordered by the Single Judge, the Prosecution attaches to the present filing as "Confidential, *ex parte* - Prosecution Only Annex A" a chart listing 116 items collected under article 54(3)(e) for which it has not yet received a response on the lifting of restrictions and detailing alternate items of disclosed evidence that contain analogous information. Also attached in Confidential, *ex parte* - Prosecution Only Annexes 1-116 are the individual items of evidence for which conditions of confidentiality still apply.
10. The Prosecution notes that it inadvertently omitted to include one additional item that contains information falling within the meaning of Rule 77 that was collected under article 54(3)(e). It has attached this item to the present filing as Confidential –*ex parte*, Prosecution Only Annex 116 and included in Confidential –*ex parte*, Prosecution Only Annex A. The Prosecution realized only this week that it had inadvertently omitted to include this item in its filing on the status of disclosure; accordingly the number of documents has been raised from 115 to 116.
11. The Prosecution further notes that the chart of alternative / analogous evidence provided to the Single Judge on 9 January 2014 has been updated in the version annexed hereto.

### ***Response related to documents collected pursuant to article 54(3)(e)***

12. In reply to the Defence's observations in paragraphs 6-15 of its response, it is important to clarify that the Prosecution has never stated that over 3000 documents collected under article 54(3)(e) *positively* contain information that it is under an obligation to disclose to the Defence. Rather, the Prosecution stated

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<sup>5</sup> ICC-01/04-02/06-210.

expressly that it created a “a set of case-specific search terms designed to retrieve all documents of potential relevance in the case”<sup>6</sup> and that it had to review these materials because:

[T]he keyword searches are designed to capture words that are ‘close to’ the names of relevant persons or places, but upon review may actually relate to different persons, places or different events and as such are not relevant to the present case at all. The Prosecution is undertaking this review in order to determine which documents are in fact relevant for disclosure and to provide focused lifting requests to source providers, which will in turn assist in their efficient review. Given that requests for lifting are generally assessed on an individual document basis, flooding the providers with requests to lift conditions to all of the documents they provided, many of which may have no relevance to the case, would not assist in a timely review. To the contrary, such an approach will slow down the process considerably.<sup>7</sup>

13. The Prosecution undertook a review of the over 3000 documents collected under article 54(3)(e) that were responsive to its keyword searches. It has assessed that over 900 of these items contain information that is incriminating and/or that contains information falling under the provisions of article 67(2) or rule 77. The Prosecution has since disclosed almost 600 of these items and has made requests to source providers to lift restrictions to the rest.
14. The remaining documents (approximately 2100) are not relevant for disclosure based on the Prosecution’s current assessment of the information contained in those materials. In this respect, at paragraphs 9 and 10 of its response<sup>8</sup> the Defence is incorrect that the remaining documents are disclosable and should be submitted to providers for lifting of restrictions and that the Prosecution has failed to explain why lifting requests have not yet been made.
15. As explained above, it is for good reason that the Prosecution does not submit requests for lifting of restrictions for documents that do *not* contain information

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<sup>6</sup> ICC-01/04-02/06-65, para. 16 (emphasis added).

<sup>7</sup> ICC-01/04-02/06-71, para. 24 (emphasis added).

<sup>8</sup> ICC-01/04-02/06-208, para.9.

that is disclosable: it assists in timely responses by the source providers by not flooding them with irrelevant requests. As the case progresses and issues evolve and crystalize, it is always possible that some of these materials may become relevant at a later stage in the proceedings, at which time requests for lifting of restrictions will be made.

16. Accordingly, the Defence cannot be entitled to a list of ERNs for documents that are not relevant for disclosure. Moreover, the Defence has not provided any grounds or justification as to how a list containing nothing more than over 3000 ERNs will assist in its preparation. According to the consistent jurisprudence of this Court, “the twin duties of disclosure (Article 67(2) of the Statute) and permitting inspection (Rule 77 of the Rules) rest with the prosecution”<sup>9</sup> and “the Chambers do not routinely oversee or review decisions taken by the prosecution as regards disclosure, but instead they will intervene only if there are good reasons for doubting that the prosecution's duties in this regard have been, or are being, properly fulfilled.”<sup>10</sup> There is no reason to doubt that the Prosecution has been properly fulfilling its disclosure obligations to date in this regard.

17. The Prosecution brought the issue to the attention of the Single Judge as soon as it was in a position to do so and report on the full status of disclosure in the case as regards documents collected under article 54(3)(e). For some of the documents, the lifting requests were made several months ago, and the Prosecution anticipated having a response before this time. It is likely that it will receive positive responses to a number of these requests in the short term, and possibly even prior to the start of the confirmation hearing, but out of an abundance of caution the Prosecution informed the Single Judge and the Defence of the current status of its requests to lift restrictions. Raising the issue earlier would, certainly, have alerted the Single Judge and the Defence to the status and number of pending lifting requests at an earlier moment in time, but it (a) would have been speculative since the providers may thereafter have responded, and (b) would not

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<sup>9</sup> ICC-01/05-01/08-632, para.22.

<sup>10</sup> ICC-01/04-01/06-2625-Red, para.8, ICC-01/05-01/08-632, para.22; ICC-01/04-01/06-2656-Conf, para.11.

have changed the fact that a number of documents may not be disclosed in advance of the confirmation hearing and that alternative measures may need to be considered, measures which could only be properly assessed at a time when it was clear which documents were affected. It is only now that the Prosecution can concretely say that a number of the documents will not be available for the confirmation hearing. Furthermore, such information would have had to be updated periodically as additional requests to lift restrictions were made. The Prosecution opted to provide as comprehensive a review as possible of the status of disclosure.

18. In paragraph 13 of its response,<sup>11</sup> the Defence cites jurisprudence that is relevant to the situation where source providers *refused* to lift restrictions. This is not the present case as we are awaiting the response in cases where we have received cooperation from providers to date. In any event, the Prosecution reiterates that alternative measures exist to deal with the potential non-disclosure of certain items of evidence before the confirmation hearing, in the form of providing the documents to the Single Judge and detailing the analogous evidence already disclosed to the Defence. As for the Defence's concern that it may be deprived of the possibility to corroborate certain evidence if the 116 items are not disclosed in advance of the confirmation hearing,<sup>12</sup> the Prosecution notes that it has detailed for the Single Judge multiple items of evidence that contain information analogous to that contained in the 116 documents. In other words, the Defence should already have multiple sources of information corroborating the information contained in these items.

19. The Prosecution is not seeking to withhold information from the Defence that it has a right to obtain; to the contrary, the Prosecution is making every effort to provide the Defence with all information that is material to its preparation or may be relevant under article 67(2) and to do so in as transparent a manner as possible. That is why the Prosecution has disclosed over 6000 items of evidence to the

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<sup>11</sup> ICC-01/04-02/06-208, para. 13.

<sup>12</sup> ICC-01/04-02/06-208, para. 15.



Defence at this stage in the proceedings, including a significant number of witness related materials.

*Response related to the disclosure of Rule 77 material on 10 January 2014*

20. In reply to the Defence's observations in paragraphs 17 of its response, the Prosecution disclosed video and audio recordings in response to specific requests by the Defence dated 9 December 2013 for all videos for *"tout autre élément de preuve vidéo en lien avec l'UPC/RP ou les FPLC"*. As a result of this request, the Prosecution disclosed one video "related to" the UPC/FPLC on 20 December 2013. The Prosecution sought further information from the Defence on this request on 31 December 2013 because of its broad nature, but it did not receive any response. The Prosecution disclosed 10 additional videos (17 hours) that *may* respond to this request on 10 January 2014, the next possible disclosure date following the Court recess. The Prosecution should not be faulted for disclosing material further to a disclosure request *made by the Defence*.
21. Similarly, the Prosecution disclosed three additional items of evidence further to a specific disclosure request by the Defence made on 12 December 2013.
22. The Prosecution also identified over the Court recess that 180 documents "related to" the UPC/FPLC had not already been disclosed and, accordingly, disclosed them in the 10 January 2014 disclosure. These items should have been captured by the Prosecution's disclosure of information from the *Lubanga* case that may be relevant to this case, but because the items had not been disclosed in the *Lubanga* case under the "Rule 77" or "Article 67(2)" disclosure classifications, the fact that they had not been disclosed was undetected until the Prosecution did final reviews and checks of its evidence collection in December 2013. The Prosecution conducted a sweep of its undisclosed items by conducting various searches and, as a result, identified these and other items that could be disclosed to the Defence in advance of the confirmation hearing.

23. Indeed, 498 documents of the documents disclosed on 10 January 2014 are single page flight records. The Prosecution opted to disclose them all as a group even though very few have any tangible relevance to the charges. The Prosecution previously disclosed several individual flight records it assessed as material to the present case.
24. The Prosecution equally had to assess the impact of disclosure on the security of certain witnesses and assess whether applications for redactions were necessary, and it was unable to finalize this assessment until recently.
25. Finally, and importantly, based on its assessment of the evidence collected to date and inclusion of additional charges and modes of liability in the Document Containing the Charges, a further review of its evidence collection was necessary to determine whether additional items were material to the preparation of the Defence. As a result, a number of documents were assessed in the recent period to be potentially material to the Defence's preparation, and were disclosed.
26. The Chambers of this Court have accepted the description of facts and their legal characterization are provisional and that there "should be no requirement that the formulation of charges in the DCC strictly follow the factual and legal foundations of the warrant of arrest, especially in view of the fact that, in accordance with article 61(4) of the Statute and as the Appeals Chamber has held, the Prosecution can continue his investigations and amend or withdraw charges without the permission of the Pre-Trial Chamber prior to the confirmation hearing."<sup>13</sup>

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<sup>13</sup> ICC-01/04-01/10-465, para. 88. See also para. 90: "In the view of the Chamber, the DCC is to be understood as the document which frames the confirmation hearing. This is the document which, in accordance with article 67(1) of the Statute and rule 121 of the Rules, must establish in detail the nature, cause and content of the charges brought against the suspect and which forms the basis for preparation for the confirmation hearing. Rule 121(3) refers to the DCC as the document containing "a detailed description of the charges." In its request for a warrant of arrest, on the other hand, the Prosecution is required, under article 58(2)(b) and (c) of the Statute, to submit to the Chamber only a "specific reference to the crimes within the jurisdiction of the Court which the person is alleged to

*Response related to the disclosure of 10 items of article 67(2) material on 10 January 2014*

27. In reply to the Defence's observations in paragraphs 21-25 of its response, the Prosecution notes that its obligations related to article 67(2) are ongoing. Critically, the Prosecution has a significant volume of materials collected during the course of its investigations into the situation in the Democratic Republic of the Congo and the year in which an item was collected has no bearing on its eventual materiality in later cases.
28. The Prosecution makes every effort to find and disclose information that the Defence has a right to have and giving the Defence 10 items comprising 92 pages 30 days before the confirmation hearing should not be considered prejudicial. It is not a significant volume of material to digest in this time period and cannot substantiate a claim that the Prosecution has run afoul of its disclosure obligations. Moreover, one of the 10 items (comprising 7 pages) was disclosed to the Defence on 20 December 2013 before formal disclosure could take place.
29. Lastly, the Prosecution emphasizes the stage of the proceedings and the fact that the Defence will not have access to every single piece of evidence prior to the confirmation hearing. The Prosecution's investigation is ongoing, the Statute and Rules provide that the Prosecution can disclose summary evidence at this stage or redact the identity of witnesses it will rely upon, and that the Prosecution must present *sufficient* evidence for the person to be committed for trial. Finally, the Prosecution is not obliged to disclose items of evidence that contain only incriminating information that it has not relied upon for confirmation but may rely on if the matter proceeds to trial. Article 61(3) requires that the person shall "be informed of the evidence on which the Prosecutor intends to rely at the hearing" (emphasis added). It does not require that the person be informed of the

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have committed", together with a "concise statement of facts which are alleged to constitute those crimes".

full universe of incriminating evidence in the Prosecution's possession, should the Prosecution decide not to rely upon it at the confirmation hearing stage.

### **Relief Requested**

30. Based on the foregoing, and with the exception of the part of its request already dealt with by the Single Judge, the Prosecution requests that the Single Judge reject the Defence's request.



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Fatou Bensouda,  
Prosecutor

Dated this 17<sup>th</sup> day of January 2014  
At The Hague, The Netherlands