

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-02/06  
Date: 30 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 1-56**  
**Prosecution Provision of 56 Documents Collected under Article 54(3)(e)**

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**

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Participation/Reparation**

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**The Office of Public Counsel for the  
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**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. On 9 January 2014, the Prosecution submitted information on the status of disclosure, informing the Single Judge that over 300 documents collected under article 54(3)(e) of the Rome Statute could not yet be disclosed because of pending requests to the providers for lifting of restrictions.<sup>1</sup> The Prosecution advised that 116 of the over 300 documents contained information it assessed as falling under rule 77 of the Rules of Procedure and Evidence (the “Rules”). The remaining documents were assessed as containing incriminating information upon which the Prosecution seeks to rely at a later stage in the proceedings, should the charges be confirmed.
2. On 17 January 2014, the Prosecution submitted the 116 documents to the Single Judge, along with a chart detailing disclosed items of evidence that contain analogous information.
3. On 27 January 2014, the Single Judge ruled that the temporary non-disclosure of these documents did not prejudice the rights of the Defence for the purposes of the confirmation of charges hearing. The Single Judge ordered the Prosecution to disclose the documents to the Defence as soon as consent has been obtained from the information providers pursuant to article 54(3)(e), and to submit a report every two weeks on the status of the remaining documents.
4. At the status conference, also on 27 January 2014, the Prosecution informed the Single Judge that one provider had consented to the lifting of restrictions for 12 of the 116 documents.<sup>2</sup>

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<sup>1</sup> ICC-01/04-02/06-201.

<sup>2</sup> ICC-01/04-02/06-T-5-CONF-EXP-ENG, p.17.

5. The Prosecution has reviewed 188 documents upon which it intends to rely as incriminating evidence and for which it has sought lifting of restrictions and is awaiting a response from the information providers. The Prosecution has identified that 56 of these documents also contain information that may be relevant to the preparation of the Defence further to rule 77. The Prosecution hereby provides these 56 documents to the Single Judge and requests that the Single Judge decide that the non-disclosure of the attached 56 documents does not cause prejudice to the rights of the Defence for the purposes of the confirmation hearing.

### **Classification as Confidential *Ex Parte***

6. The Prosecution submits that the classification of Annex A and Annexes 1-56 as Confidential – *Ex Parte* – Prosecution Only is necessary as they contain information of a confidential nature and concern materials that are currently subject to article 54(3)(e) restrictions.

### **Background**

7. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”.<sup>3</sup>
8. On 9 January 2014, the Prosecution informed the Single Judge and the Defence of the status of disclosure to date, including the pending requests to lift restrictions in documents collected under article 54(3)(e).<sup>4</sup> The Single Judge ordered the Defence to provide its response by 14 January 2014.<sup>5</sup> On

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<sup>3</sup> ICC-01/04-02/06-47.

<sup>4</sup> ICC-01/04-02/06-201.

<sup>5</sup> Email from the Senior Legal Advisor to the Pre-Trial Division, 10 January 2014 at 13:39.

14 January 2014, the Defence submitted its response and made requests for relief.<sup>6</sup>

9. On 15 January 2014, the Single Judge granted the Defence's request in part ordering the Prosecution to transmit to the Single Judge the items of evidence by 17 January 2014. The Single Judge also ordered the Prosecution to submit observations on the Defence's response and on the Defence's request for relief by 17 January 2014.<sup>7</sup>
10. On 17 January 2014, the Prosecution filed its response<sup>8</sup> and attached as 'Confidential, Ex Parte – Prosecution Only Annex A' a chart listing 116 items collected under article 54(3)(e) for which it had not yet received a response on the lifting of restrictions and alternate items of disclosed evidence that contain analogous information.
11. On 27 January 2014, the Single Judge issued the 'Decision Regarding the Non-Disclosure of 116 Documents Collected Pursuant to Article 54(3)(e) of the Rome Statute', wherein she decided that the non-disclosure of the 116 documents did not cause prejudice to the rights of the Defence for the purposes of the confirmation of charges hearing, and order that the Prosecutor disclose the documents to the Defence as soon as consent has been obtained from the information providers pursuant to article 54(3)(e) of the Statute, and that the Prosecutor submit a report every two weeks on the status of the documents obtained under article 54(3)(e) that are to be disclosed to the Defence, indicating the estimated time for lifting the restrictions and their final disclosure to the Defence.<sup>9</sup>

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<sup>6</sup> ICC-01/04-02/06-208.

<sup>7</sup> ICC-01/04-02/06-210.

<sup>8</sup> ICC-01/04-02/06-216.

<sup>9</sup> ICC-01/04-02/06-229.

12. At the status conference also held on 27 January 2014, the Prosecution informed the Single Judge that its review of the remaining 54(3)(e) documents was nearing completion and that a similar chart of analogous evidence, as filed on 17 January 2014, related to these particular documents would be filed no later than 30 January 2014, at 4:00 pm.<sup>10</sup>

### **Prosecution's Submissions**

13. The Prosecution attaches to the present filing as 'Confidential, *Ex Parte* - Prosecution Only Annex A' a chart listing 56 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 as 'Confidential, *Ex Parte* - Prosecution Only Annexes 1-56' are the individual items of evidence for which conditions of confidentiality still apply.

14. As the Prosecution's efforts to lift the restrictions from the annexed documents are on-going, the Prosecution requests that the Single Judge decide that the non-disclosure of the attached 56 documents does not cause prejudice to the rights of the Defence for the purposes of the confirmation hearing.

15. The Appeals Chamber has held that it "cannot exclude that the provision of alternative evidence may, in appropriate circumstances be one way of ensuring fairness in spite of the non-disclosure of material obtained on the condition of confidentiality under Article 54(3)(e) of the Statute", and goes on to note that "this would require an assessment by a Chamber of the adequacy of the alternative evidence proposed by the Prosecutor."<sup>11</sup>

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<sup>10</sup> ICC-01/04-02/06-T-5-CONF-EXP-ENG, p.17.

<sup>11</sup> ICC-01/04-01/06 OA13, para. 95.

16. The Prosecution submits that the information that falls under rule 77 contained in each of the annexed items is sufficiently reflected in the analogous information provided, and that the disclosure of this analogous evidence safeguards the rights of the Defence under articles 61(6) and 67.
17. While the Prosecution cannot disclose the 56 items until the sources lift restrictions, it can advise the Single Judge that it has disclosed to the Defence items of evidence that contain analogous information to the information contained in the restricted items, as referenced in attached Annex A. Armed with the same information disclosed in other items, the Defence is able to raise any arguments or present any evidence that is the subject matter of the restricted items. The disclosed items that contain comparable information to these 56 restricted items come from either (i) the same sources, (ii) other organizations similarly situated, or (iii) directly from witnesses with whom the Prosecution met and that bear the enhanced evidentiary value of witness accounts. There is accordingly no tangible prejudice at this stage stemming from non-disclosure of these items.
18. In line with the jurisprudence of the Court and the Single Judge, the Prosecution provides the attached annexes for assessment.

### Relief Requested

19. For the foregoing reasons, the Prosecution requests that the Single Judge decide that the non-disclosure of the attached 56 documents does not cause prejudice to the rights of the Defence for the purposes of the confirmation hearing.



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Fatou Bensouda,  
Prosecutor

Dated this 30<sup>th</sup> day of January 2014  
At The Hague, The Netherlands