

1 International Criminal Court

2 Pre-Trial Chamber II

3 Courtroom II

4 Situation: Democratic Republic of the Congo

5 In the case of The Prosecutor v. Bosco Ntaganda - ICC-01/04-02/06

6 Presiding Judge Ekaterina Trendafilova, Judge Hans-Peter Kaul,

7 Judge Cuno Tarfusser

8 Confirmation of Charges

9 Friday, February 14 2014

10 (The hearing starts in open session at 9.32 a.m.)

11 THE COURT USHER: All rise. The International Criminal Court is
12 now in session.

13 JUDGE TRENDAFILOVA: Good morning. Good morning. Please be
14 seated.

15 Court officer, would you please call the case.

16 THE COURT OFFICER: Thank you, Madam President. The situation in
17 the Democratic Republic of the Congo, in the case of the Prosecutor
18 against Bosco Ntaganda, ICC-01/04-02/06. We are in open session.

19 JUDGE TRENDAFILOVA: Thank you very much. We are in the smaller
20 courtroom, that's why not everyone from our team could join us and
21 probably this is the case with the Defence -- no, everyone is here.
22 Because it's your day today, Mr Desalliers.

23 But before we start with your closing statements, I was informed
24 that Ms Samson would like to raise an issue or to make a point.

25 MS SAMSON: Yes, thank you, your Honour.

1 First, I would like to present to the Chamber Ms Johanna Frivet,
2 who is joining us on behalf of the Prosecution. She's an assistant trial
3 lawyer on our team.

4 And secondly, I wanted to correct one small part of the closing
5 submission yesterday in relation to the issue of Witnesses P-0020 and
6 P-0005, for whom the Defence has raised a question as to any influence
7 they may have received via Intermediary 316.

8 The correction applies to the transcript, and the reference I
9 have is to the edited French transcript because the English one is not
10 yet available. In transcript T-10, page 67, lines 14 to 22, the
11 Prosecution corrects that it was solely able to contact Witness P-0020
12 but not Witness P-0005 to ask whether P-0316 had influenced him to lie.
13 Witness P-0020 said that when he met with representatives of the Office
14 of the Prosecutor, he met with them on his own. No one else was with
15 him. And he did not recognise P-0316's name.

16 JUDGE TRENDABILOVA: Is that all, Ms Samson?

17 MS SAMSON: Yes, thank you.

18 JUDGE TRENDABILOVA: Thank you very much.

19 Before the Defence team takes the floor, I want to greet
20 Mr Ntaganda to the hearing because I just didn't do this, and everyone
21 who is in the public gallery as well.

22 So, Mr Desalliers, the floor is over to you.

23 MR DESALLIERS: (Interpretation) Thank you, your Honour. I would
24 like to begin by making a few observations regarding the points raised by
25 the Legal Representatives of Victims yesterday.

1 Contrary to what one of the legal representatives argued
2 yesterday, the Defence in no way wishes to deny the existence of serious
3 ethnic tensions in the region. The Defence argued that the UPC/RP was,
4 indeed, established to end the serious acts of violence, the abuses to
5 which the civilian population of the Ituri region were subjected.

6 The Defence wishes to stress that the victims of a conflict that
7 raged throughout the DRC deserve all our sympathy and consideration. The
8 Defence is not challenging the fact that victims are entitled to take
9 part in these proceedings, to attend the hearings, and to submit their
10 views and concerns.

11 However, the Defence argues that the victims cannot behave like a
12 second team of prosecutors working through their legal representatives,
13 but this is -- you see, the legal representatives crossed the line
14 yesterday in their final submissions. They argued that merely because a
15 rather large number of victims were allowed to take part in the
16 proceedings constituted convincing proof that would corroborate the
17 Prosecution's evidence. The Legal Representatives of Victims also read
18 out a number of allegations from their clients involving Mr Ntaganda
19 himself directly.

20 We merely wish to make the following three observations: First
21 of all, victims are allowed to take part in these proceedings
22 anomalously, in relation to the Defence, on the basis of a prima facie
23 review of their participation application forms. These forms are
24 actually redacted. Their substance is removed. And as far as the
25 Defence is concerned, it cannot be deemed to be evidence for the case

1 file. The Chamber cannot draw any conclusions from the number of victims
2 who were allowed to take part in the proceedings, contrary to what the
3 legal representatives seem to be suggesting.

4 Secondly, the Legal Representatives of Victims read out a number
5 of passages from these participation application forms, and these forms
6 have been redacted. As far as the Defence is concerned, we think it is
7 particularly unfair for information to be kept from the Defence when
8 these participation forms are disclosed. And then later, the information
9 is revealed in open court by Legal Representatives of Victims.

10 Thirdly, one of the legal representatives read out some passages
11 from the application form of Victim a/01/308/13. In that application
12 form, this person makes serious accusations against Mr Ntaganda directly.
13 The Defence wishes to specify that we have cross-checked to determine
14 which victim it was, and we have been able to determine that this, in
15 actual fact, this information came from the application form of
16 Witness P-0010.

17 In this form, she challenges all the statements provided --

18 THE INTERPRETER: Correction.

19 MR DESALLIERS: (Interpretation) The Defence challenges all the
20 statements made, including the allegation to the effect that this person
21 was raped by Mr Ntaganda.

22 Fair proceedings depend on striking a balance, a very delicate
23 balance, and we know that the Chamber will be able to strike this balance
24 by dismissing the suggestion from the legal representatives to the effect
25 that the victim application forms or the number thereof can be considered

1 as evidence to determine whether or not the charges should be confirmed.

2 I would now like to say a few words in response to the
3 observations made yesterday by the Prosecution.

4 Your Honours, it was not until the final submissions yesterday,
5 it was not until then that the Prosecution finally - finally - admitted
6 that the operation in Mongbwalu had a military objective; namely, to oust
7 the RCD-K/ML and the Lendu combatants. Even though the Prosecution added
8 that this was not the only reason for this attack, this admission is very
9 significant.

10 It means that the Prosecution deliberately gave a rather
11 abbreviated version of the general context to the Chamber with a view to
12 leading the Chamber to conclude that the FPLC had only one thing in mind:
13 Namely, attacking the non-Hema civilian population. The Prosecution did
14 not even try to explain why they failed to deal with such a fundamental
15 element in their document containing the charges, nor did they deal with
16 the matter in their presentations during the Confirmation of
17 Charges Hearings.

18 In acting in this manner, the Office of the Prosecution has
19 engaged in a cover-up, and this is unpardonable. The Prosecution is
20 duty-bound to establish the truth; however, the Prosecution has failed to
21 fulfil this duty. The Prosecution seem to be so convinced that the
22 Mongbwalu operation targeted the civilian population that they did not
23 deem it worthy or relevant to submit to the Chamber all elements that
24 would allow the Chamber to take a truly enlightened decision on this
25 fundamental issue with all the information.

1 Since the Prosecution finally had to acknowledge the existence of
2 a military objective after our arguments were made, the Prosecution now
3 is trying to convince you that the evidence provided by the Defence
4 during our submissions was nothing more than a propaganda tool or
5 PR exercise, and it was all a masquerade, a farce. The arguments
6 advanced by the Office of the Prosecution just don't hold up.

7 First of all, I'd like to specify that the elements that the
8 Defence referred to during our presentations, which the Prosecution is
9 now trying to discredit, such as the videos that were filmed in Mandro
10 and Mongbwalu, these videos come from the Prosecution's evidence, their
11 incriminatory evidence. These two videos are on the list of elements
12 that the Prosecution has asked you to base yourselves on to confirm the
13 charges against Mr Ntaganda.

14 The Prosecution themselves made use of the Mongbwalu video during
15 their own submissions. Yet, they never told you when they played the
16 video or short passages thereof that it was some kind of masquerade. The
17 Prosecution has attempted to discredit the video that was filmed in
18 Mongbwalu by arguing that the journalist who was interviewing the various
19 people that we saw in the footage, including Mr Bosco Ntaganda, was a
20 journalist from Radio Candip. According to the Prosecution, this radio
21 station was a UPC propaganda tool at the time. Yet, this allegation is
22 incorrect.

23 The journalist in question, Mike Arereng, is from Uganda, and he
24 was not working for Radio Candip, he was working for ABC Radio based in
25 Kampala, Uganda. The Prosecution cannot be aware of that information

1 because that point is mentioned in the video itself.

2 Once again, within the evidence that was provided by the
3 Prosecution, this journalist also worked for Voice of America. The
4 Prosecution also argues that it is quite clear in the video that
5 Floribert Kisembo was not speaking to Lendu civilians. That is only the
6 Prosecution's opinion. Because when one views the footage, it is not
7 possible to draw such a conclusion.

8 If the Prosecution has further information in its files, they did
9 not disclose such information to the Defence, despite their obligation to
10 do so. I would add that the fact that this video represented the actual
11 reality at that particular point in time, that point was confirmed by
12 Prosecution Witness P-0002.

13 Now, let us turn to the video that was filmed in Mandro in which
14 we see Mr Kahwa speaking to the FPLC troops.

15 The Prosecution seem to be questioning the authenticity of
16 Mr Kahwa's message to the troops. They seem to allege that he -- well,
17 they have alleged that he had been charged with crimes against humanity
18 in the Congo. Once again, the Prosecution has erred by omission. The
19 Prosecution deliberately failed to specify to the Chamber that Mr Kahwa
20 was acquitted of these charges, yet the Prosecution was fully aware of
21 that because the Prosecution disclosed the decision of the Congolese
22 court that acquitted Mr Kahwa.

23 The Prosecution asked you to look at this video footage but
24 without giving you -- but outside of the general context. We would urge
25 the Chamber to review the footage, to read all the documents from the

1 UPC/RP and the FPLC. You will not find any kind of hate propaganda
2 regarding any ethnic group. The only thing you will find will be
3 messages about peace and reunification, whether or not the messages were
4 intended for public use.

5 The Prosecution cannot seriously argue that all the documents and
6 rhetoric from that group during the entire time that it was in existence
7 was intended merely to deceive the public. We would also urge the
8 Chamber to play particularly close attention to the credibility of the
9 evidence that the Prosecution has provided to support its case.

10 Let us take the example of Witness P-0758. This woman says that
11 she was a child soldier within the FPLC. The Defence pointed out
12 inconsistencies regarding P-0758 and her family members, inconsistencies
13 that can't be reconciled. And the Prosecution -- well, the Prosecution
14 seems to be saying that the credibility cannot be assessed by your
15 Chamber. But that position is groundless. As the Appellate Chamber
16 confirmed in the Nbarushimana case, when a Chamber determines whether
17 charges should be confirmed or not pursuant to Article 61, the
18 Pre-Trial Chamber in question can assess ambiguities, inconsistencies,
19 and contradictions within evidence, as well as any and all doubt having
20 to do with the credibility of witnesses.

21 Furthermore, this witness's lack of credibility is easy to
22 determine. One merely has to review the relevant evidence. An in depth
23 analysis is not even required to come to that conclusion. Contrary to
24 what the Prosecution was hinting at yesterday, the Defence is not just
25 challenging the credibility of P-0010 regarding her age, we are

1 challenging her entire testimony.

2 On the basis of the conclusions of the Trial Chamber in the
3 Lubanga case, the Prosecution is asking you to ignore the deceitful
4 statements made by the witness regarding her age and to hold the rest of
5 her testimony against Mr Ntaganda. But the Prosecution has twisted the
6 conclusions that the Chamber came to in the Lubanga case. That Chamber
7 deemed that the witness was not reliable when it came to many aspects of
8 her account. It should be noted that the majority does not refer to that
9 witness's testimony to support the factual conclusions. Even though the
10 Office of the Prosecution is relying on a rather ambiguous position when
11 it comes to this witness, as my colleague Ms Buteau pointed out, we would
12 argue that the Office of the Prosecution cannot ignore the fact that the
13 witness gave false information when she testified before the Chamber in
14 the Lubanga case. This is a witness that they have known for many years.

15 We submit that the Prosecution cannot keep to such an ambiguous
16 position regarding a witness before the Chamber, and we would urge the
17 Chamber to ask the Prosecution to set out a clear, definitive position
18 regarding this witness. Did P-0010 make false statements to the Court or
19 not?

20 As for the so-called insider witnesses, in particular,
21 Witnesses P-0055, P-0017, P-0038, P-0016, and P-0768, we assert that
22 these witnesses are in actual fact informers. They provided a statement
23 in exchange for immunity from prosecution and in exchange for assistance
24 from the Court. Their testimony must be analysed with great care, and
25 this point has been recognised in the jurisprudence of a number of

1 international criminal tribunals.

2 My learned friends from the OTP and the legal representatives
3 made excessive use of the conclusions of the Trial Chamber in the Lubanga
4 case. It is a constant jurisprudence that the legal and factual
5 conclusions of a Chamber cannot be imported into another case, nor can
6 they be presented as a matter of public knowledge. In any event, my
7 learned friends should have only presented the conclusions of the
8 Pre-Trial Chamber that they referred to. Those points were strongly
9 contested by the Defence in the Lubanga case and will be appealed,
10 particularly regarding the conclusions about the credibility of P-0038.
11 The witness never asked this Chamber to agree with the conclusions of the
12 Trial Chamber in the Lubanga case.

13 We will be further developing our arguments in our final written
14 submissions.

15 To sum up, your Honours, we put it to you that the charges
16 against Mr Ntaganda are based on incorrect information. We put it to you
17 that the Prosecution has failed to meet its obligations, has failed to
18 clearly show the direction that they were going in in relation to their
19 charges, and the Prosecution has not been able to demonstrate that there
20 are substantial grounds to believe in these charges; thus, we call upon
21 the Honourable Chamber not to confirm the charges against Mr Ntaganda.

22 I thank you.

23 JUDGE TRENDABILOVA: Thank you very much, Mr Desalliers.

24 If there is no one else who would like to raise some issue during
25 this hearing, I would like to say that this brings us to the end of the

1 Confirmation of Charges Hearing. At this point the Chamber would like to
2 issue the following decision that is taken on the basis of seeking the
3 observations of the two parties and the Legal Representatives
4 for Victims, because this Chamber would like very much to give full
5 opportunities to the parties in order to best present their cases so that
6 the Chamber could take a proper informed decision taking into account the
7 views and the arguments by the parties.

8 So the decision.

9 The Chamber decides to grant the parties and the
10 Legal Representatives for Victims to submit written observations
11 addressing the issues discussed during the course of the
12 Confirmation Hearing. They are not allowed to raise new issues, and if
13 they do so, the Chamber shall not consider the relevant part of said
14 submissions in its decision confirming or not confirming the charges.

15 The Chamber therefore decides to grant the Prosecutor and the
16 Legal Representatives of Victims until Friday, 7th of March, 2014, to
17 submit their written observations. Thereafter, because the Defence has
18 always the last word, the Chamber grants the Defence until Friday, the
19 4th of April, 2014, to submit its observations.

20 With regard to the amount of pages, the Chamber grants 100 pages
21 for the written observations to be submitted by the Prosecutor and by the
22 Defence, and the Legal Representatives of Victims, 50 pages, which does
23 not mean that the parties and the legal representatives have to -- to
24 submit observations that amount to this number of pages.

25 Now, we come to the end of the Confirmation of Charges Hearing.

1 On behalf of my colleagues, Judges Hans-Peter Kaul and Cuno Tarfusser, I
2 would like to thank the Office of the Prosecutor, the Defence team of
3 Mr Ntaganda, Mr Ntaganda as well, for -- the legal representatives for
4 behaving in a very professional way so that you could conduct a very
5 fluent and proper confirmation of charges proceedings.

6 Of course, my thankfulness goes to the interpreters, to the
7 court reporters, to the stenographers, to the security officers, to the
8 court officers, and, of course, to everyone who has attended these
9 hearings in the public gallery. So the confirmation hearing is over.

10 (The hearing ends in open session at 9.58 a.m.)