

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 17 May 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***

Public

**Decision Establishing a Calendar for the Disclosure of Evidence Between the
Parties**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Fatou Bensouda

Counsel for the Defence
Marc Desalliers

Legal Representatives of Victims

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

Registrar

Herman Von Hebel

Deputy Registrar

Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”)¹ hereby renders this decision establishing a calendar for the disclosure of evidence between the parties.

I. PROCEDURAL HISTORY

1. On 22 August 2006, Pre-Trial Chamber I, to which this case had originally been assigned, issued the “Decision on the Prosecution Application for a Warrant of Arrest”,² along with a corresponding warrant of arrest for Bosco Ntaganda (“Mr. Ntaganda”),³ for his alleged responsibility for the war crimes of conscripting, enlisting children under the age of fifteen and using them to participate actively in hostilities under either article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Rome Statute (the “Statute”).

2. On 15 March 2012, the Presidency re-assigned the situation in the Democratic Republic of the Congo to Pre-Trial Chamber II.⁴

3. On 13 July 2012, the Chamber issued its “Decision on the Prosecutor’s Application under Article 58”.⁵ In this decision the Chamber issued a second warrant of arrest against Mr. Ntaganda for his alleged responsibility for the crimes against humanity of murder, rape, sexual slavery, and persecution based on ethnic grounds, under articles 7(l)(a), 7(l)(g) and 7(l)(h) of the Statute; and the war crimes of murder, intentional

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, 21 March 2013, ICC-01/04-02/06-40, p. 4.

² Pre-Trial Chamber I, “Decision on the Prosecution Application for a Warrant of Arrest”, 22 August 2006, ICC-01/04-02/06-1-US-Exp-tEN; and redacted version, 6 March 2007, ICC-01/04-02/06-1-Red-tENG.

³ Pre-Trial Chamber I, “Warrant of Arrest – Corrigendum”, 7 March 2007, ICC-01/04-02/06-2-Corr-tENG-Red.

⁴ Presidency, “Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d’Ivoire situations”, 15 March 2012, ICC-01/04-02/06-32.

⁵ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application under Article 58”, 13 July 2012, ICC-01/04-02/06-36-Conf-Exp; and public redacted version, 13 July 2012, ICC-01/04-02/06-36-Red.

attacks against civilians, pillaging, rape and sexual slavery under articles 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v) and 8(2)(e)(vi) of the Statute .⁶

4. On 22 March 2013, the Single Judge issued the “Decision on Setting the Date for the Initial Appearance and Related Issues”, in which she, *inter alia*, noted Mr. Ntaganda’s voluntary surrender to the Court⁷ and decided to convene a hearing for his initial appearance on 26 March 2013.⁸

5. On 26 March 2013, before the closure of the hearing on the initial appearance, the Single Judge issued an oral decision convening a status conference on Monday 15 April 2013, for the purpose of discussing “issues related to the disclosure of evidence”.⁹

6. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “12 April 2013 Disclosure Decision”), in which she, *inter alia*, set the principles governing the process of disclosure between the parties.¹⁰

7. On 15 April 2013, the status conference took place during which the Single Judge ordered the Prosecutor, if possible, to immediately “make available” to the Defence the two applications for warrants of arrest.¹¹ According to this order, should redactions to these applications be deemed necessary, proposals for redactions should have been submitted to the Chamber no later than Thursday 25 April 2013.¹²

⁶ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application under Article 58”, 13 July 2012, ICC-01/04-02/06-36-Conf-Exp, p. 37; and public redacted version, 13 July 2012, ICC-01/04-02/06-36-Red, p. 37.

⁷ Pre-Trial Chamber II, ICC-01/04-02/06-41, p. 4.

⁸ Pre-Trial Chamber II, ICC-01/04-02/06-41, p. 5.

⁹ Pre-Trial Chamber II, Transcript of Hearing, 26 March 2013, ICC-01/04-02/06-T-2-ENG ET, p. 12, lines 11-13.

¹⁰ Pre-Trial Chamber II, ICC-01/04-02/06-47 and its annexes.

¹¹ Pre-Trial Chamber II, Transcript of Hearing, 15 April 2013, ICC-01/04-02/06-T-3-ENG ET, p. 13, lines 15-18.

¹² Pre-Trial Chamber II, Transcript of Hearing, 15 April 2013, ICC-01/04-02/06-T-3-ENG ET, p. 13, lines 20-22.

8. On 25 April and 2 May 2013, the Prosecutor filed her request for redactions to the applications for warrants of arrest¹³ followed by an amended request thereto.¹⁴

9. On 7 May 2013, the Single Judge issued the “Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest” (the “7 May 2013 Decision”).¹⁵

II. APPLICABLE LAW

10. The Single Judge notes articles 21(1)(a), (2) and (3), 51(5), 61(3) and (7), and 67 of the Statute, and rules 15, 63(1), 76-83, 121 and 122 of the Rules of Procedure and Evidence (the “Rules”).

III. DETERMINATION BY THE SINGLE JUDGE

11. The Single Judge reminds the Prosecutor and the Defence that in order to reach the stage of holding a hearing on whether to confirm the charges, the Court’s statutory documents envisage several procedural steps that must be undertaken by the Chamber as well as by the parties. Central to this is the creation of a system that regulates the disclosure of evidence between the parties and its communication to the Chamber. The Single Judge has already established this system in the recent 12 April 2013 Disclosure Decision. Yet, to put this system in effect, it is essential that the Single Judge sets up in the present decision a calendar for the disclosure of evidence between the parties.

12. In this regard, the Single Judge recalls the 12 April 2013 Disclosure Decision, in which she pointed out the different timelines imposed by the Court’s statutory provisions on the Prosecutor and the Defence (rule 121(3)-(6) of the Rules) for the *inter partes* disclosure of evidence and material and for the filing of both in the record of the case.

¹³ ICC-01/04-02/06-51-Conf-Exp and its annexes.

¹⁴ ICC-01/04-02/06-56-Conf-Exp.

¹⁵ Pre-Trial Chamber II, ICC-01/04-02/06-58-Conf-Exp.

13. According to rule 121(3) of the Rules, the Prosecutor shall provide a document containing a detailed description of the charges together with a list of evidence, for the purposes of the confirmation hearing, *no later* than 30 days before the date of its commencement. Thus, the Prosecutor's disclosure to the Defence shall be, in principle, completed at the latest 30 days before the start of the hearing.

14. Nonetheless, in the 12 April 2013 Disclosure Decision the Single Judge made clear that:

[T]he deadlines referred to in rule 121 of the Rules are only indicative of the *minimum* time limits a party can avail itself to comply with its disclosure obligations. This interpretation finds support in the express wording of "no later than", reflected in rule 121(3)-(6) and (9) of the Rules. In this regard, the Single Judge wishes to underline that the Rules serve the application of the Statute and accordingly they are subordinate to the Statute in all cases. Therefore, the *minimum* time limits established in rule 121 of the Rules, especially the time limit set up in rule 121(3) of the Rules regarding the disclosure by the Prosecutor, must be read in conjunction with and subject to article 67(1)(b) of the Statute which provides that the "accused" must have adequate time for the preparation of his or her defence. Consequently, the disclosure of large portions of the evidence for the purposes of the confirmation hearing *only* 30 days before the date of the confirmation hearing might interfere with the right of the suspect to have adequate time for the preparation of his defence. The early initiation of the process of disclosure better guarantees also the expeditiousness of the proceedings, guided by the overarching principle of fairness. For these reasons, the Single Judge expects that the parties fulfill their disclosure obligations [...] not only on the date when the deadline indicated by the statutory documents expires (footnotes omitted).¹⁶

15. Similarly, according to rule 76(1) of the Rules, the Prosecutor shall provide the Defence with the names of witnesses whom she intends to call to testify and the copies of any prior statements made by them "sufficiently in advance to enable the adequate preparation of the defence". In particular, according to rule 76(3) of the Rules, the Prosecutor is obliged to make available the statements of her witnesses "in original and in a language which the accused fully understands and speaks". Thus, in the circumstances of the present case, which might call for translations into Kinyarwanda of some of the core evidence of the Prosecutor, the Single Judge establishes the following calendar with a view to ensuring the fair and expeditious conduct of the proceedings.

¹⁶ Pre-Trial Chamber II, ICC-01/04-02/06-47, para. 16.

Disclosure by the Prosecutor

16. The disclosure of evidence on which the Prosecutor intends to rely for the purposes of the confirmation hearing shall be divided into two main batches according to the time when a piece of evidence has come into the Prosecutor's possession. For each batch, the Single Judge shall establish separate deadlines.

17. For the first batch deadlines are set up for the following: 1) evidence which can be disclosed without redactions or any other protective measures; 2) evidence which requires authorization from the Chamber for certain redactions or other protective measures; and 3) any request for translation into Kinyarwanda as explained below.

18. The second batch shall follow the same approach. In this context, the Single Judge stresses that any request for redactions must be justified in accordance with the Appeals Chamber's jurisprudence which is reflected in the 7 May 2013 Decision.¹⁷

First Batch

19. With respect to the first batch and the deadlines related thereto, the Prosecutor shall disclose to the Defence, in original language, the evidence which she intends to rely on for the purposes of the confirmation of charges, collected until 13 July 2012, the date of the issuance of the decision on the second warrant of arrest.

20. Regarding the evidence falling under the first batch which does not require redactions or other protective measures, the Prosecutor shall disclose it to the Defence,

¹⁷ Pre-Trial Chamber II, ICC-01/04-02/06-58-Conf-Exp; Appeals Chamber, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to rule 81(2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568; Appeals Chamber, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-773; Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", 13 May 2008, ICC-01/04-01/07-475; Appeals Chamber, "Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9'", 27 May 2008, ICC-01/04-01/07-521; Appeals Chamber, "Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", 13 May 2008, ICC-01/04-01/07-476.

in original language, no later than 7 June 2013. The same deadline applies to requests for redactions or other protective measures concerning the rest of the evidence falling under the same batch. Hence, by said date, the Prosecutor should submit to the Chamber justified proposals for protective measures or requests for redactions, if any. Certainly, such evidence has been in the Prosecutor's possession for sufficient time to enable the Prosecutor to apply for redactions or any necessary protective measures within the specified time limit.

21. In relation to translation into Kinyarwanda, the Single Judge grants the Defence until 20 June 2013 to review the evidence disclosed from the first batch for which no redactions or protective measures are sought, and to request, to the extent necessary, the translation of evidence which is core for the preparation of the defence.

22. With respect to the evidence where redactions or protective measures are sought, the Single Judge grants the Defence two weeks from the date of receipt of said redacted evidence to request, to the extent necessary, translations into Kinyarwanda of evidence which is core for the preparation of the defence. In this regard, the Single Judge wishes to make clear that if a request is not submitted within the established deadline she will consider this as a waiver of the suspect's right to translation of the relevant evidence.

Second Batch

23. Regarding the second batch and the deadlines related thereto, the Prosecutor shall disclose to the Defence, in original language, the evidence collected between 13 July 2012 and 8 July 2013.

24. In relation to the evidence falling under the second batch which does not require redactions or other protective measures, the Prosecutor shall disclose it to the Defence, in original language, no later than 8 July 2013. The same deadline applies to requests for redactions or other protective measures concerning the rest of the evidence falling

under the second batch. Hence, by that date, the Prosecutor should submit to the Chamber justified proposals for protective measures or requests for redactions, if any.

25. With respect to translation into Kinyarwanda, the Single Judge grants the Defence until 22 July 2013 to review the evidence disclosed from the second batch for which no redactions or protective measures are sought, and to request, to the extent necessary, the translation of evidence that is core for the preparation of the defence.

26. As to the evidence for which redactions or protective measures are sought, the Single Judge grants the Defence two weeks from the date of receipt of said redacted evidence to request, to the extent necessary, translations into Kinyarwanda of evidence which is core for the preparation of the defence. In this regard, the Single Judge reiterates that any request submitted after the established deadline would be considered a waiver of the suspect's right to translation of the relevant evidence.

Inspection of material pursuant to rule 77

27. The Single Judge shall also address the inspection of any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or were obtained from or belonged to the suspect. In this regard, for the inspection of said material, the Single Judge sets up the same deadlines established for the two batches as described above. The criterion is again the time when the material has been collected and has come into the Prosecutor's possession.

Evidence pursuant to article 67(2)

28. With regard to evidence of a potentially exculpatory nature under article 67(2) of the Statute, the Single Judge considers that although the Statute and the Rules do not provide an explicit deadline, the Prosecutor is still duty bound to disclose to the Defence any piece of such evidence on a continuous basis, as soon as practicable. Accordingly, disclosure must take place immediately after the evidence comes into

the Prosecutor's possession unless there is a justifiable reason for not doing so. At this point, the Single Judge wishes to emphasize her responsibility to organize the conduct of the proceedings in a fair and expeditious manner with full respect to the rights of the Defence to meaningfully prepare for the case under consideration.

Disclosure by the Defence

29. Regarding the disclosure by the Defence, the Single Judge recalls that, according to rule 121(6) of the Rules, if the suspect intends to present evidence at the confirmation hearing, he shall provide a list of such evidence no later than 15 days before the commencement of the hearing. With respect to such evidence, the Single Judge sets 19 August 2013 as the deadline by which the Defence shall, if necessary, submit to the Chamber justified proposals for redactions under rule 81 of the Rules following the guidance given by the Appeals Chamber in this regard.¹⁸

30. Furthermore, rule 78 of the Rules dictates that the Defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the Defence which are intended for use as evidence for the purposes of the confirmation hearing. In this respect, the Single Judge considers that the inspection of said material should take place no later than 2 September 2013.

31. Finally, according to rule 79 of the Rules, the Defence shall notify the Prosecutor if it intends to raise the existence of an alibi or raise a ground for excluding criminal

¹⁸ Appeals Chamber, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to rule 81(2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568; Appeals Chamber, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-773; Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", 13 May 2008, ICC-01/04-01/07-475; Appeals Chamber, "Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9'", 27 May 2008, ICC-01/04-01/07-521; Appeals Chamber, "Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", 13 May 2008, ICC-01/04-01/07-476.

responsibility. The notification shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to be able to respond. Such notification shall include the evidence, if any, which the Defence intends to rely on for either purpose. Any delay in notifying the Prosecutor in due course must be justified.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

Orders the Prosecutor:

- a) to disclose to the Defence, **no later than Friday 7 June 2013**, the evidence from the first batch, on which she intends to rely for the purposes of the confirmation of charges hearing, collected until 13 July 2012, and which does not require redactions or other protective measures;
- b) to submit to the Chamber, **no later than Friday 7 June 2013**, justified proposals for redactions or other protective measures, if any, in relation to the evidence from the first batch, collected until 13 July 2012;
- c) to disclose to the Defence the evidence from the first batch for which authorization for redactions is sought, **no later than 5 days** after the notification of the Chamber's decision on said request(s) for redactions;
- d) to agree with the Defence on a location and time to permit the inspection, **no later than Friday 7 June 2013**, of any material from the first batch, within the meaning of rule 77 of the Rules, which has been collected until 13 July 2012;
- e) to disclose to the Defence, **no later than Monday 8 July 2013**, the evidence from the second batch, on which she intends to rely for the purposes of the confirmation hearing, collected between 13 July 2012 and 8 July 2013, and which does not require redactions or other protective measures;

f) to submit to the Chamber, **no later than Monday 8 July 2013**, justified proposals for redactions or other protective measures, if any, in relation to the evidence from the second batch, collected between 13 July 2012 and 8 July 2013;

g) to disclose to the Defence the evidence from the second batch for which authorization for redactions is sought, **no later than 5 days** after the notification of the Chamber's decision on said request(s) for redactions;

h) to agree with the Defence on a location and time to permit the inspection, **no later than Monday 8 July 2013**, of any material from the second batch, within the meaning of rule 77 of the Rules, which has been collected between 13 July 2012 and 8 July 2013;

i) to disclose to the Defence all exculpatory evidence in her possession or control under article 67(2) of the Statute, as soon as practicable, and on a continuous basis, as specified in the present decision;

j) to submit to the Registry after inspection, electronic copies, or electronic photographs in case of tangible objects, of such evidence subject to inspection in order to be registered as evidence in the record of the case, and to submit the original form of the respective piece of evidence to be stored in the Registry vault;

k) to file in the record of the case the document containing the charges, together with the list of evidence, including a translation into Kinyarwanda, **no later than Friday 23 August 2013**.

Orders the Defence:

a) to disclose to the Prosecutor the evidence it intends to present at the confirmation hearing, if any, and to file the list of evidence, **no later than Friday 6 September 2013**;

b) to submit justified proposals for redactions, if any, pursuant to rule 81 of the Rules, **no later than 19 August 2013**;

c) to agree with the Prosecutor on a location and time to permit the inspection of any material within the meaning of rule 78 of the Rules, **no later than Monday 2 September 2013**;

d) to submit to the Registry after inspection, electronic copies, or electronic photographs in case of tangible objects, of such evidence subject to inspection in order to be registered as evidence in the record of the case, and to submit the original form of the respective piece of evidence to be stored in the Registry vault; and

e) to notify the Prosecutor sufficiently in advance, pursuant to rule 79 of the Rules and as specified in the present decision, in case it intends to raise the existence of an alibi or a ground for excluding criminal responsibility and present evidence to that effect, if any.

Decides that the Defence:

a) should submit, **no later than Thursday 20 June 2013**, a request for translation to the Chamber if it wishes to have translated into Kinyarwanda the core evidence of the first batch, where no redactions or protective measures are sought, and which is essential for the preparation of the defence;

b) should submit a request for translation to the Chamber if it wishes to have translated into Kinyarwanda the core evidence of the first batch, where redactions or protective measures are sought, and which is essential for the preparation of his defence, **no later than two weeks** after the disclosure of said evidence to the Defence;

c) should submit, **no later than Monday 22 July 2013**, any request for translation to the Chamber, if it wishes to have translated into Kinyarwanda the core evidence of the second batch where no redactions or protective measures are sought, and which is essential for the preparation of his defence;

d) should submit a request for translation to the Chamber if it wishes to have translated into Kinyarwanda the core evidence of the second batch, where redactions

or protective measures are sought and which is essential for the preparation of his defence, **no later than two weeks** after the disclosure of said evidence to the Defence.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 17 May 2013

At The Hague, The Netherlands