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**International
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Date: **23 May 2013**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing

Source: Office of the Prosecutor

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Legal Representatives of the Victims

Legal Representatives of the Applicants

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Introduction

1. The Prosecution requests a postponement of the date for the confirmation of charges hearing, as provided under Rule 121(7). Central to this application is the fact that Mr Ntaganda eluded arrest for 7 years. He has now chosen to surrender to the Court, but this fact cannot overshadow the Prosecution's duties under the Statute. In particular, Mr Ntaganda's right to an expeditious process must be balanced against the Prosecution's obligations (a) under article 68, to victims and witnesses who were interviewed many years ago and need to be contacted regarding the immediate disclosure of their statements and whose security situation must be assessed and protected; (b) under article 67(2) and Rule 77, to adequately review all materials in its collection for the purposes of disclosure to the Defence; (c) under article 54(3)(e), to seek consent from providers for lifting of conditions once materials relevant for disclosure have been identified; (d) under article 54(1) (a) to seek to establish the truth and investigate incriminating and exonerating circumstances equally; (e) under orders by the Chamber, to follow disclosure protocols and prepare in-depth analysis charts; and (f) under rule 76(3) to provide materials into a language that he fully understands and speaks.

2. It takes time to prepare a case that has effectively been dormant for this many years and to ensure full respect for these overlapping obligations. The level of assessment and preparation required cannot be completed within the deadlines ordered in the Single Judge's decision. Additionally, the likely impact of requests for translations jeopardizes the current confirmation hearing date. The Prosecution proposes a new date of mid-February 2014, which will permit sufficient time for the Prosecution to discharge its obligations, provide disclosure on a rolling basis and allow the Defence to request translations at regular intervals.

3. Procedural Background

4. On 22 August 2006, Pre-Trial Chamber I issued a warrant of arrest for Bosco Ntaganda.¹ On 13 July 2012, Pre-Trial Chamber II issued a second warrant of arrest against Mr Ntaganda for his alleged responsibility for additional crimes.²
5. Mr Ntaganda voluntarily surrendered and arrived at the detention centre of the Court on 22 March 2013. His initial appearance took place on 26 March 2013.³
6. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”.⁴
7. On 15 April 2013, the Single Judge convened a status conference.⁵ On 18 April 2013, the Single Judge ordered the Registry to test Mr Ntaganda’s language proficiency.⁶
8. On 25 April 2013, Mr Marc Desalliers was appointed as counsel for Mr Ntaganda.⁷
9. On 1 May 2013, the Registry submitted its report on Mr Ntaganda’s language proficiency.⁸
10. On 17 May 2013, the Single Judge issued the “Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties”.⁹ The Single Judge ordered the Prosecution, among other things, to disclose by 7 June 2013 the evidence on

¹ ICC-01/04-02/06-40.

² ICC-01/04-02/06-36-Conf-Exp; public redacted version at ICC-01/04-02/06-36-Red.

³ ICC-01/04-02/06-T-2- ENG ET.

⁴ ICC-01/04-02/06-47.

⁵ ICC-01/04-02/06-T-3-ENG ET.

⁶ ICC-01/04-02/06-50.

⁷ ICC-01/04-02/06-52.

⁸ ICC-01/04-02/06-55.

⁹ ICC-01/04-02/06-64.

which it intends to rely that it collected before 13 July 2012 and which does not require redactions or other protective measures.¹⁰ The Prosecution is to submit requests for redactions on the same date. By 8 July 2013, the Prosecution is to disclose any evidence collected after 13 July 2012 on which it intends to rely and which does not require requests for redactions or protective measures. The Prosecution is to submit requests for redactions on the same date.¹¹ Disclosure of material for which redactions or protective measures are granted is to take place within 5 days of the notification of the Chamber's decision on the requests.¹²

11. In the same decision, the Chamber ordered the Defence to submit by 20 June 2013 a request for translation into Kinyarwanda of the "core evidence" from the first batch of disclosure. Any request for translation of the "core evidence" from the second batch of disclosure must be made by 22 July 2013. For material disclosed with redactions or protective measures, the Defence is ordered to request translation into Kinyarwanda of the core evidence within two weeks of such disclosure.¹³

Prosecution's Submissions

12. Rule 121(7) of the Rules of Procedure and Evidence (Rules) provides that the Prosecutor or the person subject to the arrest warrant may ask the Pre-Trial Chamber to postpone the date of the confirmation hearing. The Single Judge may postpone the date of the confirmation hearing for any sufficient reason. The Appeals Chamber has stated that "where the Prosecutor requires more time to

¹⁰ ICC-01/04-02/06-64, p.11.

¹¹ ICC-01/04-02/06-64, pp.11-12.

¹² ICC-01/04-02/06-64, pp.11-12.

¹³ ICC-01/04-02/06-64, pp.13.

complete the investigation, rule 121(7) of the Rules of Procedure and Evidence permits him to seek a postponement of the confirmation of charges hearing”.¹⁴

13. The Prosecution notes that confirmation hearings have been postponed in the past due to a range of factors. For instance, Pre-Trial Chamber I postponed the confirmation hearing in the *Lubanga* case twice: first from 27 June 2006 to 28 September 2006^[1]; then from 28 September to 9 November 2006.^[2] The Single Judge acknowledged for the first postponement that “according to articles 61(3) and (6) and 67 of the Statute the Defence must have adequate time to prepare for the confirmation hearing in order to be in a position to effectively exercise its right to challenge the evidence presented by the Prosecution at such a hearing”.^[3] The confirmation hearing was ultimately held 8 months after the initial appearance. In turn, Pre-Trial Chamber I in the *Gbagbo* case also postponed its confirmation hearing, first from 18 June 2011 to 13 August 2012.^[4] The hearing was postponed again *sine die*,^[5] to eventually commence on 19 February 2013 - fifteen months after the initial appearance.

14. The first warrant of arrest against Bosco Ntaganda was issued 7 years ago. The second warrant of arrest was issued one year ago. During this significant period of time, Mr Ntaganda was a fugitive and refused to surrender to the jurisdiction of the Court.¹⁵ It is inevitable that this period of time will have an effect on the state of the investigation and the evidence. Now that Mr Ntaganda has elected to

¹⁴ ICC-01/04-01/10-514 OA4, 30 May 2012, para.44.

^[1] ICC-01/04-01/06-126.

^[2] ICC-01/04-01/06-454 and 521.

^[3] ICC-01/04-01/06-126, p.5.

^[4] ICC-02/11-01/11-152.

^[5] ICC-02/11-01/11-201.

¹⁵ Mr Ntaganda was aware of the outstanding ICC arrest warrant, which he evaded for 7 years: See, <http://www.reuters.com/article/2010/10/06/us-congo-democratic-rebel-idUSTRE6953T120101006>; <http://direct.cd/2012/05/29/rdc-bosco-ntaganda-sexplique.html>; <http://www.lemillenaireinfoplus.com/pages/politique/bosco-ntaganda-moi-a-la-cpi-kabila-n-y-echappera-pas.html>

appear, there are a number of important steps that the Prosecution must take in order to prepare the case adequately; it had effectively been hibernated over a number of years when the suspect remained a fugitive and there appeared little prospect of executing the warrants of arrest. These steps can be accelerated to a certain extent once a suspect is detained, but they cannot be avoided or abridged and they take time to implement.

15. First, in the 8 weeks since Mr Ntaganda chose to surrender to the Court, the Prosecution has had to reconstitute prosecution and investigation teams where the original team resources had been diverted to other cases. It has had to identify and engage new intermediaries given that it had, in the meantime, ceased its engagement with intermediaries in the region. It has had to establish contact with a number of witnesses, some of whom moved or changed contact details in the interim period. It has had to liaise with the Victim and Witnesses Unit (VWU) to manage the security of witnesses and continues its assessment of witnesses for whom applications for protective measures are necessary. It has continued its investigation under article 54(1), as it is required to do, to investigate incriminating and exonerating circumstances equally.

16. Second, to date, the Prosecution has collected 43,276 documents, totalling 153,381 pages in its investigations into crimes committed in Ituri. While an analysis of items of evidence was conducted in advance of the applications for warrants of arrest, this review could not encompass the complete identification of every document that would be categorized as incriminating or as relevant under article 67(2) and Rule 77. In April 2013, the Prosecution created a set of case-specific search terms designed to retrieve all documents of potential relevance in the case, either under article 67(2) and Rule 77 or as additional incriminating evidence. It has conducted the searches and found that 9602 documents responded to these search terms. It has commenced the review of those materials, which is still

ongoing. The Prosecution has also contacted information providers in order to seek lifting of article 54(3)(e) conditions of receipt for over 300 documents that are relevant for disclosure. Of note, of the 9602 documents that must be reviewed, over 3000 were collected during the initial investigation of this case under article 54(3)(e), imposing an obligation on the Prosecution to request lifting of conditions for disclosure. The Prosecution enters into such agreements on a much more limited basis today than it did in the early phases of its investigation, but from that period has a number of documents to which such conditions apply.

17. Third, in the decision of 12 April 2013, the Single Judge ordered the Prosecution to prepare an in-depth analysis chart of incriminating evidence, to be submitted with each disclosure.¹⁶ The chart must include the appropriate quote from the piece of evidence concerned, or a summary where the relevant information is too large to place in extract form. The chart should include a hyperlink to the item of evidence and each extract shall be referenced as specifically as possible by the document ID number and applicable page, paragraph or line numbers. The relevant facts from each item of evidence should be presented in the chart under each particular legal requirement.¹⁷ In practice, the in-depth analysis chart takes a significant amount of time and resources to prepare. By way of example, the inputting of the relevant information for *one* witness who provides statements, transcript evidence and related documents can take a week.¹⁸

18. Fourth, in its ongoing investigation, the Prosecution is meeting with persons who have rights under article 55(2), including the right to have the interviews audio and/or video recorded. Thereafter, the Prosecution prepares transcripts of these interviews. Although the disclosure obligation attaches only to the original form

¹⁶ ICC-01/04-02/06-47, paras.30 and p.15, item e) 3.

¹⁷ ICC-01/04-02/06-47, para.32.

¹⁸ Some witnesses have: (a) 600 pages of statements and interviews taken pursuant to article 55(2); (b) and additional 150 additional pages of trial transcript; plus (c) a number of associated documents.

of the interview (the audio/video recording), in practice the Prosecution prepares and discloses the transcript of the interview as a tool to assist in reviewing the material. Transcription is time-intensive. It takes 3 days to finalize the transcription of *one hour* of a Swahili interview; 2 days to finalize the transcription of *one hour* of English or French portions. These interviews generally run, on average, up to 10-15 hours each.

19. Fifth, significant time is devoted to individual assessments of evidence and to meaningful discussions about the disclosure value of certain documents, not only for the evidentiary viewpoint but also in terms of any necessary redactions or requests for protective measures. Redactions depend on the *current* security situation which requires not only an up-to-date assessment for all witnesses but also an assessment of redactions in place in the *Lubanga* proceeding. Redaction requests can be very intricate, as information requiring redaction is woven throughout one document. Care must be taken, particularly where the risk of missing an element that should be redacted is higher, as is the case with lengthy documents or witness statements. Accordingly, redactions require multiple reviews. The Prosecution is also required to consider the confidentiality level of disclosed documents, and provide justifications when it determines that a confidential disclosure is most appropriate.¹⁹ Moreover, the Prosecution has met with witnesses who provide information that is disclosable under article 67(2) or Rule 77, which results in security assessments being conducted and at times with requests for necessary redactions or protective measures.

20. Sixth, and significantly, it is apparent that Mr Ntaganda will require translation into Kinyarwanda of a number of Prosecution witness statements pursuant to Rule 76(3). In all likelihood, this factor alone will require the Chamber to postpone the confirmation hearing date. The Prosecution currently anticipates

¹⁹ ICC-01/04-02/06-47, para.28.

relying on 20-25 witnesses for the confirmation hearing, totalling approximately 7000 pages of prior statements and transcripts. Current estimates are that the written translation of *all* this material will require 180 weeks (for one person to complete a draft written translation). Even if the provision of audio/video materials satisfies a part of the translation requirements, there will unavoidably be delays. The Prosecution has only two Kinyarwanda translators. While the Prosecution will oppose a request for translation of *all* these materials²⁰, even the most practical solutions to ensure that Mr Ntaganda has these materials available to him in a form and in a language that permits him to understand the charges against him may include a request for translation of a number of these statements. Even minimum translation required will require a significant amount of work that most likely will collide with the confirmation hearing date.

21. Lastly, the Prosecution acknowledges that it has applied for warrants of arrest and has completed significant analysis and investigation into the charges. Yet, its investigation is not complete at this stage, nor do the Statute or Rules so require.²¹ The Prosecution is guided by the Chambers' expectation that a significant part of its investigative activities have been completed at the time of the confirmation hearing.²² It is an operational reality, however, that when a case has been dormant for many years, it takes time to get processes in place to bring that case back to life, undertake necessary further investigation, and collect information that may

²⁰ The right of the suspect to have prior statements made available to him in a language that he fully understands and speaks is not unlimited, as the Chamber must weigh this against the fairness and expeditiousness of the proceedings. See ICC-01/04-01/06-268, pp.4-8, citing *Leudicke v. Germany* [ECHR] Applications no. 6210/73 ; 7132/75 (1978), para.48 and *Kamasinski v. Austria* [ECHR] Application No. 9783/82, Judgement, 19 December 1989, para.74.

²¹ The Appeals Chamber has stated that the Statute and Rules envision investigations during the entire period prior to the confirmation of charges as well as afterwards - with the *caveat* that they should « largely be completed at the stage of the confirmation of charges hearing ». ICC-01/04-01/10-514 OA4, 30 May 2012, para.44. Citing *Prosecutor v Lubanga*, Judgment on Disclosure Restriction pursuant to Rule 81(2) and (4), ICC-01/04-01/06-568 OA3, 13 October 2006, para. 54 "*acknowledging that the Prosecutor may continue his investigation beyond the confirmation hearing, but stating that 'ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing'*".

²² ICC-01/09-02/11-700.

be relevant to both parties. It also takes time to conduct a comprehensive review of such a large pool of collected materials for *disclosure* purposes, prepare in-depth analysis charts to meet disclosure obligations, contact witnesses to advise of immediate disclosure and address security needs, and prepare transcripts of witness interviews.

22. Given the special circumstances of this case, in the 3 weeks provided by the Single Judge's order, the Prosecution cannot accomplish all these priorities, in particular: (a) review the 9602 documents that may have relevant information; (b) complete its preparation of the in-depth analysis chart that must accompany the disclosure; (c) confirm the location and explain immediate disclosure to its witnesses; (d) collect witness security information and prepare requests for redactions or protective measures; (e) justify the disclosure of confidential material; and (f) immediately disclose materials that might be relevant to the Defence under article 67(2). Additionally, there is insufficient time in the 7 weeks allotted for the deadline to disclose all newly collected materials on which the Prosecution intends to rely at the confirmation hearing, or prepare transcripts of interviews. Finally, in the allocated time the Prosecution cannot bring its investigation closer to completion.

23. Nor can the Prosecution and Registry provide the anticipated volume of translation requests expected from the Defence on 20 June and 22 July 2013 (and requests received thereafter, in the 2 weeks' following disclosure of redacted documents). Additional time must be factored in should the Chamber permit the Prosecution to respond to the Defence request before itself deliberating and deciding on the requests. In the end result, only several weeks would be left to prepare the translations before 23 August 2013 (30 days prior to the start of the confirmation hearing); the minimum time necessary under Rule 121(3) to permit Mr Ntaganda time to review the translated material and prepare his defence.

Unless the Defence were to determine that it does not require any translation, or only the translation of a few statements, several weeks does not permit the translation of more than two or three statements.

24. The Prosecution anticipates that it can complete its review of materials already collected, including requests for lifting of article 54(3)(e) restrictions, and preparation of requests for redactions or protective measures by the end August 2013. It can thereafter disclose evidence that was collected since the second arrest warrant by the end of October 2013, including requests for redactions.
25. Notwithstanding these proposed new deadlines, the Prosecution will disclose materials it intends to rely upon to the Defence on a rolling basis in advance of the final disclosure deadline. The Prosecution will also make requests for redactions or protective measures to the Chamber on a rolling basis, with a view to providing material to the Defence as soon as possible. The Defence should equally make applications for translation to the Chamber on a rolling basis - as disclosure is occurring - which, if granted, the Prosecution and Registry can act on as quickly as possible. By mid-November 2013, the Defence could provide its final request for translations, with any supplementary translation requests two weeks from the date of a decision granting redactions or protective measures to the final batch of documents.
26. Accordingly, the Prosecution proposes that the new confirmation hearing date be set in mid-February 2014. Given the urgency of the present request viewed against the deadlines imposed in decision ICC-01/04-02/06-64, the Prosecution seeks a variation of the time for the Defence to file a response to this application, if any, as provided by Regulation 35(2) of the Regulations of the Court.

Request

27. Based on the foregoing, the Prosecution requests that the Single Judge:

- a. abbreviate the time for any response by the Defence, given the urgency of the application further to Regulation 35(2);
- b. suspend the deadlines in decision ICC-01/04-02/06-64; and
- c. postpone the confirmation hearing date until mid-February 2014 further to Rule 121(7).



Fatou Bensouda, Prosecutor

Dated this 23rd Day of May 2013
At The Hague, the Netherlands