

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **7 June 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 Reply to the "*Réponse de la Défense de M. Bosco Ntaganda à la
'Prosecution's Urgent Request to Postpone the Date of the Confirmation
Hearing' déposée le 24 mai 2013*"**

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

Counsel for the Defence

Marc Desalliers

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

Other

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Didier Preira

Victims and Witnesses Unit

Patrick Craig

Detention Section

Introduction

1. The Prosecution's request to postpone the confirmation hearing is neither frivolous nor negligent, as suggested by the Defence in its response. It was prompted by Mr Ntaganda's sudden and unexpected surrender after many years, and is based on a frank assessment of what needs to be achieved and a realistic estimate of the time required to achieve it. In proposing a new confirmation hearing date and revised disclosure deadlines, the Prosecution is mindful of striking the appropriate balance between Mr Ntaganda's right to be tried without undue delay and the fact that more time is required for the case to be properly presented.¹

2. In this context, the Defence's response reveals a misunderstanding of witness protection, disclosure processes and analysis of evidence when it suggests that the Prosecution: (a) should have protected witnesses (which will often mean relocation) years before a suspect is arrested, even though there is no certainty when the suspect will in fact surrender or be arrested; (b) should have processed disclosure, including redaction requests, without knowing the concrete risks at the time of an eventual arrest and surrender or the security situation on the ground at that moment; (c) should have maintained intermediaries and prosecution and investigation teams solely dedicated to working on a case where no suspect has been detained and there are limited prospects of arrest; and (d) should have predicted the need for an in-depth analysis chart when no such obligation exists in the Statute

¹ According to the recent decision in the *Gbagbo* case (ICC-02/11-01/11-432), even where the confirmation hearing has commenced, article 61(7)(c)(i) permits a postponement to provide further evidence or conduct additional investigations, without prejudicing the suspect's rights under article 67(1)(c). A postponement *prior* to the hearing for good cause is clearly envisaged in Rule 121(7) at the request of the Defence or the Prosecution, or on the Chamber's own initiative.

or Rules and where Pre-Trial and Trial Chambers have not consistently required it, or when they did, not in the same format.

Procedural Background

3. On 22 August 2006, Pre-Trial Chamber I issued a warrant of arrest for Bosco Ntaganda.² On 13 July 2012, Pre-Trial Chamber II issued a second warrant of arrest against Mr Ntaganda covering additional crimes.³
4. Mr Ntaganda surrendered and arrived at the detention centre of the Court on 22 March 2013. His initial appearance took place on 26 March 2013.⁴
5. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”.⁵
6. On 15 April 2013, the Single Judge convened a status conference.⁶ Among other matters, the Single Judge ordered that the Defence receive the arrest warrant applications and, for that purpose, that the Prosecution make any applications for redactions by 25 April 2013.⁷
7. On 25 April 2013, the Prosecution applied for (a) limited redactions to the two arrest warrant applications, (b) the temporary non-disclosure of the statements or testimony of 16 witnesses annexed in support of the applications, (c) a variation of protective measures to give access to the Defence of the statements or testimony of 6 witnesses annexed to the

² ICC-01/04-02/06-40.

³ ICC-01/04-02/06-36-Conf-Exp; public redacted version at ICC-01/04-02/06-36-Red.

⁴ ICC-01/04-02/06-T-2- ENG ET.

⁵ ICC-01/04-02/06-47.

⁶ ICC-01/04-02/06-T-3-ENG ET.

⁷ ICC-01/04-02/06-T-3-ENG ET, p.13, lines 20-22.

applications, and (d) limited redactions to one witness statement, where the identity of the witness is not redacted.⁸

8. On 18 April 2013, the Single Judge ordered the Registry to test Mr Ntaganda's language proficiency.⁹
9. On 25 April 2013, Mr Marc Desalliers was appointed as counsel for Mr Ntaganda.¹⁰
10. On 10 May 2013, the two arrest warrant applications and supporting evidence from 5 witnesses and 68 documents was re-classified as Confidential in the case against Mr Ntaganda.¹¹
11. On 1 May 2013, the Registry submitted its report on Mr Ntaganda's language proficiency.¹²
12. On 17 May 2013, the Single Judge issued the "Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties".¹³
13. On 23 May 2013, the Prosecution requested postponement of the confirmation hearing.¹⁴ On 30 May 2013, the Defence responded to this request (the "Defence Response").¹⁵
14. On 31 May 2013, the Prosecution requested leave to reply to the Defence Response.¹⁶ On 4 June 2013, the Single Judge granted the Prosecution's

⁸ ICC-01/04-02/06-51-Conf.

⁹ ICC-01/04-02/06-50.

¹⁰ ICC-01/04-02/06-52.

¹¹ ICC-01/04-02/06-60-Conf-Red and ICC-01/04-02/06-61-Conf-Red.

¹² ICC-01/04-02/06-55.

¹³ ICC-01/04-02/06-64.

¹⁴ ICC-01/04-02/06-65.

¹⁵ ICC-01/04-02/06-69-Conf, with public redacted version at ICC-01/04-02/06-69-Red.

request to file a reply by 7 June 2013,¹⁷ particularly in relation to the issues raised in paragraphs 36, 41, 46 and 48 of the Defence Response.¹⁸

Prosecution's Submissions

Paragraphs 36-40 of the Defence Response

15. The Prosecution has promptly identified documents covered by Article 54(3)(e) agreements that are potentially relevant for disclosure and has proceeded without delay to make requests for lifting of those conditions. On 27 March 2013, just one day after Mr Ntaganda's first appearance, the Prosecution contacted the United Nations to obtain its consent to disclose all documents obtained from the United Nations and disclosed in the *Lubanga* case, in the same manner in which those documents were disclosed in the earlier case (327 documents). These documents had been disclosed in the *Lubanga* case further to article 67(2), Rule 77 or were documents upon which the Prosecution relied.

16. On 11 April 2013, the United Nations agreed to this request. After reviewing the documents to assess the state of required redactions, the Prosecution disclosed the initial group of materials not requiring redactions on 27 May 2013. The remaining documents from the United Nations were not disclosed at that time because they (a) contain redactions or protective measures approved by Trial Chamber I in the *Lubanga* case, (b) are documents the Prosecution intends to rely upon and therefore need to be entered into the in-depth analysis chart, or (c) their relevance has changed given the

¹⁶ ICC-01/04-02/06-70.

¹⁷ Email from the Senior Legal Adviser to the Pre-Trial Division, 4 June 2013 at 18:01.

¹⁸ Email from the Senior Legal Adviser to the Pre-Trial Division, 4 June 2013 at 18:01.

additional charges against Mr Ntaganda. To the extent possible, they will be disclosed in the next disclosure package.

17. For the reference of the Single Judge, the redactions to these documents were approved by the Trial Chamber in *Lubanga* to protect persons who may be at risk on account of the activities of the Court (i.e. names of victims or witnesses, identifying information of sources, names and contact information of United Nations' staff members) and to protect the privacy interests of persons named in the documents, including child victims of rape or enlistment.¹⁹ In addition, certain protective measures were authorized at the request of the United Nations to restrict the distribution of particular documents to the parties and participants and to ensure that closed or private sessions would be used if the documents were presented at trial.

18. In accordance with Regulation 42, the Prosecution will disclose these documents to the Defence with the same redactions or protective measures authorized by Trial Chamber I and will identify for the Defence the decisions in which such redactions and protective measures were ordered.²⁰

19. Additionally, only two days after Mr Ntaganda's initial appearance, on 28 March 2013, and thereafter on 11, 22 and 25 April 2013, the Prosecution submitted requests to two other information providers for permission to disclose 127 documents in this case in the same form in which they were disclosed in the case against Thomas Lubanga (the documents were disclosed in that case pursuant to article 67(2), Rule 77 and as incriminating evidence). The Prosecution is awaiting a final response from these two information providers.

¹⁹ ICC-01/04-01/06-1803.

²⁰ See, *Banda & Jerbo*, ICC-02/05-03/09-49, paras.11-12 where the Pre-Trial Chamber accepted that Regulation 42 applied to redactions as approved by the Chamber in the *Abu Garda* case.

20. On 7 June 2013, the Prosecution transmitted a second request to the United Nations to lift restrictions to an additional 138 documents that contain information under either article 67(2), Rule 77 *or* upon which the Prosecution intends to rely.
21. In light of the above, the Prosecution has demonstrated that it is working steadily towards a full review of Article 54(3)(e) materials and is making timely requests for lifting of conditions. Source providers are cooperating with these requests.
22. The Defence contends that Mr Ntaganda is prejudiced because the Prosecution is conducting a review of 3000 documents that might be relevant for disclosure but that were obtained under conditions of receipt.²¹ There is no prejudice to Mr Ntaganda in this regard. Neither the Statute, the Rules nor the Single Judge's order require that every document containing potentially exonerating information be disclosed to the Defence on the day he decides to surrender. It is an ongoing obligation to disclose such material "as soon as practicable",²² which the Prosecution has done and will continue to do.
23. Nor is the Prosecution in violation of Appeals Chamber jurisprudence, which is relevant only to the extent that article 54(3)(e) agreements preclude the disclosure of potentially exculpatory material to the Defence.²³ In the case at hand, there is no indication that information providers will refuse to lift conditions on relevant documents and the Prosecution is submitting requests expeditiously. Moreover, such information can at all times be placed in *ex parte* and *in camera* proceedings before the Chamber for its

²¹ Defence Response, paras.37-40.

²² Article 67(2).

²³ ICC-01/04-01/06-1486, para.3

review, as appropriate, consistent with the Appeals Chamber's decision in the *Lubanga* case.²⁴

24. It is also important to note that the 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.²⁵ 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.

Paragraph 41 of the Defence Response

25. Contrary to the Defence's assertion at paragraph 41, the Prosecution did provide detail as to the difficulties encountered in contacting witnesses: it indicated at paragraph 15 of its request that some of the witnesses it needs to contact have moved or changed contact details in the intervening period and that it has had to find alternate methods to facilitate contact with them.²⁶

26. The Prosecution's obligation to its witnesses means that once a suspect is arrested, it must contact witnesses to advise of disclosure, conduct a security

²⁴ ICC-01/04-01/06-1486, para. 48.

²⁵ These are known as "fuzzy" searches that recognize exact matches of a search term and matches of a lesser degree.

²⁶ ICC-01/04-02/06-65, para.15.

assessment and address any protection issues that arise as a result of the witness's cooperation with the Court. This can only realistically be undertaken at the moment the suspect is detained and faces the prospect of trial and conviction. The stakes are inevitably higher at that time and the impact on the security situation for witnesses, families and innocent third parties must be evaluated against that backdrop. It is, first, unlikely that the Victims and Witnesses Unit ("VWU") would admit witnesses into a protection program when a suspect is at large and the concrete risk on account of their cooperation with the Court remains hypothetical. Second, it would be extremely burdensome to admit witnesses to a relocation program, far removed from their extended families, communities and livelihood when there is no concrete or immediate prospect of ever arresting the person.

27. To date, the Prosecution has been able to contact 19 witnesses upon which it intends to rely and is in a position to disclose the identities and prior statements of 11 of these witnesses. The Prosecution notes that since 10 May 2013, the Defence has had access to the full or partial statements or testimony of 7 of these 11 witnesses by way of the reclassification of the arrest warrants and supporting material.
28. The Prosecution is currently liaising with the VWU regarding 4 of the 19 witnesses referred to above. As the Prosecution is still in the process of contacting a number of additional witnesses, it anticipates having to submit referrals for protective measures to the VWU for several of these witnesses but cannot be more precise until it has been able to address these issues directly with the witnesses.

Paragraphs 44-46 of the Defence Response

29. It is incorrect that the Prosecution could or should have anticipated that the Pre-Trial Chamber assigned to this case would require an in-depth analysis chart of the evidence, simply on the basis that such a chart was ordered in the *Bemba* case in 2008 and in the Kenya cases. There is no requirement for such an analytical product in the Statute or Rules and no consistent practice across Pre-Trial or Trial Chambers. Indeed, the Trial Chamber in the *Banda and Jerbo* case required only a list of evidence, following the pre-trial jurisprudence of *Lubanga*, as did the Pre-Trial Chamber in the case against *Mbarushimana*.²⁷ Most recently, the Pre-Trial Chamber in the *Gbagbo* case in January 2012 accepted a variation based on the *Banda and Jerbo* model.²⁸ The

²⁷ ICC-02/05-03/09-35, para.12: “Following careful analysis of the system of disclosure in light of the precedents of this Chamber, the First Decision on Disclosure and the views expressed by the parties at the Hearing, the Majority agrees with the Prosecution that the disclosure system adopted by the Chamber in the proceedings related to the confirmation of charges in the *Lubanga* Case and the *Katanga and Ngudjolo* Case “proved to be fair and efficient and has operated successfully in the two cases” and that “there are no compelling reasons to depart from that system that was put in place by this same Pre-Trial Chamber”. Similarly, the model accepted by the Pre-Trial Chamber in the case against *Mbarushimana* followed the jurisprudence of *Banda & Jerbo* at ICC-01/04-01/10-87, para.14: “In relation to incrimination evidence on which the Prosecutor intends to rely at the confirmation hearing, the Prosecutor will be ordered to ensure that the detailed description of the charges (“Document Containing the Charges”) together with the list of the aforementioned evidence (“List of Evidence”) which he shall provide pursuant to rule 121(3) of the Rules, are organised in such a manner that: (i) each item of evidence is linked to the factual statement it intends to prove; and (ii) each factual statement is linked to a specific element of crime, a mode of liability, or both.”

²⁸ The Pre-Trial Chamber in *Gbagbo* acknowledged the divergent jurisprudence: « So I would like to have your views on this, on the system that was -- and I think you all -- I hope you have all read the most recent decisions in *Abu Garda - Abu Garda* I would say - and *Kenya*, which I thought they were quite exemplary, good examples of the different alternatives we have, and seek your views on this, including also on some practical aspects of the different systems. There was this -- the format in which the different Chambers have requested the evidence to be presented, basically a list of evidence with some -- with a connection to the DCC or a more in-depth analysis chart, as has been requested in Pre-Trial Chamber II in the *Kenya* situation in particular.” (ICC-02/11-01/11-T-3, p.2, line 23 to p.3, line 6. Indeed, the Pre-Trial Chamber in the *Gbagbo* case opted to refer to the document simply as the “LoE” (List of Evidence) instead of an in-depth analysis chart. (ICC-02/11-01/22-30, para.33.

Prosecution could not have anticipated with certainty what this Chamber would order, particularly given the differing jurisprudence.²⁹

30. In an effort to provide the Defence with immediate disclosure of materials under article 67(2) and Rule 77, the Prosecution disclosed 2,197 documents to the Defence on 27 May 2013, including 51 documents upon which the Prosecution intends to rely. The Prosecution duly prepared the analytical chart for the 51 documents in the form ordered by the Single Judge and linked each document to elements of the charges.

31. The Defence claims in paragraph 46 of the Defence Response that the chart is of no real assistance to the Prosecution's claim that it takes a significant amount of time to input the evidence of one witness, since the chart did not contain the prior statements of any witnesses at all. In fact, the absence of witness statements in the chart fully supports the Prosecution's submission: 8 of the witnesses whose identity can now be disclosed have voluminous prior statements comprised of lengthy statements or article 55(2) interviews, trial and confirmation hearing transcripts in addition to a number of documents related to their prior statements, totalling over 6600 pages of evidence. It was not possible to complete the inputting of information for these witnesses in the 9 days between the issuance of the decision on Friday, 17 May 2013 in the afternoon and disclosure on Monday, 27 May 2013 at 10:00. Strictly speaking, the Prosecution was not obliged to disclose *any* materials upon which it intends to rely on 27 May 2013 - in advance of the Single Judge's deadline of 7 June 2013 - but did so in an effort to provide the Defence with this information at the earliest opportunity.

²⁹ It would be highly resource-intensive to prepare an in-depth analysis chart only to later find that the Pre-Trial Chamber declined to order it.

32. Preparing the in-depth analysis chart involves reviewing each of the statements, prior testimony and documentary evidence, summarizing the relevant facts in each document (a statement alone can have 25 or more important facts), ensuring no or minimal duplication of facts between prior statements and testimony, linking each fact to one or more elements of the crimes and excerpting a relevant portion for each fact, where applicable. The Defence makes reference to one example of a statement that is 11 pages (that was disclosed in full via the reclassification of the arrest warrants) to counter the Prosecution's submission. While that one statement may not take more than one day to input into the in-depth analysis chart, it is overshadowed by the weeks of work required to input the statements and related documents referred to above.

Paragraph 48 of the Defence Response

33. The Prosecution is currently conducting additional interviews under article 55(2) that require transcription. It commenced the first part of an interview under article 55(2) on 1-2 June 2013, which has been scheduled in two parts to accommodate the witness's work schedule and will resume in several weeks. The Prosecution submitted its transcription request for the first part of this interview on 4 June 2013 and was advised that it should be completed on or about 26 June 2013 (i.e. 22 days to transcribe 8.5 hours of interview).

34. The Prosecution commenced a second interview under article 55(2) on 6 June 2013, which must also be suspended to accommodate the witness and will be completed following a delay of several weeks. The Prosecution anticipates conducting one other article 55(2) interview as soon as practicable once security concerns have been addressed with the assistance of the VWU (the Prosecution has been working with the VWU to proceed

with this interview since 3 April 2013). Thereafter, the Prosecution is planning to conduct four further interviews under article 55(2) which it intends to schedule with the witnesses over the next 6-8 weeks, considering the time needed to prepare for such interviews (availability of the witnesses and their counsel, mission planning requirements and staffing).

Request

35. Based on the foregoing and as set out in its application of 23 May 2013,³⁰ the Prosecution requests that the Single Judge postpone the date of the confirmation of charges hearing to mid-February 2014 and vary the disclosure deadlines accordingly.



Fatou Bensouda, Prosecutor

Dated this 7th Day of June 2013
At The Hague, the Netherlands

³⁰ ICC-01/04-02/06-65.