

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 9 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**  
**Prosecution's Information of the Status of Disclosure**

**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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**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

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Participation/Reparation**

**The Office of Public Counsel for Victims**

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Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## **Introduction**

1. The Prosecution informs the Single Judge of the status of disclosure in this case, including of items collected under conditions of confidentiality pursuant to article 54(3)(e) of the Rome Statute.

## **Background**

2. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, wherein she ordered that “any delays in the process of disclosure, which result from procedures concerning articles 54(3)(e), 72 and 93(8) of the Statute, [...] be brought to the attention of the Chamber as soon as practicable”.<sup>1</sup>

## **Prosecution's Submissions**

3. Between 27 May and 20 December 2013, the Prosecution disclosed a total of 5121 items. It has disclosed 2045 items of incriminatory evidence, 599 items pursuant to article 67(2), and 2477 items that fall within the meaning of rule 77 of the Rules of Procedure and Evidence. The Prosecution further intends to disclose over 1200 items pursuant to rule 77, as well as 10 items pursuant to article 67(2), on 10 January 2014. The Prosecution will have disclosed the identity of 38 witnesses upon which it intends to rely for confirmation and the identity of over 100 witnesses who provide information pursuant to article 67(2) and rule 77.
4. The Prosecution will submit by 10 January 2014 an application for redactions to items that fall within the meaning of rule 77 and to two items that fall under article 67(2).
5. The Prosecution has made periodic requests for the lifting of restrictions to items collected under article 54(3)(e). Between 27 March 2013 and 9 January 2014, the

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<sup>1</sup> ICC-01/04-02/06-47, page 15.

Prosecution requested the lifting of restrictions to over 900 items. By 10 January 2013, Prosecution will have disclosed over 590 of these items.

6. The Prosecution notes that 115 of the items that are pending a request to lift restrictions contain information that may be material to the preparation of the Defence pursuant to rule 77. The remaining items are items on which the Prosecution seeks to rely in the proceedings.
7. While the Prosecution cannot disclose the 115 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 Confidential, *ex parte* Prosecution Only Annex A.<sup>2</sup> 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 115 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.
8. Second, the Confirmation Hearing is limited to a determination of whether there is sufficient evidence to establish substantial grounds to believe that the person committed the crimes charged. The Pre-Trial Chamber must assess the evidence to ensure that “(i) only those cases proceed to trial for which the Prosecutor has presented sufficiently compelling evidence going beyond mere theory or suspicion; (ii) the suspect is protected against wrongful prosecution; (iii) and judicial economy is ensured by distinguishing between cases that should go to trial and those that should not”.<sup>3</sup> There is no requirement that the Prosecution

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<sup>2</sup> Annex A lists the 115 items arranged by category of relevant rule 77 information and identifies by evidence registration number (“ERN”) the items that have been disclosed to the Defence and that contain analogous information.

<sup>3</sup> ICC-01/04-01/10-514 (OA 4), para. 39.

present *all* its evidence; indeed article 61(5) refers to the Prosecution's need to present "sufficient" evidence. Moreover, the Confirmation Hearing takes place when the Prosecution's investigations, while largely completed, may still be ongoing. The full rehearsal of evidence will take place at a later stage, if the case proceeds to trial, with the presentation of witness testimony.

9. Given the limited scope of the Confirmation Hearing, the nature of the information contained in the items and, importantly, the fact that the Prosecution has disclosed documents and witness statements that contain analogous information to that found in the items, the Prosecution submits that requirements of fairness are satisfied in this case and there is no prejudice to the Defence to proceed to the Confirmation Hearing. The Prosecution will disclose these items as soon as possible.
10. The Prosecution fully anticipates that the relevant items will be available prior to trial, and offers to provide copies of these 115 restricted items to the Single Judge, on an *ex parte* basis, should she deem this necessary.



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Fatou Bensouda,  
Prosecutor

Dated this 9<sup>th</sup> day of January 2014  
At The Hague, The Netherlands