

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 6 February 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

**Decision on the “Prosecution’s Provision of 56 Documents Collected under Article
54(3)(e)”**

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence

Marc Desalliers

Legal Representatives of the Victims

Sarah Pellet
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Legal Representatives of the 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

Other

REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court,¹ hereby renders this decision on the “Prosecution’s Provision of 56 Documents Collected under Article 54(3)(e)”.²

The present decision is classified as public although it refers to the existence of documents which have been submitted and are currently treated as confidential, *ex parte* Prosecutor only and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential, *ex parte* Prosecutor only. The references made in the present decision have been kept to a minimum as they are required for the sake of securing judicial reasoning and ensuring fairness towards the Defence.

I. PROCEDURAL HISTORY

1. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”³, in which she, *inter alia*, set the principles governing the process of disclosure between the parties.⁴

2. On 17 June 2013, the Single Judge issued the “Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence Between the Parties”⁵, in which the Single Judge, *inter alia*, postponed the commencement of the confirmation of charges hearing until Monday, 10 February 2014 and established an updated calendar for the disclosure of evidence between the parties.⁶

3. On 10 January 2014, the Single Judge received the “Prosecution’s Information of the Status of Disclosure”, in which the Prosecutor informed “the Single Judge of the

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

² ICC-01/04-02/06-239 and its confidential *ex parte* annex A and confidential *ex parte* annexes 1-56.

³ Pre-Trial Chamber II, ICC-01/04-02/06-47.

⁴ Pre-Trial Chamber II, ICC-01/04-02/06-47, para. 30, p. 15.

⁵ Pre-Trial Chamber II, ICC-01/04-02/06-73.

⁶ Pre-Trial Chamber II, ICC-01/04-02/06-73, p. 19.

status of disclosure in this case, including of items collected under conditions of confidentiality pursuant to article 54(3)(e) of the Rome Statute”.⁷ The Prosecutor noted, *inter alia*, 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” and averred that she “ha[d] disclosed to the Defence items of evidence that contain analogous information to the information contained in the restricted items”.⁸

4. On 15 January 2014, the Single Judge issued the “Order Regarding the ‘Prosecution’s Information of the Status of Disclosure’”,⁹ in which she, *inter alia*, ordered the Prosecutor “to provide to the Chamber on a confidential, *ex parte*, basis the 115 documents, accompanied with a chart detailing what alternative evidence has been provided to the Defence and in what manner the alternative evidence is claimed to be analogous to the 115 documents”.¹⁰

5. 24 January 2014, the Single Judge issued the “Decision Convening a Status Conference on Disclosure Issues and on the Organisation of the Confirmation Hearing”, in which she decided to convene a status conference for the purpose of discussing, *inter alia*, issues concerning the process of disclosure.¹¹

6. On 27 January 2014, the Single Judge issued the “Decision Regarding the Non-Disclosure of 116 Documents Collected Pursuant to Article 54(3)(e) of the Rome Statute”,¹² in which she, *inter alia*, decided that the “non-disclosure of the 116 documents does not cause prejudice to the rights of the Defence [...]”¹³ and ordered the Prosecutor to submit a report every two weeks on the status of the documents

⁷ ICC-01/04-02/06-201, para. 1.

⁸ ICC-01/04-02/06-201, paras 6-7.

⁹ Pre-Trial Chamber II, ICC-01/04-02/06-210.

¹⁰ Pre-Trial Chamber II, ICC-01/04-02/06-210.

¹¹ Pre-Trial Chamber II, ICC-01/04-02/06-225.

¹² Pre-Trial Chamber II, ICC-01/04-02/06-229. The variation of the number of documents from 115 to 116 resulted from an oversight on the part of the Prosecutor, and thus, this additional item has been added. See, ICC-01/04-02/06-216, para. 10.

¹³ Pre-Trial Chamber II, ICC-01/04-02/06-229, p. 10.

obtained under article 54(3)(e) of the Statute that are to be disclosed to the Defence, including the 116 documents [...]”.¹⁴

7. On the same date, the status conference was convened, in which the Office of the Prosecutor (the “OTP”) mentioned that a review of “additional 58 documents” would be carried out¹⁵ and that “it w[ould] be necessary for the [OTP] to provide these documents to [the Single Judge] and to provide analogous evidence, because the information is very similar to the information [...] received already by way of [the] filing on the 116 documents”.¹⁶ Accordingly, the OTP proposed to file “the same chart of analogous evidence [similar to the one previously submitted to the Chamber in relation to the 116 documents] by Thursday [30 January 2014]”.¹⁷

8. On 30 January 2014, the Chamber received the “Prosecution’s Provision of 56 Documents Collected under Article 54(3)(e)” (the “Prosecutor’s Request” or “Request”),¹⁸ in which the Prosecutor states that “it has reviewed 188 documents upon which it intends to rely as incriminating evidence and for which it has sought lifting of restrictions [...] and that it has identified that 56 of these documents also contain information that may be relevant to the preparation of the Defence” under rule 77 of the Rules.¹⁹ Accordingly, the Prosecutor “requests that the Single Judge decide that the non-disclosure of the attached 56 documents [to her filing] does not cause prejudice to the rights of the Defence for the purposes of the confirmation hearing”.²⁰

9. On 3 February 2014, the Chamber received the “Prosecution’s First Report on the Status of Disclosure of Documents Obtained under Article 54(3)(e)” (the “First 54(3)(e) Disclosure Report”).²¹

¹⁴ Pre-Trial Chamber II, ICC-01/04-02/06-229, p. 10.

¹⁵ Pre-Trial Chamber II, ICC-01/04-02/06-T-5-CONF-EXP-ENG ET, p. 16, lines 23-25.

¹⁶ Pre-Trial Chamber II, ICC-01/04-02/06-T-5-CONF-EXP-ENG ET, p. 17, lines 2-6.

¹⁷ Pre-Trial Chamber II, ICC-01/04-02/06-T-5-CONF-EXP-ENG ET, p. 17, lines 2-9.

¹⁸ ICC-01/04-02/06-239 and its confidential *ex parte* annex A and confidential *ex parte* annexes 1-56.

¹⁹ ICC-01/04-02/06-239, para. 5.

²⁰ ICC-01/04-02/06-239, p. 8.

²¹ ICC-01/04-02/06-243.

II. APPLICABLE LAW

10. The Single Judge notes articles 21(1)(a), 2 and(3), 54(3)(e) and 61 and 67 of the Rome Statute (the “Statute”), and rules 77 and 121(2) of the Rules of Procedure and Evidence (the “Rules”).

III. DETERMINATION BY THE SINGLE JUDGE

11. At the outset, the Single Judge wishes to point out that upon reading of the First 54(3)(e) Disclosure Report, it became clear that the consent of the information provider has been obtained with respect to a number of documents which fall under the 56 documents referred to in the Prosecutor’s Request.

12. In particular, according the First 54(3)(e) Disclosure Report, the Prosecutor has already disclosed a total of four documents out of the 56 documents subject of the Prosecutor’s Request, on 31 January 2014 and 3 February 2014 respectively. These documents are found in annexes 25, 32, 34 and 38 appended to the present Prosecutor’s Request. With respect to one remaining document found in annex 33, the Prosecutor stated in the First 54(3)(e) Disclosure Report that this document was submitted to the Chamber alongside others for the sake of obtaining authorization to redact some information prior to their disclosure to the Defence.²² Once the Chamber has ruled on said request for redaction, the Prosecutor will be in a position to disclose annex 33.

13. In view of this information, the Single Judge considers that the Prosecutor’s Request to provide the Defence with items of evidence which include analogous information to those found in annexes (25, 32, 33, 34 and 38) becomes moot. Accordingly, the Prosecutor should have requested withdrawal of this relevant part of her Request. Although the Prosecutor has not followed this path, the Single Judge finds it appropriate to address this issue, and accordingly, confine her ruling on the remaining 51 documents subject of the Prosecutor’s Request (the “51 Documents”).

²² ICC-01/04-02/06-243, para. 2; “Prosecution’s Eight Application for Redactions”, 31 January 2014, ICC-01/04-02/06-241-Conf-Exp.

14. In this context, the Single Judge recalls the judgment of 21 October 2008, in which the Appeals Chamber stated:

[W]henever the Prosecutor relies on article 54(3)(e) of the Statute [s]he must bear in mind [...] [her] obligations under the Statute and apply that provision in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial. There might be circumstances in which this tension can be resolved by reverting to some or all of the measures referred to by the Prosecutor [...] and summarised at paragraph 28 above, in particular if only small numbers of documents are concerned.²³

In paragraph 28 of the same judgment some of these measures were referred to and includes “the identification of new, similar exculpatory material, providing material in summarised form [...]”.²⁴

15. Thus, in light of the Appeals Chamber’s jurisprudence, it is permissible for the Prosecutor to rely on analogous information in so far as “small numbers of documents are concerned”²⁵ and that the Defence is in a position to exercise its right under articles 61(6) and 67 of the Statute.

16. With respect to the number of documents, the Single Judge considers that the Prosecutor’s Request does not call for the non-disclosure of hundreds of documents. Rather, the Request aims at providing the Defence with items of evidence which include analogous information concerning only 51 documents. To this end, the Single Judge finds that the number of documents is relatively small.

²³ Appeals Chamber, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’”, 21 October 2008, ICC-01/04-01/06-1486, para. 44.

²⁴ Appeals Chamber, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’”, 21 October 2008, ICC-01/04-01/06-1486, paras 28,44.

²⁵ Appeals Chamber, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’”, 21 October 2008, ICC-01/04-01/06-1486, para. 44.

17. Turning to the other important aspect regarding the Prosecutor's Request, namely whether as a result of holding disclosure and instead providing analogous information the Defence is still in a position to exercise its right under article 61(6) and 67 of the Statute, the answer to this question relies mainly on whether the information provided by the Prosecutor in effect substitutes the original information found in the 51 Documents. In other words, the issue is whether the proposed alternative or analogous information is actually "comparable" to the original.²⁶

18. The Single Judge has examined the information contained in the 51 Documents and compared them to the alternate information or items of evidence disclosed to the Defence. She finds that the analogous information referred to by the Prosecutor either originates from the same source or sources which are similarly situated. For instance, in relation to documents concerning the contextual information, namely crimes committed by Lendu forces, which emanate mainly from the United Nations (the "UN") and/or Non-Governmental Organizations²⁷, documents of comparable nature and/or the same source have already been disclosed to the Defence.²⁸ In addition, UN documents which provide lists of political and military leaders in Ituri,²⁹ such as "FAPC, UPC, FRPI, FRDC and UPDF" are matched with alternate documents equivalent in nature and also originating from the same source namely, the UN.³⁰

19. With respect to some specific documents, the Single Judge considers that the analogous information provided is nearly identical. For example, the content of a signed agreement "Acte d'engagement" referred to in the original non-disclosed document is identical to the information found in the alternative evidence.³¹ Further,

²⁶ Pre-Trial Chamber II, ICC-01/04-02/06-229, para. 13.

²⁷ ICC-01/04-02/06-239-Conf-Exp-Anx2 - ICC-01/04-02/06-239-Conf-Exp-Anx18.

²⁸ ICC-01/04-02/06-239-Conf-Exp-AnxA, p. 4-12.

²⁹ ICC-01/04-02/06-239-Conf-Exp-Anx21 - ICC-01/04-02/06-239-Conf-Exp-Anx22.

³⁰ ICC-01/04-02/06-239-Conf-Exp-AnxA, p. 18-19.

³¹ ICC-01/04-02/06-239-Conf-Exp-Anx25.

the Prosecutor provided the Defence with the exact redacted version of a non-ICC statement concerning the involvement of Uganda in Ituri.³²

20. It should be noted that in cases where the two sets of documents do not overlap completely, the information contained in the alternative evidence has been found to pertain to the same general category of information as the one contained in the 51 Documents. By way of an example, documents concerning the information on the involvement of the Movement for the Liberation of Congo (the "MLC") in the operation "effacez le tableau" in December 2002,³³ or documents that concern information suggesting that the "UPC/FPLC" had peaceful intentions or a cooperative stance,³⁴ are generally reflected in the alternative evidence although not referring to all particularities.³⁵

21. Moreover, in several instances, multiple items of alternative evidence provided by the Prosecutor are more detailed and comprehensive in certain respects than the original documents covered by article 54(3)(e) of the Statute. In particular, in relation to one of the original non-disclosed documents concerning the contextual information, that is referring to the crimes committed by Lendu forces (child soldiers),³⁶ the Prosecutor provided more detailed and comprehensive alternative evidence such as several UN documents, a witness statement and 2 witness screening notes revealing similar information.³⁷ The Prosecutor has also provided a number of UN documents, several Reports from various organizations/bodies and a witness statement³⁸ as alternative or analogous evidence to the original non-disclosed document, which includes information on the involvement of the MLC in the attack on Mambasa.³⁹

³² ICC-01/04-02/06-239-Conf-Exp-Anx34; ICC-01/04-02/06-239-Conf-Exp-AnxA, p. 34.

³³ ICC-01/04-02/06-239-Conf-Exp-Anx20.

³⁴ ICC-01/04-02/06-239-Conf-Exp-Anx25 - ICC-01/04-02/06-239-Conf-Exp-Anx33.

³⁵ ICC-01/04-02/06-239-Conf-Exp-AnxA, p. 15-34.

³⁶ ICC-01/04-02/06-239-Conf-Exp-Anx19.

³⁷ ICC-01/04-02/06-239-Conf-Exp-AnxA, p. 12-15.

³⁸ ICC-01/04-02/06-239-Conf-Exp-AnxA, p. 15-18.

³⁹ ICC-01/04-02/06-239-Conf-Exp-Anx20.

22. Therefore, given the limited scope of the confirmation of charges hearing, the Single Judge considers that the analogous information or evidence provided by the Prosecutor in terms of its comparable nature and content to the original, the similarity or equivalence of its source and its volume, allows the Defence to exercise its rights for the purpose of this particular stage of the proceedings. It follows that the provision of said analogous information constitutes an appropriate counter-balancing measure “in spite of the non-disclosure of the information”,⁴⁰ contained in the 51 Documents.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) decides** that the non-disclosure of the 51 Documents does not prejudice the rights of the Defence for the confirmation of charges hearing; and
- b) orders** the Prosecutor to disclose the 51 Documents to the Defence as soon as consent has been secured from the information provider in accordance with article 54(3)(e) of the Statute.

⁴⁰ Appeals Chamber, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’”, 21 October 2008, ICC-01/04-01/06-1486, para. 48.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 6 February 2014

At The Hague, The Netherlands