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**International
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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 Urgent Request to Postpone the Date of the Confirmation Hearing" and Setting a New 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, Prosecutor
 James Stewart, Deputy Prosecutor

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**
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**The Office of Public Counsel for the
 Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**
 Fiona McKay

Others

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court” or the “ICC”)¹ issues this decision on the “Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing” (the “Prosecutor’s Request” or the “Request”),² and sets a new 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”,³ along with a corresponding warrant of arrest for Bosco Ntaganda (“Mr. Ntaganda”),⁴ for his alleged responsibility for the war crimes of conscripting and 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 (the “DRC”) to the Chamber⁵ which, on 13 July 2012, issued its “Decision on the Prosecutor’s Application under Article 58”.⁶ 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 attacks against civilians, pillaging,

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

² ICC-01/04-02/06-65.

³ 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.

⁴ Pre-Trial Chamber I, “Warrant of Arrest – Corrigendum”, 7 March 2007, ICC-01/04-02/06-2-Corr-tENG-Red.

⁵ 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.

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; and public redacted version, 13 July 2012, ICC-01/04-02/06-36-Red.

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.⁷

3. 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 Court⁸ and decided to convene a hearing for his initial appearance on 26 March 2013.⁹ During the initial appearance, it was decided that “23 September 2013 is the date for the commencement of the confirmation hearing”.¹⁰

4. On 12 April 2013, the Single Judge established the regime for evidence disclosure in the present case¹¹ and subsequently, on 17 May 2013, issued the “Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties” (the “Calendar Decision”).¹²

5. On 24 May 2013, the Chamber was notified of the Prosecutor’s Request.¹³ In her final relief, the Prosecutor requested the Single Judge to:

- 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).¹⁴

6. On 24 May 2013, the Single Judge issued the “Decision Requesting Observations on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’” (the “24 May 2013 Decision”),¹⁵ in which she granted the first element of the

⁷ 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.

⁸ Pre-Trial Chamber II, ICC-01/04-02/06-41, p. 4.

⁹ Pre-Trial Chamber II, ICC-01/04-02/06-41, p. 5.

¹⁰ Pre-Trial Chamber II, Transcript of Hearing, 26 March 2013, ICC-01/04-02/06-T-2-ENG ET, p. 12, lines 2-3.

¹¹ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 12 April 2013, ICC-01/04-02/06-47.

¹² Pre-Trial Chamber II, ICC-01/04-02/06-64.

¹³ ICC-01/04-02/06-65.

¹⁴ ICC-01/04-02/06-65, para. 27.

¹⁵ Pre-Trial Chamber II, ICC-01/04-02/06-66.

Prosecutor's Request and decided, *inter alia*, to defer ruling on the remaining elements until "the Defence has either, filed its observations or waived the right of doing so within the deadline prescribed in the [...] decision".¹⁶

7. On 30 May 2013, the Defence filed its observations in which it requested the dismissal of the Prosecutor's Request (the "Defence's Observations" or "Observations").¹⁷

8. On 31 May 2013, the Chamber received the "Prosecution's Urgent Request to File a Reply", in which the Prosecutor requested leave to reply to the Defence's Observations (the "Urgent Request").¹⁸ According to the Prosecutor, being granted leave to reply will enable her to address "specific misconceptions in the Defence's submissions".¹⁹ These misconceptions relate to two main points raised in the Prosecutor's Request namely, the documents which require review and the nature of analysis of evidence pertaining to the preparation of a warrant of arrest *vis-à-vis* "ensuring disclosure of *all* materials that are either relevant to the preparation of the Defence or upon which the Prosecution may wish to rely".²⁰

9. On 4 June 2013, the Chamber granted, by way of an email, the Urgent Request to the effect that the Prosecutor should file her reply no later than Friday, 7 June 2013. The Chamber also suspended the 7 June 2013 deadline established in the Calendar Decision and all orders related thereto, until it has decided on the Prosecutor's Request. This decision was also notified to the Defence.

10. On 7 June 2013, the Chamber received the "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" deposed le 24 mai 2013*'" (the "Reply").²¹

¹⁶ Pre-Trial Chamber II, ICC-01/04-02/06-66, p. 5.

¹⁷ ICC-01/04-02/06-69-Conf; ICC-01/04-02/06-69-Conf-tENG; A public redacted French version was notified to the Chamber on 31 May 2013, see ICC-01/04-02/06-69-Red.

¹⁸ ICC-01/04-02/06-70.

¹⁹ ICC-01/04-02/06-70, para. 10.

²⁰ ICC-01/04-02/06-70, paras 10-12.

²¹ ICC-01/04-02/06-71.

II. APPLICABLE LAW

11. The Single Judge notes articles 21(1)(a) and (3), 61(1) and 67 of the Statute, and rules 76(3) and 121(7) of the Rules of Procedure and Evidence (the "Rules").

III. DETERMINATION BY THE SINGLE JUDGE

12. The Single Judge recalls that in the 24 May 2013 Decision she deferred ruling on two elements of the Prosecutor's Request namely, (1) to suspend the deadlines set out in the Calendar Decision and (2) to postpone the confirmation hearing until mid-February 2014, until "the Defence has either, filed its observations or waived the right of doing so within the deadline prescribed in [the 24 May 2013 Decision]".²² Since the Chamber has received the Defence's Observations within the required deadline, the Single Judge shall rule on the two elements set out in the Prosecutor's Request in the present decision. The Single Judge shall first rule on the possibility of postponing the confirmation hearing and thereafter address the second part of the Request concerning the suspension of the deadlines established in the Calendar Decision.

13. With respect to the postponement of the date of the confirmation hearing, the Single Judge recalls that in its judgment of 30 May 2012, the Appeals Chamber stated that "where the Prosecutor requires more time to complete the investigation, rule 121(7) of the Rules of Procedure and Evidence permits [her] to seek a postponement of the confirmation of charges hearing".²³ Further, it is recalled that in the 24 May 2013 Decision the Single Judge stressed that "one of her main duties is to ensure that judicial proceedings are conducted in a fair and expeditious manner taking into consideration the competing interests at stake".²⁴ These are the guiding considerations on the basis of which the Single Judge shall rule on the Prosecutor's Request.

²² Pre-Trial Chamber II, ICC-01/04-02/06-66, p. 5.

²³ Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514, para. 44.

²⁴ Pre-Trial Chamber II, "Decision Requesting Observations on the 'Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing'", 24 May 2013, ICC-01/04-02/06-66, para. 9.

14. In this context, the Single Judge notes that in her Request, the Prosecutor raises a number of concerns related to the state of the investigation and the evidence. According to the Prosecutor, the current case has been dormant for “several years”, and it is “inevitable” that the period between the issuance of the first warrant of arrest (7 March 2007) and the second warrant of arrest (13 July 2012) “will have an effect on the state of the investigation and evidence”.²⁵ Thus, the date set by the Chamber for the commencement of the confirmation hearing is unfeasible, especially in view of the different tasks and duties required to be carried out by her Office during this short interval.²⁶

15. In support of the Request, the Prosecutor develops a number of arguments related to the duties or obligations to be carried out by her Office in the course of the pre-trial proceedings leading up to the confirmation of charges hearing.²⁷ In so doing, the Prosecutor places particular emphasis on the specificities and circumstances of the present case as mentioned in the preceding paragraph.

16. The Single Judge will not rehearse these arguments in detail as developed by the Prosecutor. It is sufficient to summarize the Prosecutor’s arguments concerning her duties or tasks in the following points: (a) the protection of witnesses and victims who were previously interviewed, locating them, obtaining their consent to disclose their statements and conducting security assessments in coordination with the Victims and Witnesses Unit for the purposes of redactions or requests for protective measures; (b) reviewing all relevant materials in the Prosecutor’s possession which amount to 9,602 documents for the purposes of disclosure of incriminating and exculpatory evidence and compliance with her obligations and in particular those falling under article 67(2) of the Statute and rule 77 of the Rules; (c) seeking consent from information providers to lift restrictions on 3,000 documents obtained under article 54(3)(e) of the Statute for the purposes of disclosure; (d) complying with the disclosure deadlines established by the Single Judge and preparing in-depth analysis charts to be presented with each

²⁵ ICC-01/04-02/06-65, para. 14.

²⁶ ICC-01/04-02/06-65, paras 1-2 and 15-23.

²⁷ ICC-01/04-02/06-65, paras 14-21.

disclosure, which is time-consuming; (e) investigating incriminating and exonerating circumstances, pursuant to article 54(1)(a) of the Statute; and (f) complying with her obligations under rule 76(3) of the Rules and providing Mr. Ntaganda with materials into Kinyarwanda, the language he fully understands and speaks. The same points were further clarified in the Prosecutor's Reply.

17. In the Observations, the Defence puts forward a number of arguments to rebut the Prosecutor's justifications as summarized above and seeks to dismiss the Prosecutor's Request.²⁸

18. The Single Judge has carefully studied the submissions of both parties, and being guided by the fact that proceedings should be conducted in a fair and expeditious manner bearing in mind the competing interests at stake and that the Prosecutor is entitled to seek a postponement if needed, she considers that in the circumstances of the present case the Prosecutor's Request is justified. This conclusion stands despite the Defence's counter arguments, which fail to convince the Single Judge to rule otherwise.

19. In this respect, the Single Judge recalls that in its Observations, the Defence argues that the "Prosecution cannot reasonably contend that [the suspect] has been at large since 2006",²⁹ because the "first warrant [of arrest against him] was issued under seal in 2006 and was not made public until April 2008".³⁰

20. The Single Judge does not see merit in this argument. The fact that a warrant of arrest was issued under seal and only became public in 2008 does not mean that the person's arrest has not been sought pursuant to said warrant since 2006. This only means that the existence of the warrant of arrest was not supposed to be known to the public and to any entity which was not concerned or called upon to execute the warrant of arrest. Thus, the person was *de facto* at large from the moment the warrant of arrest was subject to execution. Yet, even if the Defence's argument were correct,

²⁸ ICC-01/04-02/06-69-Conf-tENG.

²⁹ ICC-01/04-02/06-69-Conf-tENG, para. 19.

³⁰ ICC-01/04-02/06-69-Conf-tENG, para. 19.

the period from April 2008 until his initial appearance in March 2013 amounts to almost five years, which is still considered a lengthy period of time that might consequently result in the “dormancy” of the case.

21. With respect to the related argument put forward by the Defence that Mr. Ntaganda “had been a general in the national army of the Democratic Republic of the Congo (FARDC) since early 2009, and participated in that capacity in joint peacekeeping operations with MONUC/MONUSCO”,³¹ the Single Judge considers that the acknowledgment of such a role is irrelevant and does not deny the fact that there was a pending warrant of arrest against him since 2006, which was not executed for several years. The same holds true in relation to the Defence’s argument that Mr. Ntaganda never sought to “conceal his place of residence, which was [...] known to the Prosecution”.³²

22. The Defence also contends that the Prosecutor “cannot argue” that the case has been inactive for seven years “when barely a year ago, on 14 May 2012, [she] applied for a second warrant [of arrest against the suspect]”.³³

23. The Single Judge finds this argument misleading. As correctly noted by the Defence, the 14 May 2012 application was related to a “second warrant for Mr Ntaganda’s arrest”.³⁴ Hence, although the person subject to said warrant is Mr. Ntaganda, the counts on the basis of which the second warrant of arrest was issued are completely different than those mentioned in the first warrant of arrest issued on 22 August 2006. Thus, it cannot be said that the entire case was active. This is equally true with respect to the Defence’s argument that in a press conference dated 15 March 2012, the former Prosecutor revealed his intention to request a second warrant of arrest “following a review of the evidence in the record”.³⁵ One should note that reviewing evidence in the record of a case for the purpose of requesting a second

³¹ ICC-01/04-02/06-69-Conf-tENG, para. 19.

³² ICC-01/04-02/06-69-Conf-tENG, para. 19.

³³ ICC-01/04-02/06-69-Conf-tENG, para. 20.

³⁴ ICC-01/04-02/06-69-Conf-tENG, para. 20.

³⁵ ICC-01/04-02/06-69-Conf-tENG, para. 21.

warrant of arrest is different from the review of evidence pertaining to counts contained in a warrant of arrest previously issued, as the focus of each review is certainly different.

24. The Defence further avers that the bulk of the evidence “underpinning both warrants [against Mr. Ntaganda] was also relevant in the *Lubanga* case, in which the evidence was presented” to the Trial Chamber and thereafter to the Appeals Chamber.³⁶

25. The Single Judge disagrees with this argument for two reasons. First, the *Lubanga* case involves a different accused who has played a particular role during the events, and accordingly, the evidence presented against him will most likely differ depending on the circumstances underlying the particular case. Second, it is obvious that the Prosecutor will have to present additional evidence with regard to facts contained in the second warrant of arrest issued against Mr. Ntaganda, as those facts were not part of the case against Thomas Lubanga Dyilo.

26. The abovementioned response to the arguments related to the overlap of evidence and facts also applies to the Defence’s assertion that the existence of five cases arising from the DRC situation is sufficient to prove that the Prosecutor “was compelled to conduct a regular review [of] the evidence pertaining to the situation”.³⁷ One has to distinguish between conducting an *overall review* of the evidence related to an entire situation and meticulously reviewing pieces of evidence for a specific case, involving a particular suspect, and with particular underlying circumstances. Thus, although it is true that the Prosecutor was supposed to have “reviewed” the evidence related to the DRC situation, the latter amounts to *different* cases against *different* suspect(s)/accused.

³⁶ ICC-01/04-02/06-69-Conf-tENG, para. 22.

³⁷ ICC-01/04-02/06-69-Conf-tENG, para. 23.

27. Moreover, referring to two decisions issued by the Chamber concerning the arrest of Mr. Ntaganda, the Defence argues that in view of said decisions the Prosecutor “cannot reasonably argue” that the suspect’s appearance was “improbable”.³⁸

28. The Single Judge does not share the Defence’s reasoning in this regard. Issuing one or more decisions related to the execution of the first warrant of arrest does not mean *per se* that the arrest was actually “probable” during the relevant period. This is so, especially that Pre-Trial Chamber I issued the first warrant of arrest in August 2006, which was pending for years. Further, even after the issuance of the decisions related to the execution of the first warrant of arrest and the issuance of the second warrant of arrest, Mr. Ntaganda was not surrendered to the seat of the Court but appeared before this Court following his voluntary surrender. It follows that it is hard to argue that Mr. Ntaganda’s arrest was probable after the lapse of all these years.

29. Turning to the next set of arguments put forward by the Defence in relation to the tasks to be carried out by the Prosecutor, the Defence asserts that the Prosecutor “misconceived [her] investigation and prosecution obligations”.³⁹ Relying on paragraph 21 of the Request and a decision issued by this Chamber in the case of the *Prosecutor v. Uhuru Muigai Kenyatta*,⁴⁰ the Defence argues that the Prosecutor “cannot limit [her]self to a superficial review of the evidence collected before applying for a warrant of arrest, but should at that time have carefully reviewed all evidence in [her] possession”.⁴¹ Moreover, referring to the jurisprudence of the Appeals Chamber, the Defence states that the Prosecutor’s investigation “should largely be completed prior to the confirmation hearing” in order to present “a reliable case record” at the confirmation hearing stage.⁴²

³⁸ ICC-01/04-02/06-69-Conf-tENG, paras 24 and 25.

³⁹ ICC-01/04-02/06-69-Conf-tENG, para. 29.

⁴⁰ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties”, 20 April 2011, ICC-01/09-02/11-64.

⁴¹ ICC-01/04-02/06-69-Conf-tENG, para. 30.

⁴² ICC-01/04-02/06-69-Conf-tENG, para. 31.

30. The Single Judge observes that the Defence is misrepresenting paragraph 21 of the Prosecutor's Request. A literal reading of said paragraph does not lead to the conclusion that the Prosecutor has been relying on a "superficial review of the evidence collected" prior to the application for a warrant of arrest. Rather, the Prosecutor explicitly states that she "has completed significant analysis and investigation into the charges [during this period]. Yet, [the] investigation is not complete at this stage".⁴³

31. In this regard, the Single Judge agrees with the essence of the Defence's argument that conducting "significant analysis and investigation" up until the confirmation hearing is not sufficient. As the Appeals Chamber as well as this Chamber have stated, the Prosecutor's investigation "should largely be completed by the stage of the confirmation hearing".⁴⁴ This, however, does not exclude the possibility that the Prosecutor may conduct further investigation thereafter in certain circumstances.⁴⁵ Besides, the Court's statutory documents do not oblige the Prosecutor to complete the *entirety* of her investigation at the beginning of the pre-trial proceedings. Thus, it cannot be concluded that the Prosecutor has "misconceived [her] investigation and prosecution obligations", if the investigation or the review of evidence was not completed at the *start* of the pre-trial proceedings.

32. As such, and bearing in mind the circumstances of the present case, in order for the Prosecutor to present a "reliable case record" at the confirmation hearing stage as requested by the Defence, it is pertinent that the Single Judge provides the Prosecutor with a reasonable extension of time to carry out her duties during the pre-trial phase up until the confirmation hearing rather than to make a finding on the Prosecutor's alleged failure to fulfil her investigative duties.

⁴³ ICC-01/04-02/06-65, para. 21.

⁴⁴ Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Pre-trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514, para. 44.

⁴⁵ Pre-Trial Chamber II, "Corrigendum to 'Decision on the Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'", 21 March 2013, ICC-01/09-02/11-700-Corr, para. 36.

33. The Defence also argues in the same vein that since the bulk of the evidence pertaining to the case has been in the Prosecutor's possession for many years, the investigation should have been "largely completed", and a thorough knowledge of the case record and regular review of the evidence should have been also finalized.⁴⁶ According to the Defence, the Prosecutor's justifications that the original investigation and prosecution teams have been reassigned to other cases and that she has ceased "all activity after the issuance of the second warrant of arrest" are untenable.⁴⁷ Citing a decision issued by Pre-Trial Chamber III in 2008 in the case of the *Prosecutor v. Jean Pierre Bemba Gombo*, the Defence argues that the internal organization of the Office of the Prosecutor "ha[s] a limited bearing on legal considerations and the efficient organization of the confirmation of the charges hearing".⁴⁸

34. The Single Judge agrees with the Defence that, in principle, the internal organization of the Office of the Prosecutor should be of limited consideration. Yet, to say that the internal organization of the "Prosecutor's office can only have a limited bearing on legal considerations" does not mean that this bears no effect whatsoever, as the Defence suggests. By contrast, it is a factor that should be considered among others when deciding the issue at stake, in light of the particularities and developments in the present case.

35. In this regard, the Single Judge reminds again the Defence of the time during which the suspect was at large. In those circumstances, the Single Judge cannot ignore the realities surrounding the operation of international judicial institutions, such as the ICC, in terms of the complexity of the judicial process and the instant challenges arising in the context of each relevant situation or case. A court such as the ICC facing a constantly growing number of situations and cases over the past years cannot but direct its efforts towards those cases where there is a compelling need for a prompt

⁴⁶ ICC-01/04-02/06-69-Conf-tENG, para. 32.

⁴⁷ ICC-01/04-02/06-69-Conf-tENG, paras 33-34.

⁴⁸ ICC-01/04-02/06-69-Conf-tENG, para. 35; citing Pre-Trial Chamber III, "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber's III decision on disclosure", 25 August 2008, ICC-01/05-01/08-75, para. 65.

action on the part of the relevant organ. Where the suspect is evading justice for many years, it is neither possible nor reasonable to impose on the Prosecutor a permanent stand-by availability of the teams for years, pending a hypothetical surrender or voluntary appearance of the suspect. Therefore, to make a finding that the Prosecutor failed to carry out her duties and manage a case like the one under consideration in few weeks' time, in view of the circumstances explained in her filing, would be unfair.

36. The Defence also argues that the Prosecutor has been in breach of her obligations with respect to documents obtained under article 54(3)(e) of the Statute concerning confidentiality agreements due to the fact that she has not stated the outcome of the steps taken to contact the information providers to amend the confidentiality status of 300 documents and due to the late initiation of this process.⁴⁹ According to the Defence, taking these steps only after five years, given the large volume of evidentiary material amounting to a total number of 3,000 documents, "is likely to cause Mr Ntaganda irreparable prejudice".⁵⁰

37. The Single Judge observes that in paragraphs 15-21 of her Reply to the Defence's Observations, the Prosecutor explains in detail the steady steps undertaken to comply with her obligations to obtain the consent of the information providers and lift the restrictions on the disclosure of these documents on a continuous basis and as soon as practicable. Moreover, the Defence fails to explain the reasons for its allegation that the suspect "is likely [to suffer] irreparable prejudice", given this early stage of the proceedings. Since the Defence is relying on a mere hypothesis of a potential prejudice which is not substantiated by any proof, the Single Judge cannot endorse this argument.

38. In paragraph 41 of the Defence's Observations, a complaint is made regarding the Prosecutor's alleged imprecision in providing details on "the number of witnesses to be contacted, the problems encountered and the number of victims concerned by the

⁴⁹ ICC-01/04-02/06-69-Conf-tENG, para. 36.

⁵⁰ ICC-01/04-02/06-69-Conf-tENG, paras 36-40.

communication with the Victims and Witnesses Unit”.⁵¹ In the Defence’s opinion the lack of imprecision cannot justify a “five-month postponement of the confirmation hearing”.⁵²

39. The Single Judge cannot agree with the Defence on this point. In paragraph 15 of the Request as well as in paragraphs 25-28 of the Reply, the Prosecutor explains in detail the difficulties faced by her Office in contacting some of the witnesses, conducting the necessary security assessment and applying for the appropriate protective measures.⁵³ According to the Prosecutor, the process of contacting witnesses and securing their protection “can only realistically be undertaken at the moment the suspect is detained and faces the prospect of trial and conviction”.⁵⁴ Further, admitting witnesses in the protection programme or the relocation programme with all of the practical implications, without a “concrete or immediate prospect of ever arresting the person”,⁵⁵ is in the opinion of the Prosecutor “extremely burdensome”⁵⁶ and in the view of the Single Judge unwarranted. Moreover, with respect to the imprecision as to the number of witnesses to be contacted, the Prosecutor has provided the Chamber with sufficient information at this stage. Accordingly, in the context of the present case, the Prosecutor’s arguments are justified.

40. The Defence also contends that “by reassigning team members to other cases and ceasing all collaboration with its intermediaries, the Prosecution has itself created a situation where it cannot undertake a periodical review of the necessary protective measures”.⁵⁷ In the Defence’s view, this alleged negligence on the part of the Prosecutor should not result in any “undue delay to the proceedings”.⁵⁸

⁵¹ ICC-01/04-02/06-69-Conf-tENG, para. 41.

⁵² ICC-01/04-02/06-69-Conf-tENG, para. 41.

⁵³ ICC-01/04-02/06-71, paras 25-28.

⁵⁴ ICC-01/04-02/06-71, para. 26.

⁵⁵ ICC-01/04-02/06-71, para. 26.

⁵⁶ ICC-01/04-02/06-71, para. 26.

⁵⁷ ICC-01/04-02/06-69-Conf-tENG, para. 43.

⁵⁸ ICC-01/04-02/06-69-Conf-tENG, para. 43.

41. It is true that the protection of witnesses is an on-going duty which should be in place at all relevant times. However, such a duty should be managed and adjusted to the circumstances underlying each particular case. As stated earlier in this decision, the Single Judge cannot disregard the continuous increase in the number of situations and cases before the Court. Some of these situations and cases are more active than others depending on, *inter alia*, whether or not suspects have been apprehended or appeared voluntarily. In these circumstances, there is a need to prioritise these active cases which require prompt action and to manage them with the staff available. Having this in mind, the Single Judge can neither conclude that the Prosecutor is negligent in carrying out her duties nor that the suspect's right to be tried without undue delay is violated.

42. The Defence also refers to the Prosecutor's complaint against the amount of time it takes to prepare an in-depth analysis chart of incriminating evidence with each disclosure.⁵⁹ According the Defence, the Prosecutor should have anticipated that the Chamber would require this chart based on previous practice.⁶⁰

43. The Single Judge finds logic in the Prosecutor's argument that she was not obliged to start preparing an in-depth analysis chart in the absence of any judicial instruction. The Single Judge also notes the Prosecutor's contention that an "analytical chart" was prepared in relation to 51 documents disclosed and in the form ordered on 12 April 2013.⁶¹ Thus, the issue at stake is whether the Prosecutor is in a position to comply and prepare these charts within the remaining time frame as of the issuance of the 12 April 2013 decision setting the regime of evidence disclosure. It is recalled that the in-depth analysis chart is an "auxiliary instrument" which aims at assisting to streamline the process of evidence disclosure, establish satisfactory conditions for the proper preparation of the Defence and prepare the substantive discussions during the

⁵⁹ ICC-01/04-02/06-69-Conf-tENG, paras 44-46.

⁶⁰ ICC-01/04-02/06-69-Conf-tENG, para. 45.

⁶¹ ICC-01/04-02/06-71, para. 30.

confirmation hearing.⁶² In view of the Prosecutor's justifications developed in paragraphs 29-32 of her Reply, and considering the Chamber's duty to ensure a proper and fair organisation of the proceedings, the Single Judge cannot but take this factor into consideration when deciding on the postponement of the confirmation hearing, thus allowing the Prosecutor to comply with the Chamber's orders.

44. In paragraphs 47-50 of its Observations, the Defence again alleges imprecision regarding the information provided by the Prosecutor in her Request with respect to the transcription of interviews under article 55(2) of the Statute.⁶³ According to the Defence, in light of the alleged vagueness and/or lack of imprecise information, the Prosecutor cannot rely on the argument regarding the transcription of interviews as a justification for the postponement of the confirmation hearing.⁶⁴

45. Having reviewed the information provided in paragraphs 33-34 of the Prosecutor's Reply, the Single Judge considers that said information is pertinent to the issue at stake. In particular, contrary to what the Defence asserts as to the Prosecutor's lack of precision, the Single Judge finds that the Prosecutor has furnished the Chamber with sufficient information as to the past interviews conducted under article 55(2) of the Statute which require transcription, as well as the interviews scheduled to take place in the near future and the precise dates for possible transcription. The Single Judge, being duty bound to ensure a proper and fair organisation of the proceedings, cannot but take this factor into consideration, including any expected delays, when deciding on the postponement of the confirmation hearing.

46. Turning to the issue of translation of witness statements into Kinyarwanda, the Defence opposes any delay to the start of the confirmation hearing on this account.⁶⁵ The Defence reiterates its "realistic and feasible approach",⁶⁶ already expressed during

⁶² Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 12 April 2013, ICC-01/04-02/06-47, para. 31.

⁶³ ICC-01/04-02/06-69-Conf-tENG, paras 47-50.

⁶⁴ ICC-01/04-02/06-69-Conf-tENG, para. 50.

⁶⁵ ICC-01/04-02/06-69-Conf-tENG, paras 53 and 56.

⁶⁶ ICC-01/04-02/06-69-Conf-tENG, para. 53.

the status conference held on 15 April 2013, and argues that by receiving the French version of the Prosecutor's witness statements it will be in a position "to identify those whose translation should take priority".⁶⁷

47. In light of the Defence's arguments and mindful of rule 76(3) of the Rules, the Single Judge considers that the Defence could still request the translation of at least a certain number of the twenty five witness statements during the pre-trial proceedings. This is more evident from reading paragraph 56 of the Defence's Observations, where the Defence informs the Chamber that it "made an urgent application to the Registrar for additional resources, *inter alia*, to enable it to hire a Kinyarwanda/French interpreter/translator for its team for the duration of the confirmation stage".⁶⁸ Given that translation into Kinyarwanda, in principle, takes more time than translation into the working languages of the Court, the Single Judge cannot ignore this factor in its determination on the issue at hand.

48. In light of the foregoing, and based on the circumstances of the present case, the Single Judge cannot conclude that the Prosecutor "has been seriously negligent in [her] statutory investigation and prosecution obligations",⁶⁹ and that a dismissal of the Request would be warranted. Accordingly, the Single Judge grants the first part of the Prosecutor's Request to the extent specified in the operative part of the present decision.

49. Given that granting the first part of the Prosecutor's Request relating to the postponement of the confirmation hearing has a direct impact on the deadlines established in the Calendar Decision, the Single Judge considers that the second part of the Request concerning the suspension of these deadlines should also be granted.

⁶⁷ ICC-01/04-02/06-69-Conf-tENG, para. 54.

⁶⁸ ICC-01/04-02/06-69-Conf-tENG, para. 56.

⁶⁹ ICC-01/04-02/06-69-Conf-tENG, para. 63.

The Registry, in charge of the victims' application process,⁷⁰ is requested to take note of the new calendar established in this decision and adjust its deadlines accordingly.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **decides** to postpone the initial date set for the commencement of the confirmation hearing;
- b) **decides** that the new date for the confirmation of charges hearing is **Monday, 10 February 2014**;
- c) **decides** to retain the principles established in the Calendar Decision and suspend *only* the remaining deadlines set out in that decision;
- d) **orders** the Prosecutor:
 - (i) to disclose to the Defence, **no later than Monday, 2 September 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;
 - (ii) to submit to the Chamber, **no later than Monday, 2 September 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;
 - (iii) 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;
 - (iv) to agree with the Defence on a location and time to permit the inspection, **no later than Monday, 2 September 2013**, of any material

⁷⁰ Pre-Trial Chamber II, "Decision Establishing Principles on the Victims' Application Process", 28 May 2013, ICC-01/04-02/06-67.

from the first batch, within the meaning of rule 77 of the Rules, which has been collected until 13 July 2012;

- (v) to disclose to the Defence, **no later than Friday, 1 November 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 1 November 2013, and which does not require redactions or other protective measures;
- (vi) to submit to the Chamber, **no later than Friday, 1 November 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 1 November 2013;
- (vii) 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;
- (viii) to agree with the Defence on a location and time to permit the inspection, **no later than Friday, 1 November 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 1 November 2013;
- (ix) 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;
- (x) 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;

(xi) 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, 10 January 2014.**

e) orders the Defence:

(i) 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, 24 January 2014;**

(ii) to submit justified proposals for redactions, if any, pursuant to rule 81 of the Rules, **no later than Wednesday, 8 January 2014;**

(iii) 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, 20 January 2014;**

(iv) 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

(v) 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.

f) decides that the Defence:

(i) should submit, **no later than Tuesday, 17 September 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;

(ii) 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;

(iii) should submit, **no later than Friday, 15 November 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;

(iv) 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 Monday, 17 June 2013

At The Hague, The Netherlands

No. ICC-01/04-02/06

22/22

17 June 2013