

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 27 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

**Decision Regarding the Non-Disclosure of 116 Documents Collected
Pursuant to Article 54(3)(e) of the Rome Statute**

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
 Dmytro Suprun

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

Registrar
 Herman von Hebel

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 (the “Court”),¹ hereby issues this decision regarding the non-disclosure of 116 documents collected pursuant to article 54(3)(e) of the Rome Statute (the “Statute”).

I. Procedural History

1. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”.²
2. On 17 May 2013, the Single Judge issued the “Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties”.³
3. 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”,⁴ in which the Single Judge, *inter alia*, postponed the commencement of the confirmation of charges hearing until Monday, 10 February 2014 and established a new calendar for the disclosure of evidence between the parties.
4. On 10 January 2014, the Single Judge received the “Prosecution’s Information of the Status of Disclosure” (the “Prosecutor’s Information” or “Information”), in which the Prosecutor informed “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”.⁵ 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

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

² Pre-Trial Chamber II, ICC-01/04-02/06-47.

³ Pre-Trial Chamber II, ICC-01/04-02/06-64.

⁴ Pre-Trial Chamber II, ICC-01/04-02/06-73.

⁵ ICC-01/04-02/06-201, para. 1.

“ha[d] disclosed to the Defence items of evidence that contain analogous information to the information contained in the restricted items”.⁶

5. On 14 January 2014, the Defence filed the “Réponse de la Défense de M. Bosco Ntaganda à la ‘Prosecution’s Information on the Status of Disclosure’ transmise le 9 janvier 2014” (the “Defence’s Response”).⁷ The Defence indicated, *inter alia*, that it does not have any information concerning the nature of the documents in question. According to the Defence, it is essential that these documents be submitted to the Chamber so that it may be informed of the nature of the information communicated in order to determine whether or not the solution proposed by the Prosecutor is appropriate.⁸

6. 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

7. On 17 January 2014, the Prosecutor filed the “Prosecution’s Response to the ‘Réponse de la Défense de M. Bosco Ntaganda à la ‘Prosecution’s Information of the Status of Disclosure’ transmise le 9 janvier 2014’ (ICC-01/04-02/06-208)” (the “Prosecutor’s Response” or the “Response”).¹¹ In the Response, the Prosecutor noted, *inter alia*, that she “inadvertently omitted to include one additional item that contains information falling within the meaning of Rule 77 that was collected under article 54(3)(e)” and “accordingly the number of documents has been raised from 115 to

⁶ ICC-01/04-02/06-201, paras 6-7.

⁷ ICC-01/04-02/06-208.

⁸ ICC-01/04-02/06-208, paras 13-14.

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

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

¹¹ ICC-01/04-02/06-216, with “Confidential *ex parte*, Prosecution Only Annex A” and “Confidential *ex parte*, Prosecution Only Annexes 1-116”.

116".¹² In addition, the Prosecutor attached "as 'Confidential, *ex parte* - Prosecution Only Annex A' a chart listing 116 items collected under article 54(3)(e) for which [...] [she] has not yet received a response on the lifting of restrictions and detailing alternate items of disclosed evidence that contain analogous information".¹³

8. On 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 on Monday, 27 January 2014, at 14.30hrs to discuss issues as specified in said decision (the "Status Conference").¹⁴

II. Applicable Law

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

III. Introductory Remarks

10. 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. The Single Judge considers that the references made in the present decision are required by the principle of publicity and judicial reasoning. These references have been kept to a minimum and are made without endangering the interests concerned.

11. The Single Judge notes that, in addition to the matter of the analogous information to the 116 documents, the Defence Response raises further issues with regard to the disclosure of documents collected under Article 54(3)(e) of the Statute,¹⁵

¹² ICC-01/04-02/06-216, para. 10.

¹³ ICC-01/04-02/06-216, para. 9.

¹⁴ Trial Chamber II, ICC-01/04-02/06-225, p. 6.

¹⁵ ICC-01/04-02/06-208, paras 6-11.

the communication of documents to the Defence under rule 77 of the Rules¹⁶ and the disclosure of documents falling under article 67(2) of the Statute.¹⁷ The Single Judge considers it essential to first discuss, *inter alia*, “the issues raised in these documents submitted to the Chamber” at the Status Conference.¹⁸ Consequently, the Single Judge decides to confine the present decision to the 116 documents and to defer her ruling on the additional issues affecting the disclosure process until supplementary observations have been presented by the Prosecutor and the Defence at the Status Conference.

IV. Determination by the Single Judge

12. In the Information, the Prosecutor asserts that she has disclosed to the Defence materials which include analogous information to the original documents so as to ensure that the rights of the Defence are not compromised.

13. In this regard, the Single Judge notes that the term “analogous” is defined as “comparable in certain respects”.¹⁹

14. The Single Judge has assessed whether the information contained in each of the 116 items is sufficiently reflected in the alleged analogous information so as to allow the Defence to exercise its rights under articles 61(6) and 67 of the Statute, in particular with respect to the elements of the crimes and the modes of liability contained in the Prosecutor’s “Document Containing the Charges” (the “DCC”),²⁰ as well as the credibility of certain witnesses on which the Prosecutor seeks to rely for the confirmation of charges hearing. Accordingly, the Single Judge has considered whether the proposed counter-balancing measure of providing analogous

¹⁶ ICC-01/04-02/06-208, paras 16-20.

¹⁷ ICC-01/04-02/06-208, paras 21-25.

¹⁸ Trial Chamber II, “Decision Convening a Status Conference on Disclosure Issues and on the Organisation of the Confirmation Hearing”, 24 January 2014, ICC-01/04-02/06-225, para. 11.

¹⁹ “Concise Oxford English Dictionary”, Eleventh Edition, Oxford University Press (2004), p. 46.

²⁰ ICC-01/04-02/06-203-AnxA.

information can “ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information”.²¹

15. The Single Judge notes that the Prosecutor has detailed analogous information to 115 documents out of the 116 documents.

16. In relation to these 115 documents, the Single Judge finds that the analogous information referred to by the Prosecutor either originates from the same source or a source that is similarly situated. For instance, the Single Judge notes that in respect of the documents relating to the involvement of Uganda and Rwanda in the conflict in the Democratic Republic of the Congo (the “DRC”), which emanate mainly from the United Nations (the “UN”),²² UN documents of a comparable nature have already been disclosed to the Defence.²³ Similarly, by way of example, UN documents suggesting that the *Union des Patriotes Congolais* (the “UPC”)/*Force Patriotique pour la Libération du Congo* (the “FPLC”) had an internal disciplinary mechanism²⁴ are, *inter alia*, matched by equivalent documents that also originate from the UN or from the UPC/FPLC directly in the alternative evidence.²⁵ In addition, the alternative evidence also refers to witness statements or witness testimony provided in the context of proceedings before the Court, which provide additional information that is analogous to the contents of certain documents.²⁶

17. In addition, the Single Judge considers that the analogous information is nearly identical in respect of certain documents. For example, a UN document containing a

²¹ 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.

²² ICC-01/04-02/06-216-Conf-Exp-Anx1 - ICC-01/04-02/06-216-Conf-Exp-Anx24.

²³ ICC-01/04-02/06-216-Conf-Exp-AnxA, p. 2-6.

²⁴ ICC-01/04-02/06-216-Conf-Exp-Anx46 - ICC-01/04-02/06-216-Conf-Exp-Anx53.

²⁵ ICC-01/04-02/06-216-Conf-Exp-AnxA, p. 9.

²⁶ For instance, ICC-01/04-02/06-216-Conf-Exp-AnxA, p. 1-2, p. 9, p. 10.

specific piece of information concerning a witness²⁷ is to be found identically in a statement provided by this witness.²⁸ Similarly, in relation to certain documents concerning alleged crimes by Lendu forces,²⁹ the alternative evidence contains documents replicating the exact same events.³⁰ Furthermore, where the particulars of the two sets of documents do not overlap in full, the alternative evidence has been found to pertain to the same general category of information contained in these 115 documents. Therefore, these documents provide a sufficient basis for the Defence to exercise its rights. For instance, documents suggesting that the UPC/FPLC had peaceful intentions or a cooperative stance,³¹ or documents concerning the presence of child soldiers in UPC camps,³² are generally reflected in the alternative evidence although not all particulars are contained therein.³³

18. Furthermore, the Single Judge notes that, in several instances, multiple items of alternative evidence have been provided by the Prosecutor. For instance, in relation to two documents concerning the presence of child soldiers in UPC camps,³⁴ four UN documents, two witness statements and an additional item of alternative evidence have been provided.³⁵ Comparably, 21 documents suggesting that the UPC/FPLC had peaceful intentions or a cooperative stance are matched by 13 documents emanating from or involving the UPC/FPLC, nine UN documents, seven press articles and one witness transcript in the alternative evidence.

19. In light of the limited scope of the confirmation of charges hearing, which concerns a determination of “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes

²⁷ ICC-01/04-02/06-216-Conf-Exp-Anx98.

²⁸ ICC-01/04-02/06-216-Conf-Exp-AnxA, p. 18.

²⁹ For instance, ICC-01/04-02/06-216-Conf-Exp-Anx76, ICC-01/04-02/06-216-Conf-Exp-Anx84, ICC-01/04-02/06-216-Conf-Exp-Anx85 and ICC-01/04-02/06-216-Conf-Exp-Anx86.

³⁰ ICC-01/04-02/06-216-Conf-Exp-AnxA, p. 13-15.

³¹ ICC-01/04-02/06-216-Conf-Exp-Anx25 - ICC-01/04-02/06-216-Conf-Exp-Anx45.

³² ICC-01/04-02/06-216-Conf-Exp-Anx58, ICC-01/04-02/06-216-Conf-Exp-Anx59.

³³ ICC-01/04-02/06-216-Conf-Exp-AnxA, p. 6-10.

³⁴ ICC-01/04-02/06-216-Conf-Exp-Anx58 - ICC-01/04-02/06-216-Conf-Exp-Anx59.

³⁵ ICC-01/04-02/06-216-Conf-Exp-AnxA, p. 10.

charged”, the Single Judge is of the view that the similar nature, the comparable sources and the volume of the analogous information allows the Defence to exercise its rights in relation to the subject-matter of these documents for the purposes of this hearing. Consequently, the Single Judge deems that the provision of the analogous information constitutes an appropriate counter-balancing measure in relation to the non-disclosure of the 115 documents collected under article 54(3)(e) of the Statute.

20. The Single Judge has also taken note of the Prosecutor’s submission that no analogous information has been provided in respect of one document out of the 116 documents as the document in question does not have “relevant content”.³⁶

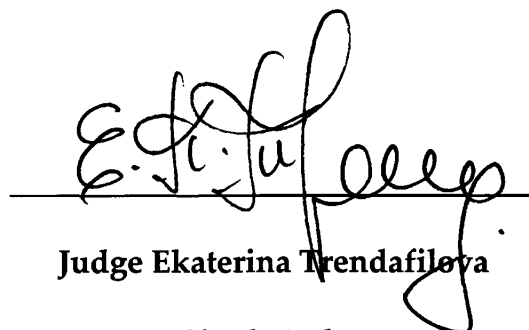
21. Upon careful evaluation of this document and its relevance to the proceedings, the Single Judge considers that the absence of analogous information does not cause prejudice to the Defence. The Single Judge considers that the contents of the document in question do not have a direct bearing on the elements of the crimes and the modes of liability contained in the DCC or the credibility of the witnesses on which the Prosecutor seeks to rely. However, the Single Judge emphasises that this finding does not preclude a re-evaluation should the evolving nature of the proceedings reveal a need for counter-balancing measures in respect of the non-disclosure of this document.

³⁶ ICC-01/04-02/06-216-Conf-Exp-AnxA, p. 20.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- (a) decides** that the non-disclosure of the 116 documents does not cause prejudice to the rights of the Defence for the purposes of the confirmation of charges hearing;
- (b) orders** the Prosecutor to disclose the 116 documents to the Defence as soon as consent has been obtained from the information providers pursuant to article 54(3)(e) of the Statute; and
- (c) orders** the Prosecutor to submit a report every two weeks on the status of the documents obtained under article 54(3)(e) of the Statute that are to be disclosed to the Defence, including the 116 documents, indicating the estimate time for lifting the restrictions and their final disclosure to the Defence.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Monday, 27 January 2014

At The Hague, The Netherlands