



Original: **English**

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

Date: **22 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* OPCV and OTP only Annex**

**Joint Request of the Common Legal Representatives to access documents in the  
*Bosco Ntaganda* case record**

**Source: Office of Public Counsel for Victims**

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

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**Detention Section**

**Victims Participation and Reparations  
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**Other**

## I. PROCEDURAL BACKGROUND

1. On 22 August 2006, Pre-Trial Chamber I, which the present case had originally been assigned to, issued the “Decision on the Prosecution Application for a Warrant of Arrest”,<sup>1</sup> along with a corresponding warrant of arrest for Mr Bosco Ntaganda.<sup>2</sup>
2. On 15 March 2012, the Presidency re-assigned the situation in the Democratic Republic of the Congo to Pre-Trial Chamber II.<sup>3</sup>
3. On 13 July 2012, Pre-Trial Chamber II (the “Chamber”) issued the “Decision on the Prosecutor’s Application under Article 58”,<sup>4</sup> issuing a second warrant of arrest against Mr Bosco Ntaganda.
4. On 28 May 2013, the Single Judge of the Chamber (the “Single Judge”) issued the “Decision Establishing Principles on the Victims’ Application Process”<sup>5</sup> in which she established, *inter alia*, a victims’ application process and ordered the Registry to consult with applicants in relation to their preference for legal representation and to start identifying appropriate assistant to counsel with the involvement or in consultation with the Office of Public Counsel for Victims (the “OPCV” or the “Office”).<sup>6</sup>

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<sup>1</sup> See the “Decision on the Prosecution Application for a Warrant of Arrest” (Pre-Trial Chamber I), No. ICC-01/04-02/06-1-US-Exp-tEN, 22 August 2006; a redacted version was filed in the record of the case on 6 March 2007 and the decision was made public on 1<sup>st</sup> October 2010, No. ICC-01/04-02/06-1-Red-tENG.

<sup>2</sup> See the “Warrant of Arrest”, No. ICC-01/04-02/06-2-Anx-tENG, 22 August 2006; a corrigendum was filed into the record of the case on 7 March 2007, No. ICC-01/04-02/06-2-Corr-tENG-Red.

<sup>3</sup> See the “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” (Presidency), No. ICC-01/04-02/06-32, 15 March 2012.

<sup>4</sup> See the “Decision on the Prosecutor’s Application under Article 58” (Pre-Trial Chamber II), No. ICC-01/04-02/06-36-Conf-Exp, 13 July 2012; and public redacted version No. ICC-01/04-02/06-36-Red.

<sup>5</sup> See the “Decision Establishing Principles on the Victims’ Application Process” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-67, 28 May 2013.

<sup>6</sup> *Idem*, p. 22.

5. On 2 December 2013, the Single Judge issued the “Decision Concerning the Organisation of the Common Legal Representation of Victims”,<sup>7</sup> appointing two counsel from the Office as common legal representatives of the two groups of victims identified in the “Decision Requesting the VPRS and the OPCV to take steps with regard to the legal representation of victims in the confirmation of charges hearing and in the related proceedings” (the “Common Legal Representatives”).<sup>8</sup>

6. On 15 January 2014, the Single Judge issued the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (the “15 January 2014 Decision”),<sup>9</sup> admitting the victims applicants listed in annex C thereof as victims in the confirmation of charges hearing and in the related proceedings.<sup>10</sup> The Single Judge also established the participatory rights of victims in said proceedings<sup>11</sup> specifying *inter alia* that “[i]n respect of those decisions, filings and evidence that are classified as ‘confidential’, the Chamber will retain the option to decide on a case-by-case basis, either upon motivated request by the common legal representatives or proprio motu, whether or not to grant access to these documents”.<sup>12</sup>

7. The Common Legal Representatives respectfully request the Single Judge to treat this request on an urgent basis considering the fact that the confirmation of the charges hearing is scheduled to start on 10 February 2014.

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<sup>7</sup> See the “Decision Concerning the Organisation of the Common Legal Representation of Victims” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-160, 2 December 2013.

<sup>8</sup> *Idem*, paras. 10, 23 and 25. See also the “Decision Requesting the VPRS and the OPCV to take steps with regard to the legal representation of victims in the confirmation of charges hearing and in the related proceedings” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-150, 20 November 2014.

<sup>9</sup> See the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-211, 15 January 2014.

<sup>10</sup> See the “Annex C to the Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-211-AnxC, 15 January 2014.

<sup>11</sup> See the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, *supra* note 9, section IX, paras. 81-96.

<sup>12</sup> *Idem*, para. 90.

## II. REQUEST FOR ACCESS TO SPECIFIC DOCUMENTS

8. The Common Legal Representatives submit that in order to fulfill their mandate and to be able to adequately protect the rights and interests of the victims they represent, it is necessary that access to certain documents be granted to them.

9. Due to the fact that the Common Legal Representatives have had, to date, no access to the index of the record of the case, they are not in a position to identify all documents which may be of interest for the fulfillment of their mandate on behalf of the victims who have been admitted to participate in the confirmation of charges hearing and in the related proceedings.<sup>13</sup> Moreover, the Common Legal Representatives submit that access to certain confidential and/or under seal documents and/or materials relating to the warrants of arrest and/or to the security and protection of their clients may have an impact on the personal interests of the victims they represent and therefore be relevant to protect their rights.

10. Consequently, the Common Legal Representatives respectfully request the Single Judge to grant them access to the full index of the record of the case and to reserve their the right to submit requests in accordance with the 15 January 2014 Decision for communication of documents and/or materials in the record of the case after they have had the opportunity to examine said index, if they consider access to specific documents and/or materials necessary for the fulfilment of their mandate on behalf of the victims.

11. Despite the fact that the full index of the case record is not available to the Common Legal Representatives, they – through the reading of public documents – have been able to identify some documents which are important for the fulfilment of

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<sup>13</sup> See the “Annex C to the Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, *supra* note 10.

their mandate as legal representatives of the participating victims in the *Bosco Ntaganda* case.

**A. Request for notification of all materials dealing with dual status individuals**

12. As a general rule, Chambers have recognised that legal representatives have a right to receive copy of any document and/or material related to the dual status individuals they represent, including the ones in the possession of and/or under the control of the Prosecution.<sup>14</sup> In particular, the Common Legal Representatives note that access to information related to the security and well-being of dual status individuals is crucial in order to be fully acquainted with issues which may affect the security of said persons.

13. In her “Prosecution’s provision of information related to DRC-OTP-P-0758 and request to redact information in three victim applications”,<sup>15</sup> the Prosecutor informed the Chamber that victims applicants a/01308/13, a/00090/13 and a/00436/13 are respectively Prosecution Witnesses P-0010, P-0113 and P-0805, respectively.<sup>16</sup> Victim a/01308/13 has been authorised to participate in the confirmation of charges hearing and the related proceedings and is represented within Group 1;<sup>17</sup> whereas

<sup>14</sup> See *inter alia* the “Decision on victims’ participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, para. 111; the “Decision on the legal representative’s request for clarification of the Trial Chamber’s 18 January 2008 ‘Decision on victims’ participation’” (Trial Chamber I), No. ICC-01/04-01/06-1368, paras. 27-35; the “Decision on certain practicalities regarding individuals who have the dual status of witness and victim” (Trial Chamber I), No. ICC-01/04-01/06-1379, 5 June 2008, paras. 52-78 and the “Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings” (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 12 July 2010, paras. 50-54.

<sup>15</sup> See the “Prosecution’s provision of information related to DRC-OTP-P-0758 and request to redact information in three victim applications”, No. ICC-01/04-02/06-199-Conf-Exp, 9 January 2014, referred to by the Single Judge in her “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, *supra* note 9, paras. 12 and 70-75.

<sup>16</sup> See the “Prosecution’s provision of information related to DRC-OTP-P-0758 and request to redact information in three victim applications”, *supra* note 15, paras. 8, 11 and 14 and “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, *supra* note 9, para. 70.

<sup>17</sup> See the “Annex C to the Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, *supra* note 10.

victims a/00090/13 and a/00436/13 have been admitted to participate in the confirmation of charges hearing and the related proceedings and are represented within Group 2.<sup>18</sup>

14. At present, the Common Legal Representatives are only privy to the applications for participation of their respective clients and, in accordance with the very narrow interpretation given by the Prosecution to the 15 January 2014 Decision,<sup>19</sup> gained access to the public evidence contained in the Prosecution's list of evidence on 21 January 2014.

15. However, from reading public filings it seems clear that several documents exist with regard to these dual status individuals, whether emanating directly from the Prosecution or else, that should be notified to their respective legal representatives. These include, but are not limited to:

- Observations of the Victims and Witnesses Unit on the security situation of the relevant victims/witnesses;<sup>20</sup>
- Any request for redactions concerning these dual status individuals and relevant annexes currently unknown to the Common Legal Representatives, including the relevant annexes of the "Prosecution's

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<sup>18</sup> *Idem*.

<sup>19</sup> See the "Prosecution's Communication of the Disclosure of Evidence and Submission of a Consolidated In-depth Analysis Chart of Incriminating Evidence", No. ICC-01/04-02/06-217, 20 January 2014 (dated 17 January 2014), para. 8.

<sup>20</sup> See the "Decision on the Reclassification of Documents" (Single Judge, Pre-Trial Chamber II), No. ICC-01/04-02/06-212-Conf-Exp, 16 January 2014, para. 18 and especially footnote 20 referring to the following documents: ICC-01/04-02/06-59-Conf-Exp; ICC-01/04-02/06-81-Conf-Exp; ICC-01/04-02/06-93-Conf-Exp; ICC-01/04-02/06-98-Conf-Exp; ICC-01/04-02/06-101-Conf-Exp; ICC-01/04-02/06-104-Conf-Exp; ICC-01/04-02/06-124-Conf-Exp; ICC-01/04-02/06-126-Conf-Exp; ICC-01/04-02/06-130-Conf-Exp; ICC-01/04-02/06-131-Conf-Exp; ICC-01/04-02/06-134-Conf-Exp; ICC-01/04-02/06-136-Conf-Exp; ICC-01/04-02/06-138-Conf-Exp; ICC-01/04-02/06-139-Conf-Exp; ICC-01/04-02/06-142-Conf-Exp; ICC-01/04-02/06-149-Conf-Exp; and ICC-01/04-02/06-153-Conf-Exp.

provision of information related to DRC-OTP-P-0758 and request to redact information in three victim applications”;<sup>21</sup> and

- Their statements and more generally any documents listed in the Prosecution’s list of evidence and/or any document/material in the possession of and/or under the control of the Prosecution which may relate to the Common Legal Representatives’ clients but that the latter cannot identify due to the very general nature of said list.<sup>22</sup>

### **B. Request for notification of other documents**

16. The Common Legal Representatives also contend that in order to effectively represent the interests of their clients at the confirmation of charges hearing to be held in less than 3 weeks, and in order to give effect to the rights accorded to victims under Article 68(3) of the Rome Statute, they shall be notified of a certain number of other documents.

17. The Common Legal Representatives observe that, in accordance with “internationally recognized human rights”,<sup>23</sup> the requirements of a “fair trial” mean, *inter alia*, that “each party must be afforded a reasonable opportunity to present his case [...] under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”<sup>24</sup> and that, moreover, the right to a “fair trial” means that each participant must have “the opportunity not only to make known any evidence needed for his claims to

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<sup>21</sup> See the “Prosecution’s provision of information related to DRC-OTP-P-0758 and request to redact information in three victim applications”, *supra* note 15.

<sup>22</sup> See Annex B attached to the “Prosecution’s submission of document containing the charges and the list of evidence”, No. ICC-01/04-02/06-203-AnxB, 10 January 2014.

<sup>23</sup> In this regard, see “Judgment on the Prosecutor’s Application for extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168, 13 July 2006, para. 11.

<sup>24</sup> See ECHR, *Dombo Beheer B.V. v. The Netherlands*, Application No. 14448/88, Judgment of 27 October 1993, para. 33.

*succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision".<sup>25</sup>*

18. In this regard, the Common Legal Representatives recall principle 21 of the Basic Principles on the Role of Lawyers, pursuant to which:

*"[i]t is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time".<sup>26</sup>*

19. In light of the principles of the aforementioned "internationally recognized human rights", the Common Legal Representatives submit that they should be granted access to a certain number of documents currently classified as confidential in the record of the case. They would otherwise be deprived of the possibility of representing the interests of their clients effectively and appropriately at the confirmation of charges hearing.<sup>27</sup>

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<sup>25</sup> See ECHR, *Mantovanelli v. France*, Application No. 21497/93, Judgment of 18 March 1997, para. 33; *Nideröst-Huber v. Switzerland*, Application No. 18990/91, Judgment of 18 February 1997, para. 24; *Lobo Machado v. Portugal*, Application No. 15764/89, Judgment of 20 February 1996, para. 31; *Vermeulen v. Belgium*, Application No. 19075/91, Judgment of 20 February 1996, para. 33; *Ruiz-Mateos v. Spain*, Application No. 12952/87, Judgment of 12 September 1993, para. 63.

<sup>26</sup> See the "Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990". This document is available on the website of the UN High Commissioner for Human Rights at the following address: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.

<sup>27</sup> In this sense see the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, para. 151: *"the Single Judge notes that in the Lubanga Case, as well as in the present case, the bulk of the evidence filed by the Prosecution and the Defence in the record of the respective cases has been classified as confidential. Therefore, if victims were to be denied access to confidential filings, they would essentially be prevented from effectively participating in the evidentiary debate held at the confirmation hearing"*.

## 1. Notification of the consolidated In-depth Analysis Chart and Prosecution List of Evidence

20. The Common Legal Representatives respectfully request the Single Judge to order notification of the consolidated In-depth Analysis Chart as filed by the Prosecution on 17 January 2014.<sup>28</sup>

21. Indeed, the public document containing the charges as notified on 10 January 2014, even when read in conjunction with its Annex B,<sup>29</sup> does not provide any information as to the evidence to be used in support of the Prosecution's arguments, whether public or otherwise since it does not contain any reference to the material to be relied upon by the Prosecution for the purposes of the confirmation of charges hearing.<sup>30</sup>

22. The Common Legal Representatives are mindful of the fact that the reasoning underlying the obligation imposed on the Prosecutor to provide an in-depth analysis chart of incriminating evidence provided for in the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" issued by the Single Judge on 12 April 2013 was to *"establish [...] satisfactory conditions for the proper preparation of the Defence"*,<sup>31</sup> specifying that *"th[e] 'law-driven' organization of the chart mirrors the way in which the confirmation hearing before this Chamber will unfold"*.<sup>32</sup>

23. However, the Common Legal Representatives contend that the victims need to be sufficiently prepared for the confirmation of charges hearing and hence be

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<sup>28</sup> See Annex C attached to the "Prosecution's Communication of the Disclosure of Evidence and Submission of a Consolidated In-depth Analysis Chart of Incriminating Evidence", *supra* note 19. The document was notified on 20 January 2014.

<sup>29</sup> See the "Prosecution's submission of document containing the charges and the list of evidence", No. ICC-01/04-02/06-203, 10 January 2014.

<sup>30</sup> In this sense, see the "Requête urgente de la Défense aux fins d'ordonner au Procureur de se conformer aux Décisions de la Chambre ICC-01/04-02/06-47 et ICC-01/06-02/06-73", No. ICC-01/04-02/06-206, 14 January 2014 (dated 13 January 2014), para. 8.

<sup>31</sup> See the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (Single Judge, Pre-Trial Chamber II), No. ICC-01/04-02/06-47, 12 April 2013, para. 31.

<sup>32</sup> *Idem*.

privity to “the ways in which [it] will unfold”.<sup>33</sup> In this regard, they submit that in accordance with the jurisprudence of the Court as developed by Pre-Trial Chambers I and II, “the interests of victims are affected at [the stage of the confirmation of charges] since this is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspects are responsible for the crimes included in the Prosecution Charging Document”<sup>34</sup> and that “the issue of the guilt or innocence of the persons charged before this Court is not only relevant, but it also affects the core interests of those granted the procedural status of victim in any case before the Court, because this issue is closely linked to the satisfaction of their right to justice”.<sup>35</sup> Furthermore, “the personal interests of victims may be affected by the outcome of the Confirmation Hearing to the extent that it aims at either (i) confirming the charges against those responsible for perpetrating the crimes which caused them to suffer harm; or (ii) declining to confirm the charges for those not responsible for such crimes, so that the search for those who are criminally liable can continue”.<sup>36</sup>

24. From this perspective, the Common Legal Representatives note that Pre-Trial Chamber III in the *Bemba* case allowed access by the legal representatives of victims to any informal list of evidence eventually submitted by the Prosecution as a tool “contributing to the practical organisation of proceedings”.<sup>37</sup> Similarly, Trial Chamber III granted the legal representatives access to the redacted version of the Prosecution’s in-depth analysis chart in the context of the subsequent trial in the same case, “given

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<sup>33</sup> *Idem*.

<sup>34</sup> See the “Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, para. 45. See also the “Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation” (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-121, 6 February 2008, pp. 6, 8 and 9.

<sup>35</sup> See the “Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case”, *supra* note 34, paras. 31-44. See also the “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” (Pre-Trial Chamber II), No. 02/04-01/05-252, 10 August 2007, paras. 9 to 11.

<sup>36</sup> See the “Decision on 138 applications for victims’ participation in the proceedings” (Pre-Trial Chamber I), No. ICC-01/04-01/10-351, 11 August 2011, para. 23.

<sup>37</sup> See the “Sixth Decision on Victims’ Participation Relating to Certain Questions Raised by the Office of Public Counsel for Victims” (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-349, 8 January 2009, para. 8.

*the immediacy of the commencement of trial, and the need for victims to prepare for their participation therein*".<sup>38</sup> The Common Legal Representatives consider that this principle applies *mutatis mutandis* to the pre-trial stage of a case for the purpose of the confirmation of charges hearing.

25. Moreover, the Common Legal Representatives contend that they should be granted access to the Prosecution list of evidence as filed in the record of the case.<sup>39</sup>

26. The Single Judge already established the modalities of participation of the victims during the confirmation of charges hearing enumerating the procedural rights of victims authorised to participate. But she also specified that "[a]longside these specific rights conferred to the victims *ex lege*, other rights may be granted by the Chamber either upon specific request by the legal representative or *proprio motu*, in accordance with article 68(3) of the Statute".<sup>40</sup>

27. In this context, the Common Legal Representatives note that the Single Judge did not rule on the possibility to challenge the evidence and to question witnesses, if applicable. Consequently they will have a possibility to put requests before the Chamber demonstrating that such course of action is justified and that the issue(s) under consideration directly affects the personal interests of the victims they represent.

28. However, the possibility for the Common Legal Representatives to be able to do so is currently impaired by the absence of notification of the Prosecution list of

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<sup>38</sup> See the "Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings" (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 12 July 2010, para. 49.

<sup>39</sup> See Annex A attached to the "Prosecution's Communication of the Disclosure of Evidence and Submission of a Consolidated In-depth Analysis Chart of Incriminating Evidence", *supra* note 19.

<sup>40</sup> See the "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", *supra* note 9, para. 81. See also the "Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012, para. 47.

evidence. Indeed, absent this document, the Common Legal Representatives are not in a position to identify specific issues arising out of the confirmation of charges hearing which may affect the personal interests of the victims, so as to justify any request to the Chamber. In this regard, the Single Judge herself, together with the Prosecution, recognised the ambiguity of the situation of the Common Legal Representatives:

*“the legal representative of victims is prevented from identifying specific documents and material related to the issue at stake, since the list of evidence is confidential. If the list of evidence was always filed confidential, the victims’ legal representative would never be in a position – using the Prosecutor’s words – to ‘demonstrate that the material relates to issues specific to their interests’, even when the legal representative of victims has correctly identified an issue capable of affecting the victims’ rights.”<sup>41</sup>*

29. The Common Legal Representatives contend that access to the list of evidence on which the Prosecution will rely at the confirmation of charges hearing is a necessary prerequisite for them to be able to represent the interests of the participating victims. The Common Legal Representatives further argue that granting them access to the Prosecution list of evidence will just enable them to request access to documents related to the personal interests of their clients, if need be, and does not aim at obtaining indiscriminately all material listed thereon.

30. Finally, in the *Laurent Gbagbo* case, the OPCV acting as common legal representative had access to the Prosecution’s list of evidence and the Element-Based Chart. Indeed, the Single Judge endorsed an agreement between the Office and the Prosecution, specifying that:

*“[...] the security of witnesses in this case would not be prejudiced if the Document Containing the Charges were notified to the OPCV provided that the OPCV respects at all time their current level of confidentiality. Similarly and for the same reasons, the Single Judge does not foresee any risk that would arise from enabling the OPCV to*

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<sup>41</sup> See the “Second Decision on the ‘Request by the Victims’ Representative for access to confidential materials” (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-01/11-340, 23 September 2011.

also have access to the List of Evidence and the Element-Based Chart".<sup>42</sup>

## 2. Other documents relevant to the victims' personal interests which appear to be already in possession of the OPCV

31. In the *Lubanga* case, the Office was acting as legal representative of four dual status individuals and in accordance with Trial Chamber I's "Decision on victims' participation"<sup>43</sup> was notified of "*any material within the possession of the prosecution that are relevant to the personal interests of victims [...] and which have been identified with precision by the victims in writing*".<sup>44</sup> Indeed, the Trial Chamber established that "*as a matter of general principle, and in order to give effect to the rights accorded to victims under Article 68(3) of the Statute, the prosecution shall, upon request by the victims' legal representatives, provide individual victims who have been granted the right to participate with any materials within the possession of the prosecution and relevant to the personal interests of victims*"<sup>45</sup>. As a result, and upon request of the Office, the Prosecution disclosed numerous documents, amongst which a significant amount was eventually not even used at trial. The Common Legal Representatives have therefore already access to all the evidence used for the *Lubanga* trial.

32. Following the disclosure by the Prosecution of the public evidence on 21 January 2014,<sup>46</sup> the Office compared the list as compiled by the Prosecution in Annex B of the "Prosecution's submission of document containing the charges and the list of evidence"<sup>47</sup> with its own records. For the benefit of the Chamber, the Common Legal Representatives therefore attach a list demonstrating that numerous documents,

<sup>42</sup> See the "Decision on OPCV requests for access to confidential documents in the record of the case" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-166, 27 June 2012, para. 15.

<sup>43</sup> See the "Decision on victims' participation", *supra* note 14.

<sup>44</sup> *Idem*, para. 111. See also the "Decision on the legal representative's request for clarification of the Trial Chamber's 18 January 2008 'Decision on victims' participation'" (Trial Chamber I), No. ICC-01/04-01/06-1368, 2 June 2008, para. 34.

<sup>45</sup> See the "Decision on victim's participation", *supra* note 14, para. 111.

<sup>46</sup> See *supra* para. 14.

<sup>47</sup> See the "Prosecution's submission of document containing the charges and the list of evidence", *supra* note 29.

including confidential documents, have already being disclosed to the Office.<sup>48</sup> Incidentally, the Common Legal Representatives note that it seems that some documents, classified public in other cases pending before the Court and disclosed to the OPCV, have not been notified as part of the disclosure in the *Bosco Ntaganda* case.<sup>49</sup> By the same token, it seems that some documents although public by nature have not been disclosed to the Common Legal Representatives.<sup>50</sup>

33. To summarise, out of 2081 documents listed in Annex B of the “Prosecution’s submission of document containing the charges and the list of evidence”,<sup>51</sup> the Common Legal Representatives have access to 1028 documents of which only 208 were disclosed by the Prosecution on 21 January 2014.

34. The list compiled by the OPCV is filed as a Confidential *ex parte* only available to the OPCV and the OTP because it concerns previous disclosure between the two offices.

35. Therefore, the Common Legal Representatives respectfully request the Single Judge to order the Prosecution to confirm that all the confidential documents appearing as such in the attached Annex are documents and/or material which it intends to rely upon for the purposes of the confirmation of the charges hearing and previously used and notified to the OPCV in the *Lubanga* or in the *Katanga* cases. The Common Legal Representatives also respectfully request the Single Judge to order the Prosecution to verify the level of confidentiality assigned to the documents contained in Annex B of the “Prosecution’s submission of document containing the

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<sup>48</sup> See the “Annex: OPCV access to evidence mentioned in ICC-01/04-02/06-203-AnxB” (the “Annex”), annexed to the present request.

<sup>49</sup> See *inter alia* documents DRC-D01-0003-5896; DRC-D03-0001-0004; DRC-D03-0001-0086; DRC-OTP-0082-0016; DRC-OTP-0083-0002; DRC-OTP-0094-0251; DRC-OTP-0102-0003; DRC-OTP-0102-0009; DRC-OTP-0120-0295; DRC-OTP-0127-0058; DRC-OTP-0127-0059; DRC-OTP-0127-0061; DRC-OTP-0127-0065; DRC-OTP-0127-0148; DRC-OTP-0160-0479; DRC-OTP-1008-0008.

<sup>50</sup> See *inter alia* DRC-OTP-0037-0457 and DRC-OTP-0077-0500 which have been identified by the Prosecution as “Media / Press article” in Annex B, ICC-01/04-02/06-203-AnxB.

<sup>51</sup> See the “Prosecution’s submission of document containing the charges and the list of evidence”, *supra* note 29.

charges and the list of evidence and to disclose to the Common Legal Representatives all the public documents not previously disclosed on 21 January 2014.

## **FOR THE FOREGOING REASONS**

The Common Legal Representatives respectfully request the Single Judge

- a) to grant the Common Legal Representatives full access to the index of the record of the case and consequently to order the Registry to provide them with a copy of the said index;
- b) to reserve the Common Legal Representatives' right to submit proposals regarding the disclosure of documents and/or materials after they have had the opportunity to examine the index of the record of the case, if they consider it necessary for the fulfilment of their mandate on behalf of the participating victims;
- c) to order the Registry to notify the relevant Common Legal Representative of documents linked with dual status individuals as identified, but not limited to, in paragraph 15 of this joint request;
- d) to order the Registry to notify the Common Legal Representatives of the consolidated In-Depth Analysis Chart and of the Prosecution's List of Evidence filed on 17 January 2014;

e) to order the Prosecution to confirm that all the confidential documents appearing as such in the attached annex are documents and/or material which it intends to rely upon for the purposes of the confirmation of the charges hearing and previously used and notified to the OPCV in the *Lubanga* or in the *Katanga* cases; and

~~g)~~f) to order the Prosecution to verify the level of confidentiality assigned to the documents contained in Annex B of the "Prosecution's submission of document containing the charges and the list of evidence and to disclose to the Common Legal Representatives all the public documents not previously disclosed on 21 January 2014.



Dmytro Suprun  
Common Legal Representative of the  
Victims of the Attacks



Sarah Pellet  
Common Legal Representative of the  
Child soldiers

Dated this 22<sup>nd</sup> day of January 2014

At The Hague, The Netherlands and Bunia, The Democratic Republic of the Congo