

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 29 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 on the “Joint Request of the Common Legal Representatives to access documents in the *Bosco Ntaganda* case record”

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 Surpun

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

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Herman von Hebel, Registrar

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 renders this decision on the “Joint Request of the Common Legal Representatives to access documents in the *Bosco Ntaganda* case record” (the “Application”).²

I. Procedural History

1. On 22 August 2006, Pre-Trial Chamber I to which the situation in the Democratic Republic of the Congo (the “DRC”) had been originally assigned, issued a warrant of arrest for Bosco Ntaganda (“Mr. Ntaganda”) for his alleged responsibility for the war crimes of conscripting, 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”), committed from July 2002 to December 2003 at various locations in the Democratic Republic of the Congo (the “DRC”).³ On 13 July 2012, the Chamber to which the same situation had been reassigned,⁴ issued a second warrant of arrest for Mr. Ntaganda for his alleged responsibility for the crimes against humanity of murder under article 7(1)(a) of the Statute, rape and sexual slavery under article 7(1)(g) of the Statute and persecution under article 7(1)(h) of the Statute, and for the war crimes of murder under article 8(2)(c)(i) of the Statute, attack against a civilian population under article 8(2)(e)(i) of the Statute, rape and sexual slavery under article 8(2)(e)(vi) of the Statute, and pillaging under article 8(2)(e)(v) of the Statute, all committed in various locations of the DRC between 1 September 2002 and the end of September 2003.⁵

¹ Pre-Trial Chamber II, 21 March 2013, ICC-01/04-02/06-40.

² ICC-01/04-02/06-222 with a confidential *ex parte* annex.

³ ICC-01/04-02/06-2-Corr-tENG-Red.

⁴ 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.

⁵ ICC-01/04-02/06-36-Red.

2. On 22 March 2013, Mr. Ntaganda voluntarily surrendered to the Court and made his first appearance before the Chamber on 26 March 2013.⁶

3. On 17 June 2013, following a request by the Prosecutor, 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”,⁷ in which the Single Judge decided to postpone the initial date for the commencement of the confirmation of charges hearing for Monday, 10 February 2014.⁸

4. On 10 January 2014, the Prosecutor filed the document containing the charges (the “DCC”) together with a list of evidence to present at the confirmation of charges hearing (the “List of Evidence”) and a translation into Kinyarwanda of both documents.⁹

5. On 15 January 2014, the Single Judge issued the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”¹⁰ (the “15 January 2014 Decision”), in which the Single Judge, *inter alia*, admitted applicants as victims participating in the confirmation of charges hearing; decided to appoint Mr. Dmytro Suprun as common legal representative of victims of attacks carried out by UPC/FPLC and Ms. Sarah Pellet as common legal representative of victims child soldiers; and established the procedural rights that

⁶ ICC-01/04-02/06-T-2-ENG, page 12, lines 2-3.

⁷ Pre-Trial Chamber II, “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”, 17 June 2013, ICC-01/04-02/06-73, p. 19.

⁸ Pre-Trial Chamber II, “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”, 17 June 2013, ICC-01/04-02/06-73, p. 19.

⁹ ICC-01/04-02/06-203, ICC-01/04-02/06-203-AnxA, ICC-01/04-02/06-203-Conf-AnxB, ICC-01/04-02/06-203-AnxC.

¹⁰ Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, 15 January 2014, ICC-01/04-02/06-211.

these victims admitted to participate in the present case may exercise through their respective common legal representatives.¹¹

II. The Application

6. In their Application, the common legal representatives request the Single Judge to grant them access to different categories of documents “in order to fulfil their mandate and to be able to adequately protect the rights and interests of the victims they represent”.¹²

7. In particular, the common legal representatives request access first of all to the full index of the record of the case in order to be in a position to examine the index and request access, as the case may be, to documents that are considered necessary for the fulfilment of their mandate (the “First Request”).¹³

8. Secondly, the common legal representatives request access to documents related to victims a/01308/13, a/00090/13 and a/00436/13, on the basis that these individuals have the dual status of victims and witnesses in the present case (the “Second Request”).¹⁴ In particular, the common legal representatives request to be provided with the observations of the Victims and Witnesses Unit (the “VWU”) on the security situation of these victims/witnesses; any request for redactions concerning these dual status individuals and their relevant annexes, including the annexes to document ICC-01/04-02/06-199-Conf-Exp submitted by the Prosecutor; and their statements and more generally any documents listed in the Prosecutor’s list of evidence and/or any document in the possession of and/or under the control of the Prosecutor which may relate to these victims/witnesses.¹⁵

¹¹ Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, 15 January 2014, ICC-01/04-02/06-211, p. 37.

¹² ICC-01/04-02/06-222, para. 8.

¹³ ICC-01/04-02/06-222, para. 10.

¹⁴ ICC-01/04-02/06-222, paras 12-15.

¹⁵ ICC-01/04-02/06-222, para. 15.

9. Thirdly, the common legal representatives request access to the In-depth Analysis Chart filed by the Prosecutor on 17 January 2014, on the basis that “the victims need to be sufficiently prepared for the confirmation of charges hearing”.¹⁶ Moreover, the common legal representatives request access to the list of evidence filed by the Prosecutor on 17 January 2014.¹⁷ In this respect, the common legal representatives submit that absent those documents they 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” (the “Third Request”).¹⁸

10. Further, the common legal representatives submit that the Office of Public Counsel for Victims (the “OPCV”) was acting as legal representative of four dual status individuals in the case of the Prosecutor v. Thomas Lubanga (the “*Lubanga* case”) and, thus, they have “already access to all the evidence used in the *Lubanga* trial”.¹⁹ In light of this, the common legal representatives request the Single Judge to order the Prosecutor to confirm that all the confidential documents already in their possession are intended to be relied upon by the Prosecutor at the confirmation of charges hearing.²⁰ In addition, the common legal representatives request the Single Judge to order the Prosecutor to verify the level of confidentiality assigned to the documents contained in her list of evidence and to disclose to the common legal representatives all the public documents not previously disclosed (the “Fourth Request”).²¹

¹⁶ ICC-01/04-02/06-222, para. 21.

¹⁷ ICC-01/04-02/06-222, para. 25.

¹⁸ ICC-01/04-02/06-222, para. 28.

¹⁹ ICC-01/04-02/06-222, para. 31.

²⁰ ICC-01/04-02/06-222, p. 17.

²¹ ICC-01/04-02/06-222, p. 17.

III. Determination by the Single Judge

11. The Single Judge notes articles 21(1)(a) and (3), 61(3) and 68(3) of the Statute, and rule 121(3) and (10) of the Rules of Procedure and Evidence (the “Rules”).

12. The Single Judge will hereunder address in turn the four requests identified above.

13. At the outset, the Single Judge recalls that, as stated in the 15 January 2014 Decision, in 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”.²²

14. With regard to the First Request, the Single Judge recalls that in several instances confidential filings or decisions are referred to in public documents, upon the condition that these references do not undermine the interests protected by the confidential level of classification. The Single Judge is of the view that a full index of the case record to be generated by the Court Management Section (the “CMS”) could represent a useful instrument for the common legal representatives to conduct a review of the case file, without providing them indiscriminately with access to confidential information contained therein absent prior authorization by the Single Judge. Such index should contain the document number, the title and the date of notification of each filing, decision and order issued so far in the case and classified as “confidential” only. This will put the common legal representatives in a position to identify potential documents, if any, which they seek to access, provided that these documents appear to contain information affecting the personal interests of the victims and that access thereto is not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial, as provided in article 68(3) of the Statute.

²² Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, 15 January 2014, ICC-01/04-02/06-211, para. 90.

15. In light of the foregoing, the Single Judge does not see any prejudice for the Prosecutor and the Defence, should the common legal representatives be provided with access to the full index of the case record. Accordingly, the Single Judge orders the CMS to generate a full index of the record of the case, as specified above, and to communicate it to the common legal representatives as soon as possible.

16. The Single Judge underlines that access to such index is without prejudice to any further determination as to whether it is appropriate to provide the common legal representatives with access to confidential documents that could be sought as a result of the review of such index.

17. Turning to the Second Request, the Single Judge observes that it is known that victims a/01308/13, a/00090/13 and a/00436/13 cooperate with the Prosecutor as witnesses P-0010, P-0113 and P-0805, respectively.²³ The Single Judge further notes that, in preparation for the confirmation of charges hearing, the common legal representatives are expected to contact the respective dual status victims and witnesses that they represent, in order to familiarize with them and seek instructions, as the case may be. In light of these circumstances, the Single Judge considers it appropriate to order the Prosecutor to communicate to the respective common legal representatives all pieces of evidence included in the List of Evidence and that originated from witness P-0010 (victim a/01308/13), witness P-0113 (victim a/00090/13) and witness P-0805 (a/00436/13), in the same format as disclosed to the Defence. The Single Judge considers that access to material that is not included in the List of Evidence but that is merely under the control of the Prosecutor may not be granted, in so far as the Prosecutor has not chosen to include this material in her List of Evidence, thereby renouncing to rely on it at the confirmation of charges hearing.

18. The Single Judge stresses that access to said material shall exclusively serve the purpose of properly representing the interests of the victims during the confirmation of charges hearing.

²³ Pre-Trial Chamber II, "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", 15 January 2014, ICC-01/04-02/06-211, para. 90.

19. Moreover, the Single Judge notes that, in the context of the Second Request, the common legal representatives also seek access to the observations of the VWU on the security situation of the three dual status victims and witnesses as well as any request for redactions concerning them.²⁴ In this respect, the Single Judge recalls that the proceedings related to the authorisation to redact information in the evidence to be disclosed to the Defence is an *ex parte* process, Prosecutor and VWU only, the latter being tasked with advising the Single Judge on the security situation of the witnesses for whom the Prosecutor requests redactions. Providing the common legal representatives with access to the entirety of this material would result in revealing several information concerning individuals who have no correlation whatsoever with the three victims a/01308/13, a/00090/13 and a/00436/13. In addition, it would reveal information that the Prosecutor sought to redact under rule 81(2) and (4) of the Rules. Accordingly, access to said documentation may not be granted as a whole. However, the Single Judge is of the view that the common legal representatives should be aware of the security situation surrounding the respective dual status victims and witnesses that they represent. With a view to provide the common legal representatives with updated information in this regard, the Single Judge orders the VWU to communicate to the respective common legal representatives updated information about the security situation of victims a/01308/13, a/00090/13 and a/00436/13 as soon as possible, in a form to be agreed upon between the common legal representatives and the VWU.

20. Concerning the Third Request, the Single Judge observes that the common legal representatives seek access to the In-depth Analysis Chart and the list of evidence filed by the Prosecutor as Annex A to filing ICC-01/04-02/06-217 on 20 January 2014.²⁵ At the outset, the Single Judge clarifies that Annex A to filing ICC-01/04-02/06-217 is not the List of Evidence to be presented by the Prosecutor pursuant to article 61(3) of the Statute and rule 121(3) of the Rules, which was submitted on 10

²⁴ ICC-01/04-02/06-222, para. 15.

²⁵ ICC-01/04-02/06-222, paras 20-21.

January 2014 and reclassified as “public”,²⁶ and therefore is accessible to the common legal representatives.²⁷ With regard to Annex A to filing ICC-01/04-02/06-217, the Single Judge observes that it contains, besides a list of documents and witness interviews translated into Kinyarwanda, the list of material disclosed either pursuant to article 67(2) of the Statute or rule 77 of the Rules, which are instrumental to the preparation of the Defence for the confirmation of charges hearing.²⁸ In light of the foregoing, it follows that access to Annex A to filing ICC-01/04-02/06-217, shall not be provided to the common legal representatives, who have already access to the List of Evidence which the Prosecutor intends to rely on at the confirmation of charges hearing.

21. As for the access to the In-depth Analysis Chart, the Single Judge specifies that this part of the Third Request refers to the *consolidated* version of the In-Depth Analysis Chart, with which the Prosecutor provided the Defence and the Chamber on 20 January 2014.²⁹ This document contains a “law-driven” analysis of incriminating evidence that “mirrors the way in which the confirmation hearing before the Chamber will unfold”.³⁰ The Single Judge observes further that the common legal representatives will be in a position to follow the presentation of the evidence at the confirmation of charges hearing, including the confidential evidence, in which regard the Chamber will decide on a case by case basis.³¹

22. In light of the foregoing, the Single Judge considers that access to the consolidated version of the In-depth Analysis Chart will provide the common legal representatives with guidance as to what type of material will be used by the Prosecutor at the confirmation of charges hearing to support the charges against Mr.

²⁶ Pre-Trial Chamber II, “Decision on the Defence Urgent Request of 14 January 2014”, 14 January 2014, ICC-01/04-02/06-209, p. 7.

²⁷ ICC-01/04-02/06-203-AnxB.

²⁸ ICC-01/04-02/06-217, para. 7.

²⁹ ICC-01/04-02/06-217 and ICC-01/04-02/06-217-Conf-AnxC.

³⁰ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 12 April 2013, ICC-01/04-02/06-47, paras 31-31.

³¹ Pre-Trial Chamber II, “Second Decision on the ‘Request by the Victims’ Representative for access to confidential materials’”, 23 September 2011, ICC-01/09-01/11-340, para. 11.

Ntaganda. Likewise, granting access to the consolidated version of the In-Depth Analysis Chart does not equal to disclosing to the common legal representatives the entirety of the evidence (more specifically the confidential evidence) included by the Prosecutor in the List of Evidence, which would in principle “violate the exceptional nature of a request to access confidential material pursuant to article 68(3) of the Statute”.³²

23. With regard to the Fourth Request, the Single Judge takes notice of the fact that due to the involvement of the OPCV in previous cases before the Court, the two common legal representatives in the present case have access to at least 1028 documents “of which only 208 were disclosed by the Prosecution”.³³ For ease of reference, these documents are listed in the confidential *ex parte* annex to the Application.³⁴ The Fourth Request is constituted by two distinct limbs. With regard to the first limb, the common legal representatives request “the Single Judge to order the Prosecution to confirm that all the confidential documents appearing as such in the [...] Annex [to the Application] 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”.³⁵

24. In this respect, the Single Judge is of the view that the Prosecutor has already filed her List of Evidence to be relied upon at the confirmation of charges hearing, with the document numbers for each item of evidence included therein. Therefore, the Single Judge sees no reason to order to the Prosecutor to confirm that the documents in the possession of the common legal representatives will be relied upon by the Prosecutor. Unless a document is included in the List of Evidence to be filed 30 days before the confirmation of charges hearing, pursuant to article 61(3) of the Statute in combination with rule 121(3) of the Rules, it may not be used by the Prosecutor at the hearing. A comparison between the documents’ numbers of the

³² See also Pre-Trial Chamber II, “Decision on the ‘Request by the Victims’ Representative for access to confidential materials’”, 21 September 2011, ICC-01/09-01/11-337, para. 10.

³³ ICC-01/04-02/06-222, para. 33.

³⁴ ICC-01/04-02/06-222-Conf-Exp-Anx.

³⁵ ICC-01/04-02/06-222, para. 35.

material in the possession of the common legal representatives with the List of Evidence is thus exhaustive.

25. As for the second limb of the Fourth Request, the Single Judge understands that the common legal representatives are in fact urging the Prosecutor to disclose to them all “public evidence filed by the Prosecutor [...], in the same format as disclosed to the recipient party (i.e. redacted or unredacted version, summaries, audio/video, and their metadata)” as ordered by the Single Judge in the 15 January 2014 Decision.³⁶ In this respect, the Single Judge reminds the Prosecutor that by virtue of rule 121(10) of the Rules, the common legal representatives may access the public record of the case created and maintained by the Registry, including the public evidence as referred to above. Therefore, the Single Judge orders the Prosecutor to ensure that all evidence included in the List of Evidence and which is classified as “public” be identified and timely communicated to the common legal representatives, in compliance with rule 121(10) of the Rules and with the 15 January 2014 Decision.

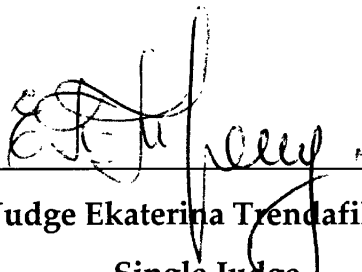
FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **orders** the Court Management Section to generate a full index of the case record and to transmit it to the common legal representatives, in accordance with paragraphs 14-15 of the present decision;
- b) **orders** the Prosecutor to communicate to the respective common legal representatives all pieces of evidence included in the List of Evidence and that originated from witness P-0010 (victim a/01308/13), witness P-0113 (victim a/00090/13) and witness P-0805 (a/00436/13), in the same format as disclosed to the Defence;

³⁶ Pre-Trial Chamber II, “Second Decision on the ‘Request by the Victims’ Representative for access to confidential materials’”, 23 September 2011, ICC-01/09-01/11-340, para. 89.

- c) **orders** the Prosecutor to ensure that all evidence included in the List of Evidence and which is classified as “public” be identified and timely communicated to the common legal representatives, in accordance with paragraph 25 of the present decision;
- d) **orders** the Victims and Witnesses Unit to communicate to the respective common legal representatives updated information about the security situation of victims a/01308/13, a/00090/13 and a/00436/13 as soon as possible, in a form to be agreed upon between the common legal representatives and the Victims and Witnesses Unit;
- e) **orders** the Registry to provide the common legal representatives with access to document ICC-01/04-02/06-217-Conf-AnxC.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 29 January 2013

At The Hague, The Netherlands