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No.: ICC-01/04-02/06
Date: 7 February 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Joint Request of the Common Legal Representatives to access the “Requête de la Défense relative à l’admissibilité de certains éléments de preuve que le Procureur entend présenter à l’audience de confirmation des charges et en radiation de certaines parties du document contenant les charges” (ICC-01/04-02/06-250-Conf)

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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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”,¹ along with a corresponding warrant of arrest for Mr Bosco Ntaganda.²
2. On 15 March 2012, the Presidency re-assigned the situation in the Democratic Republic of the Congo to Pre-Trial Chamber II.³
3. On 13 July 2012, Pre-Trial Chamber II (the “Chamber”) issued the “Decision on the Prosecutor’s Application under Article 58”,⁴ 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”⁵ 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”).⁶

¹ See the “Decision on the Prosecution Application for a Warrant of Arrest” (Pre-Trial Chamber I), No. ICC-01/04-02/06-I-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 1st October 2010, No. ICC-01/04-02/06-I-Red-tENG.

² 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.

³ 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.

⁴ 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.

⁵ 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.

⁶ *Idem*, p. 22.

5. On 2 December 2013, the Single Judge issued the “Decision Concerning the Organisation of the Common Legal Representation of Victims”,⁷ 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”).⁸

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”),⁹ admitting the victims applicants listed in annex C thereof as victims in the confirmation of charges hearing and in the related proceedings.¹⁰ The Single Judge also established the participatory rights of victims in said proceedings¹¹ 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”.¹²

7. On 22 January 2014, the Common Legal Representatives jointly filed their “[...] Request [...] to access documents in the Bosco Ntaganda case record” (the “Common Legal Representatives’ Joint Request”) whereby they requested full access to the index of the record of the case.¹³

⁷ 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.

⁸ *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.

⁹ 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.

¹⁰ 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.

¹¹ 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.

¹² *Idem*, para. 90.

¹³ See the “Joint Request of the Common Legal Representatives to access documents in the Bosco Ntaganda case record”, No. ICC-01/04-02/06-222, 23 January 2014 (dated 22 January 2014), para. 10.

8. On 29 January 2014, the Single Judge granted said request specifying that *“full index of the case record to be generated by the Court Management Section 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”*.¹⁴ The Single Judge further emphasised that *“[t]his 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”*.¹⁵

9. On 7 February 2014, the Common Legal Representatives received notice of the filing by the Defence of their *“Requête de la Défense relative à l’admissibilité de certains éléments de preuve que le Procureur entend présenter à l’audience de confirmation des charges et en radiation de certaines parties du document contenant les charges”* (the *“Defence’s Request”*), which has not been notified to them.¹⁶

10. 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.

¹⁴ See the *“Decision on the ‘Joint Request of the Common Legal Representatives to access documents in the Bosco Ntaganda case record’”* (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-01/06-237, 29 January 2014, para. 14.

¹⁵ *Idem*.

¹⁶ See the *“Requête de la Défense relative à l’admissibilité de certains éléments de preuve que le Procureur entend présenter à l’audience de confirmation des charges et en radiation de certaines parties du document contenant les charges”*, No. ICC-01/04-01/06-250-Conf, 7 February 2014 (dated 6 February 2014).

II. REQUEST FOR ACCESS TO THE DEFENCE'S REQUEST

11. 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 the victims who have been admitted to participate in the confirmation of charges hearing and in the related proceedings,¹⁷ it is necessary that access to the Defence's Request be granted to them.

12. The Common Legal Representatives are mindful that the Defence's Request refers to a number of confidential documents. However, as put forward in their Joint Request, despite the very narrow interpretation given by the Prosecution to the 15 January 2014 Decision,¹⁸ *"out of 2081 documents listed in Annex B of the 'Prosecution's submission of document containing the charges and the list of evidence', the Common Legal Representatives have access to 1028 documents of which only 208 were disclosed by the Prosecution on 21 January 2014"*.¹⁹

13. Moreover, the issues raised by the Defence in their request, directly impact on the personal interests of the victims since it aims at suppressing parts of the document containing the charges, to be discussed during the confirmation of the charges hearing to be held as of 10 February 2014.

14. In this regard, the Common Legal Representatives observe that, in accordance with "internationally recognized human rights",²⁰ the requirements of a "fair trial" mean, *inter alia*, that *"each party must be afforded a reasonable opportunity to present his*

¹⁷ See the "Annex C to the Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", *supra* note 10.

¹⁸ See the "Joint Request of the Common Legal Representatives to access documents in the Bosco Ntaganda case record", *supra* note 13, para. 14.

¹⁹ *Idem*, para. 33 (footnote omitted). See also the annex attached to the Common Legal Representatives' Joint request, *supra* note 13, No. ICC-01/04-02/06-222-Conf-Exp-Anx.

²⁰ 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.

case [...] under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”²¹ 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 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”.²²

15. 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”.*²³

16. In light of the principles of the aforementioned “internationally recognized human rights”, the Common Legal Representatives submit that they should be granted access to the Defence’s Request. They would otherwise be deprived of the possibility of representing the interests of their clients effectively and appropriately at the confirmation of charges hearing.²⁴

²¹ See ECHR, *Dombo Beheer B.V. v. The Netherlands*, Application No. 14448/88, Judgment of 27 October 1993, para. 33.

²² 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.

²³ 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>.

²⁴ 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”.

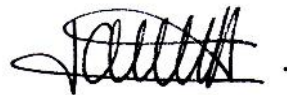
17. Last but not least, the Single Judge expressly granted the right to the Common Legal representatives “to make written submissions on specific issues of law and/or fact”.²⁵ Absent of notification of the Defence’s Request, the Common Legal Representatives will not be in a position to submit a specific request to this effect in compliance with the 15 January 2014 Decision.²⁶

FOR THE FOREGOING REASONS

The Common Legal Representatives respectfully request the Single Judge to grant the Common Legal Representatives access to the “Requête de la Défense relative à l’admissibilité de certains éléments de preuve que le Procureur entend présenter à l’audience de confirmation des charges et en radiation de certaines parties du document contenant les charges” and consequently to order the Registry to provide them with a copy of said request.



Dmytro Suprun
Common Legal Representative of the
Victims of the Attacks



Sarah Pellet
Common Legal Representative of the
Child soldiers

Dated this 7th day of February 2014

At The Hague, The Netherlands

²⁵ See the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *supra* note 9, para. 96.

²⁶ *Idem*, paras. 96 and 82-83.