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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

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 confidential
documents in the 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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I. PROCEDURAL BACKGROUND

1. On 2 December 2013, the Single Judge of the Pre-Trial Chamber II (the “Chamber”) issued the “Decision Concerning the Organisation of the Common Legal Representation of Victims”,¹ 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”.²

2. On 15 January 2014, the Single Judge of the Chamber (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”).³ In said decision, the Single Judge established the participatory rights of victims at the confirmation of charges hearing and related proceedings.⁴ In relation to victims’ access to the court record of the case, the Single Judge ruled that “*CLR1 and CLR2 have the right, during the confirmation of charges hearing and the related proceedings, to have access to all public decisions and public filings in the record of the case*”⁵ and specified that “*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*”.⁶

¹ 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.

² *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.

³ 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.

⁴ *Idem*, section IX, paras. 81-96.

⁵ *Ibid.*, para. 89.

⁶ *Ibid.*, para. 90.

3. On 7 February 2014, the Single Judge issued the “Second Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”.⁷ The Single Judge reaffirmed “*the participatory rights afforded to the victims*” in the 15 January 2014 Decision.⁸

4. On 22 January 2014, the Common Legal Representatives jointly filed their “[...] Request [...] to access documents in the Bosco Ntaganda case record” whereby they requested to be granted full access to the index of the record of the case.⁹

5. 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*”.¹⁰ 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”.¹¹

6. In accordance with the instructions of the Single Judge, the Common Legal Representatives therefore jointly submit the present request to be granted access to certain documents filed in the case record. In this regard, they respectfully request the Chamber to exercise its discretion and grant them notification of specific

⁷ See the “Second Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-251, 7 February 2014.

⁸ *Idem*, para. 42.

⁹ 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.

¹⁰ 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.

¹¹ *Idem*.

confidential filings within the record of the case. For the reasons outlined below, the Common Legal Representatives submit that the materials requested directly affect the interests of victims they represent and that access thereto is necessary for the proper representation of their clients in the proceedings.

II. JOINT REQUEST

7. The Court's jurisprudence emphasises that the *"object and purpose of article 68(3) of the Statute and rules 91 and 92 of the Rules is to provide victims with a meaningful role in the criminal proceedings before the Court (including at the pre-trial stage of a case) so that they can have a substantial impact in the proceedings"*.¹² The term "meaningful", as opposed to "symbolic", characterising the legal representation of victims has been interpreted as more than the mere ability to *"represent the views and concerns of the victims, but also to allow victims to follow and understand the development of the trial"*.¹³ Access to confidential materials as specified *infra* is essential to enable the Common Legal Representatives to follow the proceedings in an informed manner and take actions necessary to protect the rights and interests of the participating victims they represent.

A. Access to parties' observations under rule 89 of the Rules of Procedure and Evidence

8. The Common Legal Representatives respectfully request to be granted access to the observations made by the Prosecution and the Defence pursuant to rule 89(1) of the Rules of Procedure and Evidence.

9. At the outset, the Common Legal Representatives observe that they have already been notified of certain confidential filings submitted by the Defence and the

¹² See "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", No. ICC-01/04-01/07-474 (Pre-Trial Chamber I, Single Judge), 13 May 2008, para. 157 (we underline).

¹³ See the "Decision appointing a common legal representative of victims" (Trial Chamber V), No. ICC-01/09-01/11-479, 23 November 2012, para. 3.

Prosecution under rule 89(1) of the Rules of Procedure and Evidence, namely, the observations which were made following the issuance of a decision on the participation of victims.¹⁴ However, the Common Legal Representatives have not been notified of rule 89(1) observations filed prior said decision. The Common Legal Representatives contend that the observations at stake shall be disclosed to them as they directly relate to the content of the victims' applications. Moreover, in the present case, there is no reason to deny access to rule 89(1) observations with respect of certain victims, while the Common Legal Representatives have been notified of the same type of observations in relation to other victims.

10. Furthermore, the right to effective legal representation implies that the Common Legal Representatives is privy to any challenges, arguments or submissions made by the parties in their observations on their clients' applications. Indeed, the Common Legal Representatives are bound by the Code of Professional conduct for counsel¹⁵ which establishes that “[c]ounsel shall take the steps necessary to ensure proper legal representation of the client according to the Statute and the Rule of Procedure and Evidence”.¹⁶ Denying to the Common Legal Representatives access to rule 89(1) observations, after the victims concerned have been granted their status in the proceedings and counsel have been appointed, would not be in compliance with the fundamental right to “proper legal representation” enshrined in article 9(3) of the Code of Professional Conduct for Counsel.

11. Furthermore, during the confirmation of charges hearing, the Defence clearly opposed to the use, by the Common Legal Representatives, of excerpts from victims' application forms and challenged the accounts made by victims in said

¹⁴ See the “Observations de la Défense de M. Bosco Ntaganda sur les 160 demandes de participation transmises à la Défense le 13 décembre 2013”, No. ICC-01/04-02/06-196-Conf, 2 January 2014 (dated 30 December 2013) ; the “Observations de la Défense de M. Bosco Ntaganda sur les 204 demandes de participation transmises à la défense le 31 octobre 2013”, No. ICC-01/04-02/06-219-Conf, 20 January 2014. See also the “Prosecution’s observations on 203 applications for victim participation in the pre-trial proceedings”, No. ICC-01/04-02/06-220-Conf, 20 January 2014.

¹⁵ See the Code of Professional conduct for counsel, article 1.

¹⁶ *Idem*, article 9(3).

applications.¹⁷ It is obvious that said Defence submissions directly affect the interests of the victims as they relate to the content of their application forms. To enable the Common Legal Representatives to be in a position to fully consider the merits of the arguments put forward by the Defence, they should therefore be aware of all previous submissions made by the Defence under rule 89(1) of the Rules of Procedure and Evidence.

12. Accordingly, the Common Legal Representatives respectfully request to be given access to the following observations submitted by the Prosecution under rule 89(1) of the Rules of Procedure and Evidence, bearing in mind that redactions should be applied in accordance with their respective appointment:

- ICC-01/04-02/06-119-Conf
- ICC-01/04-02/06-128-Conf
- ICC-01/04-02/06-146-Conf
- ICC-01/04-02/06-168-Conf
- ICC-01/04-02/06-195-Conf

13. As regards the Defence observations under rule 89(1) of the Rules of Procedure and Evidence, the Common Legal Representatives respectfully request to be given access to the following filings, bearing in mind that redactions should be applied in accordance with their respective appointment:

- ICC-01/04-02/06-118-Conf
- ICC-01/04-02/06-127-Conf
- ICC-01/04-02/06-143-Conf
- ICC-01/04-02/06-169-Conf

¹⁷ See the transcript of the confirmation of charges hearing held on 14 February 2014, No. ICC-01/04-02/06-T-11-ENG ET WT, p.4, lines 4 to 21.

B. Request for access to materials pertaining to dual status individuals

14. In addition, the Common Legal Representatives submit that it is of particular importance for them to be provided with all the information concerning dual status individuals, including any request by the Prosecutor for the redaction of statements, notes and other materials related to them. Such filings are of direct relevance to victims' interests because they refer to protective measures implemented in respect of materials produced in relation to said victims.

15. This position is in line with the jurisprudence of the Court. Indeed, Chambers have emphasised that counsel-client relationship should not be affected by the fact that a particular person benefits from dual status.¹⁸ Accordingly, although they are not in a position to identify such materials due to the fact that requests in this sense might still be classified *ex parte*, only available to the Prosecutor, the Common Legal Representatives shall be duly notified of any protective measure implemented *vis-à-vis* their respective clients.

16. Therefore, the Common Legal Representatives respectfully request to be notified of all requests for redaction of materials compiled in relation to individuals with dual status, if any.

¹⁸ See 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. See also 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.

C. Access to other relevant filings

1. *Response to the Defence request to exclude evidence*

17. On 6 February 2014, the Common Legal Representatives were notified of the confidential filing entitled « *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* ». ¹⁹ In said request, the Defence challenged the admissibility into evidence of 237 documents filed by the Prosecution on various legal grounds. ²⁰ Despite being notified of the initial filing from the Defence, the Common Legal Representatives were not notified of the Prosecution's response thereof. ²¹

18. The Common Legal Representatives submit that victims have a vital interest in being granted access to the Prosecution's response since it relates to the admissibility of a significant body of evidence in the present case. As such, the issues arising from the Defence challenge and the Prosecution's response thereto involve crucial aspects of the case against the suspect, and hence, inevitably affect the interests of the victims. Moreover, the resolution of the Defence's challenge will necessarily impact on the Chamber's determination of whether there is sufficient evidence providing substantial grounds to believe that the suspect is responsible for the crimes charged.

19. The Common Legal Representatives reiterate 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*

¹⁹ 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-01/04-02/06-250-Conf, 6 February 2014.

²⁰ *Idem*, para. 3.

²¹ See No. ICC-01/04-02/06-269-Conf. Reference to the Prosecution response was made at paras. 199 and 248. See the "*Prosecution's submissions on issues that were raised during the confirmation of charges hearing*", No. ICC-01/04-02/06-276-Conf, 10 March 2014 (dated 7 March 2014).

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”²² 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”.²³ 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”.²⁴

20. Accordingly, the Common Legal Representatives respectfully request to be granted access to Prosecution’s filing No. ICC-01/04-02/06-269-Conf.

2. Prosecutor’s Applications for Warrants of Arrest

21. The Common Legal Representatives respectfully request to be granted access to the confidential redacted version of the “Prosecutor’s Application for Warrants of Arrest under Article 58”.²⁵ This document is relevant to the victims’ interests, because it is supposed to define the precise contours of the case and the exact scope of the crimes initially charged by the Prosecution. Moreover, the Common Legal

²² 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.

²³ 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 22, 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.

²⁴ 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.

²⁵ See the “Prosecutor’s Application for Warrants of Arrest”, No. ICC-01/04-02/06-60-Conf, 10 January 2010.

Representatives note that the Prosecution has already made available a confidential redacted version of both its Applications for Warrants of Arrest to the Defence.²⁶ The basis for the classification of such document as “Confidential – Prosecution and Defence only” provided for by the Prosecution is that “*they contain confidential information related to Prosecution witnesses*”.²⁷ In this regard, the Common Legal Representatives contend that they already gained knowledge of said information by participating in the Confirmation of the charges hearing and that some of the victims they represent enjoy the dual status of participating victims and Prosecution’s witnesses.

22. Accordingly, the Legal Representatives respectfully request to be granted access to the confidential redacted version of the “Prosecutor’s Application for Warrants of Arrest under Article 58” as disclosed to the Defence under Annexes A and B to the filing No. ICC-01/04-02/06-62.

FOR THE FOREGOING REASONS

The Common Legal Representatives respectfully request the Chamber to be notified of the following filings:

- ICC-01/04-02/06-119-Conf
- ICC-01/04-02/06-128-Conf
- ICC-01/04-02/06-146-Conf
- ICC-01/04-02/06-168-Conf
- ICC-01/04-02/06-195-Conf
- ICC-01/04-02/06-118-Conf
- ICC-01/04-02/06-127-Conf
- ICC-01/04-02/06-143-Conf

²⁶ See the “Prosecution’s Provision of Redacted Applications for Warrants of Arrest”, No. ICC-01/04-02/06-62, 10 May 2013.

²⁷ *Idem*, para. 4.

- ICC-01/04-02/06-169-Conf
- ICC-01/04-02/06-269-Conf
- Annexes A and B to filing No. ICC-01/04-02/06-62
- any eventual materials pertaining to dual status witnesses.



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Dated this 3rd day of April 2014

At The Hague, The Netherlands