

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 15 April 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
confidential documents in the 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 Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Herman von Hebel, Registrar

Defence Support Section

Victims and Witnesses Unit

Patrick Craig

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 confidential documents in the case record” (the “Application”).²

I. PROCEDURAL HISTORY

1. On 22 August 2006, Pre-Trial Chamber I, to which this case 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

2. On 13 July 2012, the Chamber, to which the DRC situation has 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, as well as 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-01/04-02/06-287.

³ Pre-Trial Chamber I, “Warrant of Arrest – Corrigendum”, 7 March 2007, 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.

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

4. On 10 January 2014, the Prosecutor filed the document containing the charges (the “DCC”) together with the list of evidence and a translation into Kinyarwanda of both documents.⁷

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”⁸ (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 Dmytro Suprun (“Mr. Suprun”) as common legal representative of victims of attacks carried out by *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* and Sarah Pellet as common legal representative of victims child soldiers; and established the procedural rights that these victims admitted to participate in the present case may exercise through their respective common legal representatives.⁹

6. On 29 January 2014, the Single Judge issued the “Decision on the ‘Joint Request of the Common Legal Representatives to access documents in the *Bosco Ntaganda* case record’” (the “29 January 2014 Decision”)¹⁰ in which she took a number of measures to provide the two common legal representatives of victims with access to certain confidential information in the case record.¹¹

7. On 6 February 2014, the Defence filed the “*Requête de la Défense relative à l’admissibilité de certains éléments de preuve que le Procureur entend présenter à l’audience*

⁶ Pre-Trial Chamber II, Transcript of Hearing, 26 March 2013, ICC-01/04-02/06-T-2-ENG.

⁷ 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.

⁸ 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.

⁹ 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.

¹⁰ Pre-Trial Chamber II, 29 January 2014, ICC-01/04-02/06-237.

¹¹ Pre-Trial Chamber II, 29 January 2014, ICC-01/04-02/06-237, pp. 12-13.

de confirmation des charges et en radiation de certaines parties du document contenant les charges” (the “6 February 2014 Defence Request”).¹²

8. 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” (the “7 February 2014 Decision”),¹³ in which the Single Judge admitted a further number of applicants as victims participating in the confirmation of charges hearing (the “Hearing”).¹⁴

9. On 10 February 2014, the Hearing commenced.¹⁵ After the closing statements, the Chamber granted the parties and the common legal representatives of victims to submit their final written observations on issues discussed during the Hearing,¹⁶ which were all duly submitted.¹⁷

10. On 3 March 2014, the Prosecutor responded to the 6 February 2014 Defence Request.¹⁸

II. THE APPLICATION

11. In their Application, the common legal representatives of victims request the Single Judge to grant them access to the following categories of documents: (i) the observations submitted by the Prosecutor and the Defence pursuant to rule 89(1) of the Rules of Procedure and Evidence (the “Rules”) in respect of some batches of victims’ applications for participation;¹⁹ (ii) “all the information concerning dual status individuals, including any request by the Prosecutor for the redaction of

¹² ICC-01/04-02/06-250-Conf.

¹³ Pre-Trial Chamber II, ICC-01/04-02/06-251.

¹⁴ Pre-Trial Chamber II, 7 February 2014, ICC-01/04-02/06-251, pp. 19-20.

¹⁵ Pre-Trial Chamber II, Transcript of Hearing, 10 February 2014, ICC-01/04-02/06-T-7-ENG ET WT.

¹⁶ Pre-Trial Chamber II, Transcript of Hearing, 10 February 2014, ICC-01/04-02/06-T-11-ENG ET WT, p. 11. A new deadline for the Defence was set on 8 April 2014, see Pre-Trial Chamber II “Decision on the ‘Prosecution’s Urgent Application for Redactions and for a Variation of Protective Measures Applied by Trial Chamber I’”, 3 April 2014, ICC-01/04-02/06-289-Conf, p. 8.

¹⁷ ICC-01/04-02/06-273; ICC-01/04-02/06-275; ICC-01/04-02/06-276-Conf; and ICC-01/04-20/06-292-Conf-Red.

¹⁸ ICC-01/04-02/06-269-Conf.

¹⁹ ICC-01/04-02/06-287, paras 8-13.

statements, notes and other materials related to them”²⁰; (iii) the Prosecutor’s response to the 6 February 2014 Defence Request; and (iv) the Prosecutor’s applications for warrants of arrest under article 58 of the Statute.²¹

III. DETERMINATION BY THE SINGLE JUDGE

12. The Single Judge notes articles 21(1)(a), (3), 61(7), and 68(1) and (3) of the Statute.

13. 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. As also pointed out by the common legal representatives of victims in their Application, the purpose of the victims’ participation regime under the Statute and the Rules is to provide victims with a meaningful role in the proceedings, as opposed to a symbolic one, so that they can have a “substantial impact” in the proceedings.²³

15. The Single Judge further recalls that the common legal representatives of victims have been granted, amongst other procedural rights, the opportunity to present final written observations on issues discussed during the Hearing, just as the parties to these proceedings.

16. Finally, the Single Judge underlines that the filing of the Defence final written observations on issues discussed at the Hearing marks its closure.²⁴ The Chamber is currently deliberating its decision pursuant to article 61(7) of the Statute.

²⁰ ICC-01/04-02/06-287, para. 14.

²¹ ICC-01/04-02/06-287, para. 22.

²² Pre-Trial Chamber II, 15 January 2014 Decision, ICC-01/04-02/06-211, para. 90.

²³ ICC-01/04-02/06-287, para. 7.

²⁴ See ICC-01/04-02/06-292-Conf-Red.

17. In light of the above and for the reasons developed below, the Single Judge considers that the Application could be granted in part.

18. Concerning the access to some of the observations filed by the Prosecutor and the Defence pursuant to rule 89(1) of the Rules on victims applications, the Single Judge recalls that they primarily served the Chamber's determination whether or not applicants qualified as victims in the case, in accordance with rule 85(a) of the Rules. The Single Judge acknowledges that as a matter of principle there is no reason to deny the common legal representatives of victims access to said observations. However, providing access to the observations at this advanced stage of the pre-trial proceedings would serve no meaningful purpose.

19. As regards the victims' request to accessing the Prosecutor's article 58 applications, the Single Judge underlines that those applications were presented solely for the purposes of requesting the issuance of the warrants of arrest. However, the contours of the case and, accordingly, the subject matter of the Hearing, were delineated by the DCC pursuant to article 61(3) of the Statute in conjunction with rule 121(3) of the Rules. Thus, the knowledge of the DCC and not of the Prosecutor's applications under article 58 of the Statute accord with the concept of meaningful participation of the victims.

20. In relation to the requested access to the Prosecutor's response to the 6 February 2014 Defence Request²⁵, the Single Judge clarifies that the issue of admissibility of certain pieces of evidence is currently considered by the Chamber. Thus, providing the common legal representatives of victims with access to the Prosecutor's response at this stage, would also serve no purpose.

21. In relation to the request to access material related to dual status victims/witnesses in the case, the Single Judge recalls that in the 29 January 2014 Decision she ordered the Prosecutor "to communicate all pieces of evidence included in the List of Evidence and that originated from witness P-0010 (victim a/01308/13),

²⁵ ICC-01/04-02/06-250-Conf.

witness P-0113 (victim a/00090/13) and witness P-0805 (a/00436/13), in the same format as disclosed to the Defence”.²⁶ The Single Judge stressed that “access to said material shall exclusively serve the purpose of properly representing the interests of the victims *during the confirmation of charges hearing*” (emphasis added).²⁷

22. However, the Single Judge also held that the common legal representatives of victims should be aware of the security situation surrounding the respective dual status victims/witnesses that they represent and, to this effect, ordered the Victims and Witnesses Unit (the “VWU”) to communicate as soon as possible to the respective common legal representatives of victims updated information about the security situation of three victims/witnesses in the present case, in a form to be agreed between the common legal representatives of victims and the VWU.²⁸

23. The Single Judge notes that providing for the protection of victims and witnesses pursuant to article 68(1) of the Statute is an on-going process that does not end with the close of the Hearing. Therefore, the common legal representatives of victims should be kept updated about the security situation of their clients. In this regard, the Single Judge notes that the mechanism established in the 29 January 2014 Decision should also apply to victim a/01721/13, who is witness P-0100 in this case.²⁹ Accordingly, the Single Judge orders the VWU to communicate to Mr. Suprun updated information about the security situation of victim a/01721/13 as soon as possible, in a form to be agreed upon between the common legal representative and the VWU.

24. However, concerning the access to “any request by the Prosecutor for the redaction of statements, notes and other materials related to [the dual status victims]”,³⁰ the Single Judge clarifies that these requests are not confined to information relating to victims having dual status. Moreover, the Prosecutor’s

²⁶ Pre-Trial Chamber II, 29 January 2014 Decision, ICC-01/04-02/06-237, p. 12.

²⁷ Pre-Trial Chamber II, 29 January 2014 Decision, ICC-01/04-02/06-237, para. 18.

²⁸ Pre-Trial Chamber II, 29 January 2014 Decision, ICC-01/04-02/06-237, p. 13.

²⁹ Pre-Trial Chamber II, 7 February 2014 Decision, ICC-01/04-02/06-251, para. 9.

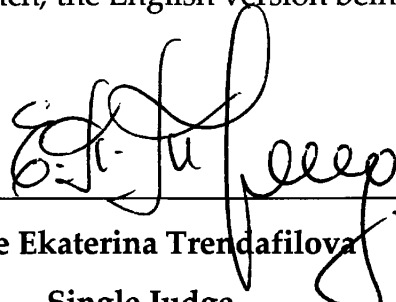
³⁰ ICC-01/04-02/06-287, para. 14.

requests for redactions have been decided upon by the Chamber and, accordingly, knowledge thereof is meaningless.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) Orders** the Victims and Witnesses Unit to communicate to Dmytro Suprun updated information about the security situation of victim a/01721/13 as soon as possible, in a form to be agreed upon between the common legal representative and the Victims and Witnesses Unit; and
- b) Rejects** the remainder of the Application.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Tuesday, 15 April 2014

At The Hague, The Netherlands