

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 29 February 2008

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR vs. BOSCO NTAGANDA**

**Under Seal
Ex Parte, Prosecution Only**

**Prosecution's Application for Unsealing the Arrest Warrant against Bosco
Ntaganda**

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer

Background

1. On 12 January 2006, the Prosecution filed the "Prosecutor's Application for Warrants of Arrest, Article 58" ("the Application") before the Pre-Trial Chamber I for the issuance of an arrest warrant against Thomas LUBANGA DYILO and Bosco NTAGANDA.¹
2. On 10 February 2006, the Chamber issued the "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (the "10 February 2006 Decision") in which the Chamber decided to issue a warrant of arrest for Thomas LUBANGA DYILO and rejected the issuance of a warrant of arrest for Bosco NTAGANDA based on the inadmissibility of the case against him.²
3. Following the Prosecution's appeal of 14 February 2006,³ and the 13 July 2006 Appeals Chamber "Judgement on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'" (the "Appeals Chamber Judgment"),⁴ the Pre-Trial Chamber on 22 August 2006 rendered its "Decision on the Prosecution Application for a Warrant of Arrest" (the "22 August 2006 Decision"),⁵ issuing a warrant for arrest for Bosco NTAGANDA.⁶

¹ ICC-01/04-98-US-Exp.

² ICC-01/04-118-US-Exp-Corr.

³ ICC-01/04-125-US-Exp.

⁴ ICC-01/04-169-US-Exp OA.

⁵ ICC-01/04-02/06-1-US-Exp.

⁶ ICC-01/04-02/06-1-US-Exp.

4. The Pre-Trial Chamber decided that the warrant of arrest for Bosco NTAGANDA shall be included in a separate self-executable document containing the information required by article 58 (3) of the Statute, which shall remain under seal until otherwise provided for by the Chamber.
5. On 6 February 2007, the Registrar filed his first "Rapport du Greffier Concernant l'exécution de la Décision ICC-01/04-02/06-01-US et Demande d'Instructions",⁷ regarding the implementation of the 10 August 2006 Decision and requesting instructions from the Chamber.
6. On 30 May 2007, the Registrar notified the DRC authorities of the existence of the under seal warrant of arrest against Bosco NTAGANDA and of the Request for cooperation for the arrest and surrender of Bosco NTAGANDA.⁸ The Registrar notified in the same way the United Nations Special Representative of the Secretary-General in the DRC on 31 May 2007.
7. On 18 June 2007, the Registrar filed his "Deuxième Rapport du Greffier Concernant l'exécution de la Décision ICC-01/04-02/06-01-US", whereby he reported on the notification to the DRC authorities of the requests for cooperation for the arrest and surrender of Bosco NTAGANDA REDACTED.

⁷ ICC-01/04-02/06-5-US-Exp.

⁸ See – *Deuxième rapport du Greffier concernant l'exécution de la décision* ICC-01/04-02/06-1-US du 18 juin 2007.

8. On 11 February 2008,⁹ the Registrar notified the Ugandan authorities of the existence of the under seal warrant of arrest against Bosco NTAGANDA.

Unsealing of the arrest warrant

9. In its Application, the Prosecution had requested that “(i) the Application be received by the Pre-Trial Chamber under seal; (ii) the fact of the existence of the Application also be sealed; and (iii) any proceedings conducted in connection with the Application be held *ex parte* and in closed session”. The Prosecution gave two main reasons for the sealing, i.e. that “public awareness of the Application, related proceedings and/or the Pre-Trial Chamber’s determination (i) could cause Mr Thomas Lubanga Dyilo and/or Mr Bosco Ntaganda to flee and/or to obstruct or endanger the investigations or the proceedings of the Court; and (ii) that the physical well-being of Mr Thomas Lubanga Dyilo could be put at risk”.¹⁰

10. In its 22 August 2006 decision, the Pre-Trial Chamber decided to issue a warrant of arrest under seal on the basis of the Prosecution’s assurances that “public knowledge of the Prosecution’s application prior to any decision might (i) result in Mr Thomas Lubanga Dyilo and/or Mr Bosco Ntaganda hiding, fleeing, and/or obstructing or endangering the investigations or the proceedings of the Court; and (ii) put the physical well-being of Mr Thomas Lubanga Dyilo at risk”, and on the fact that NTAGANDA “remain[ed] at large despite criminal proceedings against him

⁹ ICC-01/04-02/06-14-US-Exp.

¹⁰ See Application at paras 7-10.

in the DRC and continue[d] to fight as a top commander of the MRC against the FARDC in the Ituri district".¹¹

11. The Prosecution submits that the circumstances that underscored the sealing of the arrest warrant against Bosco NTAGANDA as they were described in the Prosecution's Application have changed.

12. *First*, the Prosecution submits that there has been a change of circumstances in the situation of Bosco NTAGANDA since the filing of the Prosecution Application. It is no longer the case that Bosco NTAGANDA "*continues to fight as a top commander of the MRC against the FARDC in the Ituri district*".¹² Instead, Bosco NTAGANDA is reported to have moved from the District of Ituri to the Province of North Kivu, into the Masisi area, where he has reportedly taken the position of Chief of Staff within the political-military group *Congrès national pour la défense du peuple* (CNDP), a group continuing to fight the National armed forces of the DRC (the "FARDC"), under the command of the renegade FARDC General Laurent NKUNDA.¹³

¹¹ ICC-01/04-02/06, paras 79-80.

¹² ICC-01/04-02/06, para 80.

¹³ According to media sources, Bosco Ntaganda accompanied Laurent Nkunda to an official military ceremony as early as 22 March 2007: See Radio Okapi, *Affaire Laurent Nkunda: le gouverneur du Nord-Kivu dit privilégier la paix*, 23 March 2007; see <http://www.radiookapi.net/index.php?i=53&a=12696>. The CNDP announced the restructure of its organisation on its website on 27 April 2007, naming Bosco Ntaganda as the chief of staff of the ANC/CNDP forces; see http://www.cndp-congo.org/cndp_reorganise1.html. Human Rights Watch describes Bosco Ntaganda as one of the "closest subordinates" of Laurent Nkunda; see Human Rights Watch, *Renewed Crisis in North Kivu*, Vol. 19, No. 17(A), October 2007, p. 65. Also see: UN Security Council, *Final Report of the Group of Experts on the Democratic Republic of the Congo*, pursuant to Security Council Resolution 1698 (2006), UN doc. S/2007/423, 18 July 2007, Para. 87: "87. The CNDP politico-military organization, under the chairmanship of Nkunda, has a military wing containing a number of disaffected military officers, including individuals already subject to Security Council sanctions. One of them, Bosco Taganda, holds the position of CNDP commander of operations. Mr. Taganda does not hold an official position in FARDC but is involved in the planning and direction of FARDC mixed brigade operations.", at <http://daccessdds.un.org/doc/UNDOC/GEN/N07/384/59/PDF/N0738459.pdf?OpenElement>), and OCHA, *Situation humanitaire en RDC (Ituri) - Rapport hebdomadaire du 12 au 18 novembre 2007*, 18 November 2007: "Selon UNDSS, les habitants de Burasi (ter. Irumu) ont rapporté la traversée vers l'Ouganda d'anciens miliciens UPC : ces miliciens seraient recrutés par Bosco Ntaganda, l'ancien

13. All available recent information continues suggesting that Bosco NTAGANDA remains in the North Kivu province, away from the Ituri district.
14. *Second*, concerning the risk that Bosco NTAGANDA could flee or hide if the arrest warrant was unsealed, there are reasons to believe that Bosco NTAGANDA may have become aware of the existence of the arrest warrant against him. Questions have been received by representatives of the Office of the Prosecutor from external observers, on the occasion of the transfer of Mathieu NGUDJOLO to the Court, that seem to indicate that information is circulating in the field on the existence of the warrant issued against Bosco NTAGANDA.
15. In particular, it is worth noting that the CNDP, in a Declaration issued on 14 January 2008, at the beginning of the Goma Peace Conference, made a clear link between the work of international judicial institutions in the DRC and existing arrest warrants, criticising international jurisdictions taking over DRC cases at the same time as it was requesting that arrest warrants against some of its leaders be withdrawn: « [N]ous condamnons sans réserve les pratiques actuellement en vigueur consistant à soustraire des concitoyens, contre leur gré, au juge que les lois nationales leurs assignent, en les extradant vers des juridictions supranationales. En agissant de la sorte, on prive notre Etat de ses fonctions régaliennes d'administration et de distribution de la justice. De telles pratiques sont incompatibles avec la notion de souveraineté nationale. Le CNDP apprend par des media que des mandats d'arrêt auraient été émis

commandant UPC, pour le compte du général dissident Laurent Nkunda." ; available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/AMMF-797LD9?OpenDocument&rc=1&cc=cod>.

contre certains parmi ses Chefs militaires. Elle les déclare sans fondements et demande leur retrait pur et simple. Il exige, en outre, la libération sans conditions, de tous les prisonniers politiques et de toutes les personnes arrêtées et détenues illégalement dans des conditions inhumaines et soumises à des traitements cruels et dégradants au simple motif de collaboration et/ou de sympathie envers le CNDP. »¹⁴

16. A statement dated 28 January 2008 and published on the website Kivupeace.org, which is considered to be closely related to the CNDP, goes even further by saying that: « *Ainsi, longtemps tous les Ituriens en particulier ceux de l'ethnie Hema ont déploré les poursuites engagées à la CPI contre des Hemas et Tutsis uniquement, en l'occurrence Thomas Lubanga, Bosco Ntaganda, entre autres. »¹⁵*

17. Third, the arrest warrant has been notified to the DRC authorities for almost one year without the DRC authorities being in a position to actually implement it on the ground and apprehend Bosco NTAGANDA. Because of his position among an armed group currently active in a remote area of North Kivu *de facto* not under the control of the DRC authorities, and despite a request to MONUC for assistance in the implementation of the request for arrest and surrender, the DRC authorities have not been in a position to find access to him.

18. The prospects for an arrest of Bosco NTAGANDA on the DRC territory remain limited under the current circumstances, in light of the current

¹⁴ Déclaration du Congrès National pour la Défense du Peuple à la Conférence sur la Paix, la Sécurité et le développement dans les provinces du Nord-Kivu et du Sud-Kivu, 14 January 2008, page 6. http://www.amanileo.org/index2.php?option=com_docman&task=doc_view&gid=19&Itemid=47.

¹⁵ See Kivupeace, La Cour Pénale Internationale : Instrument Juridique ou Politique?, 25 January 2008, at http://www.kivupeace.org/cpi_instrument_juridique.html.

security situation in the probable area of localisation of Bosco NTAGANDA and of his reported affiliation with the armed group controlling most of the Masisi and Rutshuru areas of North Kivu. The Prosecution submits that there are therefore no reasonable prospects for arrest that would be damaged by the unsealing. To the contrary, it is submitted that the unsealing might in reality assist the DRC authorities in their efforts to apprehend him. The unsealing of the warrant of arrest could ensure in particular that all other actors involved in the DRC situation, in the Great Lakes region and beyond are officially informed of it, and could make it more difficult for him to seek refuge back in Ituri or in neighbouring countries.

19. The DRC authorities primarily responsible for the execution of the request for arrest and surrender have indicated, at the occasion of the recent transfer of Mathieu NGUDJOLO, and while questioned about their progresses in relation to Bosco NTAGANDA, that, given the circumstances highlighted above, and in particular the fact that Bosco NTAGANDA continues to be active in North Kivu in the *Masisi* area, under the control of NKUNDA, they would be in a better position to execute the request with the existence of the arrest warrant being public. They assess that an unsealing could foster support for an arrest operation from international partners in the Kivu provinces, where Bosco NTAGANDA is allegedly Chief of Staff of the CNDP.

20. For these reasons, the Prosecution respectfully submits that it would be appropriate to at this stage unseal the arrest warrant against Bosco NTAGANDA.

Victims and Witness Security

21. The Prosecution, as submitted consistently, is of the view that victims and witnesses protection is a priority consideration and that no measure should be proposed or taken that creates a risk to witnesses and victims. In the present cases, measures have been taken to protect witnesses before submitting the present request. Arrangements and measures have already been put in place by the Prosecution and/or the Victims and Witnesses Unit of the Registry, for adequate security of the witnesses called for the case.

Request for Sealing

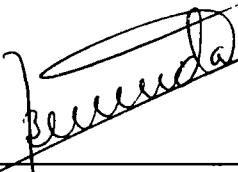
22. The Prosecution requests that this submission be received under seal, *ex parte* - Prosecutor only as it relates to material that is under seal.

No Request to Unseal the Application and the Decisions

23. For victim and witnesses protection purposes, the Prosecution submits that the Application and Decisions should remain sealed. The Application and the Decisions describe in detail the evidence gathered in the course of the investigation and render certain witnesses and victims identifiable. Redactions, however extensive, would not prevent exposing those witnesses and victims to an excessive level of risks.

Request

24. The Prosecution requests that the warrant of arrest issued by the Court in the case *The Prosecutor vs. Bosco NTAGANDA* be unsealed.



Luis Moreno-Ocampo
Prosecutor

Dated this 29th day of February 2008
At The Hague, The Netherlands