

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 14 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
Urgent
Decision on the Defence Urgent Request of 14 January 2014**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Nicole Samson

Legal Representatives of Victims

Counsel for the Defence

Marc Desalliers

Legal Representatives of 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

Herman Von Hebel

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

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 “Requête urgente de la Défense aux fins d’ordonner au Procureur de se conformer aux Décisions de la Chambre ICC-01/04-02/06-47 et ICC-01/06-02/06-73” (the “Request”).²

I. PROCEDURAL HISTORY

1. On 22 August 2006, Pre-Trial Chamber I, to which this case had originally been assigned, issued the “Decision on the Prosecution Application for a Warrant of Arrest”,³ along with a corresponding warrant of arrest for Bosco Ntaganda (“Mr. Ntaganda”),⁴ 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”).
2. On 15 March 2012, the Presidency re-assigned the situation in the Democratic Republic of the Congo to this Chamber.⁵
3. On 13 July 2012, the Chamber issued its “Decision on the Prosecutor’s Application under Article 58”.⁶ In this decision the Chamber issued a second

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, 21 March 2013, ICC-01/04-02/06-40, p. 4.

² ICC-01/04-02/06-206.

³ Pre-Trial Chamber I, “Decision on the Prosecution Application for a Warrant of Arrest”, 22 August 2006, ICC-01/04-02/06-1-US-Exp-tEN; and redacted version, 6 March 2007, ICC-01/04-02/06-1-Red-tENG.

⁴ Pre-Trial Chamber I, “Warrant of Arrest – Corrigendum”, 7 March 2007, ICC-01/04-02/06-2-Corr-tENG-Red.

⁵ 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.

⁶ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application under Article 58”, 13 July 2012, ICC-01/04-02/06-36-Conf-Exp; and public redacted version, 13 July 2012, ICC-01/04-02/06-36-Red.

warrant of arrest against Mr. Ntaganda for his alleged responsibility for the crimes against humanity of murder, rape, sexual slavery, and persecution based on ethnic grounds, under articles 7(l)(a), 7(l)(g) and 7(l)(h) of the Statute; and the war crimes of murder, intentional attacks against civilians, pillaging, rape and sexual slavery under articles 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v) and 8(2)(e)(vi) of the Statute.⁷

4. On 22 March 2013, the Single Judge issued the “Decision on Setting the Date for the Initial Appearance and Related Issues”, in which she, *inter alia*, noted Mr. Ntaganda’s voluntary surrender to the Court⁸ and decided to convene a hearing for his initial appearance on 26 March 2013.⁹

5. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “12 April 2013 Disclosure Decision”), in which she, *inter alia*, set the principles governing the process of disclosure between the parties.¹⁰

6. On 17 June 2013, 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” (the “17 June 2013 Decision”),¹¹ in which she, *inter alia*, decided to retain the principles established in the 12 April 2013 Disclosure Decision¹² and ordered the Prosecutor to file in the record of the case the document containing the charges, together with the list of evidence, including a translation into Kinyarwanda, no later than Friday, 10 January 2014.¹³

⁷ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application under Article 58”, 13 July 2012, ICC-01/04-02/06-36-Conf-Exp, p. 37; and public redacted version, 13 July 2012, ICC-01/04-02/06-36-Red, p. 37.

⁸ Pre-Trial Chamber II, ICC-01/04-02/06-41, p. 4.

⁹ Pre-Trial Chamber II, ICC-01/04-02/06-41, p. 5.

¹⁰ Pre-Trial Chamber II, ICC-01/04-02/06-47 and its annexes.

¹¹ Pre-Trial Chamber II, ICC-01/04-02/06-73, pp. 19,21.

¹² Pre-Trial Chamber II, ICC-01/04-02/06-73, p. 19.

¹³ Pre-Trial Chamber II, ICC-01/04-02/06-73, p. 21.

7. On 10 January 2014, the Chamber received the “Prosecution’s Submission of Document Containing the Charges and the List of Evidence” together with four annexes appended thereto.¹⁴

8. On 14 January 2014, the Chamber received the Request in which the Defence seeks the following relief:

ORDONNER au Procureur de communiquer sans délai à la Défense :

- - Une version complète du DCC comportant les références, au moyen de notes de bas de page ou d’une liste d’éléments de preuve analogue à celle déposée par le Procureur dans l’affaire *Abu Garda*, aux extraits précis des éléments sur lesquels se fonde chacune des allégations factuelles énoncées par le Procureur dans ce document ; et
- Une version complète et consolidée du tableau IDAC, comportant uniquement les éléments pertinents aux charges pour lesquelles le Procureur entend requérir le renvoi en jugement et aux modes de responsabilité visés, conformément à l’ordonnance du 12 avril 2013.¹⁵

The Defence also requested the Single Judge to order the reclassification of Annex B of document ICC-01/04-02/06-203-Conf into public.

II. APPLICABLE LAW

9. The Single Judge notes articles 21(1)(a), (2) and (3), 61(3) and (7), and 67 of the Statute, and rule 121 of the Rules of Procedure and Evidence and regulations 23 *bis* and 29 of the Regulations of the Court.

III. DETERMINATION BY THE SINGLE JUDGE

10. The Single Judge recalls the 12 April 2013 Disclosure Decision in which she recalled two earlier decisions issued by the same Chamber on 31 July 2008 and 6 April 2011 concerning the required analysis of the evidence exchanged between the parties.¹⁶ According to the 12 April 2013 Disclosure Decision the Prosecutor was

¹⁴ ICC-01/04-02/06-203 and its annexes.

¹⁵ ICC-01/04-02/06-206, pp. 7-8.

¹⁶ Pre-Trial Chamber II, ICC-01/04-02/06-47, para. 29.

expected to provide an in depth analysis chart (the "IDAC") of incriminating evidence following a structure of a draft model charted annexed to said decision.¹⁷ In this regard, the Single Judge explained that the approach advanced in the Chamber's previous decisions and reiterated in the 12 April 2013 Disclosure Decision:

[E]nsures that the Chamber establishes satisfactory conditions for the proper preparation of the Defence. This prevents any unnecessary delays that might negatively impact on the commencement of the confirmation hearing as envisaged by the Chamber. Further, said approach also ensures that the Presiding Judge is in a position to "organise the presentation of evidence by the parties according to the crimes charged with one party responding to the other on each count consecutively". Thus, this "law-driven" organization of the chart mirrors the way in which the confirmation hearing before this Chamber will unfold. It streamlines the substantive discussions and, thereafter, the structure and timely preparation of the article 61(7) decision. Thus, the "law-driven" analysis is crucial as the role of the Chamber is not limited to simply verifying whether the facts as presented by the Prosecutor are proven to the requisite threshold. Rather, the "law-driven" approach aims at deciding whether the constitutive elements of the crimes and the mode(s) of liability as charged by the Prosecutor within the factual ambit of the case are established in accordance with the standard set forth in article 61(7) of the Statute [...] it is essential that only relevant information extracted from the evidence, which supports the facts presented under a particular legal requirement, should be included in the chart. This practically means that the appropriate quote from the piece of evidence concerned should be included in the chart [...] In addition, the Single Judge requests the Prosecutor to include in the chart, as established in Annex 2 to this decision, a hyperlink directing the reader to the relevant piece of evidence as uploaded in the electronic system of the Court. Lastly, each extract of information included in the chart shall be referenced as specific as possible, including the document ID number and, where necessary, the page, paragraph or lines. The Single Judge opines that the Prosecutor, having progressively analysed and reviewed the evidence collected in this case "page by page or, where required, paragraph by paragraph", with a view to be fully prepared to fulfil her duties, is in a position to provide the above information to the Defence and the Chamber¹⁸ (footnotes omitted).

11. However, with regard to the first part of the Request, which aims at ordering the Prosecutor to provide the Defence with a footnoted Document Containing the Charges (the "DCC"), establishing links between the factual allegations contained in said DCC and the evidence presented by the Prosecutor, the Single Judge recalls that she has never requested this type of document. Thus, she does not consider that the Prosecutor failed to comply with her obligations provided for in the 12 April 2013 Disclosure Decision as the Defence asserts.

¹⁷ Pre-Trial Chamber II, ICC-01/04-02/06-47, para. 30.

¹⁸ Pre-Trial Chamber II, ICC-01/04-02/06-47, paras 31-31.

12. Nonetheless, the Prosecutor was ordered to comply with the second part of the Defence's Request as it is apparent from the quoted passages in paragraph 10 above. In this context, the Single Judge observes that so far the Prosecutor has not complied with the Chamber's order set out in its previous decisions (the 12 April 2013 Disclosure Decision and the 17 June 2013 Decision), and according to regulation 29 of the Regulations in the "event of non-compliance by a participant [...] with an order of a Chamber [...], the Chamber may issue an order that is deemed necessary in the interests of justice".

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

a) rejects the first part of the Defence's Request;

b) grants the second part of the Defence's Request and **orders** the Prosecutor to file in the record of the case a consolidated in-depth analysis chart in accordance with the 12 April 2013 Disclosure Decision covering all the charges and modes of liability presented in the document containing the charges, no later than Friday 17 January 2014 at 1600hrs; and

c) grants the third part of the Defence's Request and **order** the Registrar to reclassify Annex B of document ICC-01/04-02/06-203-Conf as public document.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Tuesday, 14 January 2014

At The Hague, The Netherlands