

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 16 June 2015

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

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

Public

Second decision on victims' participation in trial proceedings

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

Trial Chamber VI ('Chamber')¹ of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Article 68(1) and (3) of the Rome Statute ('Statute'), Rules 85, 89 and 90-92 of the Rules of Procedure and Evidence ('Rules'), and Regulations 79-80 and 86 of the Regulations of the Court, issues the 'Second decision on victims' participation in trial proceedings'.

I. Background and procedural history

1. On 6 February 2015, the Chamber issued its 'Decision on victims' participation in trial proceedings' ('First Participation Decision'),² whereby it established the procedure for the participation of victims in the present case. In accordance with the admission system adopted, the Registry must assess the applications for participation received on the basis of the Chamber's guidance and separate them into three groups: applicants who clearly qualify as victims ('Group A'); applicants who clearly do not qualify as victims ('Group B'); and applicants for whom the Registry could not make a clear determination ('Group C'). The Registry shall transmit all complete application forms in its possession to the Chamber and transmit Group C application forms, with any necessary redactions, to the Office of the Prosecutor ('Prosecution') and the defence team for Mr Ntaganda ('Defence'), who may subsequently file observations thereon.
2. In the same decision, and with a view to deciding whether or not to maintain the current representation system, the Chamber instructed the Registry to consult with victims who participated in the confirmation stage of the

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber VI as composed by the Presidency's 'Decision replacing a judge in Trial Chamber VI', 18 March 2015, ICC-01/04-02/06-521 and to the chamber in its previous composition.

² ICC-01/04-02/06-449.

proceedings and to report back to the Chamber within 21 days of notification.³

3. On 26 February and 16 March 2015, the Registry transmitted 626⁴ and 375⁵ Group A applications to the Chamber, together with assessment reports thereon.⁶
4. Also on 16 March 2015, and having been granted an extension of time,⁷ the Registry filed its report on consultations with participating victims ('Registry's Report on Legal Representation').⁸ In response, on 25 March 2015, the Legal Representatives of Victims ('LRVs') filed their 'Joint Submissions on Issues Related to the Legal Representation of Victims' ('LRVs' Submissions').⁹
5. On 2 April 2015, the Registry transmitted 39 Group C applications to the Chamber,¹⁰ in unredacted form, and to the parties,¹¹ in redacted form. On the same date, it also filed the related assessment report ('Third Report').¹²

³ First Participation Decision, ICC-01/04-02/06-449, para. 54.

⁴ First Transmission to the Chamber of Applications for Participation in Trial Proceedings, ICC-01/04-02/06-472 and 626 confidential, *ex parte*, only available to the Registry, Annexes.

⁵ Second Transmission to the Chamber of Applications for Participation in Trial Proceedings, notified on 17 March 2015, ICC-01/04-02/06-514 and 375 confidential, *ex parte*, only available to the Registry, Annexes.

⁶ Registry's First Assessment Report on Applications for Victims' Participation in Trial Proceedings, ICC-01/04-02/06-479 ('First Report') and confidential Annex; Registry's Second Assessment Report on Applications for Victims' Participation in Trial Proceedings, notified on 17 March 2015, ICC-01/04-02/06-518 ('Second Report') and confidential Annex A. A corrigendum of Annex A was filed on 22 May 2015 (ICC-01/04-02/06-518-Conf-AnxA-Corr).

⁷ Decision on the Registry's request for an extension of time for consultations, 27 February 2015, ICC-01/04-02/06-480. *See also* Request for an Extension of Time to Report on Consultations with Victims on the System for Legal Representation Pursuant to Regulation 35 of the Regulations of the Court, 19 February 2015, ICC-01/04-02/06-465-Conf.

⁸ Registry's Report on Consultations with Victims Pursuant to Decision ICC-01/04-02/06-449, ICC-01/04-02/06-513-Conf-Exp.

⁹ ICC-01/04-02/06-532-Conf-Exp.

¹⁰ Third Transmission to the Trial Chamber of Applications for Participation in the Proceedings, ICC-01/04-02/06-538 and 39 confidential, *ex parte*, only available to the Registry, Annexes.

¹¹ Transmission to the parties of Applications for Participation in Trial Proceedings, ICC-01/04-02/06-539 with 39 confidential, *ex parte*, only available to the Prosecution and the Defence, Annexes.

¹² Registry's Third Assessment Report on Applications for Victims' Participation in Trial Proceedings, notified on 7 April 2015, ICC-01/04-02/06-540-Conf and confidential Annex A.

6. On 28 April 2015, in accordance with the time limit set by the Chamber,¹³ the Prosecution¹⁴ and Defence¹⁵ filed observations on the Group C applications transmitted on 2 April 2015 (respectively, 'First Prosecution Submissions' and 'First Defence Submissions').
7. On 8 May 2015, the Registry transmitted 29 Group A applications and 22 Group B applications to the Chamber, as well as one Group C application to the Chamber,¹⁶ in unredacted form, and to the parties,¹⁷ in redacted form. Also on 8 May 2015, the Registry filed a final assessment report ('Fourth Report').¹⁸
8. On 20 May 2015, in accordance with the time limit set by the Chamber,¹⁹ the Prosecution²⁰ and Defence²¹ filed observations on the Group C application transmitted on 8 May 2015.

II. Applicable law

9. The Chamber incorporates by reference the applicable law as set out in the First Participation Decision.²²
10. It is recalled, in particular, that individuals seeking to be admitted as participating victims will have to demonstrate that they are victims within

¹³ Email from a Legal Officer of the Chamber to parties and participants on 13 April 2015 at 10.25.

¹⁴ Prosecution's observations on 39 applications for victim participation during trial, ICC-01/04-02/06-575-Conf.

¹⁵ Observations on behalf of Mr Ntaganda following the transmission of 39 victims' applications for participation in the proceedings, ICC-01/04-02/06-573-Conf.

¹⁶ Fourth Transmission to the Trial Chamber of Applications for Participation in the Proceedings, ICC-01/04-02/06-594 and 52 confidential, *ex parte*, only available to the Registry, Annexes.

¹⁷ Second Transmission to the Parties of Applications for Participation in Trial Proceedings, ICC-01/04-02/06-593 and 52 confidential, *ex parte*, only available to the Prosecution and Defence, Annex.

¹⁸ Registry's Fourth Assessment Report on Applications for Victims' Participation in Trial Proceedings, ICC-01/04-02/06-592 and confidential Annexes.

¹⁹ Email from a Legal Officer of the Chamber to parties and participants on 11 May 2015 at 11.09.

²⁰ Prosecution's observations on one application for victim participation during trial, ICC-01/04-02/06-602 ('Second Prosecution Submissions').

²¹ Observations on behalf of Mr Ntaganda following the transmission of one victim application for participation in the proceedings, ICC-01/04-02/06-601 ('Second Defence Submissions').

²² ICC-01/04-02/06-449, paras 41-51.

the meaning of Rule 85 of the Rules and shall therefore meet the following criteria:

- i. his or her identity as a natural person must be established;
- ii. he or she has suffered harm; and
- iii. the suffered harm is a result of an incident falling within the parameters of the confirmed charges.

III. Chamber's determination

11. In accordance with the admission system set out in the First Participation Decision, the Registry transmitted, by way of four transmissions, a total of 1092 applications for participation. In the present decision, the Chamber will first decide on the status of the Group A and B applications transmitted and then assess, in light of the parties' submissions, whether the Group C applications transmitted qualify as victims for the case at hand.

12. As for the modalities of victim participation, the Chamber recalls that they have been set out in the 'Decision on the conduct of proceedings'.²³

A. Group A and B applications

13. The Registry transmitted a total of 1030 Group A applications and 22 Group B applications to the Chamber. All applications transmitted were individually assessed by the Registry, on a *prima facie* basis, who found that they either clearly meet or do not meet the requirements of Rule 85(a) of the Rules, as listed above.

14. The Chamber has not identified any error in the Registry's assessment and thus: (i) authorises the participation of the 1030 applicants whose applications were transmitted under Group A; and (ii) directs that victim

²³ 2 June 2015, ICC-01/04-02/06-619, paras 63-70.

status not be granted to the 22 applicants whose applications were transmitted as Group B.

B. Group C applications

15. In its Third and Fourth Reports, the Registry indicated it could not make a clear determination as to whether or not 40 applicants provided sufficient information to satisfy the third criterion of the assessment under Rule 85(a) of the Rules. That is, the Registry identified and transmitted, to the Chamber as well as to the parties, 40 Group C applications, as it could not clearly determine whether or not the personal harm they reported resulted from an incident falling within the parameters of the confirmed charges.
16. In light of the fact the Registry considered all Group C applications satisfied the first two criteria of the test under Rule 85(a) of the Rules, and having noted that the parties also limited their observations to the third criterion of the test, the Chamber's analysis will be limited to the contentious issues.
17. From the outset, the Chamber notes that the parties have framed their submissions primarily around the scope of the charges. The Prosecution argues that the 40 applicants have suffered harm as a result of crimes falling within the parameters of the confirmed charges.²⁴ The Defence argues that the harm suffered falls outside the geographical and/or temporal scope of the charges.²⁵
18. In this regard, the Chamber emphasises that the assessment of victim eligibility is distinct from any assessment of the facts and circumstances described in the charges, and is of a *prima facie* nature. Victim eligibility determinations do not delineate, and are without prejudice to, the

²⁴ First Prosecution Submissions, ICC-01/04-02/06-575-Conf, paras 2, and 18-30; Second Prosecution Submissions, ICC-01/04-02/06-602, paras 2 and 23-25.

²⁵ First Defence Submissions, ICC-01/04-02/06-573-Conf, paras 2 and 9-16; Second Defence Submissions, ICC-01/04-02/06-601, paras 2 and 8-14.

parameters of the charges, the admission of any items into evidence or the Chamber's ultimate decision on the merits.

19. In addition, as concerns the Defence argument that Group C applications transmitted were redacted in a way which hindered its capacity to submit meaningful observations,²⁶ the Chamber, noting that the redactions are limited to identifying information, considers that the redactions applied by the Registry constitute appropriate measures under Article 68(1) of the Statute. Indeed, in the view of the Chamber, and as decided in the First Participation Decision,²⁷ the Registry may, at this stage, transmit redacted versions of Group C applications to the parties. The Chambers considers that no prejudice to or inconsistency with the right of the accused to a fair and impartial trial arises from such redactions.

i. Group C applications transmitted on 2 April 2015

20. The 39 applications for participation transmitted on 2 April 2015 raise the question as to whether or not harm suffered in Kilo, Kilo-Mission and other *localités* which can be found 2 to 5 kilometres away from Kobu can result from crimes allegedly committed in Kobu in the context of the attack against the Walendu-Djatsi *collectivité* which took place between on or about 12 February and on or about 27 February 2003 ('Second Attack').

21. At the outset, the Chamber notes that the applicants claim to have suffered harm predominantly in February and/or March 2003, and that locations referred to in the applications appear to be located in the undefined area where the Walendu-Djatsi *collectivité* and the Banyali-Kilo *collectivité* meet. The Chamber is also mindful, as pointed out by the Prosecution,²⁸ that the fact that applicants locate their village in relation to Kilo – located in the

²⁶ First Defence Submissions, ICC-01/04-02/06-573-Conf, paras 1 and 4-5; Second Defence Submissions, ICC-01/04-02/06-601, paras 1 and 3-4.

²⁷ ICC-01/04-02/06-449, para. 24(iv).

²⁸ First Prosecution Submissions, ICC-01/04-02/06-575-Conf, para. 27.

Banyali-Kilo *collectivité* – does not necessarily mean that the villages in question are closer to Kilo, as opposed to Kobu – located in the Walendu-Djatsi *collectivité*.

22. The Chamber is of the view that applicants should be granted victim status, in principle, for the purposes of this particular case, if they report having suffered harm allegedly caused by the *Union des Patriotes Congolais* ('UPC') / *Force Patriotique pour la Libération du Congo* ('FPLC') soldiers: (i) sufficiently close in time to the relevant timeframes specified in the charges; and (ii) in locations sufficiently proximate to those listed in the Pre-Trial Chamber's decision pursuant to Article 61(7)(a) and (b) of the Statute ('Confirmation Decision'),²⁹ unless other information provided warrants a different finding.
23. In light of the above, the Chamber is satisfied that, despite referencing locations specifically charged in the context of the attack on the Banyali-Kilo *collectivité*, which took place between on or about 20 November 2002 and on or about 6 December 2002, the 39 applicants have *prima facie* demonstrated that they have suffered harm which is sufficiently linked to the charges for the purpose of a Rule 85(a) assessment to be granted victim status.
24. Lastly, the Chamber notes Applicant a/00209/13, in addition to harm resulting from crimes allegedly committed in the context of the Second Attack, also reports harm suffered as a result of the death of his 14-year-old child who is alleged to have been '[TRANSLATION] a soldier of Mr Ntaganda' before the end of May 2003.³⁰ The Chamber considers he may also be admitted to participate to the proceedings on the basis of the harm he

²⁹ Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309.

³⁰ ICC-01/04-02/06-538-Conf-Exp-Anx3, page 1.

suffered as a parent of a 14-year-old child used in hostilities and deceased after having been recruited by the UPC/FPLC.³¹

ii. Group C application transmitted on 8 May 2015

25. The application for participation transmitted on 8 May 2015 raises the question as to whether or not the harm suffered by Applicant a/00058/13 as a result of the murder of her two daughters in Gutsi is sufficiently within the framework of the confirmed charges so as to qualify as victim for the present case.

26. The Chamber notes the Registry's submissions concerning the 'close territorial proximity between Gutsi and Bambu',³² the latter being a location in relation to which murder was specifically charged.³³ Moreover, the Chamber also notes that Pre-Trial Chamber II found that there were substantial grounds to believe that UPC/FPLC soldiers committed persecution, as well as forcible transfer of population and displacing of civilians, in Gutsi.³⁴

27. Following the above analysis, the Chamber is satisfied the applicant *prima facie* established that she suffered personal harm sufficiently linked to the charges to qualify as victim for the present case.

C. Legal Representation

28. As to the legal representation of victims, the Chamber recalls that it received the Registry's Report on Legal Representation³⁵ and the related LRVs' Submissions.³⁶ The Chamber has considered whether any reasons exist to

³¹ See Confirmation Decision, ICC-01/04-02/06-309, para. 74.

³² Fourth Report, ICC-01/04-02/06-592, para. 9.

³³ Confirmation Decision, ICC-01/04-02/06-309, para. 36.

³⁴ ICC-01/04-02/06-309, para. 36.

³⁵ Registry's Report on Legal Representation, ICC-01/04-02/06-513-Conf-Exp. See also Decision on victims' participation in trial proceedings, 6 February 2015, ICC-01/04-02/06-449, paras 53-54.

³⁶ LRVs' Submissions, ICC-01/04-02/06-532-Conf-Exp.

modify the current legal representation system. The Majority considered whether counsel from the Democratic Republic of Congo ('DRC') should replace the current counsel in order to achieve a closer proximity of the counsel to the victims. The Chamber, by Majority, Judge Ozaki dissenting, considered that there are no compelling reasons to modify the current system of legal representation for the purpose of trial proceedings. In reaching the decision that the current system should be maintained, the Majority took into account that the current LRVs have been working on the case since December 2013 and are thus familiar with the voluminous record of the case, as well as the procedural history. In the Majority's view, besides the importance of continuity and the general requirement of possessing the necessary legal skills, proximity to the victims is a relevant consideration to be taken into account when deciding who should represent these victims. In this regard, it considers that proximity to the victims does not necessarily require physical proximity. Any counsel representing victims should have knowledge of the victims' culture, the context in which the alleged crimes took place (i.e. the armed conflict) and – in order to assess the impact of the alleged crimes on the individual victims – also the circumstances in which the victims live.

29. The Majority found that the current LRVs have shown in their written and oral submissions a high degree of understanding of the situation on the ground and the needs of victims in general, as well as the specific circumstances of the victims in this case. Moreover, both LRVs have a field counsel in the DRC to ensure effective and regular contact with the victims, and the LRVs themselves also conduct regular visits to the field to meet with the victims they represent. These field counsel, who are from the DRC itself, work and live in the affected region, whilst the LRVs have direct and ready

access to the Chamber and the trial proceedings, which will soon take place by way of hearings on an almost daily basis.

30. The Majority also took note of the Registry's recommendation to maintain the current system for legal representation during the trial proceedings.³⁷ In addition, the Majority noted the outcome of a survey conducted by the VPRS amongst the victims. Although the survey only represents the views of a sample of the victims and is subject to certain difficulties described by the Registry in its report,³⁸ the Majority nonetheless considered it important that the vast majority of the victims consulted expressed the wish to retain the current LRVs, and a significant majority appears to be 'overall content' with their current legal representation.³⁹

31. In these circumstances, the Majority found the current system to meet all the requirements for an effective and fair representation of victims. As the Majority could not identify any concrete reason to change the system that appeared to be functioning very well so far, it decided to leave the current system in place.

32. Accordingly, the Chamber, by majority, decides that Ms Sarah Pellet shall represent the 141 child soldiers victims⁴⁰ and Mr Dmytro Suprun shall represent the 929 victims of the UPC/FPLC attacks,⁴¹ admitted by way of the present decision.

³⁷ Registry's Report on Legal Representation, ICC-01/04-02/06-513-Conf-Exp, para. 26.

³⁸ Registry's Report on Legal Representation, ICC-01/04-02/06-513-Conf-Exp, paras 12-14.

³⁹ Registry's Report on Legal Representation, ICC-01/04-02/06-513-Conf-Exp, para. 16.

⁴⁰ First Report, ICC-01/04-02/06-479, para. 4 (117 applicants); Second Report, ICC-01/04-02/06-518, para. 4 (23 applicants); Fourth Report, ICC-01/04-02/06-592, para. 4 (1 applicant).

⁴¹ First Report, ICC-01/04-02/06-479, para. 4 (509 applicants); Second Report, ICC-01/04-02/06-518, para. 4 (352 applicants); Third Report, ICC-01/04-02/06-540 (39 applicants); Fourth Report, ICC-01/04-02/06-592, paras 4 and 8 (29 applicants).

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DECIDES to admit the applicants listed in Annex A as participating victims;

DECIDES to reject the applications for participation submitted by the following applicants: a/00222/13; a/00201/13; a/00205/13; a/00223/13; a/00224/13; a/00226/13; a/00227/13; a/00229/13; a/00230/13; a/00609/13; a/00626/13; a/01286/13; a/01320/13; a/00036/13; a/00232/13; a/00233/13; a/00586/13; a/00591/13; a/00595/13; a/00610/13; a/00697/13; a/00755/13;

DECIDES, BY MAJORITY, JUDGE OZAKI DISSENTING, that the current system of legal representation of victims should be maintained during trial proceedings;

DECIDES that Mr Dmytro Suprun shall represent the 929 victims of attacks carried out by UPC/FPLC hereby admitted;

DECIDES that Ms Sarah Pellet shall represent the 141 child soldiers victims hereby admitted;

INSTRUCTS the Registry to transmit to the legal representatives of victims copies of the redacted and unredacted versions of the applications for participation submitted by victims they are hereby appointed to represent;

INSTRUCTS the Registry to file, by 22 June 2015, public redacted versions of:


- Registry's Report on Legal Representation (ICC-01/04-02/06-513-Conf-Exp);
- Third Report (ICC-01/04-02/06-540-Conf); and
- Filing ICC-01/04-02/06-465-Conf;

ORDERS the LRVs to file a public redacted version of the LRVs' Submissions (ICC-01/04-02/06-532-Conf-Exp) by 29 June 2015; and

ORDERS the Prosecution to file a public redacted version of the First Prosecution Submissions (ICC-01/04-02/06-575-Conf) and the Defence, of the First Defence Submissions (ICC-01/04-02/06-573-Conf), by 29 June 2015.

Judge Ozaki appends a partially dissenting opinion.

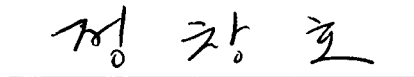
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 16 June 2015

At The Hague, The Netherlands