

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 26 June 2013

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 “*Demande de participation de neuf victimes admises dans le procès de M. Thomas Lubanga Dyilo*”

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

Legal Representatives of the Applicants
Carine Bapita Buyangandu

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
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**
Fiona McKay

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 “*Demande de participation de neuf victimes admises dans le procès de M. Thomas Lubanga Dyilo*” (the “Application”).²

I. PROCEDURAL HISTORY

1. On 22 August 2006, Pre-Trial Chamber I issued a warrant of arrest for Bosco Ntaganda (“Mr. Ntaganda”) for his alleged responsibility for the war crimes of conscripting and 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 Ituri Province of the Democratic Republic of the Congo (the “DRC”).³

2. On 15 March 2012, the Presidency re-assigned the situation in the DRC to Pre-Trial Chamber II.⁴

3. On 13 July 2012, the Chamber 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, and 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

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

² ICC-01/04-02/06-72-Conf and its confidential *ex parte* annexes.

³ Pre-Trial Chamber I, “Warrant of arrest”, 22 August 2006, ICC-01/04-02/06-2-Anx-tENG; a corrigendum was filed into the record of the case on 7 March 2007, see 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.

Statute, and pillaging under article 8(2)(e)(v) of the Statute, all committed in the Ituri Province of the DRC between 1 September 2002 and the end of September 2003.⁵

4. On 22 March 2013, Mr. Ntaganda voluntarily surrendered to the Court. His initial appearance before the Court took place on 26 March 2013 and the Chamber set 23 September 2013 as the date for the commencement of the confirmation of charges hearing,⁶ which was postponed to 10 February 2014 pursuant to 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”.⁷

5. On 26 April 2013, the Chamber issued the “Decision Requesting the Victims Participation and Reparations Section to Submit Observations”⁸ with a view to organizing “the victims’ application process and the subsequent proceedings related thereto including the determination under rule 85 of the Rules in an efficient and fair manner”.⁹ The observations were filed on 6 May 2013.¹⁰

6. On 28 May 2013, the Single Judge issued the “Decision Establishing Principles on the Victims’ Application Process”¹¹ in which she established the principles governing the collection, processing and transmission of applications for victims’ participation in the present case (the “28 May 2013 Decision”). The Single Judge also requested the Victims Participation and Reparations Section (the “VPRS”) “to collect forthcoming applications for victims’ participation in the present case by using the Simplified Form,” taking into account the specific features of the case against Mr. Ntaganda.¹²

⁵ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application under Article 58”, 13 July 2012, ICC-01/04-02/06-36-Red.

⁶ Pre-Trial Chamber II, Transcript of Hearing, 26 March 2013, ICC-01/04-02/06-T-2-ENG ET, page 12, lines 2-3.

⁷ Pre-Trial Chamber II, ICC-01/04-02/06-73, p. 19.

⁸ Pre-Trial Chamber II, ICC-01/04-02/06-54, para. 5.

⁹ Pre-Trial Chamber II, ICC-01/04-02/06-54, para. 5.

¹⁰ ICC-01/04-02/06-57.

¹¹ Pre-Trial Chamber II, ICC-01/04-02/06-67.

¹² Pre-Trial Chamber II, ICC-01/04-02/06-67, p. 21.

7. On 4 June 2013, the Single Judge issued a series of instructions to the VPRS in accordance with paragraph 32 of the 28 May 2013 Decision.¹³

8. On 10 June 2013, Carine Bapita (“Ms. Bapita”), the legal representative of victims a/0051/06, a/0078/06, a/0105/06, a/0231/06, a/0232/06, a/0248/06, a/0249/06, a/0250/06 and a/0613/08 in the case of the *Prosecutor v. Thomas Lubanga Dyilo* (the “Lubanga case”) submitted the Application, in which she requests the Single Judge to:

58. *Dire et juger que l'admission de a/0051/06, a/0078/06, a/0105/06, a/0231/06, a/0232/06, a/0248/06, a/0249/06, a/0250/06, a/0613/08 dans le procès Le Procureur c/ Thomas Lubanga Dyilo demeure valide pour le procès Le Procureur c/ Bosco Ntaganda, en ce qu'elle répond à tous les critères fixés par la Cour et eu égard au fait que la Cour privilégie généralement sa propre jurisprudence, toutes Chambres confondues.*

59. *En conséquence, accorder le statut de victimes participantes à a/0051/06, a/0078/06, a/0105/06, a/0231/06, a/0232/06, a/0248/06, a/0249/06, a/0250/06, a/0613/08 dans l'affaire Le Procureur c/ Bosco Ntaganda.*

60. *Autoriser ces neuf victimes à participer à toutes les phases de l'affaire Le Procureur c/ Bosco Ntaganda (préliminaire, procès, appel, réparation).*

61. *Constater que ces victimes ont le statut particulier d'enfants soldats, que deux d'entre elles rapportent avoir subi des viols et violences sexuelles et que deux autres ont été mariées de force à des miliciens de l'UPC; en conséquence, tenir compte de leurs spécificités en leur accordant le droit de participer à la procédure.*

62. *Constater que toutes les informations requises, telles que mentionnées par la décision du 28 mai 2013 figurent dans les formulaires de demandes de participation à la procédure Le Procureur contre Thomas Lubanga Dyilo annexés aux présentes écritures. Néanmoins, si la Chambre estime qu'il en est besoin, autoriser le conseil à recueillir de nouvelles demandes de participation des neuf victimes demandereses, spécifiquement conçues pour le procès Le Procureur c/ Bosco Ntaganda.*

63. *Si la Chambre l'estime préférable, autoriser le conseil à recueillir de nouvelles procurations auprès des neuf victimes demandereses, spécifiquement conçues pour le procès Le Procureur c/ Bosco Ntaganda.*¹⁴

¹³ E-mail of a Legal Officer of Pre-Trial Chamber II to the VPRS, 4 June 2013.

¹⁴ ICC-01/04-02/06-72-Conf, paras 58-63.

II. APPLICABLE LAW

9. The Single Judge notes articles 21(1)(a), (2) and (3), 68(3) of the Statute, rules 16 and 89 of the Rules of Procedure and Evidence (the “Rules”) and regulation 86(9) of the Regulations of the Court (the “Regulations”).

III. DETERMINATION BY THE SINGLE JUDGE

10. The present decision is classified public even though it makes reference to the Application which is classified as confidential. However, the Single Judge considers that such references in the present decision are required by the principle of publicity and judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to as they have been kept to a minimum.

11. The Single Judge observes that the Application contains three separate requests. The first request revolves essentially around the automatic recognition and admission as victims in the present case of victims a/0051/06, a/0078/06, a/0105/06, a/0231/06, a/0232/06, a/0248/06, a/0249/06, a/0250/06 and a/0613/08 which are already admitted in the *Lubanga* case. In support of this request, Ms. Bapita argues that the facts for which these applicants were admitted as victims in the *Lubanga* case are the same as in the instant case and that another chamber of this Court already examined their applications for participation.¹⁵ In her second request, Ms. Bapita solicits the Single Judge’s acceptance of the information contained in the application forms submitted previously by the 9 victim applicants in the *Lubanga* case or, alternatively, the Single Judge’s authorization to collect and submit new applications by using the Simplified Form specifically designed for the purposes of the present proceedings.¹⁶ Lastly, Ms. Bapita requests that her clients, should they be admitted as victims in the present case, continue to be represented by the same legal team that assisted them in the *Lubanga* case.¹⁷

¹⁵ ICC-01/04-02/06-72-Conf, paras 20-48.

¹⁶ ICC-01/04-02/06-72-Conf, paras 62-63.

¹⁷ ICC-01/04-02/06-72-Conf, para. 44.

12. At the outset, it should be clarified that in the 28 May 2013 Decision the Single Judge established the principles governing the victims' application process in the present case. By its very nature, a decision setting the framework for the victims' application process and instructing the VPRS accordingly, may not be exhaustive.¹⁸ In light of this, as has been specified by the Single Judge in said decision, the VPRS has been instructed "to raise with the Single Judge, if need be and on a continuous basis, any issues that may arise in regard to the collection and processing of the applications, in order to readily address and resolve such issues before the transmission of the applications to the Chamber".¹⁹ To this end, the Single Judge stated that she will provide the VPRS and other specialized sections of the Registry, if need be, with specific instructions and directions on concrete issues that may arise during the application stage and that are, therefore, unpredictable *a priori*.

13. Turning to the issues *sub judice*, the Single Judge recalls rule 89(1) of the Rules which provides that "victims shall make written application to the Registrar, who shall transmit the application to the *relevant* Chamber" [emphasis added]. Accordingly, victims who wish to participate in the proceedings of the case of the *Prosecutor v. Bosco Ntaganda* should apply before this Chamber. More importantly, the Single Judge highlights that the expressed declaration by the victim applicant to participate in this case cannot be assumed on the basis of the victims' participation in another case, such as the *Lubanga* case, as the latter "[...] involves a different accused who has played a particular role during the events".²⁰ Rather, it is imperative that the victim applicants express their desire to participate in the present case concerning Mr. Ntaganda.

¹⁸ See for example Pre-Trial Chamber II, "Decision on the Registrar's 'Request for instructions on the processing of victims applications'", 28 June 2011, ICC-01/09-01/11-147, para. 6.

¹⁹ Pre-Trial Chamber II, 28 May 2013 Decision, ICC-01/04-02/06-67, para. 32.

²⁰ Pre-Trial Chamber II, "Decision on the 'Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing' and Setting a New Calendar for the Disclosure of the Evidence Between the Parties", 17 June 2013, ICC-01/04-02/06-73, para. 25.

14. In this regard, the Single Judge notes the special application procedure established in the 28 May 2013 Decision²¹ for the purpose of “enhanc[ing] the overall efficiency and expeditiousness of the proceedings leading to the confirmation of charges hearing”²². In particular, the Single Judge developed, in consultations with the VPRS, a Simplified Form specifically designed according to the characteristics of the present case and “the very limited and clear purpose of the application phase, i.e. to determine whether an applicant meets the requirements of rule 85 of the Rules for the purposes of being granted the status of victim in the present case”.²³ In view of such limited purpose, the Simplified Form “whilst accurate and precise enough to be assessed against the backdrop of rule 85 of the Rules, should minimise the concerns for identification and, hence, the need to resort to protective measures, ultimately allowing for the transmission of such information to the parties in non-redacted form, to the extent possible”.²⁴

15. The Single Judge further recalls that the application procedure established in the 28 May 2013 Decision provides that the Simplified Forms collected on the field shall be grouped by the VPRS according to appropriate criteria.²⁵ The Simplified Forms collected, processed and grouped by the VPRS shall subsequently be transmitted together with a report under regulation 86(5) of the Regulations to this Chamber.²⁶ This grouping by the VPRS “will also simplify and expedite the decision-making by the Chamber as envisaged by rule 89(4) of the Rules”.²⁷

²¹ Pre-Trial Chamber II, 28 May 2013 Decision, ICC-01/04-02/06-67, paras 33-44.

²² *Ibid.*, para. 18.

²³ *Ibid.*, para. 22.

²⁴ *Ibid.*, para. 22.

²⁵ *Ibid.*, para. 35.

²⁶ *Ibid.*, para. 37. According to the procedure established in the present case, the report under regulation 86(5) of the Regulations shall be accompanied by: (i) Annex A, containing the groups of applicants as established by the VPRS on the basis of appropriate criteria together with the VPRS's assessment as to whether the requirements of rule 85 of the Rules are met for each applicant in the relevant group(s) and for the group(s) as such; and (ii) Annex B, containing copies of complete applications, including a proof of identity of those applicants who did not object to their identity being disclosed.

²⁷ Pre-Trial Chamber II, 28 May 2013 Decision, ICC-01/04-02/06-67, para. 34.

16. Finally, it is the view of the Single Judge that it is essential that the VPRS verify whether or not victims admitted to participate in other cases wish to take part in the confirmation of charges hearing and the related proceedings against Mr. Ntaganda.

17. In light of the foregoing, the Single Judge considers it correct not to proceed in the present case with the automatic recognition and admission of victims who have participated in proceedings related to the *Lubanga* case. The same holds true in respect of victims who have participated in any other case before the Court.

18. In this respect, with a view to give full implementation to the application system for victims' participation as established in the present case, the Single Judge issued on 4 June 2013 a series of instructions to the VPRS, in accordance with the 28 May 2013 Decision. These instructions cover, *inter alia*, the subject matter of the Request *sub judice* and have due regard to the particular situation of victims participating in other cases before the Court. The Single Judge instructed:

VPRS staff as well as trained intermediaries [...] [to] encourage applicants who wish to participate in the Ntaganda case, to use said Simplified Form as it contains all information relevant for the Single Judge's decision under rule 85 of the Rules. The Simplified Form is also easier and not time-consuming to complete both by victims and those who assist them.

[...]

[The VPRS to] take all reasonable steps to contact applicants who applied for participation in the Situation in the DRC, in the Lubanga, Katanga and Ngudjolo cases, including applications in the Lubanga case which contain the name of Mr. Ntaganda, and verify their wish to participate in the present case. Should any of these applicants wish to participate, they will have to fill in the Simplified Form as any other new applicant in the current case.²⁸

[...]

[T]he VPRS as well as properly trained intermediaries [...] [to] be guided by the limited nature of the application stage. As explained [...] in paragraph 24 of the [28 May 2013] Decision, since the Simplified Form has been developed to contain only the necessary

²⁸ The Single Judge clarifies that the information, relevant to the Chamber's determination under rule 85 of the Rules, which is already contained in application forms which have been submitted to the Court for the purposes of other proceedings, may be referenced to or integrated into the Simplified Form by the victim applicants or the person assisting them. The victim applicants shall sign the Simplified Form thus expressing their desire to participate in the present case. A copy of the original application form will, however, remain in the electronic log, as ordered in the 28 May 2013 Decision, ICC-01/04-02/06-67, para. 24.

amount of information required by rule 85 of the Rules, any information that goes beyond it – including documentation to substantiate the harm suffered or any details concerning the events – must be stored separately by the VPRS in the electronic log to be accessible to the Chamber if need be. At this point the Single Judge reiterates that it is the responsibility of the [Public Information and Documentation Section] and the VPRS to properly inform applicants in accordance with paragraph 25 of the [28 May 2013] Decision that, if admitted as victims, they “will have ample opportunities throughout all stages of the proceedings to present their stories, in particular to voice their ‘views and concerns’, as well as to exercise the rights provided by the statutory framework of the Court and any other rights deemed appropriate by the Chamber, in compliance with article 68(3) of the Statute and with the Rules”. More specifically, victims admitted in this case will be able to communicate with their legal representative for the purpose of conveying their views and concerns to the Chamber.²⁹

19. In light of the above, and in order to ensure uniformity in the Single Judge’s determination as to who qualifies as victim in the present case in accordance with rule 85 of the Rules, she will assess any applications for victims’ participation once they will be transmitted by the Registry to this Chamber in accordance with the principles established in the 28 May 2013 Decision and recalled in the previous paragraphs.³⁰

20. Thus, the recognition and admission of victims a/0051/06, a/0078/06, a/0105/06, a/0231/06, a/0232/06, a/0248/06, a/0249/06, a/0250/06 and a/0613/08 in the *Lubanga case* as victims in the present case cannot be made at this stage.

21. With regard to the second request, as the Single Judge will not entertain the merits of the 9 applications outside the scope of the application procedure established by the 28 May 2013 Decision, she shall address only Ms. Bapita’s request to submit new applications. In this context, the Single Judge acknowledges the intention of Ms. Bapita to facilitate the communication between the intermediaries she refers to in the Application and the VPRS for the purpose of contacting the 9 applicants and filling in the Simplified Form.³¹ However, the Single Judge stresses that it is the responsibility of the VPRS pursuant to regulation 86(9) of the Regulations to assist victim applicants either directly or through the use of trusted and properly trained intermediaries, in accordance with the VPRS’ developed best

²⁹ E-mail of a Legal Officer of Pre-Trial Chamber II to the VPRS, 4 June 2013.

³⁰ Pre-Trial Chamber II, 28 May 2013 Decision, ICC-01/04-02/06-67, paras 29-44.

³¹ ICC-01/04-02/06-72-Conf, paras 49, 51-53.

practices.³² The Single Judge recalls in this regard, that “intermediaries, if involved in the application process, should operate under the control of the VPRS, which bears responsibility for their proper performance”.³³

22. Accordingly, the second request is granted to the extent that Ms. Bapita facilitate the communication between the intermediaries she referred to in the Application and the VPRS for the purpose of contacting the 9 applicants and filling in the Simplified Form. To this effect, the Single Judge instructs Ms. Bapita to communicate to the VPRS the names and contact details of the intermediaries which she referred to in the Application, in order for the VPRS to assess the best way of contacting victims a/0051/06, a/0078/06, a/0105/06, a/0231/06, a/0232/06, a/0248/06, a/0249/06, a/0250/06 and a/0613/08 and to assist them in filling in the Simplified Form.

23. As for the third request, the Single Judge underlines that the continuation of the legal representation of applicants a/0051/06, a/0078/06, a/0105/06, a/0231/06, a/0232/06, a/0248/06, a/0249/06, a/0250/06 and a/0613/08 is subject to their admission as victims in the present case. Taking into account that such admission has not taken place yet, the Single Judge considers it premature, at this stage, to address the issue of the legal representation of said applicants.

³² Pre-Trial Chamber II, 28 May 2013 Decision, ICC-01/04-02/06-67, para. 27.

³³ Pre-Trial Chamber II, 28 May 2013 Decision, ICC-01/04-02/06-67, para. 28.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **PARTLY GRANTS** the Application to the extent specified in paragraph 22 above;
- b) **ORDERS** Ms. Bapita to communicate to the VPRS, by no later than **Monday, 1 July 2013**, the names and contact details of the intermediaries referred to in the Application;
- c) **REJECTS** the remainder of the Application.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 26 June 2013

At The Hague, The Netherlands