



Original: English

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

Date: 29 August 2013

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public Document

**Request to appear before the Chamber
on the Defence's Application for interim release**

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Procedural Background

1. On 22 August 2006, Pre-Trial Chamber I, which the present case had originally been assigned to, issued the “Decision on the Prosecution Application for a Warrant of Arrest”,¹ along with a corresponding warrant of arrest for Mr Bosco Ntaganda.²
2. On 15 March 2012, the Presidency re-assigned the situation in the Democratic Republic of the Congo to Pre-Trial Chamber II.³
3. On 13 July 2012, Pre-Trial Chamber II (the “Chamber”) issued the “Decision on the Prosecutor’s Application under Article 58”,⁴ issuing a second warrant of arrest against Mr Bosco Ntaganda.
4. On 22 March 2013, the Single Judge of the Chamber (the “Single Judge”) issued the “Decision on Setting the Date for the Initial Appearance and Related Issues”,⁵ noting, *inter alia*, Mr Ntaganda’s voluntary surrender to the Court⁶ and deciding to convene a hearing for his initial appearance,⁷ which took place on 26 March 2013.⁸

¹ See the “Decision on the Prosecution Application for a Warrant of Arrest” (Pre-Trial Chamber I), No. ICC-01/04-02/06-1-US-Exp-tEN, 22 August 2006; a redacted version was filed in the record of the case on 6 March 2007 and the decision was made public on 1st October 2010, No. ICC-01/04-02/06-1-Red-tENG.

² See the “Warrant of Arrest”, No. ICC-01/04-02/06-2-Anx-tENG, 22 August 2006; a corrigendum was filed into the record of the case on 7 March 2007: see No. ICC-01/04-02/06-2-Corr-tENG-Red.

³ See the “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” (Presidency), No. ICC-01/04-02/06-32, 15 March 2012.

⁴ See the “Decision on the Prosecutor’s Application under Article 58”, No. ICC-01/04-02/06-36-Conf-Exp, 13 July 2012; and public redacted version No. ICC-01/04-02/06-36-Red.

⁵ See the “Decision on Setting the Date for the Initial Appearance and Related Issues” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-41, 22 March 2013.

⁶ *Idem*, p. 4.

⁷ *Ibid.*, p. 5.

⁸ See the Transcripts of the hearing of 26 March 2013, No. ICC-01/04-02/06-T-2-ENG ET.

5. On 20 August 2013, the Defence filed an application⁹ (the “Defence’s Application”) in which it requested the immediate interim release of Mr Bosco Ntaganda to the Kingdom of the Netherlands and, where necessary, the setting of conditions which the Chamber may consider necessary in accordance with rule 119 of the Rules of Procedure and Evidence.¹⁰

6. On 26 August 2013, the Single Judge issued the “Decision Requesting Observations on the Defence’s Application for Interim Release”,¹¹ in which she requested the Prosecution and the Kingdom of the Netherlands to submit observations on the Defence’s Application, by, respectively, 6 and 13 September 2013.¹²

7. The Principal Counsel of the Office of Public Counsel for Victims (the “OPCV” or the “Office”) notes the wording of rule 119(3) of the Rules of Procedure and Evidence which provides that “[b]efore imposing or amending any conditions restricting liberty, the Pre-Trial Chamber shall seek the views [...] [of] victims having communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or conditions imposed”.

8. Pursuant to regulation 81(4)(b) of the Regulations of the Court, the tasks of the OPCV shall include : “[...] (b) appearing, on the instruction or with the leave of the Chamber, in respect of specific issues”.¹³

⁹ See the “Version publique expurgée - Requête de la Défense aux fins de mise en liberté provisoire de M. Bosco Ntaganda”, No. ICC-01/04-02/06-87-Red, 20 August 2013.

¹⁰ *Idem*, p. 17.

¹¹ See the “Decision Requesting Observations on the Defence’s Application for Interim Release” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-92, 26 August 2013.

¹² *Idem*, pp. 4-5.

¹³ The Office has, in the past, requested and been granted leave to appear on issues of interest for victims. See, *inter alia*, the “Order on the Office of Public Counsel for Victims’ request filed on 21 November 2007 (Trial Chamber I), No. ICC-01/04-01/06-1046, 27 November 2007, par. 2; the “Ordonnance relative à la soumission d’écritures sur l’interprétation de la norme 42 du Règlement de la Cour (norme 28 du Règlement de la Cour)” (Trial Chamber II), No. ICC-01/04-01/07-1205, 12 June 2009, which *inter alia* decided on the OPCV’s Request to appear filed on 20 May 2009 (“Demande du BCPV afin d’être autorisé en vertu de la norme 81-4-b du Règlement de la Cour à comparaître devant

9. In this regard, the Office emphasises the reasons for its creation, namely to create an expert body within the Court in order to efficiently and timely address victims' issues.¹⁴ The practice developed by the Court in this regard and the responsibilities vested in the OPCV by both the Chambers and the victims since the inception of the Office to date has clearly contributed to the development of such expertise. The possibility to appear before a Chamber in respect of specific issues falls in line with the reasons for establishing the Office and seems warranted in this specific case in which victims have a specific right to be heard and the issue of their legal representation has not yet been addressed.

10. On the basis of these two provisions, the Principal Counsel submits the present Request to appear before the Chamber on the issue of the interim release of the suspect to protect the interests of victims having communicated with the Court.

la Chambre dans le cadre de questions spécifiques liées aux mesures de protection au bénéfice du témoin W-007", No. ICC-01/04-01/07-1160). See also, the "Decision on the OPCV's 'Second Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to the victims' application process'" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-57, 13 March 2012, by which the OPCV was authorised to submit written observations on the practical implications of the Registry's proposal on a partly collective application form for victims' participation; the Transcripts of the hearing of 30 October 2007, No. ICC-01/04-01/06-T-58-ENG, p. 13, lines 4 to 18; and the Transcripts of the hearing of 4 December 2007, No. ICC-01/04-01/06-T-62-ENG-ET WT, pages 53 to 54.

¹⁴ In this sense see Judge Sir Adrian FULFORD, "The role of the Office of Public Counsel for Victims in trial proceedings", in OPCV, *Helping victims make their voice heard: The Office of Public Counsel for Victims 5 years of activities*, 2010, pp. 4-5. This booklet is available on the website of the Court at the following address:

<http://www.icc-cpi.int/NR/rdonlyres/01A26724-F32B-4BE4-8B02-A65D6151E4AD/282846/LRBookletEng.pdf>.

II. Victims have a right to present their views on the Defence's Application in accordance with the legal texts of the Court

11. The Office contends that providing victims with the possibility to present their views on the Defence's Application for interim release is enshrined in the legal texts of the Court and is supported by the current jurisprudence of the Court.

12. As indicated *supra*,¹⁵ rule 119(3) of the Rules of Procedure and Evidence clearly provides for an obligation binding upon Pre-Trial Chambers to seek, before imposing or amending any conditions restricting liberty, the views of "*victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or conditions imposed*".

13. As explained by the Single Judge of Pre-Trial Chamber II the concept of "*victims having communicated with the Court*" refers to "*victims that, whilst not having (as yet) been allowed to participate in proceedings, have nevertheless been in contact with the Court*"¹⁶. Furthermore he clarified that

"[i]t seems beyond controversy that for the purposes of all of these provisions [including rule 119(3) of the Rules of Procedure and Evidence], victims who have applied to participate in the Court's proceedings by submitting the relevant form duly registered in the file by the relevant sections of the Registry qualify as 'victims having communicated with the Court'".¹⁷

14. In the present case, the Office contends that victims whose applications for participation based on a simplified form have been collected by the Registry should, undoubtedly be considered as "*victims that have communicated with the Court in that case*" within the meaning of rule 119(3) of the Rules of Procedure and Evidence, even

¹⁵ See *supra* para. 7.

¹⁶ See the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-101, 13 August 2007 (dated 10 August 2007), para. 93.

¹⁷ *Idem*.

though their applications for participation have not yet been transmitted to the Chamber for consideration.

15. The Office also contends that the same approach should apply to those victims who submitted applications for participation in the *Lubanga* case, irrespective of whether or not they submitted a simplified application form for participation in the present case, as far as the events described by the victims in that case, in term of temporal and territorial scope, coincide to a very large extent with the ones constituting the crime of enlisting and conscription of children under the age of 15 into armed forces and of using them actively in hostilities, as described in the first warrant of arrest issued against Mr Bosco Ntaganda which is coincident with the one issued against Mr Lubanga, who was then found guilty of said crimes.

16. Indeed, in the Office's opinion, the victims who applied to participate in the *Lubanga* case and who alleged identical events, in term of temporal and territorial scope, compared to the ones constituting the crime of enlisting and conscription of children under the age of 15 into armed forces and of using them actively in hostilities, for which Mr Bosco Ntaganda is suspected, cannot be prevented from enjoying their right under rule 119(3) of the Rules of Procedure and Evidence to present observations on the Defence's Application for the only reason that the Chamber decided not to consider applications for participation based on the regular application form, as opposed to a simplified one. In this regard, the Office observes that many victims who applied to participate in the *Lubanga* proceedings expressly mentioned Mr Bosco Ntaganda as one of the perpetrators of the crime they suffered from and some of the victims represented by the Office for the purpose of the proceedings in the *Lubanga* case have clearly indicated their willingness to participate in the *Bosco* case, and they are in the process of filling out the simplified form.

17. Furthermore, the above-mentioned categories of victims meet the second criterion under rule 119(3) of the Rules of Procedure and Evidence, in particular those victims “*could be at risk as a result of a release or conditions imposed*”.

18. In this regard, the Office observes that the identity of many victims who are still participating in the *Lubanga* case and who may wish to participate in the present case are known to the suspect, by virtue of the disclosure process and given the fact that the Defence counsel for Mr Bosco Ntaganda was also a member of the Defence team for Mr Lubanga. Moreover, some victims who are still participating in the *Lubanga* case and who wish to participate in the present case expressed to the Office their fear that their identity be disclosed to Mr Bosco Ntaganda.

19. Finally, in relation to the interest of victims to be heard on the issue of interim release, the Office wishes to recall that an analysis of the provisions governing victims’ participation in the proceedings before the Court clearly demonstrates that said participation is not restricted to specific stages and is therefore possible at all stages in the proceedings.¹⁸ Moreover, the jurisprudence of the Court has already acknowledged that the personal interests of the victims are affected by the issue of the detention of suspects and accused persons.¹⁹

¹⁸ See the proposals submitted by France, UN Doc. PCNICC/1999/DP.2, 1 February 1999, p. 7; Costa Rica, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999, p. 1, and Colombia, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999, p. 2. For a review of the preparatory works, see BITTI (G.) and FRIMAN (H.), “Participation of Victims in the Proceedings”, in LEE (R.S.) (ed.), *The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc. New York, 2001, pp. 456-474.

¹⁹ See the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’” (Appeals Chamber), No. ICC-01/04-01/06-824 OA 7, 13 February 2007, par. 54. See also, the “Decision on the application by victims for participation in the appeal” (Appeals Chamber), No. ICC-02/11-01/11-491 OA4, 27 August 2013, par. 12; and the “Reasons for the ‘Decision on the Participation of Victims in the Appeal against the ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’” (Appeals Chamber), No. ICC-01/05-01/08-566 OA8, 20 October 2009, para. 17.

¹⁹ See the “Decision Inviting Observations from the Participants concerning the Detention of Germain Katanga (Rule 118(2))” (Trial Chamber II), No. ICC-01/04-01/07-1252, 29 June 2009; the “Decision Inviting Observations from the Participants Concerning the Detention of Germain Katanga

20. Therefore, providing victims with the possibility to present views on the Defence's Application is not only established by the legal texts of the Court but it is also appropriate because their interests are affected by the eventual outcome of the proceedings related to the detention of the suspect.²⁰

21. Victims' participation in the proceedings before the Court is not, in itself, liable to affect the rights of the suspect. As Judge Blattmann pointed out:

"Both the rights of victims and that of the accused are amply protected under the Statute. Further, many major legal systems are able to incorporate victims' participation into their proceedings whilst ensuring the rights of the accused to both a fair and expeditious hearing".²¹

22. Victims' participation constitutes an integral part of the concept of fair and impartial proceedings before this Court as far as it is expressly provided under article 68(3) of the Rome Statute. Indeed, fair trial guarantees should apply not only to the Defence but also to the Prosecution and Victims.²² Furthermore, the participation of victims is consistent with the view of international human rights law

(Rule 118(2) of the Rules of Procedure and Evidence)" (Trial Chamber II), No. ICC-01/04-01/07-942, 5 March 2009; the "Decision Inviting Observations from the Participants concerning the Detention of Germain Katanga (Rule 118(2))" (Trial Chamber II), No. ICC-01/04-01/07-748, 13 November 2008, and the "Decision concerning observations on the review of the pre-trial detention of Germain Katanga (Pre-Trial Chamber I)", No. ICC-01/04-01/07-668, 9 July 2008. See also the "Décision aux fins de recueillir les observations des participants sur la détention de Mathieu Ngudjolo (Règle 118-2)" (Trial Chamber II), No. ICC-01/04-01/07-1192, 5 June 2009; the "Decision Inviting Observations from the Participants concerning the Detention of Mathieu Ngudjolo Chui (Rule 118(2))" (Trial Chamber II), No. ICC-01/04-01/07-904, 18 February 2009; the "Decision Inviting Observations from the Participants concerning the Detention of Mathieu Ngudjolo Chui (Rule 118(2))" (Trial Chamber II), No. ICC-01/04-01/07-732, 30 October 2008, and the "Decision concerning observations on the review of the pre-trial detention of Mathieu Ngudjolo Chui" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-602, 17 June 2008.

²⁰ See *supra* para. 19.

²¹ See the Separate and Dissenting Opinion of Judge René Blattmann appended to the "Decision on Victims' Participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, para. 26.

²² See the "Decision on the Prosecution's application for leave to appeal the Chamber's decision of 17 January 2006 on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6" (Pre-Trial Chamber I), No. ICC-01/04-135-tENG, 20 April 2006 (dated 31 March 2006), para. 38.

as a continuum, and is recognised in a large number of national systems. It follows that the balance of criminal proceedings cannot be affected by victims' participation. On the contrary, taking victims' interests into consideration is one of the factors that help to balance such proceedings, particularly since it is the violation of the fundamental rights of the victims themselves that is involved. The role of the victims should therefore not be confused with the role of the Prosecution.²³ Giving victims with the possibility to present views on the Defence's Application is thus simply to ensure that the rights afforded to them under the Rome Statute are effectively implemented, and hence has no impact on the rights of the suspect.

FOR THE ABOVE-MENTIONED REASONS, the Principal Counsel of the Office of Public Counsel for Victims respectfully requests the Pre-Trial Chamber to be allowed to appear before it on the issue of the interim release of Mr Bosco Ntaganda, within a deadline established by the Chamber, in order to represent the interests of victims having communicated with the Court in the case.



Paolina Massidda
Principal Counsel

Dated this 29th day of August 2013

At The Hague, The Netherlands

²³ See the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" (Appeals Chamber), No. ICC-01/04-01/06-824 OA 7, 13 February 2007, para. 55. See also in this sense DONAT-CATTIN (D.), « Article 68 », in TRIFFTERER (O.) (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition, Verlag C.H. BeckoHG, Hart Publishing and Nomos VerlagsgesellschaftmbH and Co, Munchen, Altustried-Krugzell, 2008, pp. 1296 and 1297: "*victims (or her/his representative) are a 'guardians' of the fairness of the proceedings with respect to their personal interests, and not 'agents' in search of retribution. The possibility of intervention in the most crucial stages of the proceedings may represent an important step in the 'rehabilitation' of the victims*".