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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***

Confidential - Prosecution, Defence and VPRS only

**Prosecution's Observations on 172 Applications for Victim Participation in the
Pre-Trial Proceedings**

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution submits observations on 172 applications for victim participation, pursuant to rule 89(1) of the Rules of Procedure and Evidence ("Rules") and the Single Judge's "Decision Establishing Principles on the Victims' Application Process".¹ Based on its assessment, the Prosecution supports all applications to participate as victims in the proceedings.
2. The Prosecution notes that it relies in its assessment, in part, on the summary provided by the Victims Participation and Reparation Section ("VPRS") relating to the proof of identity and kinship of each applicant for whom the relevant identity documentation has not been transmitted to the Prosecution. Should the Single Judge determine, based on a review of the supporting documentation, that the identity of applicants or, where applicable, kinship between the applicants and their family members has not been sufficiently established, the applicants concerned should be requested to provide further information.

Confidentiality

3. The Prosecution files its observations as "Confidential - Prosecution, Defence and VPRS only" pursuant to regulation 23 *bis* (2) of the Regulations of the Court, in accordance with the Confidential Redacted version of the filing by the VPRS.

Procedural background

4. On 28 May 2013, the Single Judge ordered the parties to submit observations on victims' application within 14 days of their transmission by VPRS.²

¹ ICC-01/04-02/06-67.

² *Ibid*, page 21.

5. On 13 September 2013, the Registry provided the Prosecution with 29 unredacted victim applications.³ The parties submitted their observations on 1 October 2013.⁴
6. On 8 October 2013, the Registry provided the Prosecution with 172 unredacted victim applications.⁵

Legal criteria for victim participation in the proceedings

7. The Prosecution considers that victim participation before the Court is an essential feature of the Statute and the Rules as well as an important contribution to international justice. Under the Statute, victims are actors in the administration of international justice rather than its passive subjects. Their participation is a statutory right, not a privilege bestowed on a case-by-case basis.
8. The Prosecution supports victim participation when all statutory requirements are met. Consistent with its view of the unique and necessary perspective victims lend to the proceedings, the Prosecution supports a liberal approach in permitting applicants to amend or clarify incomplete applications, if possible.
9. According to the Appeals Chamber, a person has the right to participate as a victim in the proceedings under article 68(3) if (i) he/she qualifies as a victim pursuant to rule 85; and (ii) his/her personal interests are affected by the issues, legal or factual, raised in the proceedings at hand.⁶
10. With respect to the first requirement of article 68(3)—qualification as a victim under rule 85—the established jurisprudence of the Court provides that the following four criteria must be satisfied *prima facie* for victim status to be granted,⁷

³ ICC-01/04-02/06-106-Conf-Exp.

⁴ ICC-01/04-02/06-119-Conf, ICC-01/04-02/06-118-Conf.

⁵ ICC-01/04-02/06-122-Conf-Exp.

⁶ See, e.g., ICC-01/04-556, para. 45; ICC-01/04-01/06-1335, para. 36.

⁷ See, e.g., ICC-02/05-01/07-58, para. 7; ICC-01/04-01/07-579, para. 67.

regardless of the stage of the proceedings in which the applicants wish to participate: (i) the applicant must be a natural person as set forth in rule 85(a) or an organisation or institution as set forth in rule 85(b); (ii) the applicant must have suffered harm; (iii) the crime from which the harm resulted must fall within the jurisdiction of the Court; and (iv) there must be a causal link between the crime and the harm.⁸

11. In reviewing applications, Chambers do generally not delve into the credibility of applicants' statements or require rigorous corroboration.⁹ Rather, Chambers "assess the applicants' statements first and foremost on the merits of their intrinsic coherence, as well as on the basis of the information otherwise available" to the Chamber.¹⁰

12. The second requirement of article 68(3)—that the applicant's personal interests are affected by legal or factual issues raised in the proceedings at hand—is considered separately from the victim status.¹¹ As indicated by the Appeals Chamber, "[c]lear examples of where the personal interests of victims are affected are when their protection is in issue and in relation to proceedings for reparations."¹² "An assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor".¹³

13. The established jurisprudence additionally requires that the harm suffered and the personal interests of the victim must be linked to the charges confirmed against the accused or, at earlier stages in the proceedings, the offences alleged in

⁸ See, e.g., ICC-01/04-556, para. 45; ICC-01/04-01/06-1335, para. 36.

⁹ See ICC-01/04-01/07-579, para. 67.

¹⁰ ICC-01/04-01/07-579, paras. 67, 132.

¹¹ See, e.g., ICC-01/04-556, para. 45; ICC-01/04-101-tEN-Corr, para. 62 (indicating that "personal interests" requirement constitutes an additional criterion to be met by victims, over and above the victim status accorded to them).

¹² ICC-01/04-01/06-925, para. 28.

¹³ *Ibid.*

the warrant of arrest or summons to appear or the document containing the charges.¹⁴

14. The first step in the determination of whether the applicant is a “natural person” within the meaning of rule 85 is an inquiry into whether the applicant has provided adequate proof of identity. Chambers have recognized that a balance must be achieved between the need to establish an applicant’s identity with certainty, on the one hand, and the applicant’s personal circumstances, on the other. Bearing in mind that the chaotic circumstances present in a given situation may preclude applicants from obtaining or producing copies of official identity papers and to ensure that victims are not unfairly deprived of the opportunity to participate, Chambers have considered non-official identification documents or, in appropriate cases, a statement signed by two credible witnesses attesting to the identity of the applicant as being sufficient proof of identity.

15. Further, “when assessing whether an applicant has suffered harm as a result of the loss of a family member, the Court requires proof of the identity of the family member and of his or her relationship with the applicant.”¹⁵

16. The Appeals Chamber has defined “harm” within the meaning of rule 85(a) as “loss, injury or damage”¹⁶ and explained that cognizable harm include material, physical and psychological injuries.¹⁷ The single most important requirement isolated by the Appeals Chamber for identifying “harm” is that the loss or injury must be suffered personally by the applicant.¹⁸ A qualifying injury may be direct

¹⁴ ICC-01/04-01/06-1432, paras. 2, 62-65 (“For the purposes of participation in the trial proceedings, the harm alleged by a victim and the concept of personal interests under article 68(3) of the Statute must be linked with the charges confirmed against the accused.”).

¹⁵ ICC-02/05-02/09-147-Red, para. 6; *see also* ICC-02/04-179, paras. 35-38.

¹⁶ ICC-01/04-01/06-1432, para. 31.

¹⁷ ICC-01/04-01/06-1432, para. 32. *See also* ICC-02/04-164, para. 8 (treating “‘psychological trauma’ and ‘emotional harm’ as falling within the concept of ‘mental harm’”).

¹⁸ ICC-01/04-01/06-1432, para. 32.

or indirect, so long as it is the applicant who experiences it.¹⁹ Direct victims are those whose injury or loss is the “result of the commission of a crime within the jurisdiction of the Court,” while indirect victims are “those who suffer harm as a result of the harm suffered by the direct victims.”²⁰ Indirect harm can arise, *inter alia*, where persons endure psychological suffering or material deprivation when a family member is killed as a result of the crimes for which the Suspect is called to answer.²¹

Factual analysis of the applications

Natural persons, harm suffered caused by crimes within the jurisdiction of the Court

17. All 172 applicants are natural persons acting on their own behalf.²² The 172 applicants have personally suffered direct and/or indirect physical, material and/or psychological harm. Their individual accounts sufficiently establish that the harm suffered resulted from crimes committed within the jurisdiction of the Court. The underlying acts attributed to the UPC constitute one or more of the following crimes relevant to the second warrant of arrest:²³ attack against a civilian population, murder, pillaging, rape, sexual slavery, or persecution.²⁴ Further, Pre-Trial Chamber II made specific findings regarding the incidents (crimes, dates and locations) common to this group of applicants.²⁵

¹⁹ ICC-01/04-01/06-1432, paras. 32, 34-35.

²⁰ ICC-01/04-01/06-1813, para. 44.

²¹ ICC-01/04-01/06-1813, paras. 50-51.

²² Even if the box “acting on behalf of a victim” was tagged in several applications, the facts described relate to the applicant him- or herself.

²³ ICC-01/04-02/06-36-Red, page 36, (i), (iii), (iv), (v), (vii).

²⁴ Articles 7(1)(a), 7(1)(g)-1, 7(1)(g)-2, 7(1)(h), 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v), 8(2)(e)(vi)-1 and 8(2)(e)(vi)-2 of the Statute.

²⁵ ICC-01/04-02/06-36-Red, paras. 43, 61.

Duplicate applications

18. According to the VPRS,²⁶ applicants a/00050/13, a/00086/13, a/00435/13, a/00569/13, and a/01076/13 submitted several applications. The duplicate applications have not been transmitted to the Prosecution. The Prosecution is therefore unable to compare the applications or assess any impact the different applications may have on the criteria to establish participation as a victim. The Prosecution notes, however, that the discrepancies that were flagged by the VPRS appear to be minor.

Identification of perpetrators

19. Applicant a/00168/13²⁷ identifies the perpetrators of the crimes he suffered as “*groupe armé confondu*”; however, he provides the precise date of the attack (17 February 2003), on which the Prosecution alleges the UPC attacked his village (Kobu). Accordingly, the Prosecution is satisfied that there is sufficient attribution of these crimes to the UPC.

Indirect harm suffered from murder of extended family members

20. Applicants a/00051/13,²⁸ a/00942/13²⁹ and a/00049/13³⁰ have suffered indirect harm as a result of the murders of their family members (nephews and uncle). These applicants have provided letters from local authorities that confirm their kinship with the deceased. In addition, their claims of loss for either financial support, support in the form of assistance with physical work or claims of mental suffering all sufficiently demonstrate personal harm. The Prosecution considers that personal harm has been sufficiently established.

²⁶ ICC-01/04-02/06-122-Conf-AnxA.

²⁷ ICC-01/04-02/06-122-Conf-AnxB-61-Red.

²⁸ ICC-01/04-02/06-122-Conf-AnxB-27-Red.

²⁹ ICC-01/04-02/06-122-Conf-AnxB-114-Red.

³⁰ ICC-01/04-02/06-122-Conf-AnxB-25-Red.

Dates of the crimes

21. Applicants, a/00101/13,³¹ a/00102/13³² and a/00113/13³³ identify the date of the alleged crimes according to the name of the operation: "*pendant l'opération Shika na mukono*". Applicants a/00005/13,³⁴ a/00008/13³⁵ and a/00989/13³⁶ also refer to the same operation. According to the Prosecution's information, this term was used by the UPC to designate the UPC attacks on Lipri, Bambu, Kobu and surrounding villages during the period of 17 February to 2 March 2003.³⁷
22. The Prosecution notes that Applicant a/00083/13³⁸ indicates that the events occurred in 2013, which appears to be a transcription error since she names one of the UPC commanders involved in the 17 February to 2 March 2003 operation (Salumu Mulenda). On this basis, the Prosecution submits that it has been sufficiently established that the crimes alleged have occurred within the relevant time frame of the charges.³⁹

Proof of identity and kinship

23. The applications transmitted all bear the signature or thumbprint of the applicant. The identification documents have not been transmitted to the Prosecution, which only has access to the analysis of completeness and sufficiency done by the VPRS.⁴⁰ According to the VPRS's report, almost all applicants have provided voting cards or identity cards as proof of identity and some provide an additional letter from local authorities as proof of identity and kinship. Applicants

³¹ ICC-01/04-02/06-122-Conf-AnxB-45-Red.

³² ICC-01/04-02/06-122-Conf-AnxB-46-Red.

³³ ICC-01/04-02/06-122-Conf-AnxB-47-Red.

³⁴ ICC-01/04-02/06-122-Conf-AnxB-3-Red.

³⁵ ICC-01/04-02/06-122-Conf-AnxB-5-Red.

³⁶ ICC-01/04-02/06-122-Conf-AnxB-119-Red.

³⁷ See ICC-01/04-02/06-119-Conf, para. 18.

³⁸ ICC-01/04-02/06-122-Conf-AnxB-39-Red.

³⁹ ICC-01/04-02/06-36-Red, page 36 and para. 61.

⁴⁰ ICC-01/04-02/06-122-Conf-AnxA.

a/00174/13, a/017074/13 and a/01077/13 only provide a letter from local authorities. Applicant a/00186/13 also provides a letter from local authorities and a demobilisation letter. All identification documents provided are of the type listed in the Registry's report on proof of identity documents available in the DRC and referred to by the Single Judge.⁴¹

24. In its report, the VPRS has noted several inconsistencies between application forms and the documents presented to prove identity and/or kinship.⁴² For instance there are slight variations in: (i) the spelling of names of Applicants a/00001/13, a/00004/13, a/00009/13, a/00017/13, a/00025/13, a/00041/13, a/00045/13, a/00049/13, a/00053/13, a/00060/13, , a/00101/13, a/00113/13, a/00152/13, a/00166/13, a/00454/13, a/00543/13, a/00565/13, a/00599/13, a/01048/13 and a/01065/13; (ii) the spelling of the names of family members for Applicants a/00028/13, a/00070/13, a/00179/13, a/00181/13, a/00600/13, a/00637/13, a/01015/13, a/01033/13, a/01059/13 and a/01063/13; and (iii) the date of birth of Applicants a/00102/13, a/00178/13 and a/00496/13.⁴³ The Prosecution does not oppose the VPRS's conclusion that these are minor discrepancies caused by transcription or copying errors and that the identities and kinship are sufficiently established for these applicants.

25. The VPRS also noted miscellaneous missing administrative data in the letters of local authorities or the application forms in relation to Applicants a/00040/13, a/00041/13, a/00053/13, a/00942/13 a/00988/13, a/00991/13, a/00998/13 and a/00999/13. Given that the Prosecution does not have access to the original supporting documentation, it defers to the Single Judge's determination on the consistency of such documentation with the information provided in the application forms and on the impact of the missing data on the applications. The Prosecution submits that should the absence of certain data require further

⁴¹ ICC-01/04-02/06-67, para. 30, point (V) referring to ICC-01/04-02/06-53-Anx1.

⁴² ICC-01/04-02/06-122-Conf-AnxA.

⁴³ As identified in ICC-01/04-02/06-122-Conf-AnxA.

clarification, the applicants should be requested to submit further information in order to establish identity and kinship.

Conclusion

26. The Prosecution submits that all 172 applicants meet all the requirements under article 68(3) to participate as victims in the pre-trial proceedings in this case, provided that the Single Judge is satisfied that the attached identity documentation sufficiently proves identity and kinship.



Fatou Bensouda, Prosecutor

Dated this 24th Day of October 2013
At The Hague, the Netherlands