



Original: English

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

Date: 1 August 2014

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Geoffrey Henderson

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

PUBLIC

**Public redacted version of the “Registry’s Interim Report on the organization of
common legal representation” (ICC-01/04-02/06-141-Conf-Exp)
dated 13 November 2013**

Source: Registry

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor

Counsel for the Defence
Mr Marc Desalliers

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
Mr Esteban Peralta Losilla

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**
Ms Fiona McKay

Other

The Registrar of the International Criminal Court (the “Court”);

NOTING the Single Judge’s Decision in the case of *The Prosecutor v. Bosco Ntaganda* (the “Case”), notified on 28 May 2013, establishing principles on the victims’ application process (the “Decision of 28 May”);¹

NOTING the Registry’s First Report on applications to participate in the proceedings in the Case, notified on 13 September 2013 (the “First Report on applications”);²

NOTING article 68(3) of the Rome Statute, rules 16(l)(b) and 90 of the Rules of Procedure and Evidence (the “Rules”), regulations 23 *bis*, 79 and 86(9) of the Regulations of the Court (the “Regulations”); and regulations 112 and 113 of the Regulations of the Registry;

CONSIDERING that the Registry will be filing applications to participate in the proceedings on a rolling basis in accordance with the Decision of 28 May;³

CONSIDERING that the Single Judge in her Decision of 28 May instructed the Registry to consult with applicants as to their preferences for legal representation, to assess whether or not they could be represented by a common legal representative(s), including by the Office of Public Counsel for Victims (the “OPCV”), and to start identifying an appropriate “assistant to counsel” with the involvement of or in consultation with the OPCV;⁴

¹ ICC-01/04-02/06-67.

² ICC-01/04-02/06-106-Conf-Red.

³ ICC-01/04-02/06-67, para. 39.

⁴ ICC-01/04-02/06-67, para. 47 and page 22.

CONSIDERING that since the Decision of 28 May, the Registry has been consulting applicants with regard to their legal representation, and assessing how they could be grouped for the purpose of common legal representation;

CONSIDERING that this Interim Report is filed with the status “Confidential *ex parte* Registry only” since it includes some identifying information or information that is related to the protection of victims and intermediaries, but that the Registry is in a position to propose appropriate redactions, if so instructed by the Chamber;

TRANSMITS to the Single Judge the Registry’s Interim Report on the organization of common legal representation (the “Report”).

1. The present document provides the Chamber with the results of the Registry’s consultations and consequent assessment relating to the organisation of common legal representation of victims in the Case.

A. Content of the Report

2. In the Decision of 28 May the Single Judge indicated that legal representation of the applicants who might be admitted as participants in the Case would be subject to (i) the wishes expressed by the applicants, (ii) the potential conflicts of interest among groups of applicants, and (iii) the Chamber’s discretion which depends on the circumstances of the case.⁵ She requested the Registry to consult with applicants as to their preferences for legal representation and to assess whether or not they could be represented by a common legal representative(s), including by the OPCV, as well as to start identifying an appropriate assistant to counsel with the involvement or in consultation with the OPCV.

⁵ ICC-01/04-02/06-67, para 46.

3. Accordingly, the Registry consulted the applicants with a view to assess if more than one group was needed to represent victims in the proceedings⁶ and the criteria that the applicants wish to be taken into account in the choice of their legal representation before the Court.
4. Pursuant to the Decision of 28 May⁷ and on the basis of the outcome of the above consultation with the victims, the Registry consulted the OPCV on the criteria that should be taken into account in the selection⁸ of an assistant to counsel to be based in the field, and whether they had already identified any potential candidate(s).⁹
5. With this Report, the Registry provides preliminary observations on these two points. The Report includes:
 - Information concerning how applicants have been consulted to date and preliminary results regarding the preferences expressed by applicants as to legal representation (Part B);
 - The Registry's observations on the existence of potential conflicts of interest among groups of applicants (Part C), and the reasons why it recommends separate legal representation for two groups of victims;
 - Recommendations of the Registry regarding the next steps in the organization the common legal representation of participating victims

⁶ Pursuant to rule 90(4) of the Rules.

⁷ ICC-01/04-02/06-67, p.22.

⁸ For a description of the Registry's selection process put in place to recommend common legal representation of victims, please refer to *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ICC-01/09-01/11-243 and *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11-467; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11-214 and *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11-517; the case *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* ICC-02/05-03/09-203 and ICC-02/05-03/09-204-Conf-Exp., and the case *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-120.

⁹ Email, from the Chief of Section, Victims Participation and Reparations Section (the "VPRS"), to the Principal Counsel, OPCV sent on 13 November 2013.

(Part D), including the criteria proposed to guide the selection of common legal representatives.

B. Consultations with applicants and preliminary results on preferences expressed regarding their legal representation

6. In order to assess and report to the Chamber on the preferences of applicants as to their legal representation, the Registry took into consideration the results of the activities conducted in the field (both by the VPRS and by intermediaries) as well as information provided by the applicants who have submitted applications for participation to date.

*VPRS consultations in the field and opinions expressed in application forms*¹⁰

7. Since April 2013, the VPRS has conducted consultations in the field with victims, [REDACTED] and intermediaries.¹¹ The VPRS also analysed the opinions expressed by applicants in their applications forms.¹²

¹⁰ When filling in an application form requesting to participate in the proceedings, the Registry presented the applicants with an additional space to present information not necessary for the Chamber's determination under rule 85 of the Rules, including, *inter alia*, two questions relating to their preferences regarding legal representation. This additional information, submitted together with the form, is not filed but is stored by the VPRS, in accordance with para. 24 of the Decision of 28 May.

¹¹ Meetings were held in [REDACTED] and throughout the territory of Djugu [REDACTED]. For more information on field activities conducted by the VPRS, please refer to the First Report on Applications, paras. 6 to 9. The Registry notes that these consultations should not be considered as a technical survey of opinion, as they were not conducted according to a methodology specific to such surveys, including for population sampling, the conduct of a large scale consultations and the analysis of results. For this reason the Registry puts reservations on the representativeness and reliability of the results provided here, and recommends treating them as preliminary and for informative purposes only.

¹² The VPRS reports here the results after having compiled the opinions of 462 applicants received, scanned and analysed at Headquarters. Although this number does not reflect the totality of applications to participate received or expected to be received in the future, the Registry nonetheless believes that they represent a significant proportion of the total applicants expected, and decided to submit the Report at the present moment, in order not to delay the appointment of a common legal representative or representatives. The information related to preferences as regards legal representation contained in applications for participation received will continue to be analysed and

8. At the outset, the Registry wishes to draw the Chamber's attention to the fact that, although the Registry has conducted outreach in the affected communities and provided training to intermediaries on the topic of legal representation,¹³ as it also observed in other situations, the issue of common legal representation at the Court remains a complex concept for many victim applicants, who often have no experience or understanding of judicial proceedings, even within their own countries. The VPRS believes that this difficulty is reflected, for instance, in the high percentage of applicants who did not answer the question regarding their preference as regards legal representation, or appear to have not understood the question in the application forms.¹⁴
9. The results of the consultations conducted by the VPRS were supplemented by the results of a survey conducted by the organisation Avocats Sans Frontières (ASF) with applicants for participation in the Case,¹⁵ which provides additional insights into the question of the preference of applicants in terms of legal representation.¹⁶

compiled for the purpose of organising common legal representation, and in particular, for the purposes of identifying criteria for the selection of a common legal representative(s) and assistants, as appropriate.

¹³ Approximately two hours of the training of intermediaries which took place in early [REDACTED] 2013 dealt specifically with this question, explaining the issues at stake and providing guidance on how to assist victims to answer questions related to legal representation in the application form.

¹⁴ For instance, the Registry notes that 253 applicants either did not answer the question related to the criteria that the Registry should take into account when selecting their legal representative (108), or answered that they had no criteria to provide (145).

¹⁵ The organisation informed the VPRS that when assisting victims to fill in applications through its local partners, who had been trained by the VPRS to assist victims to complete applications, members of their staff also used a questionnaire developed by the organisation to survey the views of the victims they assisted on the subject of legal representation. The organisation compiled the results of this consultation in a Report entitled "Victims' Consultation on the Grouping for their Legal Representation in the Bosco Ntaganda case" (the "ASF Consultation report"). The Consultation report includes an eight-question questionnaire used for the purpose, together with a compilation of the results based on the answers provided in 592 such questionnaires (69 related to the applicants alleging crimes related to the Warrant of Arrest of 2006, and 523 related to applicants alleging crimes related to the Warrant of Arrest of 2012).

¹⁶ An advanced draft copy of this report was communicated to the VPRS on 31 October 2013, but the VPRS does not have access to the completed questionnaires themselves. The documents provided by ASF can be made available upon the Chamber's request.

10. The results of the VPRS consultations show that the main criteria identified for the selection of a common legal representative are for the legal representative to be competent and available, regardless of his or her nationality.¹⁷ Opinions appear to be divided between those who prefer a Congolese lawyer (with many expressing a preference for a non-native of Ituri) as this would imply that the person has a wide knowledge of the context and is able to communicate with the victims, while others would favour a person who is not Congolese, as in their view this would better ensure that he or she is neutral and/or impartial. In general, respondents highlighted the importance of appointing someone who can understand victims, the background of the conflict and of the Case, and the context in which they are living, with some respondents asking that the person has proximity and regular communication with the victims.¹⁸

11. On the question of whether all victims could be represented by one common legal representative, which is relevant in order to assess whether there are distinct interests or conflicts of interests between victims that would call for separate groups for the purpose of common legal representation,¹⁹ relatively few applicants expressed an opinion in the application forms,²⁰ although the results of the survey conducted by ASF indicate that most victims questioned did not wish

¹⁷ In the sample of application forms analysed, 86 applicants mentioned competence and good work ethics and 30 applicants cited a good knowledge of the local context as criteria that the Court should take into consideration when selecting a legal representative.

¹⁸ 71 applicants expressed a preference for a Congolese lawyer, of whom 16 stated that this would mean he/she has knowledge of the local context, while 18 applicants expressed a preference for a non-Congolese lawyer, some explaining that this is due to concerns relating to neutrality and/or impartiality. 28 applicants emphasised that the lawyer should be able to speak the language of the victims. The ASF Consultation report also emphasizes that the result of their survey showed an often-expressed need of “proximity”, at least from applicants alleging to have suffered crimes related to the Warrant of Arrest of 2006.

¹⁹ Pursuant to rule 90(4) of the Rules.

²⁰ 76 applicants said they objected: of these, 60 applicants said they objected based on questions related to ethnicity or community, or tensions based on the events which are the basis of the Case. 166 applicants answered they had no objection to one lawyer representing all the victims of the Case, although at least in some instances the answers appear to demonstrate a misunderstanding of the question (for instance, two applicants responded “oui, ça lui plaît, car elles sont nombreuses” (“yes, s/he likes it, because they are numerous”). 217 applicants did not answer the question.

all victims to be represented by a single common legal representative.²¹ Moreover, some serious concerns were expressed during the consultation meetings held by the VPRS in the field at the prospect of one legal team representing both Hema and Lendu/non-Hema victims or, of one team representing both the former child soldiers and the victims of the attacks allegedly committed by the Union des patriotes congolais (the “UPC”) and Forces patriotiques pour la libération du Congo (the “FPLC”). Most participants who raised this concern²² highlighted persistent tensions that would make a common legal representation of all victims of the Case difficult, and, for some, unacceptable.²³

²¹ According to the ASF Consultation report, only a small percentage (9.1%) of applicants surveyed would accept one single group, whereas a significant majority (64.7%) of the victims expressed their wish to be grouped on an ethnic basis, with variations across the territory that sometimes reflect the specific local realities faced by the victims. There is a general opposition by victims of the events related to the Warrant of Arrest of 2006 to a grouping whereby a single lawyer would represent all victims in the case: 43.8% of the applicants surveyed would favour a grouping on an ethnic basis, of whom 62.1% would prefer a lawyer who represents Hema victims or a group composed of Hema and communities historically related to the Hema such as Alur and Bira. Only 9.4% of the victims of events related to the Warrant of Arrest of 2012 wished for a single common legal representative to represent them together with all the other victims of the Case. ASF also reports that 67.7% of these applicants favoured a grouping based on ethnic considerations, with 71.5% of these preferring to be represented by a lawyer who represents only Lendu victims (42.2%), or Lendu victims along with members of other ethnicities, except the Hema and “their allies” (29.3%). When providing these results, ASF highlighted the particular challenge posed by variations in interpretation, since applicants who answered that they wished to be represented together with people from the same “community” could have meant either that they wished to be grouped with people from the same village or place of residence (and thus not necessarily the same ethnicity), or with people from the same “ethnic group”. The Registry believes that the format of the ASF survey and the conditions in which the survey was administered (more specific questions addressing the issues and more time spent with the applicants exclusively on the question of legal representation) could explain, amongst other factors, why some answers to the ASF survey could differ from the answers provided to otherwise similar questions found in the form used by the Registry.

²² Reports from the field point to the fact that those most opposed to all victims being commonly represented in one group were resident on the axis Lipri-Nyangaray, as opposed to applicants consulted in the Bambu-Kobu-Kilo-Mongwalu area, who generally did not oppose the idea of a single legal team representing all the victims in the Case.

²³ Similarly, the ASF Consultation report mentions particularly strong reactions among individuals from both communities who expressed strong objections to the idea of one legal representative representing victims from both the Hema and the Lendu or non-Hema communities. It indicates that among the concerns raised by victims were that a legal representative who represents both communities would betray one group in order to benefit the other group, that past events do not allow for reconciliation, and that this common grouping would create more hatred. Some of the

12. The Registry also notes that 213 applicants attached a power of attorney to their application forms in favour of specific lawyers.²⁴

C. Potential conflicts of interest

13. As recalled in the Decision of 28 May Decision, and in accordance with rule 90(4) of the Rules, the organization of common legal representation must take into account potential conflicts of interests between groups of applicants.²⁵ It is the policy of the Registry, where no conflict of interest arises between victims participating in relation to a Case that would justify their separate representation, to recommend that all the participating victims are represented by one common legal representative.²⁶

14. The Registry notes the approach as regards conflicts of interests adopted for the participation of victims in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (the “Katanga and Ngudjolo” case), in which the victims were separated into two distinct groups at the trial stage.²⁷ Trial Chamber II

opinions expressed went so far as to say that a legal representative who represents both communities would have to fear for his or her security.

²⁴ The VPRS notes that all the applications submitted with a power of attorney were transmitted through ASF. The applicants nominated either [REDACTED] a legal representative on the ICC List of Counsel maintained by the Registry who also represents victims of the Situation in the DRC not linked to a specific case, who assisted some applicants in filling in application forms with the support of the NGO, or [REDACTED] and [REDACTED], who are representing victims in the case *The Prosecutor v. Thomas Lubanga Dyilo* (the “Lubanga” case) and also have links with the NGO. In addition, two applicants said they wished to be represented by [REDACTED] who, as part of a team of legal representatives (“Team V02”) represents victims in the *Lubanga* case. The Registry further notes that it received an additional 98 applications, which are not included in the current analysis of opinions, using the Standard Application Form who designated a representative on the ICC List of Counsel maintained by the Registry, [REDACTED]. Finally, the Registry notes that a legal representative of victims, Ms. Bapita, submitted to the Chamber the applications of 9 of her clients participating in the *Lubanga* case for participation in the current Case and that those victims may submit applications using the simplified form (see ICC-01/04-02/06-72-Conf).

²⁵ ICC-01/04-02/06-67, para. 46.

²⁶ This is in line with the Report of the Court on legal aid “Legal and financial aspects of funding victims’ legal representation before the Court, 5 October 2009, which states that: “As far as possible, resources from the legal aid scheme would be provided to one team of legal representatives per case at the trial phase, bearing in mind that there may be occasions where it is necessary to have more than one team, such as where a conflict of interest arises.” (ICC-ASP/8/25, p. 15).

²⁷ ICC-01/04-01/07-1328.

ordered this after the Registry and legal representatives of victims submitted their views to the effect that there existed a potential conflict of interest between the victims of the crime of using children under the age of fifteen to participate actively in hostilities and the victims of the attack on Bogoro on February 2003.²⁸ Trial Chamber II took into consideration several factors in its decision and in particular the large number of applications received, the absence of tensions in terms of ethnicity, age, gender or the type of crimes the victims of the Bogoro attacks alleged, the existence of a small group of former child soldiers among the victims who may have perpetrated some of the crimes that victimised the other applicants and the fact that the child soldiers had a different ethnic background to that of the other applicants.²⁹

15. As already highlighted in the Registry's First report on Victim applications,³⁰ and further noted by the consultations held in the field and reported above,³¹ the context of the Case creates two distinct groups of victims: the victims linked to the Warrant of Arrest of 2006, former child soldiers of the UPC/FPLC military group (the "UPC/FPLC child soldiers"), and the victims linked to the Warrant of Arrest of 2012, victims of attacks allegedly conducted by the UPC/FLPC military group (the "UPC/FPLC attacks"). The Registry notes that although the groups would not be composed strictly along ethnic lines, there is a fairly strong correlation in that most of the group of UPC/FPLC child soldiers would be Hema,³² whereas a majority of the group of victims of UPC/FPLC attacks would be Lendu and other non-Hema.³³

²⁸ ICC-01/04-01/07-1328, para.6.

²⁹ ICC-01/04-01/07-1328, paras. 12-13.

³⁰ ICC-01/04-02/06-106-Conf-Red, paras 10 to 14.

³¹ Para. 11.

³² Although other ethnic groups such as Alur, Bira and Nande could also be concerned by the Warrant of Arrest of 2006.

³³ See documents filed by the Prosecutor in the current Case, for instance ICC-01/04-611-Red-Corr2, p.5, para. 2. Nevertheless there are instances of Hema victims of the attacks.

16. While, as stated earlier, the Registry generally favours reducing the number of common legal representatives, in light of the views expressed by applicants, and the risk that one group of victims may have perpetrated some of the crimes that victimised the other group, the Registry concludes that separate legal representation is advisable. The potential for a conflict of interest is likely to go beyond what a legal team would be able to accommodate in terms of managing the different groups of victims and representing all interests in the proceedings, and risks preventing the establishment of a climate of trust that lies at the heart of the counsel - client relationship.³⁴ Hence, at this stage the Registry respectfully recommends the creation of two distinct victims groups, each represented by a legal team: a group composed of UPC/FPLC child soldiers and another with victims of UPC/FPLC attacks. This scheme is consistent with the Registry's approach in terms of grouping the applications to participate.³⁵

17. The Registry is aware that despite the creation of the two groups, there could still be conflicts of interest that arise between victims within each group. However, to the best of its knowledge, there is at present no reason to believe that any other conflicts of interest exist. Should a conflict of interest arise during the proceedings, the legal representatives would have the duty, under Article 16(3) of the Code of Professional Conduct for Counsel, to immediately inform the Chamber and take all other appropriate steps.

D. The Registry's conclusions and recommendations regarding remaining steps in the organization the common legal representation of participating victims

18. Based on the considerations mentioned in this Report, the Registry recommends that two common legal representatives be appointed to represent victims in the Case: one representing a group of victims composed of UPC/FPLC child soldiers and another representing the victims of UPC/FPLC attacks. Both teams should be

³⁴ See art. 14(1) of the Code of Professional Conduct for Counsel.

³⁵ ICC-01/04-02/06-106-Conf-Red, paras. 11-12.

sufficiently distinct and strictly isolated from one another so as to avoid not only conflicts of interest but also any perception of conflicts of interest.

19. Based on the consultations held, the Registry further recommends providing victims participating in the Case with legal representation that combines relevant expertise and experience, including international criminal litigation experience and experience representing large groups of victims, proficiency in the language of the proceedings, a wide knowledge and understanding of the Case and of its context, as well as of the victims' situation in the field,³⁶ including expertise relating to the type of victimization suffered by individuals in the group. The legal representative(s) should also demonstrate abilities to communicate easily and to establish a relationship of trust with victims.³⁷
20. Finally the Registry recommends that the legal representatives benefit from a team structure which allows for sufficient support in the field in order to have proximity with victims and be able to continuously inform and receive instructions from them.
21. When making its recommendations to the Chamber regarding the composition of the legal team, the Registry will be mindful of the financial implications in terms of the impact on the Court's legal aid scheme pursuant to rule 90(5) of the Rules.
22. Based on the usual practice of the Registry,³⁸ and on the findings of the Registry's consultations presented in this Report, the Registry recommends that it takes the

³⁶ Although this criterion would be most easily established by having as legal representative or as team member(s) individual(s) living and working in the DRC, this could also be fulfilled by selecting individual(s) who have substantial experience living or working in the region, and preferably in the DRC itself.

³⁷ These criteria will favour a legal representative or team member(s) speaking Swahili, and with previous experience and/or the capacity to enable victims to speak frankly about the crimes experienced by them, especially in relation to crimes of sexual violence and crimes committed against children.

³⁸ When it makes its recommendations on common legal representation of victims pursuant to its responsibilities under rules 16(1)(b) and 90 of the Rules, the Registry applies the minimum requirements for counsel set out in the Court's legal texts, any criteria established by the relevant Chamber, and criteria relevant to each case, in particular, criteria identified in the course of consultations with victims.

following steps with a view to arriving at final proposals to the Chamber on the appointment of common legal representatives of victims for the pre-trial stage of the Case:

- a. Request OPCV to indicate the potential availability of more than one counsel of the Office as well as the arrangements the Office would put in place to avoid any conflict of interest, or appearance of conflict of interest, between the legal teams, in the event that the Single judge decides that the OPCV shall represent more than one group of victims in the Case;
- b. In the event that the Chamber decides that there should be more than one group of victims and that the OPCV will not represent both groups, circulate a call for expressions of interest³⁹ to the Registry's list of counsel;
- c. Proceed with a selection process aimed at identifying an assistant to counsel and, if relevant, counsel from those who expressed their interest, which will be accomplished as rapidly as possible, the Registry making every effort to complete the process within one month;
- d. Submit to the Single Judge its recommendation on the appointment of common legal representatives of victims.

23. The Registry respectfully recommends the approach outlined above in paragraph 22 and awaits the instructions of the Single Judge.

³⁹ The call for interest will describe the profile sought, based on objective criteria established by the Registry, the criteria mentioned by the victims as regards their preference for legal representation and the relevant instructions of the Single Judge.

24. The Registry is in a position to immediately transmit a public version of this Report proposing appropriate redactions, if so instructed by the Chamber.

A handwritten signature in black ink, appearing to read 'Marc Dubuisson', is written over a horizontal line.

Marc Dubuisson, Director DCS

per delegation of Mr Herman von Hebel, Registrar

Dated this 1 August 2014

At The Hague, The Netherlands