

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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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

**Registry submission pursuant to “Order Scheduling a Status Conference and
Setting a provisional Agenda”**

Source: The Registrar

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

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

NOTING the “*Order Scheduling a Status Conference and Setting a Provisional Agenda*” issued by Trial Chamber VI (“the Chamber”) on 21 July 2014;¹

NOTING articles 43(6), 64(3) and 68(1) and (4) of the Rome Statute, rules 16 to 19 and 132(1) of the Rules of Procedure and Evidence, regulations 23bis and 54 of the Regulations of the Court and regulations 79 to 96 of the Regulations of the Registry;

CONSIDERING that that the Registry is requested to make submissions on items b, g and h of the provisional agenda;²

RESPECTFULLY SUBMITS AS FOLLOWS:

On item b

Whether the Prosecution anticipates issues concerning the protection of witnesses and other persons (including the need for redactions), the disclosure of identities of witnesses, as well as referrals to the Court’s witness protection program

Protection referrals

1. In relation to any issues concerning the protection of witnesses and referrals to the Court’s witness protection program, the Victims and Witnesses Unit (the “VWU” or “Unit”) encourages the parties to follow the procedure established in regulations 80(1) and 96(2) of the Regulations of the Registry (the “RoR”) and remains available to assist the parties and provide them with a protection referral form to facilitate any request.

¹ ICC-01/04-02/06-339.

² Ibid. p. 5, para. 7.

2. The Unit will afterwards perform a risk assessment on the security situation of the individual for whom protection measures are requested. It is essential, for the purpose of assessment and recommendation of the appropriate protective measures that the parties provide specific information on the nature of the threat or risk the individual could be exposed to.

Other witness related matters

3. The Registry respectfully takes this opportunity to inform the Chamber that prior to any witness giving testimony, the VWU is required to carry out a witness familiarisation procedure for the benefit of those witnesses. The Unit recommends the adoption of a Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial (the “Familiarisation Protocol”). The Familiarisation Protocol aims to outline the procedures that serve the best interests of witnesses and provide for sustainable working solutions for all entities involved. The Protocol covers issues pertinent to the familiarisation process and takes into account the practices and experiences concerning witnesses appearing before the Court. It covers issues relating to, *inter alia*, preparation phase, arrangements for witnesses falling under the scope of Rule 74 of the Rules and courtroom familiarisation.
4. Subject to the approach of the Chamber in the present case, the Unit informs the Chamber of the Familiarisation Protocol which was filed in the *Bemba* case³ and the Amended Familiarisation Protocol which was filed in both *Kenya* cases⁴. Both Protocols reflect the relevant jurisprudence of the Court.
5. In the event the Unit would need to provide its assessment on the need for special measures to be implemented for the benefit of potentially vulnerable witnesses, the Unit also recommends the adoption of the “Protocol on the

³ ICC-01/05-01/08-1081-Anx.

⁴ ICC-01/09-01/11-704-Anx and ICC-01/09-02/11-727-Anx.

vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses”⁵ (“the Vulnerability Protocol”), which was filed in the *Bemba* case.

6. The Unit stands ready to file the two above mentioned Protocols in the record of the case with the necessary adjustments, as deemed appropriate, to reflect the practice in the *Ntaganda* case, upon the instruction by the Chamber.
7. Furthermore, in the event that the parties and participants are to call ‘dual status’ witnesses and in order to promote a uniformed practice, the Unit informs the Chamber on the mechanism on the exchange of information relating to individuals enjoying dual status, as introduced in the *Lubanga* case. An amended proposed mechanism was recently filed in the *Banda* case, subsequent to the required consultation between the Unit and the parties and participants as directed by Trial Chamber IV.⁶
8. In addition to the above-mentioned, the Registry informs the Chamber that, in its Decision on the Protocol on the Handling of Confidential Information and Contact with Witnesses of the Opposing Party, issued on 17 December 2013 Pre-Trial Chamber II instructed the parties to liaise with the VWU prior to adopting such Protocol. The parties and the VWU are still in the process of consultation subsequent to further proposals made in this regard.

⁵ ICC-01/05-01/08-974-Anx2.

⁶ ICC-02/05-03/09-556-Conf-Anx.

On item g

Update on victims' applications and the procedure for allowing victims to participate in the trial proceedings

9. As regards point (g) of the Chamber's Order, the Registry will provide below an update on the victims' applications received so far by the Victims Participation and Reparations Section (the "VPRS") and observations on the procedure for allowing victims to participate in the trial proceedings. On this last point, the Registry's observations are aimed to assist the Chamber to settle on an admission system that builds on the Registry's implementation experience and furthers the Court-wide effort to make victim participation more efficient, sustainable and meaningful.

Update on Victims' Applications

10. To date, the Registry has received a total of approximately 2,000 applications for participation in the proceedings in relation to the *Ntaganda* case (the "Case"). Out of these, 1,186 applications were transmitted⁷ to the Chamber and the Parties during the pre-trial stage of the proceedings,⁸ and 1,120 victims were accepted to participate at the confirmation of charges hearing.⁹

⁷ The Registry notes that the remaining approximately 800 applications for participation in the proceedings were not transmitted during the pre-trial stage of the proceedings either because they were received after the deadline set by the Pre-Trial Chamber for the receipt of the applications by the VPRS (45 days before the start of the confirmation hearing scheduled on 10 February 2014, see ICC-01/04-02/06-67-67, paragraph 40) or because they were assessed by the Registry as incomplete or falling outside the scope of the Case.

⁸ The VPRS transmitted these applications in six batches between September 2013 and January 2014 (see ICC-01/04-02/06-106-Conf-Exp, ICC-01/04-02/06-122-Conf, ICC-01/04-02/06-132-Conf, ICC-01/04-02/06-154-Conf, ICC-01/04-02/06-179-Conf and ICC-01/04-02/06-200-Conf). Original non-redacted versions of the applications were transmitted to the Chamber and the Prosecution and redacted versions were transmitted to the Defence, based on the Decision establishing principles on the victims' application process notified on 28 May 2013 (ICC-01/04-02/06-67).

⁹ ICC-01/04-02/06-211.

11. The Registry anticipates that a further approximate number of 400 applications may be received bringing the total number of victims seeking to participate at Trial in the present Case to approximately 2,400. Considering that the scope of the present Case has been in some instances narrowed, expanded and/or clarified by the Confirmation of Charges Decision,¹⁰ the Registry anticipates having to make a comprehensive review of all applications for participation in the proceedings received to date in order to assess whether the victims admitted to participate at the Confirmation Hearing remain within the scope of the Case, as well as to assess all other applications received so far that might fall within the newly confirmed scope of the Case. The Registry will address this considerable workload by organising applications in the following administrative manner: (1) Applications admitted to participate at the pre-trial stage of the proceedings (1,120); (2) Applications transmitted to the Pre-Trial Chamber (the “PTC”) but not accepted (80); (3) Applications received during the pre-trial stage of the proceedings, but not transmitted to the PTC (approximately 800); (4) Applications expected during the trial stage of proceedings (approximately 400).

Observations on the Procedure for Allowing Victims to Participate at Trial

12. The Registry welcomes the opportunity to provide its observations on the admission system for victims to participate at trial and is mindful of the imperative set by the various Trial Chambers and Appeals Chamber that the system needs to be “meaningful” as opposed to “purely symbolic”.¹¹ In

¹⁰ ICC-01/04-02/06-309.

¹¹ ICC-01/04-01/06-1119, para 85; *The Prosecutor v. Thomas Lubanga*, Appeals Chamber, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para 97; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Order on the Organisation of Common Legal Representation of Victims, 22 July 2009, ICC-01/04-01/07-1328, para 10(a), Decision on the modalities of victim participation at trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, para 57; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision on common legal representation of victims for the purpose of trial, 10 November 2010, ICC-01/05-01/08-1005, para 9(a); *The Prosecutor v. Francis Kirimi Muthaura*

consideration of the above and in light of the circumstances surrounding the present Case, the Registry respectfully submits two potential admission systems along with their attendant resource implications for the Chamber's consideration.

Option 1: Ntaganda Pre-Trial Approach

13. The parameters of the *Ntaganda* Pre-Trial victims' admission system (the "Ntaganda Pre-Trial Approach") have been set out by the Single Judge in her 28 May 2013 Decision Establishing Principles on the Victims' Application Process and the 15 January 2014 Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings.¹² In essence, the system includes inter alia: (1) A short simplified 2-page application form to be completed by victims seeking to participate in the proceedings with only the first page of the application to be transmitted to the Parties and the full application, including the documents attached, available to the Chamber; (2) Administrative grouping of victims based on the incidents in which the victim applicants were involved or the harm that they suffered; (3) A confidential report on applications notified by the Registry that includes basic security information and statistics compiled on the groups of victims whose applications are being transmitted to the Chamber and the Parties; (4) A table attached to the above mentioned report, listing all individual rule 85 of the Rules of procedure and evidence (the "Rules") assessments prepared by the Registry under regulation 86(5) of the Regulations of the Court on victims seeking to participate in the proceedings, available in original non-redacted version to the Chamber and Prosecution and in a redacted version to the Defence.

and Uhuru Muigai Kenyatta, Decision on victims' representation and participation, 3 October 2012, ICC-01/09-02/11-498, para 9.

¹² Pre-Trial Chamber II, 28 May 2013, ICC-01/04-02/06-67; Pre-Trial Chamber II, 15 January 2014, ICC-01/04-02/06-211.

14. If the Ntaganda Pre-Trial Approach were to be adopted at trial, the Registry expects that with the limited resources currently available, it would take as long as one year to process all applications that are currently in the Registry's possession and transmit those that will be assessed as complete and falling within the new scope of the Case.¹³ Should the Chamber nevertheless desire a continuation at trial of the Ntaganda Pre-Trial Approach, the Registry remains available to explore with the Chamber ways to make the system more efficient.

15. The Chamber may however decide that judicial determination on individual applications for participation in the proceedings may not be appropriate in the present Case in light of the considerable number of applications received, the precarious security situation in the areas where many of the victims seeking to participate in the Case currently reside¹⁴ and the Court-wide imperative to conduct proceedings in as expeditious, transparent and fair a manner as possible. If this decision is taken, the Registry proposes in option 2 a system that may be more sustainable in light of the current resources required to implement victim participation at trial. The Registry remains available should the Chamber require any further detail on the option presented below.

¹³ The Registry notes that 1683 applications for participation in the proceedings were received by the VPRS before the deadline set by the Pre-Trial Chamber (ie, 45 days before the confirmation of charges hearing scheduled on 10 February 2014). Not taking into account the field related work implied by the filling in and collection of the applications, the processing of these applications implied the following tasks: scanning, data entry in the database, legal analysis to check the application for completeness and assess whether it falls within the scope of the Case and redaction process. The VPRS managed to complete these tasks within the deadline set by the PTC for the transmission of the applications to the PTC and the Parties (30 days before the date of the confirmation of charges hearing, ie 10 January 2014). The VPRS had to allocate 11 persons (6 staff and 5 individual contractors specially recruited for 6 months) full time to process these applications.

¹⁴ ICC-01/04-02/06-106-Conf-Exp, para.9; ICC-01/04-02/06-132-Conf, paras 9-10; ICC-01/04-02/06-211, paras 44-45.

Option 2: Neutral Registration through the Registry and Participation through the Common Legal Representative

16. The Registry notes at the outset that the most time and resource consuming element of the Ntaganda Pre-Trial Approach is the preparation of the individual paragraphs describing the Registry's Rule 85 assessments of completeness and inclusion within the scope of the Case. Redactions associated with these reports and on the applications themselves are also extremely time and resource intensive for the Registry. This process is followed by the Chamber conducting its own review of the applications and preparing decisions in light of the observations made by the Parties. A different division of labour could be envisaged where the Chamber establishes principles and criteria for admission at trial and the application of those principles to specific applications becomes an administrative matter that can be undertaken by the Registry. This system, if applied, would ensure that proceedings are not delayed, while victims seeking to participate in the proceedings will be afforded that opportunity.

17. In the present Case, the Registry, as a neutral organ within the Court, would apply the criteria established by the Chamber and "register" victims in the Case by transmitting their applications to the common legal representative appointed to represent the victims at trial (the "CLR").

18. For the sake of transparency of the process and in order to facilitate oversight, the Chamber could order the Registry, in cooperation with the CLR, to prepare and notify, every two months, a comprehensive report on the activities of the Registry and the CLR in relation to victims. The report would be notified publicly and include inter alia the following information: (1) Detailed Statistics on the victims' registered forms transmitted to the CLR, grouped administratively by incident and in the case of child soldiers, by

harm suffered;¹⁵ (2) The General Situation of victims participating in the case provided systematically by the CLR following meetings with the victims; (3) Updates on field related activities involving the victims from the Registry's relevant outreach and field units; (4) Protection and Support related information on victims who have been referred to the Victims and Witnesses Unit by the CLR;¹⁶ (5) Security related information of relevance to the proceedings and victims participating in the Case provided by the Field Security Unit; (6) If necessary, specific examples from the forms received where the Registry considers the instructions provided by the Chamber insufficient to make a determination on the victims' status.

19. Considering that an admission system is not an end in itself and that its purpose is to enable qualifying victims to participate in the proceedings, the Registry notes that such an approach would reduce the amount of resources required by the Registry for implementation and by the Parties and the Chamber to review the Registry's assessment and to submit observations and/or decide upon these applications. Without having to transmit applications to participate in the proceedings, produce individualised comments to explain the Registry Rule 85's assessments and without having to redact reports and applications for participation in the proceedings to be sent to the Parties, the Registry would be able to focus its current limited resources on efficiently registering victims according to the Chamber's pre-established criteria and producing a comprehensive bi-monthly report. Resources within the Chamber and the Parties otherwise dedicated to reviewing applications would also be freed under the current proposal.

20. The Registry's submission under option 2 is similar to the system of victims' participation implemented in the two *Kenya* Cases before the Court, in which

¹⁵ The Registry notes that these are merely examples, and that other administrative groupings may be deemed appropriate.

¹⁶ To be filed confidentially in a confidential *ex parte* annex available only to the Registry and the CLR.

Trial Chamber V devised an admission system that, taking into account the large number of victims involved in both cases as well as the security concerns, permitted victims seeking to participate in the proceedings through their common legal representative, to do so without having to go through the procedure established by Rule 89 (the “Kenya Approach”). These victims were permitted to register with the Court, if they wished to do so, as victim participants while those seeking to present their views and concerns individually by appearing directly before the Chamber would have to go through the standard Rule 89 application process.¹⁷ The legal framework supporting option 2 is essentially the same as in the two *Kenya* cases.

21. However in the Registry’s submission under option 2, two changes would be made to the Kenya approach. First, the Chamber would grant the Registry, instead of the CLR, the responsibility to verify whether victims fulfil the Rule 85 criteria before registering them. This responsibility, if given to a neutral body, would provide a greater degree of oversight to the Court, facilitate the work of the legal representatives in the field and ensure that the criteria established by the Chamber is systematically applied by the Court. In applying this change to the present Case, the Registry would review the applications already in its possession and those that it will receive throughout the course of proceedings. The Registry would also register and transmit those applications belonging to victims falling within the scope of the Case to the common legal representative for on-going representation at trial. As is done in the two Kenya cases, this transmission would be done on a rolling basis and the detailed statistics and general situation of the victims could be reported on a bi-monthly basis¹⁸ if so ordered by the Chamber. Second, the registration of participating victims with the Registry would be mandatory (rather than optional, as in the Kenya Approach) as this leads to greater certainty and

¹⁷ ICC-01/09-01/11-460, para 56; ICC-01/09-02/11-498, para 55.

¹⁸ See paragraph 16 above for a detailed proposal on the content of such report.

consistency in messaging to victims and intermediaries in the field and thus a more fluid process overall. Having all participating victims registered with the Registry would also enhance foreseeability with respect to the reparations phase.

On item h

Languages to be used in the proceedings, in particular, the languages spoken by the witnesses the parties intend to call and victims the legal representatives may seek authorisation to call

22. For the purposes of trial proceedings in the present case, the Registry is able to provide interpretation in French, English and Kinyarwanda. If and when witnesses testify in other languages such as Swahili, Lingala or Lendu, the Registry will be able to provide interpretation services given that sufficient notice is provided in order to allow the recruitment of freelance interpreters. With regard to Swahili and Lingala, and for logistical reasons of travel and visa arrangements, the period of notice should not be less than four weeks in advance of the testimony.

23. In respect of Lendu, the Registry is only able to provide consecutive interpretation in accordance with Regulation 61(1)(c) of the Regulations of the Registry and a notice of six weeks would be required.

24. In order to ensure the effective management of resources and without prejudice to prosecutorial and defence strategies, it would be desirable if witnesses speaking the same language could be grouped in such a way that they testify one after another. Furthermore, in order to avoid any disruptions or delays in the proceedings, the calling party should verify the language requirement of each witness well ahead of testimony. This is particularly

important with respect to witnesses who wish to testify in a language different than their mother tongue because should the witness change his or her mind at the last minute and decide to testify in a different language, this would not only prove to be extremely costly as any cancellations of freelance interpreters have to be paid, but in addition, the Registry would not be able to guarantee that the judicial calendar would not be disrupted as consequence.

RESPECTFULLY SUBMITTED,



Marc Dubuisson, Director of Court Services
per delegation of
Herman von Hebel, Registrar

Dated this 14 August 2014

At The Hague, Netherlands