

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **29 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

**Application by the Redress Trust and Avocats sans Frontières for leave to submit
observations pursuant to Rule 103 of the Rules of Procedure and Evidence**

**Source: The Redress Trust
Avocats sans Frontières**

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

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Amicus Curiae

REGISTRY

Registrar and Deputy Registrar

Mr Herman von Hebel, Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

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I. Introduction

1. The Redress Trust (**REDRESS**) and Avocats Sans Frontières (**ASF**) seek leave of Trial Chamber VI (**the Chamber**) of the International Criminal Court (**ICC**) to submit, as amicus curiae pursuant to Rule 103 of the Rules of Procedure and Evidence, written observations concerning the issue of a possible tiered application and participation process.
2. The issue is currently under review by the Chamber in the context of the Trial phase of the *Ntaganda case*.

II. Procedural Background

3. On 28 May 2013, Single Judge Trendafilova set out the application procedure for victims who wished to participate in the confirmation of charges hearing in the *Ntaganda case*. The Single Judge, recalling the “need to improve the victims' participation system in order to ensure its sustainability, effectiveness and efficiency” ordered that a simplified, one page, application form “tailored to the characteristics of the specific case at hand” be used for that purpose.¹
4. On 26 June 2013, Single Judge Trendafilova ruled that victims admitted to participate in the *Lubanga case* who wished to participate in the Pre Trial stage of the *Ntaganda case* should submit a new application using the simplified one page form.
5. On 15 January 2014 and 7 February 2014, Single Judge Trendafilova admitted a total of 1,120 victims as participants in the confirmation of charges hearing and in the related proceedings.²
6. On 9 June 2014, Pre Trial Chamber II confirmed the charges against Bosco Ntaganda.³

¹ Decision Establishing Principles on the Victims' Application Process, ICC-01/04-02/06-67, Single Judge, 28 May 2013.

² Decision on Victims' Participation at the confirmation of charges hearing and in the related Proceedings, CC-01/04-02/06-211, Single Judge, 15 January 2014; Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, Single Judge, ICC-01/04-02/06-251, 7 February 2014.

7. On 18 July 2014, Trial Chamber VI was constituted and the case of The Prosecutor v. Bosco Ntaganda was referred to it.⁴
8. On 21 July 2014, Trial Chamber VI issued the “Order Scheduling a Status Conference and Setting a Provisional Agenda” (*the Order*) wherein it scheduled a status conference for 20 August 2014 pursuant to rule 132(1) of the Rules of Procedure and Evidence. Among the issues scheduled for discussion were “an update on victims' applications and the procedure for allowing victims to participate in the trial proceedings”.⁵
9. On 14 August 2014, the Office of the Public Counsel for Victims (OPCV), the Registry and the Prosecutor submitted their observations on the provisional agenda for the 20 August Status Conference.⁶
10. On 18 August 2014, Trial Chamber VI postponed the scheduled status conference until 18 September 2014.⁷
11. On 26 August 2014, the Status Conference was rescheduled for 11 September 2014.⁸

³ Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, PTC II, ICC-01/04-02/06-309, 9 June 2014

⁴ Decision constituting Trial Chamber VI and referring to it the case of The Prosecutor v. Bosco Ntaganda, Presidency, ICC-01/04-02/06-337, 18 July 2014.

⁵ Order Scheduling a Status Conference and Setting a Provisional Agenda, ICC-01/04-02/06-339, TC VI, 21 July 2014.

⁶ Joint submissions in accordance with the “Order Scheduling a Status Conference and Setting a Provisional Agenda” issued on 21 July 2014, TC VI, ICC-01/04-02/06-351, 14 August 2014; Registry submission pursuant to “Order Scheduling a Status Conference and Setting a provisional Agenda”, TC VI, ICC-01/04-02/06-350, 14 August 2014; Prosecution's Submissions on the Provisional Agenda for the 20 August 2014 Status Conference, ICC-01/04-02/06-352, TC VI, 28 August 2014.

⁷ Order postponing and setting a new date for the status conference, TC VI, ICC-01/04-02/06-354, 18 August 2014.

⁸ Order revising dates for the status conference and for receipt of observations. TC V, ICC-01/04-02/06-358, 26 August 2014.

III. The Application for locus

12. Rule 103(1) of the Rules of Procedure and Evidence (“the Rules”) of the International Criminal Court (“ICC” or “the Court”) provides that:

“At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.”

13. Pursuant to rule 103 of the Rules, spontaneous applications can be submitted either by States, organizations or persons interested to participate in the proceedings before the Court.
14. In deciding whether to grant leave to an applicant to submit observations as *amicus curiae*, according to rule 103 of the Rules, the Appeals Chamber has underlined that, when acting within the sphere of rule 103 of the Rules, the respective Chamber should take into consideration whether the proposed submission of observations may assist it "in the proper determination of the case".⁹ The notion of ‘proper determination of the case’ has been interpreted as encompassing situations in which applicants would be in a position to supply information and assistance that will be of direct relevance to the case at hand “that otherwise will not be available to the Court, or would be costly and time consuming to secure”¹⁰. Other international courts and tribunals permit third party interventions, such as, the International Criminal Tribunal for the former Yugoslavia (“ICTY”),¹¹ the International Criminal Tribunal for Rwanda (“ICTR”)¹² and the Special Court for Sierra Leone (“SCSL”),¹³ on similar bases as Rule 103(1). The ICTR and the SCSL in particular have received submissions from third parties

⁹ See, Decision on "Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence" ICC-01/04-01/06 OA 11 of 22 April 2008. [please ensure formatting is consistent throughout footnotes: spacing, margins, indents, font etc]

¹⁰ Trial Chamber 1, The Prosecutor vs; Thomas Lubanga Dyilo, Decision granting leave to make representations in the reparations proceedings, ICC-01/04-01/06-2870, 20 April 2012, para 19; On that basis, Avocats Sans Frontières was granted leave to make representation before Trial Chamber 1 in the Reparations proceedings in the Lubanga case.

¹¹ Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia

¹² Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

¹³ Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone

where it was considered that there was a real reason to believe that those submissions would assist the court to reach the right decision.¹⁴ As indicated by the Appeals Chamber of the Special Court of Sierra Leone in its decision granting REDRESS and others the opportunity to file an amicus curiae brief and to present oral submissions:

*“The issue is whether it is desirable to receive such assistance, and ‘desirable’ does not mean ‘essential’ (which would be over-restrictive) nor does it have an over-permissive meaning such as ‘convenient’ or ‘interesting’. The discretion will be exercised in favour of an application where there is a real reason to believe that written submissions, or such submissions supplemented by oral argument, will help the Court to reach the right decision on the issue before it.”*¹⁵

IV. Specific Issues the Applicants Seek to Address, and the Nature of the Observations the Applicants Propose to Submit

15. The Applicants seek to make observations on *key factual considerations regarding a possible tiered application and participation process*. In particular:

- (a) The Applicants propose to bring to the Chamber’s attention relevant factual information regarding victims’ communities’ experiences with the new application system implemented at trial in the Kenya cases;
- (b) The Observations would also highlight practical issues, based on consultation with victims, affected communities and other stakeholders in Ituri, DRC, that may impact on the modalities for a possible tiered application and participation process.

The proposed observations relate to an issue that is before the competent Chamber

¹⁴ See for example *Prosecutor v Jean-Paul Akayesu* Case No. ICTR-96-4-T “Order Granting Leave for Amicus Curiae to Appear” 12 February 1998; *Prosecutor v Laurent Semanza* Case No. ICTR-97-20-T “Decision on the Kingdom of Belgium’s Application to File and Amicus Curiae Brief and on the Defence Application to Strike Out the Observations of the Kingdom of Belgium Concerning the Preliminary Response of the Defence” 9 February 2001; *Prosecutor v Kallon* Case No. SCSL-2003-07 “Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae brief and to Present Oral Submissions” 1 November 2003.

¹⁵ SCSL-2003-07 of 1 November 2003, *ibid.*, at para 5.

16. The order setting out the agenda for the 20 August status conference contained as one of the agenda items “an update on victims' applications and the procedure for allowing victims to participate in the trial proceedings”.
17. In its Observations, the Registry submits two potential application models along with their resource implications:
 - (i) Continuation of the application process implemented at the Pre Trial stage of the case and use of the simplified one page application form;
 - (ii) Implementation of a neutral registration system by the Registry and participation through the Common Legal Representative. Such model is similar to the one implemented in the Kenya cases. The Registry proposes to deviate from the Kenyan model on two issues, namely 1) the Chamber would grant the Registry, instead of the CLR, the responsibility to verify whether victims fulfil the Rule 85 criteria before registering them and 2) the registration of participating victims with the Registry would be mandatory (rather than optional, as in the Kenya Approach).
18. The Registry stresses that if the Ntaganda Pre-Trial Approach were to be adopted at trial, it 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.” The Registry adds that the second option may be more sustainable in light of the current resources required to implement victim participation at trial.
19. In its Observations, OPCV submits that given the “right of victims to tell their story and to have their story heard, as well as the obligation imposed upon the Court vis-à-vis victims, [...] victims’ statements contained in their applications for participation, in particular regarding the relevant events and the harm suffered, might be of relevance for the determination of the truth and should be duly considered and taken into account by the Chamber for the purpose of the trial”.

20. OPCV adds that “the model of victims’ application process as adopted at the pre-trial stage of the proceedings in the present case should be maintained for the purpose of victims’ participation in the trial proceedings.” It stresses that “the model of victims’ participation as adopted in the Kenyan cases should not be endorsed or applied *mutatis mutandis* in the present case [and that] should the Kenyan cases model be adopted, for the absolute majority of victims in the present case, the participation in the proceedings before the Court would convert into a purely symbolic one.”

22. It is thus submitted that the issue of a tiered application and participation system is currently a live issue before the Chamber.

The proposed observations will assist in the proper determination of the issue

21. It is respectfully submitted that REDRESS and ASF are well placed to provide information and assistance that will be of direct relevance to issues before the Chamber and that otherwise would not be available to the Court, or would be costly and time consuming to secure. In particular, both organisations have closely worked with victims and victims’ organisations to assist them to understand the various procedures for victims to engage with the ICC. At the Pre-Trial stage of the *Bosco Ntaganda case*, ASF already conducted a survey with applicants for participation in the Case which provided additional insights into the question of the victims’ preference for legal representation.¹⁶ REDRESS and ASF also have conducted training in victim communities and are working closely with victims and the intermediaries working with them in numerous ICC situation countries including DRC, Kenya, Uganda and Ivory Coast.

22. 24. The Applicants propose to bring to the Chamber’s attention factual information both with regards to the implementation of the Kenyan model in Kenya and with regards to the possible implementation of such model in DRC.

23. 25. The Applicants respectfully submit that so far the Chamber has received information mostly relating to the legality and resource implications of the two proposed application and participation systems. The Chamber does not appear to have

¹⁶ Pursuant to Pre-Trial Chamber's II Decision ICC-01/04-02/06-212-Conf-Exp, dated 16 January 2014, this consultation Report has been reclassified as "Public".

received information gathered through consultations with victims' communities in DRC themselves.

24. The Applicants note that submissions were received in the Kenya cases ahead of the implementation of the new application and participation system.¹⁷ However, the applicants also submit that so far, there is little information available on the implementation of the tiered system in the Kenya cases which would reflect the experiences of victims, victims' communities, intermediaries or victims' legal representatives with the new approach.¹⁸
25. 27. The Applicants do not propose to argue the legal merits and challenges associated with the two systems currently before the Chamber but rather to highlight practical issues, that may impact on the modalities for a possible tiered application and participation process and/or which may assist the Chamber in its consideration of the most efficient and effective form of participation.
26. 28. In order to do so, the Applicants will consult victims, affected communities and other stakeholders in Ituri, DRC. It is proposed that around 600 victims residing in the geographical area covered by the case be consulted and asked about practical issues that may impact on the modalities of the application and participation process in the case.
29. The Applicants will consult with partners in Kenya who have experience with the implementation of the tiered application and participation system.

¹⁷ *Prosecutor v WilliamSamoei Ruto and Joshua Arap Sang*, Request to present views and concerns of victims on their legal representation at the trial phase, TC V, ICC-01/09-01/11-469, 6 November 2012; *Prosecutor v WilliamSamoei Ruto and Joshua Arap Sang*, Amicus Curiae Observations of Kituo Cha Sheria pursuant to Rule 103 of the Rules of Procedure and Evidence, TC V, ICC-01/09-01/11-478, 23 November 2012.

¹⁸ While the Registry and Common Legal representatives of Victims have submitted bi-monthly reports on the situation of victims in Kenya, which highlighted that the system was originally welcome by some victims' communities, there is little information on the key practical issues victims and victims' communities have encountered with regards to the implementation of the system. There is also little information available on whether victims, victims' communities, and other stakeholders have been satisfied with its implementation. *Prosecutor v WilliamSamoei Ruto and Joshua Arap Sang*, Periodic Report on the general situation of victims in the Republic of Kenya and the activities of the VPRS and the Common Legal Representatives in the field, ICC-01/09-01/11-566-Anx, 23 January 2013

The granting of leave would not be detrimental to the fairness or expeditiousness of the proceedings

30. The Applicants acknowledge the importance of ensuring the expeditiousness of the proceedings such that the due process rights of the accused are protected and respected without undue delay.¹⁹

31. The Applicants note that the Status Conference has now been rescheduled for 11 September 2014. They submit that the granting of leave to submit observations would not be detrimental to the fairness or expeditiousness of the proceedings due to their direct relevance to the issue under review by the Chamber and its consideration of the most efficient and effective form of victim participation.

V. Proposed Timeline

32. As indicated above, the Applicants seek to bring to the Chamber's attention *inter alia*, information to be gathered through detailed consultation..

33. Considering current logistical constraints and the security situation in Eastern DRC²⁰ the Applicants estimate that they would require up to 15 days to conduct the field consultations and a further 15 days to process and analyse the responses. As such, should the Chamber be mindful to grant this application for leave, the Applicants would propose to submit their observations within four weeks from the date this request for leave to intervene is granted. The Applicants stress that views from the field would be highly relevant to the determination of the application and participation model to be applied in the present case.

34. The Applicants are, however, prepared to submit the intervention at an earlier date if deemed convenient or necessary by the Chamber though this may impact the breadth of the consultations.

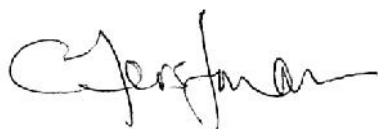
¹⁹ The Statute, Article 67.

²⁰ There continues to be tensions and staff from a human rights organisation were recently attacked by alleged FRPI fighters 40km south of Bunia, Ituri.

VI. Conclusion

35. For the reasons set forth above, the Applicants respectfully request that they be granted leave to submit written observations on the matters set out in paragraph 15 (a) and (b) above, pursuant to Rule 103 of the Rules of Procedure and Evidence.

36. The Applicants seek to make written observations only. However, if the Chamber considers that it would be of benefit to it to also receive an oral submission on these issues, we would be pleased to assist in this way.



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Director, REDRESS



Francesca Boniotti
Director General, Avocats sans Frontières

Dated 29 August 2014

At London, United Kingdom and Brussels, Belgium