

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 26 November 2013

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 *Ex parte* only available to VPRS and OPCV

**Observations of the OPCV
in accordance with the Single Judge's decision issued on 20 November 2013**

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

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Counsel Support Section

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Ms Fiona McKay

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 28 May 2013, the Single Judge of the Chamber (the "Single Judge") issued the "Decision Establishing Principles on the Victims' Application Process"⁵ in which she established, *inter alia*, a victims' application process and ordered the Registry to consult with applicants in relation to their preference for legal representation and to start identifying appropriate assistant to counsel with the involvement or in consultation with the Office of Public Counsel for Victims (the "OPCV" or the "Office").⁶

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" (Pre-Trial Chamber II), 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 Establishing Principles on the Victims' Application Process" (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-67, 28 May 2013.

⁶ *Idem*, p. 22.

5. On 20 November 2013, the Single Judge issued the "Decision Requesting the VPRS and the OPCV to take steps with regard to the legal representation of victims in the conformation of the charges hearing and in related proceedings" (the "Decision")⁷ in which she requested the OPCV *"to provide observations, on the basis of its previous experience in other cases before the Court, on the availability and the possible organization of the legal teams constituted of counsels of the office to represent the two groups of victims foreseen by the Registry [in its Report]"* and orders the Victims Participation and Reparations Section (the "VPRS") jointly with the OPCV *"to proceed without delay with the selection of several candidates for the position of assistants to counsel"*.⁸

6. In compliance with the Decision, the Principal Counsel of the OPCV submits the following observations.

7. In accordance with regulation 23bis (2) of the Regulations of the Court, the present submission is filed "Confidential *Ex parte* only available to the VPRS and the OPCV" following the classification assigned by the Single Judge.

II. Observations on the availability of the OPCV and possible organisation of the common legal representation of victims in the case

8. On a preliminary basis, the Principal Counsel submits that wishes of victims are an essential factor as far as the decision relating to their legal representation in the proceedings before the Court is concerned and constitute an important step for their meaningful and effective participation.

9. The Principal Counsel consequently acknowledges the serious concerns raised by the applicants so far, as indicated in the Decision, in relation to the possibility of having only one legal team representing victims of different ethnicity and different

⁷ See the "Decision Requesting the VPRS and the OPCV to take steps with regard to the legal representation of victims in the conformation of the charges hearing and in related proceedings" (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-150-Conf-Ex, 20 November 2013 (the "Decision").

⁸ *Idem*, paras. 12 and 13.

categories of victims (namely, former child soldiers and individuals having suffered from attacks).⁹ In this regard, she would like to underline that the Office has always paid attention to the issue of real or perceived conflicts of interests that could arise in a specific case in accordance with article 16 of the Code of Professional Conduct for Counsel and therefore always endeavours to avoid such conflicts.

10. Concerning the availability of the Office to be designated as common legal representative for the purpose of the confirmation of charges hearing and related proceedings, the Principal Counsel informs the Single Judge that, having considered the present allocation of staff within the Office to situations and cases, the current stage of different proceedings which said staff is already allocated to and the workload of the Office, two Counsels – out of the three qualified individuals within the OPCV – can be appointed as common legal representatives in the case.

11. Both counsels have extensive experience in the proceedings before the Court, as well as extensive experience in the field, particularly in the Democratic Republic of the Congo and in the Ituri region, are already working on the case and they are fully aware of the developments in the proceedings which will optimise the preparation of the confirmation of the charges hearing. Moreover, both counsels have been involved in the entirety of the case of *The Prosecutor v. Thomas Lubanga Dyilo*. This constitutes, in the Principal Counsel's view, an asset when deciding on the legal representation of victims in this case, since part of the crimes allegedly committed by Mr Bosco Ntaganda are identical to the ones for which Mr Lubanga was charged and ultimately found guilty.

12. In relation to the possible organisation of the common legal representation of victims, as indicated above, the Office is able to constitute two separate and autonomous legal teams, one for each category of victims as identified in

⁹ *Ibid.*, para. 8. In this regard, see also the "Order on the organisation of common legal representation of victims" (Trial Chamber II), No. ICC-01/04-01/07-1328, 22 July 2009. In this case, the Trial Chamber appointed two common legal representatives, one to represent the interests of former child soldiers and the other to represent the interests of the victims having suffered from the attack.

paragraph 8 of the Decision. Confidential information related to the victims will not be shared between the teams. Indeed, an information management system is in place within the Office and allows for rigorous segregation of access to such information. This system is currently used in the two Kenyan cases where two staff members of the Office are seconded to the respectively appointed common legal representatives. This system has proven to be effective.

13. In relation to the access to information, the Principal Counsel would like, however, to indicate that the management of access in this specific case will be easier to control, insofar the two teams will presumably share the same access to the evidence as ruled upon by the Chamber when deciding on the modalities of participation of victims in the proceedings. Indeed, in the practice of the Court, at the confirmation of charges hearing normally common legal representatives have been granted access to public information and the issue of the possibility for them to access confidential material has been ruled upon on a case-by-case basis. Therefore, initially, the only information which would need to be segregated relates to the applications of victims. In this regard, the Principal Counsel informs the Single Judge that said access is granted individually within the Office in each case.

14. The separate legal teams may ultimately file substantially similar submissions, depending on the views of their respective groups of clients. Further, they might share resources to the extent of their common interest, as would any other party or participant that identifies a common interest with another party or participant in the course of proceedings.

15. Furthermore, in relation to the organisation of the common legal representation, the Principal Counsel would like to underline that the involvement of victims in the proceedings before the Court implies the need to take into consideration the realities of the specific situation country, as well as the cultural and social specificities of the affected communities, and even the ones of the families concerned; factors such as complex and long proceedings to which probably

hundreds or thousands of victims will participate while the proceedings will be held far away from the locations where the crimes were committed; the need to constantly inform victims in a language they can understand despite the logistical difficulties to reach them so that they can express their views and concerns and consequently to represent their interests in the proceedings.

16. To face these challenges, the Principal Counsel observes that it will be essential, should counsels of the Office be appointed, for them to be assisted by a legal assistant in the field. These legal assistants ought to have an excellent understanding of the situation in the field and of the cultural context, as well as knowledge of the relevant local languages spoken by the victims and possibly previous experience in the proceedings before the Court dealing with the same type(s) of victimisation which is specific to this case. In this regard, the Principal Counsel informs the Single Judge that the Office is in the position of contacting two individuals who fulfil said requirements, together with the ones identified by the Registry, as indicated in the Decision.¹⁰

17. Both persons are lawyers and have extensive experience in the field dealing, one, with former child soldiers in the *Lubanga* proceedings; and the other, in dealing with victims having suffered from attacks and gender crimes in the *Katanga and Ngudjolo Chui* proceedings. They have worked or are working with the organisation *Avocats sans Frontières* which has provided and provides relevant assistance to victims in the DRC, including in providing legal representation before national courts. Moreover, should these persons apply for the position of assistant to counsel and be ultimately appointed, their appointment will grant a perfect gender balance within the two teams to be composed.

18. This system will grant constant access to victims and it would facilitate the collection of views and concerns, information and/or evidence needed to represent

¹⁰ See the Decision, *supra* note 7, para. 7.

the interests of the victims in proceedings. Furthermore, they would be able to ensure regular contact with victims in order to inform them about the developments of the proceedings and to address their questions and expectations.

19. Said model would also meet the requirements of international criminal proceedings which are long and are held in a place remote from the locations where the crimes were committed.

20. The practice already established in several proceedings has shown that the added value deriving from the synergies of the combined collaboration between lawyers of the OPCV and external lawyers is substantial, particularly for the purpose of straightening the effectiveness of the participation of victims, and that such a system addresses in an efficient manner the needs of victims.¹¹

21. In relation to the issue of real or perceived conflicts of interests, the Principal Counsel considers that this matter could be approached along the lines of Trial Chamber II in the *Katanga and Ngudjolo Chui* case. In said case, the Trial Chamber indicated that “[s]hould the common legal representative receives conflicting instructions from one or more groups of victims, he or she shall endeavour to represent both positions fairly and equally before the Chamber. In case the conflicting instructions are irreconcilable with representation by one common legal representative, and thus amount to a conflict of interest, the common legal representative shall inform the Chamber immediately, who will

¹¹ In the *Lubanga* and *Bemba* cases, an OPCV team represented the interests of victims admitted to participate in proceedings along with other teams composed of external legal representatives. In both said cases, the cooperation between said teams allowed to represent the interests of victims in effective and efficient manner, through the filing of joint written submissions. In the Kenyan cases, at trial phase, the model as adopted provides for the designation of a common legal representative who shall reside in Kenya to be able to maintain a regular contact with victims; while a representative of the Office shall attend hearings. Finally, in the *Gbagbo* case, a lawyer from the Office was appointed as common legal representative of victims admitted to participate in the proceedings, while an external lawyer joined the Office team as legal assistant in the field, in Côte d’Ivoire, to ensure the regular contact with the victims. This model has proven to be the more effective so far.

take appropriate measures".¹² In the Principal Counsel's submission, said measures might include the appointment of an external counsel.

22. The Principal Counsel would also like to underline that – having assessed the resources available to the Office – this arrangement is feasible for the purpose of the confirmation of the charges hearing and related proceedings and it will have no impact on the other mandate of the Office to provide support and assistance to the external legal representatives appointed in other cases pending before the Court.

23. Finally, the Principal Counsel respectfully submits that the Counsel Support Section (the "CSS") should be part of the selection process of the legal assistants since this section is tasked with managing the legal aid and hence the funds to be allocated for the payment of the legal assistants in the field. The involvement of the CSS, in the Principal Counsel's view, will allow the Single Judge to appraise all financial implications of the decision on common legal representation.

Respectfully submitted.



Paolina Massidda
Principal Counsel

Dated this 26th day of November 2013

At The Hague, The Netherlands

¹² See the "Order on the organisation of common legal representation of victims", *supra* note 9, para. 16.