

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original:

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

Date: 6 February 2015

**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**

**Decision on victims' participation in trial proceedings**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Ms Nicole Samson

**Counsel for Bosco Ntaganda**

Mr Stéphane Bourgon  
Mr Luc Boutin

**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**

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

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Ms Fiona McKay

**Others**

**Trial Chamber VI** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 51(4) and (5), 57(3)(c), 64(2), 67(1), 68(1) and (3) of the Rome Statute ('Statute'), Rules 16, 85, 86, 89 and 90-92 of the Rules of Procedure and Evidence ('Rules') and Regulations 24(2), 79, 80 and 86 of the Regulations of the Court ('Regulations') issues the following 'Decision on victims' participation in trial proceedings'.

## **I. Background and procedural history**

1. At the confirmation stage, the Single Judge of Pre-Trial Chamber II ('Pre-Trial Chamber') granted victim status to 1120 applicants, permitting them to participate at the confirmation of charges hearing and in related proceedings.<sup>1</sup> The Pre-Trial Chamber endorsed the Registry's recommendation<sup>2</sup> on the organisation of the legal representation of victims and decided to appoint two counsel from the Office of Public Counsel for Victims ('OPCV') as common legal representatives of two distinct groups of victims: child soldiers (140 victims); and victims of UPC/FPLC attacks (980 victims).<sup>3</sup>
2. On 21 July 2014, this Chamber issued its 'Order Scheduling a Status Conference and Setting a Provisional Agenda', in which it requested, *inter alia*, the parties and participants' submissions on 'the procedure for allowing victims to participate in the trial proceedings'.<sup>4</sup>

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<sup>1</sup> Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 January 2014, ICC-01/04-02/06-211 ('Pre-Trial Victims Decision'); Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 7 February 2014, ICC-01/04-02/06-251.

<sup>2</sup> Registry's Interim Report on the organization of common legal representation, 13 November 2013, ICC-01/04-02/06-141-Red2 (public redacted version notified on 4 August 2014).

<sup>3</sup> Decision Concerning the Organisation of Common Legal Representation of Victims, 2 December 2013, ICC-01/04-02/06-160.

<sup>4</sup> Order Scheduling a Status Conference and Setting a Provisional Agenda, 21 July 2014, ICC-01/04-02/06-339, para. 5(g).

3. On 14 August 2014, the Office of the Prosecutor ('Prosecution'),<sup>5</sup> the Legal Representatives of Victims ('LRVs')<sup>6</sup> and the Registry<sup>7</sup> submitted their observations on the system for admitting victims to participate in trial proceedings.<sup>8</sup>
4. On 11 September 2014, this issue was further addressed during the first status conference before the Chamber.<sup>9</sup>

## II. Submissions

### A. Registry

5. The Registry recalls that, in the case at hand:
  - i. 1120 applicants were admitted to participate at the confirmation stage of the proceedings;
  - ii. 80 applications were rejected by the Pre-Trial Chamber after transmission; and
  - iii. approximately 800 applications were received by the Registry but not transmitted to the Pre-Trial Chamber.
6. The Registry further informs the Chamber that it anticipates approximately 400 additional applications to participate at trial in the *Ntaganda* case.<sup>10</sup> Considering that the scope of the case has been in some instances narrowed, expanded and/or clarified by the Pre-Trial Chamber's decision pursuant to

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<sup>5</sup> Prosecution's Submissions on the Provisional Agenda for the 20 August 2014 Status Conference, 14 August 2014, ICC-01/04-02/06-352 ('Prosecution Submissions').

<sup>6</sup> Joint submissions in accordance with the "Order Scheduling a Status Conference and Setting a Provisional Agenda" issued on 21 July 2014, 14 August 2014, ICC-01/04-02/06-351 ('LRVs Submissions').

<sup>7</sup> Registry submission pursuant to "Order Scheduling a Status Conference and Setting a provisional Agenda", 14 August 2014, ICC-01/04-02/06-350 ('Registry Observations').

<sup>8</sup> On 8 September 2014 the Defence had submitted written observations on the topics to be discussed during the first status conference, but it did not address the question of victims' participation. Observations de la Défense concernant l'ordre du jour provisoire pour la Conférence de mise en état du 11 September 2014, 8 September 2014, ICC-01/04-02/06-364.

<sup>9</sup> Transcript of hearing on 11 September 2014, ICC-01/04-02/06-T-13-ENG ET.

<sup>10</sup> Registry Observations, ICC-01/04-02/06-350, para. 11; ICC-01/04-02/06-T-13-ENG ET, page 50, line 23 to page 51, line 2.

Article 61(7) of the Statute ('Confirmation Decision'),<sup>11</sup> the Registry foresees the necessity for a comprehensive review of all victim applications received to date to assess if the abovementioned modifications in the charges against Mr Ntaganda impacted on the Court's assessment.<sup>12</sup>

7. As concerns the admission of new applicants to participate in trial proceedings, the Registry distinguishes between two potential admission systems. The first option requires judicial consideration of simplified individual applications ('*Ntaganda* Pre-Trial Approach').<sup>13</sup> The second option is premised on the victim participation procedure adopted by Trial Chamber V ('Kenya Trials Approach').<sup>14</sup>
8. Emphasising that this latter option would be ideal for the *Ntaganda* case, the Registry proposes a slightly amended version of the system adopted by Trial Chamber V ('Modified Kenya Approach'). Under the Modified Kenya Approach, the Chamber would set criteria for assessing victim applications. The Registry would then apply the criteria to each application received and register qualifying applicants in a database. Finally, the Registry would, upon registration, transmit the applications of the qualifying applicants to the appointed LRVs.<sup>15</sup> By contrast, under the Kenya Trials Approach, no such application assessment was done and registration with the Registry was optional.<sup>16</sup>

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<sup>11</sup> Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309.

<sup>12</sup> Registry Observations, ICC-01/04-02/06-350, para. 11.

<sup>13</sup> Registry Observations, ICC-01/04-02/06-350, para. 13.

<sup>14</sup> Registry Observations, ICC-01/04-02/06-350, para. 20, with reference to Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on victims' representation and participation, 3 October 2012, ICC-01/09-02/11-498 ('*Muthaura and Kenyatta* Victims Decision'); Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on victims' representation and participation, 3 October 2012, ICC-01/09-01/11-460 ('*Ruto and Sang* Victims Decision').

<sup>15</sup> Registry Observations, ICC-01/04-02/06-350, para. 17.

<sup>16</sup> Registry Observations, ICC-01/04-02/06-350, para. 20.

9. The Registry submits that the Modified Kenya Approach would avoid the most time and resource consuming elements of the *Ntaganda* Pre-Trial Approach, namely the drafting of Registry assessments for the Chamber's consideration and the preparation of redacted versions of the applications received for transmission to the Defence.<sup>17</sup> According to the Registry, if the Chamber selects the *Ntaganda* Pre-Trial Approach, it would take as long as one year to process and transmit the applications currently in the Registry's possession.<sup>18</sup>

## **B. Prosecution**

10. On the review of applications for participation already received and considered at the confirmation stage, the Prosecution is of the view that, while the Registry can conduct a first review, it is for the Chamber to issue the decision allowing for victims' participation to continue after receipt of the Prosecution's observations in this regard.<sup>19</sup>
11. The Prosecution further supports the continuation of the *Ntaganda* Pre-Trial Approach, namely a judicial determination of the victim's status on the basis of simplified application forms.<sup>20</sup> It suggests setting the start of trial as a deadline for the filing of applications for participation.<sup>21</sup>
12. As regards the victims' common legal representation, the Prosecution supports the framework adopted during the confirmation process.<sup>22</sup>

<sup>17</sup> Registry Observations, ICC-01/04-02/06-350, para. 16.

<sup>18</sup> Registry Observations, ICC-01/04-02/06-350, para. 14.

<sup>19</sup> Prosecution Submissions, ICC-01/04-02/06-352, para. 39 referring to *Ruto and Sang* Victims Decision, ICC-01/09-01/11-460, para. 62; *Muthaura and Kenyatta* Victims Decision, ICC-01/09-02/11-498, para. 61; ICC-01/04-02/06-T-13-ENG ET, page 49, lines 14-21.

<sup>20</sup> Prosecution Submissions, ICC-01/04-02/06-352, para. 41; ICC-01/04-02/06-T-13-ENG ET, page 49, line 22 to page 50, line 2.

<sup>21</sup> Prosecution Submissions, ICC-01/04-02/06-352, para. 41; ICC-01/04-02/06-T-13-ENG ET, page 50, lines 3-6.

<sup>22</sup> Prosecution Submissions, ICC-01/04-02/06-352, para. 37.

### C. LRVs

13. In their joint submissions, the LRVs submit that, in accordance with the Court's jurisprudence in this regard, all victims admitted to participate at the confirmation stage of the proceedings in the present case 'should be automatically admitted to participate at the trial stage without their victim status be[ing] determined *de novo*'.<sup>23</sup>
14. Moreover, the LRVs submit that the procedure adopted by the Chamber under Article 68(3) of the Statute must give full effect to the victims' right to be heard, and that, for most victims, 'the process of application for participation appears to be the only way to provide an account of their experience which might be of relevance for the search for the truth'.<sup>24</sup> Stressing that victims have 'the right not only to tell their story but also to have their story heard within the judicial framework',<sup>25</sup> the LRVs submit that the applications for participation '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 proceedings'.<sup>26</sup>
15. Consequently, the LRVs are of the view that, should the Kenya Trials Approach be adopted, victims would be deprived of their right enshrined in Article 68(3) of the Statute.<sup>27</sup> The LRVs consider that the Kenya Trials Approach proposed by the Registry 'would not allow most of the victims to benefit from their rights under Article 68(3)' because 'the registration of the victims would be done outside of any legal context',<sup>28</sup> and neither the parties

<sup>23</sup> LRVs Submissions, ICC-01/04-02/06-351, paras 10-13.

<sup>24</sup> See LRVs Submissions, ICC-01/04-02/06-351, paras 20-21.

<sup>25</sup> LRVs Submissions, ICC-01/04-02/06-351, para. 21 *referring to* Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, Decision on the Application For Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 71.

<sup>26</sup> LRVs Submissions, ICC-01/04-02/06-351, para. 22.

<sup>27</sup> LRVs Submissions, ICC-01/04-02/06-351, para. 31.

<sup>28</sup> ICC-01/04-02/06-T-13-ENG ET, page 46, line 21 to page 47, line 4.

nor the Judges would ever be in a position to hear the very personal and tragic stories of the applicants.<sup>29</sup> In their views, 'budgetary restrictions' should not affect the right of victims to participate in the proceedings.<sup>30</sup>

16. As regards the legal representation of victims, the LRVs submit that the model adopted and implemented at the confirmation stage has demonstrated in practice its sustainability and effectiveness,<sup>31</sup> and should also be adopted by the present Chamber for the purpose of trial proceedings.

#### **D. Defence**

17. The Defence considers that victims admitted to participate at the confirmation stage of the proceedings should continue to participate as long as the Registry has performed the necessary review based on the Confirmation Decision and that the Defence is granted an opportunity to submit observations on the Registry's assessment.<sup>32</sup>
18. As for the admission of further victims, the Defence favours the framework for victims' participation adopted during the confirmation stage of the proceedings in the case at hand. It further suggests the start of trial as a cut-off date for their admission to participate in the proceedings.<sup>33</sup>
19. In the view of the Defence, the Chamber's involvement is necessary, as is the possibility for the Defence to file observations on the individual applications received.<sup>34</sup>

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<sup>29</sup> LRVs Submissions, ICC-01/04-02/06-351, para. 20.

<sup>30</sup> ICC-01/04-02/06-T-13-ENG ET, page 48, lines 17-20.

<sup>31</sup> LRVs Submissions, ICC-01/04-02/06-351, para. 28.

<sup>32</sup> ICC-01/04-02/06-T-13-ENG ET, page 50, lines 17-22.

<sup>33</sup> ICC-01/04-02/06-T-13-ENG ET, page 50, lines 10-11 and page 51, lines 3-7.

<sup>34</sup> ICC-01/04-02/06-T-13-ENG ET, page 50, line 23 to page 51, line 2.



### III. Analysis and conclusions

20. Pursuant to Article 68(3) of the Statute,<sup>35</sup> the present decision establishes the procedure for the participation of victims in the *Ntaganda* case, as well as their legal representation. Hence, except as otherwise indicated, the modalities of victim participation are not set out in the present decision, nor are the principles relating to possible reparations.

21. The Chamber will hereunder address: (i) the admission system for victims to participate in trial proceedings; (ii) the requirements to be fulfilled by the applicants to be authorised to participate as victims in trial proceedings and (iii) the common legal representation of victims authorised to participate in trial proceedings.

#### A. The admission system for victims to participate in trial proceedings

22. Rule 89 of the Rules governs '[a]pplication for participation of victims in the proceedings'. The rule provides:

1. In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.
2. The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.

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<sup>35</sup> Article 68(3) provides: '[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence'.

3. An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.
4. Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

23. With due regard to this rule and the rest of the relevant statutory scheme and jurisprudence, the Chamber has assessed the various options for admitting victims to participate in trial proceedings. The Chamber has fully considered the specific circumstances of this case, including: (i) the large number of victims expected to express interest in participating at trial;<sup>36</sup> (ii) the 2 June 2015 trial commencement date; (iii) the situation of the victims and (iv) the fact that all participants submitted in favour of a greater degree of judicial oversight in this case than that required by the Kenya Trials Approach.

24. For the reasons explained below, victims participating solely through the LRVs will be admitted to participate in this trial in accordance with the following procedure:

- (i) The Registry must transmit all complete applications in its possession (both the simplified form and any additional supporting materials), without redactions, to the Chamber on a rolling basis.
- (ii) The Registry must assess these applications on the basis of guidance provided by the Chamber in Section III(B) of the present decision. In its assessment, the Registry must separate the applicants into three groups: (a) applicants who clearly qualify as victims ('Group A'); (b) applicants who clearly do not qualify as victims ('Group B') and (c)

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<sup>36</sup> However, this number is not projected to be as large as the number of anticipated victims that were projected to be faced by Trial Chamber V. Around the time the Trial Chamber V Victims Decisions were filed, the Victims Participation and Reparations Section was giving budget assumptions on the basis that 10,000 victim applications would be filed in the two Kenya cases. Assembly of States Parties, Official Records for the Eleventh Session, 14-22 November 2012, ICC-AP/11/20 (Vol. II), para. 430(a).

applicants for whom the Registry could not make a clear determination for any reason ('Group C').

- (iii) The Registry is to follow this same procedure for victims whose applications to participate were accepted during the confirmation stage. With regard to Rule 91(1) of the Rules and Regulation 86(8) of the Regulations, the Registry should list the victims accepted during the confirmation stage under Group A unless it considers that one or more victims may no longer qualify due to the parameters of the charges confirmed in the Confirmation Decision.
- (iv) The Registry must prepare at least one report which lists, without need for application-by-application reasoning or analysis, the victim applications which fall into each of these three groups.<sup>37</sup> The Registry must notify these reports to the Chamber, the Prosecution, the Defence and the LRVs appointed to represent participating victims. When each report is notified, the Registry is also to transmit all simplified application forms in Group C, with any necessary redactions, to the Prosecution and the Defence.
- (v) To ensure that all applications are processed prior to commencing trial, the Registry must make a final transmission of simplified application forms falling under: (a) Group C to the Chamber and parties no later than 60 days prior to the trial commencement date and (b) Groups A and B to the Chamber no later than 15 days prior to the trial

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<sup>37</sup> When listing Group B victims in this report, applications which are not complete need not be included. For the Group B victims which are to be included, the lists should be further sub-divided as follows: (i) applicants who failed to demonstrate their identity or kinship; (ii) applicants who suffered alleged harm outside the temporal scope of the charges; (iii) applicants who suffered alleged harm outside the geographic scope of the charges and (iv) applicants who were rejected for any other reason.

commencement date.<sup>38</sup> The Registry's final corresponding reports must be notified by these same deadlines. No new applications may be submitted for consideration after these deadlines.

- (vi) Upon receipt of the Group C applications, the Prosecution and Defence are entitled to reply to them within a time limit which will be set by the Chamber at a later time.
- (vii) Upon receiving any submissions from the parties on the Group C applications, the Chamber will assess them individually. Barring a clear and material error apparent in the Registry's assessment, the Chamber will also ratify the assessment regarding the applications in Groups A and B.
- (viii) The Registry must maintain a database of information provided by victims admitted to participate in the proceedings, and must make available to each LRV in the case the data provided by the victims that he or she represents so that they know their victim constituency.
- (ix) Once every four months from notification of the present decision, the Victims Participation and Reparations Section ('VPRS') must periodically provide a detailed report about the victims admitted to participate in the proceedings and the general situation of participating victims. The reports must be prepared in cooperation with the LRVs, who are to provide the VPRS with detailed information relating to their activities amongst the victims.

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<sup>38</sup> When transmitting applications specifically to the Chamber, these deadlines reflect transmission of both the simplified forms and any additional supporting materials.

25. The Chamber considers that the procedure outlined above achieves the necessary balance in a manner fully consistent with the statutory framework and appropriate to the specific circumstances of this case.

26. The Chamber recognises the importance of effective and meaningful victim participation in the proceedings. Achieving an efficient application process which provides applicants with a fair and timely determination of their status on the basis of straightforward criteria is an important element in giving effect to such participation. However, such a process must not negatively impact the fairness or expeditiousness of the proceedings or the rights of the accused.

1. *Context – the specific circumstances of this case*

27. The Registry projects a substantial number of victim applicants in this case. The Chamber particularly notes the Registry's estimate that one year would be required to process and submit the applications in accordance with the *Ntaganda* Pre-Trial Approach. Adopting the *Ntaganda* Pre-Trial Approach for all applications would likely mean that not all of them could be processed by the 2 June 2015 trial commencement date. Some victims entitled to participate in trial proceedings could therefore be prevented from doing so at the trial's commencement.

28. The Chamber notes that the redaction process necessary to provide all victim applications to the parties would be 'time and resource intensive'.<sup>39</sup> Moreover, the level of redaction necessary to satisfactorily provide the protection required by Article 68(1) of the Statute may compromise the receiving party's ability to investigate them and/or make meaningful submissions. The more information given to facilitate meaningful investigations and submissions may also create a corresponding risk to the victims' safety, psychological well-

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<sup>39</sup> See Registry Observations, ICC-01/04-02/06-350, para. 16.

being, dignity and/or privacy, irrespective of the existence of professional obligations to respect confidentiality of such information.

## 2. *Admission procedure*

29. It must be noted that the parties' right to reply to victim applications set out in Rule 89(1) of the Rules is not absolute. Rule 89(1) provides that the transmission of victim applications to the parties, and their right to reply thereto, is '[s]ubject to the provisions in the Statute, in particular article 68, paragraph 1 [...]'. In this regard, the Chamber notes: (i) the Court's obligation under Article 68(1) of the Statute to protect the safety, physical and psychological well-being, dignity and privacy of victims; (ii) the right of the accused to not have measures adopted which are prejudicial to or inconsistent with his/her right to be tried with undue delay, as required by Articles 67(1)(c) and 68(1) and (3) of the Statute; and (iii) the Chamber's general obligation under Article 64(2) of the Statute to ensure the fair and expeditious conduct of the proceedings.

30. Bearing in mind these statutory provisions and the context set out above, as well as the fact that admitting victims to participate in proceedings is only assessed at a *prima facie* standard,<sup>40</sup> the Chamber considers that limiting the parties' submissions to applications which cannot be clearly resolved by the Registry is an appropriate procedure which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

31. The Chamber additionally notes that Rule 89 of the Rules contains no express requirement for individual consideration of each application by the Chamber. Rather, it provides, in Rule 89(2), that the Chamber 'may' reject an application if it considers that the applicant is not a victim or the criteria in Article 68(3) of

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<sup>40</sup> *Infra*, para. 44.

the Statute are otherwise not fulfilled. More generally, the Chamber considers that Rule 89(1) of the Rules should be interpreted in light of Rule 89(4), which gives the Chamber discretion to ‘consider the applications in such a manner as to ensure the effectiveness of proceedings’.

32. The Chamber considers that designating the Registry to assess victim applications, based on clear guidelines outlined by the Chamber, who retains ultimate authority over the process, is the most efficient and appropriate way to ‘consider the applications’ in this case. The Chamber notes that the Registry makes these kinds of assessments regularly, as past victim participation decisions have required the Registry to: (i) filter out incomplete applications from the ones transmitted to the Chamber<sup>41</sup> and (ii) make detailed reports on the merits of the applications in order to inform the Chamber’s assessments.<sup>42</sup>

33. The Chamber does not consider that such a procedure detracts from the meaningful participation of victims in ICC proceedings. In fact, this kind of procedure will expedite the processing of victims’ applications and allow them to participate through their LRVs at the earliest possible juncture. These judicial economy benefits also will expedite the trial proceedings generally, which is clearly in the interests of the victims and the parties.

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<sup>41</sup> See Decision Establishing Principles on the Victims’ Application Process, 28 May 2013, ICC-01/04-02/06-67, paras 29-30; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the treatment of applications for participation, 26 February 2009, ICC-01/04-01/07-933-tENG (translation notified 9 July 2009) (‘*Katanga and Ngudjolo Applications Decision*’), para. 28.

<sup>42</sup> Regulation 86(6) of the Regulations. *Egs* Registry, Fifth Report to the Pre-Trial Chamber on applications to participate in the proceedings, 13 December 2013, ICC-01/04-02/06-179-Conf (with annexes, see especially confidential *ex parte* Annex A); Public redacted version of the “First Report to the Pre-Trial Chamber on applications to participate in the proceedings” (ICC-01/04-02/06-106-Conf-Exp) dated 13 September 2013, 1 August 2014, ICC-01/04-02/06-106-Red2 (with annexes, see especially confidential *ex parte* Annex A; public redacted version notified 4 August 2014).

3. *Certain arguments raised by the participants*

34. The Defence argues that party submissions on and Chamber involvement in the victim admission process is 'necessary'.<sup>43</sup> The Chamber does not consider that a Chamber's individual assessment of every victim application to be an absolute statutory requirement. Rather, its appropriateness and necessity should be determined by each chamber, and this Chamber has determined such involvement on all applications to be neither appropriate nor necessary in this case. The Chamber additionally notes that the *prima facie* nature of the application assessment makes it unlikely that the Chamber and Registry will reach different conclusions about victim status in clear cases.
35. Further, victims participating solely through a common legal representative only engage with the Court through that legal representative. In such cases, the LRVs must ultimately adopt a uniform position across a vast number of participating victims. Even assuming the Chamber, with input from the parties, might reach different conclusions from the Registry in a small number of what were considered to be 'clear cases', it is speculative to assume that the marginally different victim constituency resulting from these efforts would materially change the LRVs' submissions in this case.
36. The Chamber also notes that the LRVs argue that victim applications are 'an account of their experience' that is of 'relevance for the search for the truth'.<sup>44</sup> While the Chamber considers such factors to be important within the broader framework of victim participation, it is recalled that chambers have only been evaluating victim applications to a *prima facie* standard for the purposes of participation; they are not making any concrete determination on the veracity of the claims therein. Unless these applications are submitted and discussed as

<sup>43</sup> See ICC-01/04-02/06-T-13-ENG ET, page 50, line 23 to page 51, line 2.

<sup>44</sup> See LRVs Submissions, ICC-01/04-02/06-351, para. 20.



evidence during the trial, the Chamber also cannot base its trial judgment on them.<sup>45</sup> The Chamber therefore considers that, notwithstanding any other purpose they may fulfil for the individuals concerned, victim applications are primarily intended as a procedural mechanism to participate in proceedings.

37. Moreover, the Chamber does not consider its victim participation approach to operate outside the 'judicial framework',<sup>46</sup> or to be motivated by 'budgetary restrictions', but rather by the need for fair and expeditious trial proceedings. The Chamber considers that the procedure set out in this decision fully accords with the Court's applicable law, noting that the relevant provisions are flexible enough to allow for different approaches when this is appropriate.

#### 4. *Directly participating victims*

38. As a final matter, the Chamber clarifies that the procedure for allowing any victim to testify upon request of the LRV or to participate directly in proceedings will be decided upon if and when the Chamber decides to allow for this kind of participation.

39. As for what participating 'directly' means, this term covers any victims who may be subsequently allowed to appear solely to present their views and concerns to the Chamber.<sup>47</sup> 'Direct participation' is not referring to participating victims who testify before the court as **witnesses** called by the Prosecution ('dual status witnesses'). Witnesses do not ordinarily act as 'participants' in ICC proceedings - they are persons called upon by the participants (or the Chamber) to give evidence. Because they do not become

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<sup>45</sup> See Article 74(2) of the Statute.

<sup>46</sup> LRVs Submissions, ICC-01/04-02/06-351, para. 21; ICC-01/04-02/06-T-13-ENG ET, page 46, line 21 to page 47, line 4.

<sup>47</sup> See Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138 (notified on 23 February 2012); Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08, 24 May 2012, ICC-01/05-01/08-2220.

‘direct participants’ simply by testifying, dual status witnesses will have had their applications assessed through the procedure applicable to all other victims.

40. However, the Chamber emphasises that, above and beyond any victim admission procedure, a distinct disclosure regime applies to witnesses. For the Prosecution, this means it must obtain<sup>48</sup> and provide the Defence with all the disclosable information in a dual status witness’s victim application, subject to any applicable disclosure restrictions, regardless of whether the victim participates directly in proceedings.

**B. The criteria to be fulfilled by the applicants in order to be authorised to participate as victims in trial proceedings**

41. The Chamber will now turn to the relevant criteria to be fulfilled by victim applicants.

42. Individuals seeking to be admitted as participating victims will have to demonstrate that they are victims within the meaning of Rule 85 of the Rules.<sup>49</sup>

43. The Chamber, consistent with the established jurisprudence of the Court, considers that only those persons who are victims of the crimes charged may participate in trial proceedings.<sup>50</sup> In order to qualify as victims in the present case, applicants will have to meet the following criteria:

- i. his or her identity as a natural person must be established;<sup>51</sup>

<sup>48</sup> Article 54(1)(a) of the Statute.

<sup>49</sup> Rule 85 provides: ‘[f]or the purposes of the Statute and the Rules of Procedure and Evidence: (a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes’.

<sup>50</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, 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, OA9-OA10 (‘*Lubanga* OA9-OA10 Judgment’), para. 62.

<sup>51</sup> See para. 51 below for cases in which the applicant is an organisation or institution.

- ii. he or she has suffered harm; and
- iii. the suffered harm is as a result of an incident falling within the parameters of the confirmed charges.<sup>52</sup>

44. The applicants are required to establish that these three criteria have been met *prima facie*.<sup>53</sup>

1. *Identity as a natural person*

45. With respect to the first requirement, the Chamber bears in mind the difficulties that applicants may often have in obtaining or producing copies of official identity documents in the Democratic Republic of Congo ('DRC'). It therefore endorses the flexible approach adopted by different chambers of this Court and accepts distinct forms of identification, as follows:

Passport; birth certificate; driving license; electoral card; marriage certificate; consular identity card; death certificate; document pertaining to medical treatment, rehabilitation or education; church membership card; family registration booklet; employee identity card; political party membership card; pension booklet; or a signed declaration from two witnesses

<sup>52</sup> See *Lubanga* OA9-OA10 Judgment, ICC-01/04-01/06-1432, para. 58; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, 4 June 2012, ICC-02/11-01/11-138 ('*Gbagbo* Victims Decision'), para. 20, n. 31; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on 772 applications by victims to participate in the proceedings, 18 November 2010, ICC-01/05-01/08-1017, para. 38; Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Décision sur les demandes de participation à la procédure a/0001/06, a/0002/06 et a/0003/06 dans le cadre de l'affaire *Le Procureur c. Thomas Lubanga Dyilo* et de l'enquête en République démocratique du Congo, 28 July 2006, ICC-01/04-01/06-228, page 7; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Corrigendum of Operative part of the Decision on the 345 applications for participation as victims in the proceedings, 5 August 2009, ICC-01/04-01/07-1347-Corr-tENG, para. 6 (translation notified 17 January 2013).

<sup>53</sup> ICC-01/04-01/06-1119, para. 99; *Katanga and Ngudjolo* Applications Decision, ICC-01/04-01/07-933-tENG, paras 33-34; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, ICC-01/04-01/07-1491-Red-tENG, para. 57; ICC-01/05-01/08-807-Corr, para. 92; ICC-02/05-03/09-528, para. 22. See also Appeals Chamber, *The Prosecutor v. Joseph Kony et al.*, Judgment on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, 23 February 2009, ICC-02/04-179, para. 38.

accompanied by their proof of identity, attesting to the identity of the applicant.<sup>54</sup>

46. As regards possible discrepancies between the application and identity documents submitted, the Chamber considers, as did other chambers of the Court,<sup>55</sup> that a certain degree of flexibility must be adopted. Minor discrepancies which do not call into question the overall credibility of the information provided by the applicants may be accepted.

## 2. Harm

47. The Chamber recalls that other chambers have considered that ‘harm’, under Rule 85(a) of the Rules, includes physical injuries, as well as emotional suffering and economic loss.<sup>56</sup> Under the second requirement listed above, the applicant must have *personally* suffered harm.<sup>57</sup> This personal harm can, however, be suffered *directly* or *indirectly*. In this regard, the Chamber recalls that the Appeals Chamber has stated that ‘[h]arm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims’.<sup>58</sup>

48. The Chamber is of the view that, for an indirect victim to be admitted to participate at trial, the identity of both direct and indirect victims shall be duly

<sup>54</sup> See e.g., ICC-01/04-01/06-1119, para. 87; *Katanga and Ngudjolo* Applications Decision, ICC-01/04-01/07-933-tENG, para. 30; *Gbagbo* Victims Decision, ICC-02/11-01/11-138, para. 25.

<sup>55</sup> *Katanga and Ngudjolo* Applications Decision, ICC-01/04-01/07-933-tENG, paras 33-34; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, ICC-01/04-01/07-1491-Red-tENG, para. 32; Pre-Trial Victims Decision, ICC-01/04-02/06-211, para. 23; Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Corrigendum to Decision on the Registry Report on six applications to participate in the proceedings, 28 October 2011, ICC-02/05-03/09-231-Corr, para. 24.

<sup>56</sup> *Lubanga* OA9-OA10 Judgment, ICC-01/04-01/06-1432, para. 32; Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Fourth Decision on Victims’ Participation, 12 December 2008, ICC-01/05-01/08-320, para. 70; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kogsey and Joshua Arap Sang*, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, ICC-01/09-01/11-249, para. 50; *Gbagbo* Victims Decision, ICC-02/11-01/11-138, para. 28.

<sup>57</sup> *Lubanga* OA9-OA10 Judgment, ICC-01/04-01/06-1432, para. 32.

<sup>58</sup> *Lubanga* OA9-OA10 Judgment, ICC-01/04-01/06-1432, para. 32.

established, as well as their kinship, by reference to the identity documentation referred to above. Accordingly, while it is possible to submit an application on behalf of victims,<sup>59</sup> relatives of a deceased person will not be able to participate in these proceedings unless they show that they have suffered harm personally.<sup>60</sup>

3. *The suffered harm is as a result of an incident falling within the parameters of the confirmed charges*

49. As concerns the third requirement, the Chamber considers that, as stated by the Appeals Chamber, the Confirmation Decision ‘defines the parameters of the charges at trial.’<sup>61</sup>

50. The link between the commission of the crime and the harm suffered by the applicant shall be assessed in light of the information available and established on a *prima facie* basis. The Chamber finds it sufficient that an applicant demonstrate, for example, that the alleged crimes have objectively contributed to the harm suffered. Accordingly, the crimes charged do not have to be the only cause of the harm suffered by the applicant.<sup>62</sup>

51. Pursuant to Rule 85(b) of the Rules, organisations or institutions applying for victim status must establish ‘direct harm to any of [its] property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes’.

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<sup>59</sup> See Rule 89(3) of the Rule (applications may be made by ‘a person acting with the consent of the victim or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled’).

<sup>60</sup> *Lubanga* OA9-OA10 Judgment, ICC-01/04-01/06-1432, para. 32.

<sup>61</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, para. 124.

<sup>62</sup> Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Fourth Decision on Victims’ Participation, 12 December 2008, ICC-01/05-01/08-320, paras 76-77.

**C. The common legal representation of victims authorised to participate in trial proceedings and LRVs access to the case record**

52. The OPCV currently represents the victims in this case. Two OPCV counsel have been appointed, with one representing a group consisting of alleged UPC/FPLC child soldiers and another consisting of alleged victims of UPC/FPLC attacks.<sup>63</sup> One or more legal assistant(s) assist OPCV counsel, as the OPCV stressed that there should be a legal assistant be in the field for each group of victims.<sup>64</sup>

53. When selecting LRVs, the Chamber considers that, as outlined in the two Kenya cases, a number of requirements must be balanced. These requirements include in particular: (i) the need to ensure that the participation of victims, through their legal representative, is as meaningful as possible, as opposed to purely symbolic; (ii) the purpose of common legal representation, which is not only to represent the views and concerns of the victims, but also to allow victims to follow and understand the development of the trial; (iii) the Chamber's duty to ensure that the proceedings are conducted efficiently and with the appropriate celerity and (iv) the Chamber's obligation under Article 68(3) of the Statute to ensure that the manner in which victims participate is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>65</sup> In this regard, it is particularly important that LRVs be sufficiently proximate to the victims to have knowledge of their cultural background and be willing and able to communicate with them effectively.

54. In the present case, the Chamber is interested in confirming whether the current representation system should be maintained during trial or whether

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<sup>63</sup> Decision Concerning the Organisation of Common Legal Representation of Victims, 2 December 2013, ICC-01/04-02/06-160, paras 10 and 23.

<sup>64</sup> Decision Concerning the Organisation of Common Legal Representation of Victims, 2 December 2013, ICC-01/04-02/06-160, paras 16 and 26.

<sup>65</sup> *Ruto and Sang* Victims Decision, ICC-01/09-01/11-460, para. 59; *Muthaura and Kenyatta* Victims Decision, ICC-01/09-02/11-498, para. 58.

new LRVs should be appointed. For this purpose, the Chamber directs the Registry: (i) to consult with the victims who participated in this case during the confirmation stage on the LRVs' continued representation; and (ii) report back to the Chamber as to the result of this consultation.

55. Irrespective of which counsel represent the victims in the trial phase of proceedings, the Chamber wishes to clarify that the LRVs have a general right to access the case record by the terms of Rules 92(5)<sup>66</sup> and 131(2)<sup>67</sup> of the Rules. The Chamber considers that this access generally entitles the LRVs to access filings, transcripts and material, both public and confidential.<sup>68</sup> Going forward, if the parties submitting filings/material are of the view that the LRVs ought not to access them, then they must indicate the factual and legal basis for the chosen classification.<sup>69</sup> If the LRVs wish to access previously submitted filings/material in the case record, then they are to seise the Chamber with a request for access.

56. The Chamber emphasises that the victims' access to the case record described above is limited to the LRVs only. Requests for access for individual victims must be approved by the Chamber on a case-by-case basis.<sup>70</sup>

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<sup>66</sup> Rule 92(5) provides: '[i]n a manner consistent with the ruling made under rules 89 to 91, victims or their legal representatives participating in proceedings shall, in respect of those proceedings, be notified by the Registrar in a timely manner of: (a) Proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision; [and] (b) Requests, submissions, motions and other documents relating to such requests, submissions or motions'.

<sup>67</sup> Rule 131(2) provides '[s]ubject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the defence, the representatives of States when they participate in the proceedings, and the victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91'.

<sup>68</sup> See generally *Ruto and Sang* Victims Decision, ICC-01/09-01/11-460, paras 64-69.

<sup>69</sup> See Regulation 23 *bis* of the Regulations.

<sup>70</sup> *Ruto and Sang* Victims Decision, ICC-01/09-01/11-460, paras 68-69; *Muthaura and Kenyatta* Victims Decision, ICC-01/09-02/11-498, paras 67-68.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

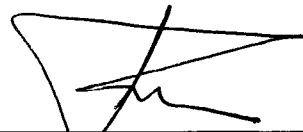
**ADOPTS** the admission system for victims to participate in trial proceedings set out in paragraph 24 of the present decision;

**DIRECTS** the Registry to file the report set out in paragraph 54 above within 21 days of notification of the present decision;

**DIRECTS** the parties to notify the LRVs going forward in accordance with paragraphs 55-56 of the present decision; and

**DIRECTS** the VPRS, in the context of its outreach activities, and the LRVs to inform the victims in the present case of the new participation procedure.

Done in both English and French, the English version being authoritative.



**Judge Robert Fremr, Presiding Judge**



**Judge Kuniko Ozaki**



**Judge Geoffrey Henderson**

Dated 6 February 2015

At The Hague, The Netherlands