

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/10

Date: 6 June 2011

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. CALLIXTE MBARUSHIMANA***

Public

Proposal on victim participation in the confirmation hearing

Source: Registry

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

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Other

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

NOTING article 68(3) of the Rome Statute, rules 89(1) and 93 of the Rules of Procedure and Evidence, and regulations 86(5) and 24 *bis* of the Regulations of the Court;

NOTING the Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana;¹

NOTING the Warrant of Arrest for Callixte Mbarushimana;²

NOTING the Order setting a deadline for the transmission of applications for victims' participation;³

NOTING the Registry's First transmission to the Pre-Trial Chamber of applications to participate in the proceedings,⁴ and its First report on applications to participate in the proceedings;⁵

NOTING the Defence response to the first transmission to the Pre-Trial Chamber of applications to participate in the proceedings;⁶

NOTING the Decision requesting the Parties to submit observations on 14 applications for victims' participation in the proceedings;⁷

NOTING the Registry's First transmission to the parties and legal representative of redacted versions of applications to participate in the proceedings;⁸

¹ ICC-01/04-01/10-1.

² ICC-01/04-01/10-2.

³ ICC-01/04-01/10-78.

⁴ ICC-01/04-01/10-166.

⁵ ICC-01/04-01/10-168-Conf-Exp.

⁶ ICC-01/04-01/10-169.

⁷ ICC-01/04-01/10-181.

⁸ ICC-01/04-01/10-190

NOTING the Decision on the Prosecution's request for the postponement of the confirmation hearing;⁹

CONSIDERING that the Registry has transmitted the 14 complete applications for participation to the Chamber;¹⁰

CONSIDERING that the Registry is in receipt of 783 applications for participation which appear to be related to the present case, of which up to 530 may be complete, but have not yet been filed with the Chamber;

TRANSMITS to the Chamber the following proposal on victim participation in the confirmation hearing.

A. Background

1. On 20 May 2011 the Registry filed its first transmission to the Chamber of applications for participation in the present case. At the time of the transmission, the Registry reported to the Chamber that in the week prior to the filing deadline, and without prior warning, it had received 783 additional applications which it had not yet been in a position to assess for completeness and report on in compliance with regulation 86 of the Regulations of the Court. The Registry indicated that should the Chamber so require, it could "file by 3 June 2011 as many of the newly received applications which are complete as it is able to process".¹¹
2. On 22 May 2011 the defence responded, stating that the imposition of a large number of applications for review "in the few weeks that remain until the confirmation hearing will place a wholly unfair and prejudicial administrative burden on the Defence", and requested that the Chamber refuse to consider

⁹ ICC-01/04-01/10-207.

¹⁰ ICC-01/04-01/10-166.

¹¹ ICC-01/04-01/10-166.

further applications.¹² On 24 May 2011 the Single Judge issued a decision acceding to the Defence's request.¹³

3. On 31 May 2011 the Chamber granted a request of the Prosecutor for a postponement of the confirmation hearing, at the same time ordering the Registry to transmit to the Chamber "complete applications for participation as victims in the proceedings at the pre-trial stage of the case no later than 30 June 2011".
4. The present filing is made under regulation 24 *bis* of the Regulations of the Court, with the objective of informing the Chamber of the constraints faced by the Registry in processing all complete applications received by 30 June 2011, and making a proposal for an alternative approach to victims' participation in the confirmation hearing.

B. Constraints faced by the Registry

5. The Registry is currently in the process of scanning and registering the 783 additional applications. However given the human resources currently available to the Victims Participation and Reparations Section, and the demands created by other judicial proceedings on that section, the Registry estimates that it would require approximately two months to process and transmit all of the complete applications (estimated to be up to 530) together with reports thereon as required by regulation 86(5) of the Regulations of the Court. The preparation of redacted versions of the applications for transmission to the parties would require a further approximately one month. The Registry estimates that by 30 June it would be able to transmit no more than 250 or 300 applications. Accomplishing even this partial transmission and reporting would significantly increase the strain on the resources of the Registry and may interfere with the Registry's ability to comply fully with orders already issued by other Chambers. This approach would also have the effect of denying any form of participation during the confirmation

¹² ICC-01/04-01/10-169.

¹³ ICC-01/04-01/10-181.

hearing to the approximately 230 to 280 who had also submitted their complete applications to the Registry at around the same time but whose applications could not be processed in the time frame available.

6. Given the difficulties faced by the Registry in processing and reporting on all of the applications, and noting, in the light of the observations previously made by defence, that it is likely that the transmission of even 250 or 300 applications to the parties on 30 June will create a significant burden for them in the period immediately before the confirmation hearing, the Registry proposes, for the Chamber's consideration, an alternative approach to victim participation for the purposes of the confirmation hearing.

C. Proposal for an alternative approach

7. The Registry notes that under rule 89(1) of the Rules of Procedure and Evidence (the "RPE") individual applications for participation are to be transmitted to the Chamber as well as to the parties in order that the latter can present observations prior to decisions on individual applications being issued by the Chamber.
8. However the Registry also notes under rule 93 of the RPE, whereas the Chamber "may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91... [i]n addition, a Chamber may seek the views of other victims, as appropriate." It is apparent that this rule enables the Chamber, on its own motion, to request and consider the views of victims who have not been formally accepted through the procedure set out in rule 89.
9. The Registry therefore proposes to the Chamber that rather than following the usual system of victim participation pursuant to rules 89 to 91, which in the present circumstances may place an undue burden on the parties and could result in the exclusion of some applicants, the Chamber could "seek the views" of the applicants as "other victims" under rule 93.

10. The Registry notes that several Chambers appear to have recognized the possibility under rule 93's second sentence for a form of victim participation to occur outside the usual rule 89 procedure involving the granting of individual participating victim status.¹⁴ In dissenting opinions (then) Judge Song has indicated that he would have enabled the presentation of victims' views outside the rule 89 procedure by relying on rule 93.¹⁵
11. In one instance, in the case of *The Prosecutor v Jean-Pierre Bemba Gombo*, the Office of Public Counsel for Victims (the "OPCV") was permitted to make opening statements at trial on behalf of persons whose applications for victim participation were yet to be decided. The legal basis for this was not expressly indicated, however the Trial Chamber referred to the "exceptional circumstances" and explained that this approach was taken "in order not to prejudice these applicants... among whom some may later be granted participating status."¹⁶
12. In that instance, the Chamber, in permitting applicants to present opening statements through the OPCV notwithstanding that their application were yet to be considered by the Chamber, made the following observations:
- The Chamber recalls that such opening statements, if any, are not considered as evidence for the purposes of the trial. The Chamber further underlines that their representation at this stage does not extend to the right to be allowed to put questions to witnesses. Accordingly, the Chamber is of the view that allowing Applicants whose applications have already been filed to be represented at the commencement of the trial and to make opening statements is not prejudicial to, or inconsistent, with the rights of the accused.¹⁷
13. The Registry thus notes that the form of participation afforded under rule 93 need not be equivalent to that granted to victims recognized through the rule 89 procedure. Rather, the Chamber may distinguish between the two groups of victims so as to reflect the much more limited scrutiny involved in the proposed

¹⁴ ICC-01/04-556, paragraph 48; ICC-02/05-177, paragraph 48; ICC-02/04-01/05-252, paragraph 102; ICC-01/04-01/06-1004, paragraph 3.

¹⁵ ICC-01/04-01/06-1335, paragraphs 9-11; See also ICC-02/05-01/09-70, paragraph 4.

¹⁶ ICC-01/05-01/08-1020, paragraph 22.

¹⁷ ICC-01/04-01/10-1020, paragraph 23.

rule 93 approach, and to ensure that their participation is not inconsistent with the rights of the suspect.

14. Should the Chamber so order, the Registry would be able to conduct a preliminary review of the 783 applications received, without conducting the full processing usually involved under the rule 89 procedure, in order to check their completeness as well as their link to the present case. Those considered complete and linked to the case could be transmitted to the Chamber. A brief report identifying which applications were considered complete could be transmitted to the Chamber and the parties and participants.
15. The Registry anticipates that such a report and transmission could be prepared by 30 June 2011.

(c) Legal representation

16. Should the present approach be adopted, the Registry would recommend that *ad hoc* counsel be appointed by the Chamber under regulation 80 of the Regulations of the Court. The Registry would be ready to facilitate the identification of appropriate counsel in accordance with the Chamber's instructions, whether private counsel or a counsel from the OPCV.
17. The Registry notes the limited time which would be available for the appointed legal representative to communicate with the applicants and seek their views. It also considers that such communication would likely be further hampered by the security challenges prevailing in North and South Kivu. Given these challenges, the Registry recognizes that it may not necessarily be possible that the counsel appointed is able to meet with and seek the views of the applicants. Despite this, the Registry respectfully suggests that this limited form of participation would remain valuable, insofar as it could achieve the objectives of:
 - Providing a limited form of recognition to the applicants in question; and

- Enabling the presentation in the proceedings of such information at least as can be gleaned from the application forms.

18. The Registry would be available to provide some assistance to the legal representative of the applicants such as by compiling basic information from the applications.

D. Conclusion

19. In light of the observations made in the present document, the Registry respectfully requests instructions from the Chamber on how to proceed.



Marc Dubuisson, Director, Division of Court Services
On behalf of Silvana Arbia, Registrar

Dated this 6 June 2011

At The Hague, The Netherlands