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Date: **9 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

**Request to appear before the Chamber pursuant to regulation 81(4)(b) of the
Regulations of the Court
on the specific issue of victims' participation in the confirmation hearing**

Source: Office of Public Counsel for Victims

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

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I. Procedural Background

1. Mr Mbarushimana made his initial appearance before Pre-Trial Chamber I on 28 January 2011. The confirmation hearing was scheduled to commence on 4 July 2011¹.

2. On 15 March 2011, the Single Judge of Pre-Trial Chamber I ordered that applications for victims' participation be submitted as soon as practicable and, in any event, no later than 45 days before the commencement of the confirmation hearing².

3. The Registry transmitted 14 applications to participate in the proceedings to the Chamber³ and to the parties and the legal representatives of applicants⁴, on 20 May and 25 May 2011, respectively. The Registry then informed the Chamber that, should the Chamber so instruct, the Registry would be able to file by 3 June 2011 as many of the newly received applications which are complete as it is able to process.

4. On 22 May 2011, the Defence filed its first Response to the first transmission by the Registry of victims' applications for participation, opposing the processing of any applications not transmitted to the Chamber by the original deadline.⁵

5. On 24 May 2011, the Chamber requested the parties' observations on the 14 victims' applications for participation.⁶

¹ See the Transcripts of the hearing held on 28 January 2011, No. ICC-01/04-01/10-T-1-ENG, p. 10.

² See the "Order setting a deadline for the transmission of applications for victims' participation" (Single Judge, Pre-Trial Chamber I), No. ICC-01/04-01/10-78, 15 March 2011.

³ See the "First transmission to the Pre-Trial Chamber of applications to participate in the proceedings" (Registry), No. ICC-01/04-01/10-166, 20 May 2011.

⁴ See the "First transmission to the parties and legal representative of redacted versions of applications to participate in the proceedings" (Registry), No. ICC-01/04-01/10-190 and ICC-01/04-01/10-166-Conf-Anx-Red-1 to 14, 25 May 2011.

⁵ See the "Defence response to the first transmission to the Pre-Trial Chamber of applications to participate in the proceedings", No. ICC-01/04-01/10-169, 22 May 2011.

⁶ See the "Decision requesting the Parties to submit observations on 14 applications for victims' participation in the proceedings" (Pre-Trial Chamber I), No. ICC-01/04-01/10-181, 24 May 2011.

6. The Defence sought a permanent stay of proceedings on 24 May 2011,⁷ which is still pending before the Chamber.

7. On 31 May 2011, the Chamber postponed, at the Prosecution's request, the start of the confirmation hearing to 17 August 2011.⁸ As a consequence to said postponement, the Victims Participation and Reparations Section was ordered to submit any other complete victims' applications for participation no later than 30 June 2011, giving enough time to the Prosecution and to the Defence to make their observations and for the Chamber to issue a decision on the applications concerned⁹. Those observations were filed by both parties on 6 June 2011.¹⁰

8. On 6 June 2011, the Registry filed a proposal on victims' participation in the confirmation hearing¹¹. The Registry noted that it *"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"* and informed the Chamber of the *"constraints faced by the Registry in processing all complete applications received by 30 June 2011"*, which led the latter to make a proposal for *"an alternative approach"* to victims' participation in the confirmation hearing.

9. The Principal Counsel of the Office of Public Counsel for Victims (the "OPCV" or the "Office") considers that the Registry's Proposal entails issues of general interest for victims and therefore submits the present Request to appear before the

⁷ See the "Defence request for a permanent stay of proceedings", No. ICC-01/04-01/10-177, 24 May 2011 and the subsequent filings dealing with this issue, pending a Decision of the Chamber.

⁸ See the "Decision on the Prosecution's request for the postponement of the confirmation hearing" (Pre-Trial Chamber I), No. ICC-01/04-01/10-207, 31 May 2011. See also the "Prosecution's request in terms of Rule 121(7) for the postponement of the confirmation hearing to preserve the fairness of the proceedings", No. ICC-01/04-01/10-189, 25 May 2011.

⁹ *Idem*, see the "Decision on the Prosecution's request for the postponement of the confirmation hearing", p. 10.

¹⁰ See the "Observations générales de la Défense sur le premier envoi de demandes de participation à la procédure en qualité de victimes" (Defence), No. ICC-01/04-01/10-212, 6 June 2011; "Prosecution's Observations on 14 Applications for Victims' Participation in the Proceedings", No. ICC-01/04-01/10-216, 6 June 2011.

¹¹ See the "Proposal on victim participation in the confirmation hearing" (Registry), No. ICC-01/04-01/10-213, 6 June 2011 (the "Registry's Proposal").

Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court on the specific issue of victims' participation in the confirmation hearing.

II. Legal Basis for the OPCV for appearing before the Chamber

10. Pursuant to regulation 81(4) of the Regulations of the Court, "[t]he Office of Public Counsel for victims shall provide support and assistance to [...] victims, including, where appropriate [...] [a]ppearing before a Chamber in respect of specific issues."

11. The provision does not specify if such possibility is triggered by a request of a Chamber in this sense or by the Office itself in requesting leave to appear before the Chamber in respect of specific issues. However, the *chapeau* of regulation 81(4) of the Regulations of the Court clearly provides for an obligation binding upon the Office to provide, where appropriate, support and assistance to victims *inter alia* in appearing before the Chamber in respect of specific issues.

12. The Office has in the past requested and been granted leave to appear on specific issues of general interest for victims¹². The Office has also appeared on specific issues having an impact on victims' general interests directly at the request of a Chamber¹³.

13. In its Decision of 1st February 2007, the Single Judge of Pre-Trial Chamber II recognised that "*the mandate vested in the OPCV by the Regulations [of the Court] also*

¹² See, *inter alia*, the "Order on the Office of Public Counsel for Victims' request filed on 21 November 2007 (Trial Chamber I), No. ICC-01/04-01/06-1046, 27 November 2007, par. 2; the "Ordonnance relative à la soumission d'écritures sur l'interprétation de la norme 42 du Règlement de la Cour (norme 28 du Règlement de la Cour)" (Trial Chamber II), No. ICC-01/04-01/07-1205, 12 June 2009, which *inter alia* decided on the OPCV's Request to appear filed on 20 May 2009 ("Demande du BCPV afin d'être autorisé en vertu de la norme 81-4-b du Règlement de la Cour à comparaître devant la Chambre dans le cadre de questions spécifiques liées aux mesures de protection au bénéfice du témoin W-007", No. ICC-01/04-01/07-1160).

¹³ See, *inter alia*, the Transcripts of the hearing of 30 October 2007, No. ICC-01/04-01/06-T-58-ENG, p. 13, lines 4 to 18; and the Transcripts of the hearing of 4 December 2007, No. ICC-01/04-01/06-T-62-ENG-ET WT, pages 53 to 54.

encompasses forms and methods of assistance to victims which fall short of legal representation”¹⁴.

14. Moreover, the Office relies on Trial Chamber I jurisprudence which recognised the opportunity for the OPCV to appear before a Chamber in respect of specific issues, initiated either by: *“the Chamber (this will usually relate to issues of general importance and applicability); a victim or his or her representative, who has asked for its support and assistance; the Office, if it is representing one or more victims; or the Office, following an application to address the Chamber on specific issues, notwithstanding the fact that it has not been requested to do so by the representatives of victims or any individual victims (this will usually relate to issues of general importance and applicability)”*¹⁵.

15. The Office is of the opinion that the role, meaning, scope and modalities of participation of victims at the pre-trial stage of the proceedings and specifically at the confirmation of charges hearing constitute a specific issue on which it is necessary and appropriate to assist them. Undoubtedly, the issues raised by the Registry in its “Proposal on victim participation in the confirmation hearing” are of such nature to impact on the proceedings in different ways and will reverberate on the scope of victims’ participation in other cases as well.

16. Furthermore, the Office argues that since Pre-Trial Chamber I is dealing with issues which need to be considered expeditiously and before the start of the confirmation of the charges hearing, the appropriate time for the OPCV to appear before the Pre-Trial Chamber in respect of the specific issue mentioned is now.

¹⁴ See the “Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-134, 1st February 2007.

¹⁵ See the “Decision on the role of the Office of Public Counsel for Victims and its request for access to documents” (Trial Chamber I), No. ICC-01/04-01/06-1211, 6 March 2008, par. 35.

III. Issues on which the OPCV would like to appear

17. The Registry's Proposal constitutes an *"alternative approach to victims' participation in the confirmation hearing"*¹⁶, based on rule 93 of the Rules of Procedure and Evidence, *"outside the usual rule 89 procedure involving the granting of individual participating victim status"*¹⁷. Consequently it appears that this proposal deviates significantly from the general framework of victims' participation set in the Rome Statute and in the Rules of Procedure and Evidence put in place in order to guarantee an effective participation of victims in the proceedings before the Court.

18. The Office believes strongly that such a proposal requires careful scrutiny, taking into account the rights of victims before the International Criminal Court, especially in the light of the jurisprudence of the Court that *"the role of victims in criminal proceedings before this Court, provided for in article 68(3) of the Statute and rules 91 and 92 of the Rules, constitutes one of the main features of the procedural framework of the Statute and the Rules, as well as a novelty in international criminal law."*¹⁸

19. Especially since the Registry indicates in its Proposal that *"the form of participation afforded under rule 93 need not be equivalent to that granted to victims recognized through the rule 89 procedure"*¹⁹, the Office sees the need for the general interests of victims to be presented to the Chamber, having notably in mind the Single Judge's Decision underlining that she *"cannot agree with those claiming that the object and purpose of these provisions is confined to provide victims with a limited access to the Court's criminal proceedings, so that they become 'second-class' participants, who have a*

¹⁶ See *supra* note 11, the Registry's Proposal, par. 4.

¹⁷ *Idem*, par. 10.

¹⁸ See, *inter alia*, the Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, pp. 51-55, especially par. 153.

¹⁹ See *supra* note 11, the Registry's Proposal, par. 13.

sort of ‘in-courtroom observer status’ and must request the leave of the Court at any time if they would like to perform any kind of procedural activity”²⁰.

20. The Office is in particular concerned that such an alternative mechanism would undermine the “*meaningful role*” of victims and their “*substantial impact in the proceedings*” as recognised and encouraged by the various chambers of the Court.²¹ Departing from the “usual” statutory participation mechanism could deprive victims of important procedural guarantees. The Registry in its Proposal indeed recognised that this mechanism would provide for a “*limited form of participation*”²², which would give a “*limited form of recognition to the applicants*”²³, having as a consequence the acknowledged fact of excluding the persons concerned²⁴ from enjoying fully their rights under the Rome Statute specifically and crucially recognised to them in the framework of the now usual but yet unique regime created with regard to victims’ participation. Since the Registry itself estimates that “*it would be able to transmit no more than 250 or 300 applications*”²⁵, by the court-ordered deadline of 30 June, it is unclear why these applications should not be governed by the normal statutory framework of victims’ participation.

21. The Office is also deeply concerned by the compatibility between the form of participation suggested by the Registry, which for instance “*does not extend to the right*

²⁰ See *supra* note 18, par. 156.

²¹ *Idem*, par. 157. See also, *inter alia*, the “Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006; the “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” (Pre-Trial Chamber II), No. ICC-02/04-01/05-252, 10 August 2007, par. 88; the “Order on the organisation of common legal representation of victims” (Trial Chamber II), No. ICC-01/04-01/07-1328, 22 July 2009, par. 10: “*First, the Chamber attaches the greatest importance to the requirement that the participation of victims, through their legal representatives, must be as meaningful as possible as opposed to being purely symbolic.*”; the Separate and Dissenting Opinion of Judge René Blattmann to Decision on victims’ participation (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, par. 13: “*It is necessary to state, first and foremost, the important notion that victims’ participation is not a concession of the Bench, but rather a right accorded to victims by the Statute*” (we underline).

²² See *supra* note 11, the Registry’s Proposal, par. 17 (we underline).

²³ *Idem* (we underline).

²⁴ *Idem*, par. 9.

²⁵ See *supra* note 11, the Registry’s Proposal, par. 5.

to be allowed to put questions to witnesses”²⁶, with the necessity to ensure that “the set of procedural rights which are consistent with the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules [effectively] enables victims to fully participate in the debate held at the confirmation hearing of the evidence contained in the record of the case kept by the Registry”²⁷.

22. In this regard, the Office notes that the confirmation of charges hearing constitutes an essential stage of the proceedings of which the participation of victims has already and constantly been recognised as being an important component²⁸.

23. Finally, on this issue, the Office understands the resource constraints faced by the Registry at this point in time, which are the same faced by the OPCV, however, it considers that victims’ participation cannot be restrained on this basis and that alternatives, not prejudicing victims’ participation’s meaning and effect, have to be found, including the recruitment of staff, if need be.

24. The Office also requests leave to submit observations on the issue of legal representation in the proceedings. In its Proposal, the Registry refers to regulation 80 of the Regulations of the Court which includes the possibility of appointing the OPCV. The Office was not consulted prior to the filing of the proposal. The Chamber ought to be fully informed, in considering the advisability of the proposal, of the Office’s present workload and other factors that might impede the effective representation of the persons concerned²⁹.

²⁶ See *supra* note 11, the Registry’s Proposal, par. 12.

²⁷ See the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case”, *supra* note 18, par. 159.

²⁸ *Idem*, par. 43 and footnote 47: “It is for these reasons that, in previous decisions, the Chamber has stated that the personal interests of victims are affected by the outcome of the pre-trial stage of a case insofar as this is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspects are responsible for the crimes with which they have been charged by the Prosecution”.

²⁹ See *supra* note 11, the Registry’s Proposal, par. 16.

25. Consequently, in the light of the Registry' Proposal and its likely consequences on the general framework of victims' participation in the proceedings before the Court, the OPCV requests to be granted the right to present the general interests of victims by presenting to the Chamber the various aspects and implications of such a Proposal, notably in the light of the "*meaningful and independent role in criminal proceedings*"³⁰ so far recognised and guaranteed to victims by the Chambers of the Court.

FOR THE ABOVE-MENTIONED REASONS, the Principal Counsel of the Office of Public Counsel for Victims respectfully requests the Pre-Trial Chamber to be allowed to appear before it by way of submitting written observations on the Registry's proposal on victim participation in the confirmation hearing, within a deadline established by the Chamber, in order to represent the general interest of victims.



Paolina Massidda
Principal Counsel

Dated this 9 June 2011

At The Hague, The Netherlands

³⁰ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 18, par. 160. See also paras. 161 to 164: "*Moreover, the Single Judge considers that the participation of those granted the procedural status of victim at the evidentiary debate held at the confirmation hearing will also be material in achieving other important goals of the Court. (...) Firstly, in the view of the Single Judge, such participation will be an important tool to ensure that certain cultural features and perceptions that are specific to the DRC in general, and to the Ituri region in particular, be taken into consideration by the Chamber when assessing the evidence. Secondly, the Single Judge also considers that such participation - coupled with the efforts taken by the Court to publicise the proceedings through a variety of technical means - will bring the proceedings conducted at the Seat of the Court, in The Hague, closer to the inhabitants of the Ituri region. This will strengthen the legitimacy of the court proceedings in such area and increase the effectiveness of the Court's function to disseminate a culture of accountability for human rights violations.*" [we underline]