

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11

Date: 10 October 2011

PRE-TRIAL CHAMBER III

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Elizabeth Odio Benito
Judge Adrian Fulford

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

**URGENT
Public**

Registry's Observations to the "Prosecution's Request for Reclassification of Annexes 1 to 1089 of the Registry's Report on Victims' Representations" dated 4 October 2011

Source: Registry

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

The Office of the Prosecutor
Mr Luis Moreno-Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented
(Participation/Reparation)**

Applicants

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Counsel Support Section

Deputy Registrar
Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**
Ms Fiona McKay

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

NOTING the Prosecutor’s letter of 19 May 2011 indicating his intention to submit a request under Article 15(3) of the Rome Statute for authorization to open investigations in the Situation in the Republic of Côte d’Ivoire (“Côte d’Ivoire”);¹

NOTING the Prosecutor’s public notice of 17 June 2011 providing notice to victims from Côte d’Ivoire of his intention to request authorization to open investigations and informing them that pursuant to Regulation 50(1) of the Regulations of the Court they have 30 days to make their representations to the Chamber;²

NOTING the Presidency’s Decision constituting Pre-Trial Chamber III (“Chamber”), and re-assigning the situation in the Republic of Côte d’Ivoire;³

NOTING the Prosecutor’s Request for authorisation of an investigation pursuant to Article 15 of the Rome Statute dated 23 June 2011;⁴

NOTING the Chamber’s Order of 6 July 2011 instructing the Victims Participation and Reparations Section (“VPRS”) to submit, by 1 August 2011, a single, consolidated report on the collective and individual representations received with the original representations annexed thereto;⁵

NOTING the Registry’s Request for an extension of time to report on victims’ representations pursuant to regulation 35 of the Regulations of the Court;⁶

NOTING the Chamber’s Decision on the Registry’s Request dated 28 July 2011, extending the deadline for filing its report to 29 August 2011;⁷

¹ ICC-02/11-1-Anx.

² <http://www.icc-cpi.int/NR/exeres/EBF86FD2-CF42-400E-B47A-71FFA771AA04.htm>

³ ICC-02/11-2.

⁴ ICC-02/11-3.

⁵ Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute, ICC-02/11-6.

⁶ ICC-02/11-8, 22 July 2011.

⁷ Decision on the VPRS request for an extension of time to report on victims’ representations pursuant to Regulation 35 of the Regulations of the Court, ICC-02/11-9.

NOTING the Registry's Report to Pre-Trial Chamber III on victims' representations received from victims from Côte d'Ivoire ("Registry Report");⁸

NOTING the Chamber's Decision pursuant to Article 15 of the Statute on the authorisation of an investigation into the situation in the Republic of Côte d'Ivoire dated 3 October 2011 ("Article 15 Decision");⁹

NOTING Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Article 15 Decision;¹⁰

NOTING Articles 15 and 68(1) of the Rome Statute ("Statute"), Rules 50(1) and (3), Rules 85 and 89(1) of the Rules of Procedure and Evidence ("Rules") and Regulations 23*bis* and 24 *bis* of the Regulations of the Court ("Regulations");

CONSIDERING that the Registry filed a public redacted version of its Report on victims' representations;¹¹

CONSIDERING that Annexes 1 to 1089 to the Registry's Report, which contain the representations, were classified by the Registry as confidential *ex parte*, available only to the Registry, because they contain information which would identify victims and other persons who have communicated with the Court who may thereby be put at risk;

CONSIDERING the Prosecution's request for access to the above-mentioned annexes ("Prosecution's Request");¹²

CONSIDERING that the Chamber instructed the Registry to file observations to the Prosecution's Request, if any, by 4 p.m. on 10 October 2011;¹³

RESPECTFULLY SUBMITS the following observations on the Prosecution's Request

⁸ ICC-02/11-11-Conf + Conf-Anxs A ~ E + Conf-Exp-Anxs 1 ~1089, 29 August 2011.

⁹ ICC-02/11-14

¹⁰ ICC-02/11-15, 3 October 2011.

¹¹ ICC-02/11-11-Red + Anxs A ~ E –Re, 29 August 2011.

¹² ICC-02/11-16, Prosecution's Requests for Reclassification of Annexes 1 to 1089 of the Registry's Report on Victims' Representations, 4 October 2011.

¹³ Email from Legal Officer, Pre-Trial Chamber III, to Legal Coordinator, VPRS, of 5 October 2011.

1. The Registry considers that, as a general principle, representations under Article 15 of the Statute should not be accessible to the Prosecution for the following reasons:

- As the neutral organ of the Court, the Registry is not a conduit for providing evidentiary material to the parties;
- The Registry refers to the Court's earlier finding that requiring that a person give an informed consent to the use of his or her statement in the proceedings constitutes the first and foremost measure of protection that can be afforded to him or her;¹⁴
- The representations may be subject to Prosecutorial disclosure requirements pursuant to Article 67(2) of the Statute and Rule 77 of the Rules irrespective of the Prosecutor's duty to protect victims;
- Transmitting representations to the Prosecution would limit the Registry's ability to utilize the Article 15 process in a manner that is beneficial for both the Chamber and for the victims themselves and may dissuade victims in future situations before the Court from making representations under Article 15.

2. While the Registry considers that victims' representations are exclusively intended to help guide the Chamber in determining whether the requirements of Article 53(1) of the Statute are satisfied, the Registry does not oppose the Prosecution's Request in this particular instance for the following reasons:

- The Article 15 process in Côte d'Ivoire was initiated by the Prosecution without cooperation from the Registry resulting in many representations being sent directly to the Prosecutor with the express intention by many of the victims that their information be received by the Prosecution;

¹⁴ ICC-01/04-01/07-412, pp. 7-8.

- Many of the representations received were not exclusively focused on the question of whether or not an investigation should be authorized *per se* due to the fact that there was no clear instruction given to the victims from the Court on the nature of the procedure or the format of the submissions. Indeed many of the representations were addressed to the Prosecutor himself and appear to the Registry to have been submitted with the express intention of being considered as evidence.
3. In light of the above, the Registry will address the purpose of victims' representations as contemplated by Article 15(3) of the Statute and Rule 50(1) of the Rules and will set out the reasons why it considers that the present situation could be regarded as a *sui generis* case.

The purpose of victims' representations as contemplated by Article 15(3) of the Statute

4. The Registry notes that Article 15(3) of the Statute explicitly provides that in the context of an application by the Prosecutor, victims may make representations *to the Pre-Trial Chamber*. Article 15(3) makes it clear that the purpose of these representations is to assist the Chamber in reaching a decision on the Prosecution's request to open an investigation. Nowhere in the Court's legal framework is it mentioned that these representations are intended for any other party or participant. This is also supported by Rule 50(4), which provides that "[t]he Pre-Trial Chamber, in deciding on the procedure to be followed, may request additional information from the Prosecutor and from any of the victims who made representations". It follows that the purpose of representations made under Article 15 is to assist the Chamber in considering whether the requirements of Article 53(1) are satisfied, and particularly in relation to Article 53(1)(c).

Disclosure Requirements

5. The Registry notes that there is a significant difference between a report produced by the Registry, which advises the Chamber, and a primary

document completed and submitted by an alleged victim. While the Registry recognizes the importance of transparency in the Court's proceedings and of public access to information, which entails that any departure from public filing be justified, its submits that information sent by victims in confidence to the Registry is not to be supplied to the parties and participants or made the subject of the proceedings unless otherwise provided for by the Chamber.

6. The Registry notes that Rule 89(1) of the Rules requires that the parties receive copies of victims' applications for participation in the proceedings, which are transmitted to the Chamber, in order that they may effectively exercise their right to make observations on whether the requirements of Rule 85 of the Rules are satisfied. However, the transmission of applications to the parties is subject to Article 68(1) of the Statute, and the requirement that the Court take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims. Therefore, the Registry notes that where no observations are required from the parties, as is the case for victims' representations submitted within the Article 15 process, there is no justification for providing these documents to the parties. Indeed, the Registry is not bound by any disclosure obligations towards the Prosecution and as noted by Trial Chamber I in the *Lubanga* case "the disclosure regime established by the Rome Statute framework is imposed on the Prosecution alone".¹⁵
7. In addition, the Registry acknowledges the Prosecution's mandate to protect victims pursuant to Article 68(1). Ensuring that victims and witnesses are appropriately protected is indeed, pursuant to Article 68 of the Statute, a responsibility of the Court as a whole¹⁶. In light of this, and in particular to the limited context of the Article 15 process where victims' representations are to be made to the Chamber only, the transmission of any information submitted by a victim to a party should entail, at a minimum, the consent of these

¹⁵ ICC-01/04-01/06-1637, 21 January 2009, para. 10.

¹⁶ ICC-01/04-01/07-776 OA7, 26 November 2008, para. 101.

persons prior to any disclosure. It may be, for whatever reason, that certain victims do not wish to reveal their identity to any of the parties of the proceedings.

8. Furthermore, the Registry notes that the absence of a Defence at this stage of the proceedings does not justify the release of the documents. The Prosecution contends that the Chamber may later decide "to what extent and in what form the information may be shared with the Defence"¹⁷. The Registry submits that while disclosing information to the Prosecution at any stage of the proceedings might lead to disclosure to the Defence, the jurisprudence in relation to victims' applications to participate in the proceedings has demonstrated that unredacted applications in the possession of the Prosecution may become subject to its disclosure obligations under Article 67(2) of the Statute and Rules 77 of the Rules.¹⁸ In addition, the Registry's experience of working with victims has shown that victims often do not fully understand the process of disclosure and its consequences. Victims usually have little or no experience with judicial proceedings and often do not understand why or how information is provided to the Prosecution or the Defence. Being properly informed about the consequences of their communication with the Court is therefore a legitimate expectation for victims to maintain.
9. In light of the foregoing, the Registry submits that in general, victims' representations submitted within the framework of the Article 15 process should not be transmitted to any party or participant, and are intended for the exclusive use of the Chamber, unless otherwise ordered by the Chamber. That said, in this particular instance, the Registry notes important reasons for not opposing the Request of the Prosecution as set out below.

¹⁷ ICC-02/11-16, para. 18.

¹⁸ ICC-01/04-01/06-1637; ICC-01/05-01/08-807, para. 59.

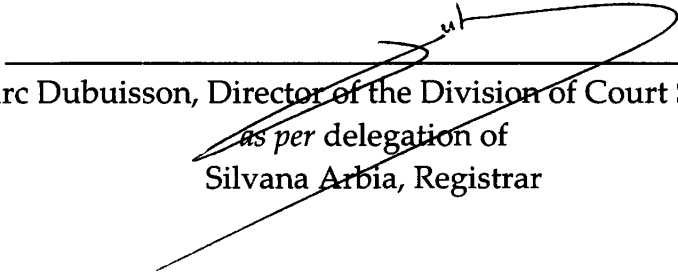
Reasons why the Registry is not opposed to the transmission of the annexes to the Prosecution in this instance

10. As extensively explained in its Report on victims' representations¹⁹, the Registry is of the view that significant efforts are required to assist victims in understanding the nature and purpose of the Article 15 process. As experienced in the present situation, in the absence of such efforts victims may not understand the object and scope of their representations to the Chamber and eventually transmit information not necessarily required for the limited purpose of the Article 15 process. In fact, the Registry notes that the review of the representations received suggested that most of information submitted might be considered to be material to the Prosecution and seem to have been submitted with the intention of being considered as such.
11. The Registry further notes that many of the representations received contained a specific mention of the fact that the victims agreed to have their information used in support of the Court in order to punish the perpetrators of the alleged crimes. Some others were specifically addressed to the Prosecutor, drawing his attention to the alleged events and asking for justice to be done.
12. As set out by the Chamber in its Article 15 Decision, victims' representations also form part of the "available information" the Chamber is to consider when making its decision under Article 15(4) of the Statute. In this regard, the Registry remarks that the Majority identified other underlying acts of crimes not presented by the Prosecution in its Request, based partly on information provided by the victims. Certain references are even made to specific submissions from victims and were used as a source to identify alleged criminal acts and suspects.
13. In those specific circumstances, the Registry does not object to the Prosecution's assertion that it might be considered to be in the interests of the victims to have this information taken into consideration by the Prosecution at

¹⁹ ICC-02/11-11-Red, para.

this stage, in order to strengthen and prioritize its investigations. This is further supported by the fact that a significant part of the representations were sent directly to the Prosecution.

14. For the reasons set out above, the Registry does not oppose the Prosecution's Request in this specific instance. The Registry wishes however to inform the Chamber that providing redacted versions of the 1089 annexes to the Prosecution, if so ordered, will constitute a significant burden on the VPRS' resources considering the current competing demands on the limited resources of the Section and would approximately take three to four months. The redaction process is further complicated given that some of the items are audio or visual recordings. In any event, the Registry remains at the Chamber's disposal regarding any decision taken in relation to the Prosecution's Request.



Marc Dubuisson, Director of the Division of Court Services
as per delegation of
Silvana Arbia, Registrar

Dated this 10 October 2011

At The Hague, The Netherlands