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APPEALS CHAMBER

Before: Judge Sang-Hyun Song
Judge SanjiMmasenonoMonageng
Judge AkuaKuenyehia
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public Document

Requests in relation to the “Decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute”

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 HISTORY

1. On 23 November 2011, Pre-Trial Chamber III issued an arrest warrant for Mr. Laurent Gbagbo,¹ who was surrendered to the Court on 30 November 2011. During the first appearance of Mr. Gbagbo, on 5 December 2011, the Chamber scheduled the commencement of the confirmation of charges hearing for 18 June 2012.²

2. On 4 June 2012, the Single Judge of Pre-Trial Chamber I (the “Single Judge”) issued a “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings”³ by which she granted 139 victims the right to participate at the confirmation of charges hearing and in related proceedings.⁴ Furthermore, the Single Judge appointed a counsel from the Office of Public Counsel for Victims (the “Office”) as the Common Legal Representative of all the victims admitted to participate in the proceedings.⁵

3. On 13 July 2012, the Single Judge issued the “Decision on the ‘*Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’” (the “Decision on Interim Release”), in which the request for interim release advanced by the Defence was rejected.⁶

¹ See the “Warrant of Arrest For Laurent Gbagbo” (Pre-Trial Chamber III), No. ICC-02/11-01/11-1, 23 November 2011.

² See the transcripts of the hearing of 5 December 2011, No. ICC-02/11-01/11-T-1-ENG, p. 8.

³ See the “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012 (the “Decision of 4 June 2012”).

⁴ *Idem.*, p. 25.

⁵ *Ibid.*, p. 26.

⁶ See the “Decision on the ‘*Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-180-Red, 16 July 2013 (the “Decision on Interim Release”).

4. On 23 July 2012, the Defence filed an appeal against the Decision on Interim Release.⁷

5. On 19 October 2012, the Single Judge issued the “Order scheduling a hearing pursuant to rule 118(3) of the Rules of Procedure and Evidence”,⁸ in which she convened a hearing on 30 October 2012 to receive observations from the Prosecutor, the OPCV and the Defence on the issue of continued detention or release of Mr Gbagbo.

6. On 26 October 2012, the Appeals Chamber issued the “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the *Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’”,⁹ dismissing the appeal of the Defence and confirming the Decision on Interim Release .

7. On 30 October 2012, a hearing on Mr. Gbagbo’s detention was held and the victims were allowed to make observations on the issue at stake.¹⁰

8. On 12 November 2012, the Single Judge issued the “Decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (the “Decision on Review of Detention”), deciding that Mr. Gbagbo shall remain in detention.¹¹

⁷ See the “Defence appeal against Pre-Trial Chamber I’s decision denying the interim release of President Gbagbo”, No. ICC-02/11-01/11-193-Conf OA, 23 July 2012.

⁸ See the “Order scheduling a hearing pursuant to rule 118(3) of the Rules of Procedure and Evidence” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-270, 19 October 2012.

⁹ See the “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the *Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’” (Appeals Chamber), No. ICC-02/11-01/11-278-Red OA, 26 October 2012.

¹⁰ See the transcript of the hearing of 30 October 2012, No. ICC-02/11-01/11-T-9-ENG ET, pp. 12-19.

¹¹ See the “Decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-291, 12 November 2012.

II. REQUESTS

A. Request for notification of a possible appeal

9. As noted on numerous occasions by the Common Legal Representative,¹² the proceedings in the *Gbagbo* case are, to a very large extent, classified confidential. Although this confidentiality seems to be justified by the “sensitivity” of the information touching upon Mr. Gbagbo’s health issues,¹³ the Common Legal Representative cannot but note that very few public redacted versions of said confidential filings are subsequently registered in the case record.

10. The Common Legal Representative contends that the principle of publicity of the proceedings, enshrined in the statutory texts of the Court,¹⁴ is very much affected by this practice, which certainly deprives the victims from effectively participating in the proceedings.¹⁵ Indeed, the fact that the personal interests of victims are directly concerned by any decision on a suspect’s detention is beyond question, as

¹² See the “Request to access documents in relation to the Defence Challenge to the Jurisdiction of the Court”, No. ICC-02/11-01/11-155, 18 June 2012; the “Request for leave to submit observations and Request to access the Expert Reports”, No. ICC-02/11-01/11-203, 8 August 2012; the “Observations on the legal principles applicable to the determination of a suspect’s fitness”, No. ICC-02/11-01/11-228-Corr, 23 August 2012, in particular paras. 8-10; the “Views and concerns of victims in relation to the “Order scheduling a hearing in relation to Mr. Gbagbo’s fitness to take part in the proceedings against him” and on the Defence’s request for postponement”, No. 02/11-01/11-245, 17 September 2012, and the “Request in relation to the ‘Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court’”, No. ICC-02/11-01/11-293, 13 November 2012. See also the transcript of the hearing of 30 October 2012, *supra* note 10.

¹³ See e.g. the “Decision on the OPCV’s ‘Request for leave to submit observations and Request to access the Expert Reports’” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-211, 15 August 2012, para. 14.

¹⁴ See articles 67(1) and 64(7) of the Rome Statute, and regulations 20, 21 and 23bis(3) of the Regulations of the Court. See also the “Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58 Application” (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-01/11-157, 4 July 2011, paras. 7-8; the “Decision on Directions for the Conduct of the Proceedings” (Trial Chamber III), No. ICC-01/05-01/08-1023, 19 November 2010, para.23; the “Decision reclassifying certain documents in the record of the Case” (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-03/09-43, 15 June 2010, p. 3; and the “Decision on Re-classification and Unsealing of Certain Documents” (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-301, 1 December 2008, para. 5.

¹⁵ See the “Decision on issues related to the hearing on Mr. Gbagbo’s fitness to take part in the proceedings against him” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-249, 20 September 2012, paras. 28-31.

acknowledged by the Single Judge when inviting the OPCV to represent the victims during the hearing held on 30 October 2012¹⁶, and as constantly recognised by the practice of the Appeals Chamber which acknowledged that the personal interests of victims are affected by the issue related to the detention of a suspect or accused¹⁷.

11. Incidentally, the Common Legal Representative notes that the victims were not invited to submit their views and concerns on the first request for *interim* release submitted by the Defence which led to the Decision on Interim Release and the first appeal in the present case, despite the fact that rule 119(3) of the Rules of Procedure and Evidence establishes that “*before [...] amending any conditions restricting liberty, the Pre-Trial chamber shall seek the views of [...] victims that have communicated with the Court in that case and who the Chamber considers could be at risk as a result of a release or conditions imposed*”. Indeed, victims only learnt about the existence of said proceedings after the issuance of the redacted version of the Appeals Chamber’s decision in the matter¹⁸.

12. The Common Legal Representative is grateful to the Single Judge to have issued her subsequent Decision on Review of Detention on a public basis. However, the Common Legal Representative is unaware at this point in time of whether an appeal against the Decision has been filed before the Appeals Chamber, pursuant to article 82(1)(b) of the Rome Statute. Considering that a large part of the documents

¹⁶ See the “Order scheduling a hearing pursuant to rule 118(3) of the Rules of Procedure and Evidence”, *supra* note 8.

¹⁷ See *inter alia* the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’” (Appeals Chamber), No. ICC-01/04-01/06-824 OA 7, 13 February 2007; the “Reasons for the ‘Decision on the Participation of Victims in the Appeal Against the ‘Decision on the Interim Release of Jean-Pierre Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’” (Appeals Chamber), No. ICC-01/05-01/08-566 OA 2, 20 October 2009; the “Decision on the Participation of Victims in the Appeal against Trial Chamber I’s Oral Decision of 15 July 2010 to Release Thomas Lubanga Dyilo” (Appeals chamber), No. ICC-01/04-01/06-2555 OA 17, 17 August 2010; the “Decision on the Participation of Victims in the Appeal against the ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’ of Trial Chamber III” (Appeals Chamber), No. ICC-01/05-01/08-857 OA 4, 18 August 2010,

¹⁸. See the “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’””, *supra* note 9.

submitted so far by the parties on this matter have been filed confidentially or discussed in closed session as noted above, it might also be that an appeal has been filed confidentially and therefore has not been notified to the Common Legal Representative. In this regard, considering that the Decision on Review of Detention was issued on 12 November 2012, the Common Legal Representative notes that the deadline for lodging an appeal regarding this decision has already elapsed pursuant to article 82(1)(b) of the Rome Statute and rule 154 of the Rules of Procedure and Evidence.

13. In the absence of said notification, the Common Legal Representative is unable to represent the interests of the victims concerned.

14. Therefore, should an appeal have been filed against the Decision on Review of Detention, the Common Legal Representative respectfully requests the Appeals Chamber to be granted access to said document, as well as to any subsequent document to be filed in the interlocutory appeal.

B. Request for participation in a possible interlocutory appeal

15. The Common Legal Representative is privy to the practice of the Appeals Chamber according to which the victims are not granted an automatic right to participate in appellate proceedings.¹⁹ Although the Common Legal Representative shares the views of Judge Song and Judge Van den Wyngaert that victims who have been permitted to participate in proceedings giving rise to an appeal are participants in said appeal pursuant to regulation 64(4) and (5) of the Regulations of the Court,²⁰

¹⁹ See *supra* note 17. See also the "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against the Trial Chamber I's Decision entitled 'Decision on Victims' Participation'" (Appeals Chamber), No. ICC-01/04-01/06-1335 OA 9 and OA 10, 16 May 2009 and the "Decision on the 'Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)'" (Appeals Chamber), No. ICC-01/04-01/10-509 OA 4, 2 April 2012

²⁰ See the "Dissenting opinion by Judge Song", No. ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 2-8. See also the "Dissenting opinion by Judge Song", No. ICC-01/04-01/06-1335 OA 9 OA 10, 16 May 2008, paras. 3-7; the "Partly dissenting opinion by Judge Song", No. ICC-01/05-138 OA 2 OA

the Common Legal Representative respectfully requests the Chamber to allow the victims she represents to participate in any eventual appeal regarding the Decision on Review of Detention, since (i) their personal interests are affected by the issue on appeal; (ii) they have been authorised to participate in the proceedings by Pre-Trial Chamber I; and (iii) the manner of their participation is neither prejudicial to nor inconsistent with the rights of the suspect and a fair and impartial trial.

1. The personal interests of victims are affected

16. The jurisprudence of the Court has already acknowledged that the personal interests of the victims are affected by the issue of detention of suspects and accused persons.

17. Indeed, as in the present case, the Appeals Chamber, ruling on an application by victims to participate in the appeal lodged by Thomas Lubanga Dyilo against a decision by Pre-Trial Chamber I dismissing his application for interim release, expressly acknowledged that: *“the personal interests of the victims were affected by the circumstances of the current case, having regard to the nature of the appeal itself.”*²¹

18. Similarly, Pre-Trial Chamber I, as well as Trial Chambers II and III, when reviewing periodically their decisions to keep Mathieu Ngudjolo Chui, Germain

3, 18 June 2008, para. 3; the “Partly dissenting opinion by Judge Song”, No. ICC-02/04-503 OA 4 OA 5 OA6, 30 June 2008, paras. 1-2; the “Separate opinion of Judge Song”, No. ICC-01/04-01/06-1452 OA 12, 6 August 2008, para. 1; the “Dissenting opinion by Judge Song”, No. ICC-01/05-01/08-623 OA 2, 27 November 2009, paras. 3-4; the “Separate opinion of Judge Song and Judge Van den Wyngaert”, No. ICC-01/04-01/06-2205 OA 15 OA 16, 8 December 2009, p. 42; the “Separate opinion of Judge Song”, No. ICC-01/04-01/07-2124 OA 11, 24 May 2010, p. 8 and the “Separate Opinion of Judge Song”, No. ICC-01/04-01/10-509 OA 4, 2 April 2012, p. 9.

²¹ See the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’” *supra* note 19, para. 54.

Katanga and Jean-Pierre Bemba Gombo in detention, have always invited the victims to submit their observations on the maintenance of the detention in question.²²

2. Victim participation is appropriate

19. The Common Legal Representative submits that the participation of victims in a possible interlocutory appeal against the Decision on Review of Detention is appropriate, because their interests are affected by the eventual outcome of the proceedings related to the detention of the suspect.²³

20. Furthermore, the Common Legal Representative is of the view that victims granted leave to participate in proceedings giving rise to a decision which may have been appealed must be entitled *a fortiori* to participate in the interlocutory appeal in question, all the more so where, as in the present case, the interlocutory appeal involves an issue which, as explained above, directly affects their interests.²⁴

21. Finally, it is appropriate for the victims to participate in an eventual interlocutory appeal in this matter, since their participation corresponds with the requirements regarding the right for victims to be heard as set out in article 68(3) of

²² See the “Decision Inviting Observations from the Participants concerning the Detention of Germain Katanga (Rule 118(2))” (Trial Chamber II), No. ICC-01/04-01/07-1252, 29 June 2009; the “Decision Inviting Observations from the Participants Concerning the Detention of Germain Katanga (Rule 118(2) of the Rules of Procedure and Evidence)” (Trial Chamber II), No. ICC-01/04-01/07-942, 5 March 2009; the “Decision Inviting Observations from the Participants concerning the Detention of Germain Katanga (Rule 118(2))” (Trial Chamber II), No. ICC-01/04-01/07-748, 13 November 2008, and the “Decision concerning observations on the review of the pre-trial detention of Germain Katanga (Pre-Trial Chamber I)”, No. ICC-01/04-01/07-668, 9 July 2008. See also the “Décision aux fins de recueillir les observations des participants sur la détention de Mathieu Ngudjolo (Règle 118-2)” (Trial Chamber II), No. ICC-01/04-01/07-1192, 5 June 2009; the “Decision Inviting Observations from the Participants concerning the Detention of Mathieu Ngudjolo Chui (Rule 118(2))” (Trial Chamber II), No. ICC-01/04-01/07-904, 18 February 2009; the “Decision Inviting Observations from the Participants concerning the Detention of Mathieu Ngudjolo Chui (Rule 118(2))” (Trial Chamber II), No. ICC-01/04-01/07-732, 30 October 2008, and the “Decision concerning observations on the review of the pre-trial detention of Mathieu Ngudjolo Chui” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-602, 17 June 2008.

²³ See *supra* paras. 16-17.

²⁴ *Idem*.

the Rome Statute. Thus, an analysis of the articles and rules governing victim participation in the proceedings before the Court clearly shows that victim participation is not restricted to specific stages and is therefore possible at all stages in the proceedings, including interlocutory appeals.²⁵

3. Victim participation is not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial

22. First, the Common Legal Representative is of the view that protecting the rights of the suspect/accused is a fundamental principle without which the integrity of criminal proceedings could not be safeguarded and justice would not be done.

23. The Common Legal Representative notes that victims' participation in the proceedings before the Court is not, in itself, liable to affect the rights of the suspect. As Judge Blattmann pointed out:

"Both the rights of victims and that of the accused are amply protected under the Statute. Further, many major legal systems are able to incorporate victims' participation into their proceedings whilst ensuring the rights of the accused to both a fair and expeditious hearing".²⁶

24. In this regard, the Common Legal Representative also notes that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly of the United Nations on 29 November 1985, sets out the principle of access to justice for victims and the right to fair treatment.²⁷

²⁵See also the proposals submitted by France, UN Doc. PCNICC/1999/DP.2, 1 February 1999, p. 7; Costa Rica, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999, p. 1, and Colombia, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999, p. 2. For a review of the preparatory works, see BITTI (G.) and FRIMAN (H.), "Participation of Victims in the Proceedings", in LEE (R.S.) (ed.), *The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc. New York, 2001, pp. 456-474.

²⁶ See the Separate and Dissenting Opinion of Judge René Blattmann appended to the "Decision on Victims' Participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, para. 26.

²⁷ See United Nations General Assembly Resolution 40/34 of 29 November 1985 available at: <http://www.un.org/documents/ga/res/40/a40r034.htm>, principles 4 to 7.

25. The Common Legal Representative would further point out that the role of the victims should not be confused with that of the Prosecution.²⁸ The purpose of victims' participation in the possible interlocutory appeal is thus simply to ensure that the rights afforded to them under the Rome Statute are effectively implemented, and hence has no impact on the rights of the suspect.

26. Moreover, victims' participation in the possible interlocutory appeal cannot be prejudicial to or inconsistent with the rights of the suspect, since regulation 24(1) of the Regulations of the Court allows the Defence to respond to any document submitted by the victims pursuant to such participation.

27. The Common Legal Representative further submits that victims' participation constitutes an integral part of the concept of a fair and impartial proceedings, as expressly provided for in the texts of the Court allowing the views of victims whose personal interests are affected by the outcome of the possible appeal to be taken into consideration in an objective and in-depth fashion.²⁹ Furthermore, this right on the part of victims is consistent with the view of international human rights law as a continuum, and is recognised in a large number of national systems. It follows that the balance of criminal proceedings cannot be affected by victims' participation. On the contrary, taking victims' interests into consideration is one of the factors that help to balance such proceedings, particularly since it is the violation of the fundamental

²⁸See the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" *supra* note 19, para. 55. See also in this sense DONAT-CATTIN (D.), « Article 68 », in TRIFFTERER (O.) (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition, Verlag C.H. BeckoHG, Hart Publishing and Nomos VerlagsgesellschaftmbH and Co, Munchen, Altustried-Krugzell, 2008, pp. 1296 and 1297: "*victims (or her/his representative) are a 'guardians' of the fairness of the proceedings with respect to their personal interests, and not 'agents' in search of retribution. The possibility of intervention in the most crucial stages of the proceedings may represent an important step in the 'rehabilitation' of the victims*".

²⁹ See *supra* paras. 16-17.

rights of the victims themselves that is involved.³⁰ Thus, participation by the victims in the possible interlocutory appeal cannot prejudice the interests of the Defence.³¹

For the reasons set out above, should an appeal have been lodged against the Decision on Review of Detention of Mr. Gbagbo,

28. The Common Legal Representative respectfully requests the Appeals Chamber:

- to verify whether said appeal – which in principle should deal with legal issues – could be reclassified as public or could be made accessible to her even in its confidential version. In the negative, to order the party who has filed the appeal to file a suitably redacted version of the document in the record of the case within a deadline to be determined by the Chamber;
- to order that the document in support of the appeal be subsequently filed publicly or in the alternative in a suitably redacted version within a deadline to be determined by the Chamber; and
- to order the other party to file its response in a version which can be notified to the Common Legal Representative.

29. Moreover, the Common Legal Representative, having noted the case-law of the Appeals Chamber in this regard, respectfully calls upon this Chamber to rule that

³⁰ See the “Response of the Legal Representatives of Victims to the Prosecution’s Application and the OPCD’s Request for Leave to Appeal the ‘Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0027/07 to a/003/07 and a /0035/07 to a/0038/07’”, No. ICC-02/05-116, 17 December 2007, para. 30, pp. 9-10.

³¹ See DONAT-CATTIN (D.), “Article 68”, in TRIFFTERER (O.) (Ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, Nomos Verl. Ges., Baden-Baden, 1999, pp. 876-877: “The victims’ genuine wish is that the truth be established and the case solved. [...] The second [concept of due process for defendant] is fair trial, which is comprehensive of, but not limited to, the respect for all the rights of the suspect/accused; it means equitable justice for defendants, victims and international society as such, the foundation of all procedural norms of the Statute.”

the personal interests of the 139 victims authorised to participate in the proceedings by Pre-Trial Chamber I³² are affected by the interlocutory appeal, that the presentation of their views and concerns is appropriate at this stage, and that their participation is neither prejudicial to nor inconsistent with the rights of the Defence and a fair and impartial trial.

30. The Common Legal Representative further requests the Appeals Chamber to grant leave to the victims to file their observations on the document to be submitted in support of the appeal, within a time limit to be set by the Chamber, and, more generally, to authorise the Common Legal Representative to submit written observations on any issue affecting the interests of the victims raised by the Prosecution or the Defence during the appellate proceedings, in accordance with the procedure laid down by the Chamber.



Paolina Massidda
Principal Counsel

Dated this 20th day of November 2012

At The Hague, The Netherlands and Genoa (Italy)

³² See the "Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings", *supra* note 3.