



Original: **English**

No.: **ICC-02/11-01/11**

Date: **18 June 2012**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public

**Request to access documents in relation to the Defence Challenge to the
Jurisdiction of the Court**

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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**Victims Participation and Reparations
Section**

Other

I. PROCEDURAL HISTORY

1. On 25 May 2012, the Defence submitted a “*Requête en incompétence de la Cour Pénale Internationale fondée sur les articles 12(3), 19(2), 21(3), 55 et 59 du Statut de Rome présentée par la défense du Président Gbagbo*” with 15 public Annexes and 37 confidential Annexes,¹ and on 30 May 2012, a *Corrigendum* to the said application² (the “Defence Challenge”).

2. On 4 June 2012, the Single Judge of the Pre-Trial Chamber I 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 “OPCV” or the “Office”) as the Common Legal Representative of all the victims admitted to participate in the proceedings related to the confirmation of charges.⁵

3. On 8 June 2012, in her capacity as Common Legal Representative of participating victims, the Principal Counsel of the OPCV requested the Chamber, by email, to be given access to the confidential material related to the Defence Challenge to be able to represent the interests of her clients.⁶ In an email sent the same day to the Chamber, the Defence opposed the request and submitted, in particular, that the

¹ See the “*Requête en incompétence de la Cour Pénale Internationale fondée sur les articles 12(3), 19(2), 21(3), 55 et 59 du Statut de Rome présentée par la défense du Président Gbagbo*”, No. ICC-02/11-01/11-129, 25 May 2012 (dated 24 May 2012).

² See the “*Rectificatif de la Requête en incompétence de la Cour Pénale Internationale fondée sur les articles 12 (3), 19 (2), 21 (3), 55 et 59 du Statut de Rome présentée par la défense du Président Gbagbo* (ICC-02/11-01/11-129)”, No. ICC-02/11-01/11-129-Corr, 30 May 2012 (dated 29 May 2012) (the “Defence Challenge”).

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.

⁴ *Idem.*, p. 25.

⁵ *Ibid.*, p. 26.

⁶ See the email sent by the Common Legal Representative to the Senior Legal Advisor to the Pre-Trial Division on 8 June 2012 at 16:02.

Common Legal Representative did not demonstrate that the personal interests of her clients are concerned by the confidential material related to the Defence Challenge.⁷

4. On 15 June 2012, the Pre-Trial Chamber I issued the “Decision on the conduct of the proceedings following the defence challenge to the jurisdiction of the Court pursuant to article 19 of the Rome Statute”⁸, whereby the Chamber decided, *inter alia*, to: (i) appoint the OPCV, for the purpose of proceedings following the Defence Challenge, to represent those victims who have submitted applications to participate in the proceedings in the present case and whose applications have not yet been assessed by the Chamber;⁹ (ii) invite the OPCV to submit, by 27 June 2012, written observations on the Defence Challenge on behalf of both victims admitted to participate in the proceedings related to the confirmation of charges hearing and victims who have submitted applications to participate in the proceedings in the present case and whose applications have not yet been assessed by the Chamber;¹⁰ and (iii) instruct the Victims Participation and Reparations Section to provide to the OPCV the necessary information in relation to all victims related to the present case whose applications for participation in the proceedings have not been communicated to the Chamber.¹¹

II. REQUEST TO ACCESS DOCUMENTS

5. The Principal Counsel observes that she has been notified only with the 15 public Annexes attached to the Defence Challenge, but she has not been given access to the 37 confidential Annexes attached thereto. The documents she has been notified

⁷ See the email sent by the Principal Counsel of the Defence to the Senior Legal Advisor to the Pre-Trial Division on 8 June 2012 at 17:58.

⁸ See the “Decision on the conduct of the proceedings following the defence challenge to the jurisdiction of the Court pursuant to article 19 of the Rome Statute” (Pre-Trial Chamber I), No. ICC-02/11-01/11-153, 15 June 2012.

⁹ *Idem.*, p. 5.

¹⁰ *Ibid.*, par. 7 and p. 5.

¹¹ *Ibid.*, par. 8.

with do not unable her to fully understand and to address the grounds on which the Defence Challenge is brought before the Chamber.

6. Rule 59(1) and (3) of the Rules of Procedure and Evidence (the “Rules”) allows victims who have already communicated with the Court or their legal representatives to be notified of the “summary of the grounds” on which the jurisdiction of the Court is being challenged. Most of the confidential Annexes attached to the Defence Challenge contain numerous reports regarding health conditions of the suspect. In its submission, the Defence bases most of its argument on said reports to support its contentions that the treatment received by Mr. Gbagbo, while being in detention, should be considered as inhuman treatment and torture.¹² Other confidential Annexes seem to contain different documents which are used by the Defence to prove the violation of the suspect’s rights under the Ivorian law.¹³ The Principal Counsel contends that without having access to such critical information, victims cannot be said to have been notified of the “summary of the grounds” upon which the Defence Challenge is being made, as required under rule 59 of the Rules. The Principal Counsel’s capacity to properly prepare for the proceedings is therefore significantly impaired and victims will not be able to enjoy fully their rights provided for in article 19 of the Rome Statute and rule 59 of the Rules.

7. In this regard, the Principal Counsel submits that in accordance with the Basic Principles on the Role of Lawyers,¹⁴ a counsel is entitled to access to appropriate information, files and documents in sufficient time to enable him or her to provide effective legal assistance to his or her client.¹⁵ Furthermore, in accordance with the Code of Professional Conduct of Counsel appearing before the ICC, the Principal

¹² See the Defence Challenge, *supra* note 2, paras. 24 to 26, 109 and 201 to 208.

¹³ *Idem.*, paras. 13, 16, 18, 29, 34 to 39 and 129 to 139.

¹⁴ See the Basic Principles on the Role of Lawyers, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. The document is available at: <http://www2.ohchr.org/english/law/lawyers.htm>.

¹⁵ *Idem.*, Principle 21.

Counsel is bound to act in good faith and in the best interests of her clients.¹⁶ Due to lack of access to confidential documents in the possession of the Defence, which are critical to fully understand the grounds on which the Defence Challenge is brought before the Chamber, the Principal Counsel is deprived of the possibility to duly fulfil her mandate and to adequately represent the rights and interests of her clients in the proceedings.

8. Moreover, providing victims with the possibility to enjoy fully their rights under article 19 of the Rome Statute and rule 59 of the Rules complies with the ambit of well-established right of victims to truth.

9. In this regard, the Principal Counsel recalls that, pursuant to the jurisprudence established by the Court, “[t]he participation of victims in the proceedings is not limited to an interest to receiving reparations and their personal interests are self-evidently not limited to reparations issues,”¹⁷ and that “the victims are seeking not only to obtain reparations, but they also mention other grounds, such as seeking determination of the truth concerning the events they experienced, or wishing to see the perpetrators of the crimes they suffered being brought to justice.”¹⁸ The Single Judge of Pre-Trial Chamber I referred to “the latest empirical studies conducted amongst victims of serious violations of human rights, which show that the main reason why victims decide to resort to those judicial mechanisms which are available to them against those who victimised them is to have a declaration of the truth by the competent body.”¹⁹ According to the Single Judge, the “victims’ core interest in the

¹⁶ See articles 14 and 15 of the Code of Professional Conduct of Counsel appearing before the ICC.

¹⁷ See the “Decision on victims participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, par. 98.

¹⁸ See the “Decision on the Modalities of Victim Participation at Trial” (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010, par. 59.

¹⁹ See 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, par. 31. See also in this regard AMBOS (K.), *El Marco Jurídico de la Justicia de Transición*, Tenus, Bogota, 2008, notes 107-112; KIZA (E.), RATHGEBER (C.), ROHNE (H.), *Victims of War An Empirical Study on War-Victimization and Victims Attitudes towards Addressing Atrocities*, Hamburg 2006, pp. 123 and 126.

See also the Note prepared by the former Special Rapporteur of the Sub-Commission, Mr. Theo van Boven, in accordance with paragraph 2 of Sub-Commission resolution 1996/28, UN Doc. E/CN.4/1997/104, 13 January 1997, pp. 2 to 5. See also the Final report prepared by Mr. Joinet pursuant

*determination of the facts, the identification of those responsible and the declaration of their responsibility is at the root of the well-established right to the truth for the victims of serious violations of human rights,”*²⁰ finding that is fully supported by international human rights jurisprudence and scholar studies.²¹ In particular, “[w]hen the right to truth is to be satisfied through criminal proceedings, victims have a central interest in the outcome of such proceedings: (i) bring clarity about what indeed happened; and (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth.”²²

10. The Principal Counsel observes that various Chambers of the Court have systematically granted access to the OPCV – in its capacity of legal representative of victims for the purposes of article 19 proceedings – to documents pertaining to admissibility and jurisdiction challenges, including documents classified confidential, when relevant.²³ This approach was confirmed recently by Pre-Trial

to Sub-Commission decision 1996/119. Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997, pp. 3 to 31.

²⁰ See 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, par. 32.

²¹ See in this regard IACHR, *La Cantuta v. Peru*, Judgment of 29 November 2006, Series C, No. 162, par. 222 ; *Vargas-Areco v. Paraguay*, Judgment of 26 September 2006, Series C, No. 155, paras. 153 et seq. ; *Almohacid-Arellano and al v. Chile*, Judgment of 26 September 2006, Series C, No. 154, par. 148; *Comunidad Monviana v. Suriname*, Judgment of 15 June 2005, Series C, No. 124, par. 204 ; and *Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Series C, No. 7, paras. 162 to 166 and 174.

See also ECHR, *Hugh Jordan v. UK*, Application No. 24746/94, 4 May 2001, paras. 16, 23, 157 and 160; *Selmouni v. France*, Application No. 25803/94, 28 July 1999, par. 79; *Kurt v. Turkey*, Application No. 24276/94, 25 May 1998, par. 140; *Selcuk and Asker v. Turkey*, Application No. 23184/94, 24 April 1998, par. 96; *Aydin v. Turkey*, Application No. 23178/94, 25 September 1997, par. 103; and *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, par. 98. In this sense, see also NAQVI (Y.), “The Right to the Truth in International Law Fact or Fiction 9”, in (2006) *ICRC International Review*, No. 88, pp. 267-268; MENDEZ (J.), “The Right to Truth”, in JOYNER (Ch.) (Ed.), “*Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights’ Proceedings of the Siracuse Conference*”, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257 et seq. and AMBOS (K.), *El Marco Juridico de la Justicia de Transición*, Tenus, Bogota, 2008, pp. 42 to 44.

²² See 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, par. 34.

²³ See, *inter alia*, Trial Chamber III’s Oral Decision, No. ICC-01/05-01/08-T-20-Red-ENG WT2, 8 March 2010, pp. 5-6, as well as the “Decision Prescribing the Procedure to be Followed Under Article 19 of the Statute (Rule 58 of the Rules of Procedure and Evidence)” (Trial Chamber II), No. ICC-01/04-01/07-943-Conf-tENG, 5 March 2009.

Chamber I which granted the OPCV access to confidential documents filed in the context of the admissibility challenge brought by the Libyan government²⁴.

11. The Principal Counsel understands that certain confidential Annexes attached to the Defence Challenge contain sensitive information regarding the health conditions of the suspect. She submits that given the high relevance of said information, it is necessary, at this important stage of the proceedings, for the Chamber to strike a reasonable balance between the rights of victims under article 19 of the Rome Statute and rule 59 of the Rules and the protection of sensitive information regarding health conditions of the suspect. In this regard, the Principal Counsel recalls that she is bound by rules of confidentiality under the Code of Professional Conduct of Counsel.

12. Finally, due to the fact that the Principal Counsel has had, to date, no access to an index of the case record, she is not in a position to identify all documents which may be of interest for the fulfilment of her mandate on behalf of victims in relation to article 19 proceedings. The Principal Counsel, therefore, leaves it to the determination of the Chamber to appreciate whether other documents in the case record might affect the interests of victims she represents for the purpose of article 19 proceedings.

13. The Principal Counsel respectfully asks the Chamber to treat this request on an urgent basis considering that the latter ordered the observations of the victims to be submitted no later than 27 June 2012.²⁵

²⁴ See the “Decision on the OPCV ‘Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya’”, (Pre-Trial Chamber I), No. ICC-01/11-01/11-147, 15 May 2012.

²⁵ See the “Decision on the conduct of the proceedings following the defence challenge to the jurisdiction of the Court pursuant to article 19 of the Rome Statute, *supra* note 8, p. 5.

FOR THE FOREGOING REASONS, the Principal Counsel respectfully requests the Pre-Trial Chamber:

- a) To order the notification to the OPCV of the Annexes 5, 9, 10 to 12, 25 to 44, 46 to 49 and 52 attached to the Defence Challenge;
- b) To order the notification to the OPCV of any other document filed confidential in the case record which the Chamber might identify as relevant to article 19 proceedings;
- c) To order to systematically notify the OPCV with any document submitted in relation to the Defence Challenge and which might be classified confidential – on the same basis as the parties in the article 19 proceedings.



Paolina Massidda
Principal Counsel

Dated this 18th day of June 2012

At The Hague, The Netherlands