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Date: **8 March 2012**

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

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

Public

**Second Request to appear before the Chamber pursuant to Regulation 81(4)(b) of
the Regulations of the Court
on issues related to the victims' application process**

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. On 20 January 2012, the Registry filed a report containing observations on the “Organization of the Participation of Victims”¹ (the “Report of the Registry”) and in particular on the possible legal, financial and practical implications of a collective approach. A redacted version of this report was filed on 6 February 2012².

2. On 6 February 2012, the Single Judge of Pre-Trial Chamber III issued a Decision on issues related to the victims’ application process³ (the “Decision”) in which she considered, *inter alia*, that “the system for the Case should encourage a collective approach to victims’ applications”⁴.

3. On 14 February 2012, the Office of Public Counsel for Victims (the “OPCV” or the “Office”) filed before the Pre-Trial Chamber III a “Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on the specific issue of victims’ application process”⁵ which was dismissed by the Single Judge on 20 February 2012⁶ on the basis that the issues identified by the Office in its request were not live issues, especially “at a time where the Chamber is simply exploring the possibility of adopting an alternative approach in respect of victims’ applications, where no system has been adopted and, most importantly, where the Chamber is not yet seized of a

¹ See the “Organization of the Participation of Victims”, No. ICC-02/11-01/11-29-Red, 6 February 2012 (the “Registry’s Report”).

² *Idem*.

³ See the “Decision on issues related to the victims’ application process”, No. ICC-02/11-01/11-33, 6 February 2012 (the “Decision”).

⁴ *Idem*, para. 7.

⁵ See the “Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on the specific issue of victims’ application process”, No. ICC-02/11-01/11-40, 14 February 2012.

⁶ See the “Decision on OPCV’s “Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on the specific issue of victims’ application process”, No. ICC-02/11-01/11-43, 20 February 2012.

*single victim's application and no legal representatives have been appointed to express the views and concerns on behalf of victims"*⁷.

4. On 29 February 2012, the Registry filed its "Proposal on a partly collective application form for victims' participation" (the "Proposal")⁸ and on 2 March 2012, the Single Judge issued the "Decision inviting observations from the parties in relation to the victims' application process"⁹.

5. On 2 March 2012, the Redress Trust ("REDRESS") filed an Application requesting leave to submit written observations in the matter¹⁰, which was granted by the Single Judge on 8 March 2012¹¹.

6. The Principal Counsel of the Office considers that the Proposal of the Registry entails issues of general interest for victims and therefore submits the present Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on the issues identified in part III *infra*.

II. Legal Basis for the OPCV's request to appear before the Chamber

7. In accordance with 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".

⁷ *Idem*, paras. 8 et 10.

⁸ See the "Proposal on a partly collective application form for victims' participation" and related Annexes A and B, No. ICC-02/11-01/11-45, 29 February 2012 (the "Proposal").

⁹ See the "Decision inviting observations from the parties in relation to the victims' application process", No. ICC-02/11-01/11-47, 2 March 2012.

¹⁰ See the "Application by Redress Trust for Leave to Submit Observations to the Pre-Trial Chamber III of the International Criminal Court Pursuant to Rule 103 of the Rules of Procedure and Evidence", No. ICC-02/11-01/11-46 and Annex, 2 March 2012.

¹¹ See the "Decision on the "Application by Redress Trust for Leave to Submit Observations to the Pre-Trial Chamber III of the International Criminal Court Pursuant to Rule 103 of the Rules of Procedure and Evidence", No. ICC-02/11-01/11-50, 8 March 2012.

8. The provision does not specify if such possibility is triggered by a request of a Chamber in this sense or by the Office itself. 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.

9. 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.

10. 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 encompasses forms and methods of assistance to victims which fall short of legal representation*"¹⁴.

11. Moreover, the Office relies on Trial Chamber I jurisprudence which recognised the opportunity for the OPCV to appear before a Chamber in respect of

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). See also the "Decision on the "Proposal on victim participation in the confirmation hearing" (Pre-Trial Chamber I, Single Judge) which *inter alia* decided on the OPCV's Request to appear filed on 9 June 2011 ("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", No. ICC-01/04-01/10-226), rejecting the said Request arguing "*that any further observations from the OPCV are unnecessary, without prejudice to the question of whether there was a valid basis for its intervention before the Chamber on this issue*" (*Idem.*, p. 5).

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.

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.

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.

12. The Office is of the opinion that the approach to be adopted with regard to the victims’ application process in the present case constitutes a specific issue on which it is necessary and appropriate to assist the victims particularly because the matters raised by the Registry in its Proposal are of such nature to impact on the participation of victims in many ways.

13. In this regard, the Office contends that, by virtue of its extensive experience as legal representative of applicants and of victims, it can constructively contribute to the ongoing discussions on the issue. Indeed, to date, the Office has been involved in the legal representation of victims in almost all situations and cases before the Court, handling almost 5.000 applications for participation in the proceedings and meeting with more than 3.000 victims in the field, therefore developing a direct expertise on issues linked to the application process.

14. In this regard, the Office highlights the reasons for its creation, namely to create an expert body within the Court in order to efficiently and timely address victims’ issues¹⁶. The practice developed by the Court in this regard and the responsibilities vested in the OPCV by both the Chambers and the victims since the

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.

¹⁶ In this sense see Judge Sir Adrian FULFORD, “The role of the Office of Public Counsel for Victims in trial proceedings”, in OPCV, *Helping victims make their voice heard: The Office of Public Counsel for Victims 5 years of activities*, 2010, pp. 4-5. This booklet is available on the website of the Court at the following address:

<http://www.icc-cpi.int/NR/rdonlyres/01A26724-F32B-4BE4-8B02-A65D6151E4AD/282846/LRBookletEng.pdf>.

inception of the Office to date has clearly contributed to the development of such expertise. The possibility to appear before a Chamber in respect of specific issues falls in line with the reasons behind the creation of the Office.

15. Last but not least, in light of the Single Judge's decision to allow REDRESS to present observations in the matter, the Office contends that the Single Judge should also seek observations of victims in a matter which is vital for their future effective participation in the proceedings. In this regard, the OPCV underlines that the fact that the Chamber "*is not yet seized of a single victims' application*"¹⁷ does not necessary entail that no victims have communicated with the Court with regard to the case at hand. Moreover, it is exactly in situations like the present one, *i.e.* where no victims have been admitted in the case and where, as a consequence no legal representative have been appointed to express their views and concerns, that the OPCV has a duty to protect the general interests of the victims¹⁸. Furthermore, when seeking the observations of the parties in relation to the victims' application process, the Single Judge clearly "*deem[ed] it necessary that the parties are given the possibility to present their views prior to the Chamber deciding on the victims' application process in the present case*"¹⁹ which seems to indicate that the victims' application process has become a live issue.

III. Issues on which the OPCV would like to appear

16. The Office recalls its previous Request in the matter²⁰.

17. Moreover, the Proposal of the Registry and the proposed collective application form entail issues which might impact on the effectiveness of the participation of

¹⁷ See the "Decision on OPCV's 'Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on the specific issue of victims' application process'", *supra* note 6, par. 8. See also *supra*, par. 3.,

¹⁸ See *supra*, par. 9.

¹⁹ See the "Decision inviting observations from the parties in relation to the victims' application process", *supra* note 9, par. 5.

²⁰ See *supra* footnote 5.

victims in the proceedings, but also on matter linked to their effective legal representation.

18. In particular, if its Request is granted, the Office proposes to address the following issues:

The participation of victims in the proceedings ought to be “personal”

19. The participation of victims in the proceedings before the Court ought to be “personal” and thus the ensuing procedure for processing the applications of victims must be individual.

20. As already indicated in the Office’s previous Request, the drafters of the founding instruments of the Court never contemplated such a “collective approach” nor did they intend a system where one victim would represent other multiple victims, notwithstanding their consents. Rather, the ordinary meaning of the terms of the said sub-rule, read in light of its object and purpose, further illustrates and enforces the intention of the drafters which was to set up a system of individual treatment of victims’ applications, without exception.

21. In the absence of individual applications, yet envisaged in its procedural provisions, the Court can not possibly assess the “personal” harms suffered by the victims nor will it be able to distinguish the “personal” views and concerns that the victims are to express. That is also simply why the submission of individual applications, together with the resulting individualised treatment of such applications, are intrinsically connected to the system of individual participation of victims in the judicial proceedings unfolding in a case.

The Proposal of the Registry entails practical problems and will not facilitate the expeditiousness of the proceedings

22. At the outset, the Office notes that, in its Proposal, the Registry itself acknowledges that it is at this point in time unable to assess whether, in the context of the Côte d'Ivoire situation, the implementation of a collective form for victims' participation is "*relevant and appropriate*"²¹.

23. The Office understands that the goal of the proposed approach is to expedite the management of victims' applications as regard the Registry, the Chamber and for the purpose of providing observations pursuant to rule 89 of the Rules of Procedure and Evidence (the "Rules"). The Office agrees on the principle; however it contends that this goal might not be achieved through the collective application form as proposed by the Registry for a series of reasons. Indeed, the parties will have to comment on both the collective form and on each individual declaration appended to said form. Moreover, it seems foreseeable that a number of duplicates will be received by the Registry by virtue of the fact that victims may still use the individual application form and it is unclear how it would be possible to identify said duplicates, as also indicated by the Registry in paragraph 22 of Annex A to the Proposal. In the absence of the new database which – as indicated by the Registry – will only be operational in 2013, there is a tangible risk that duplicates are not identified in a relatively short period of time.

24. Despite the fact that the information provided in the collective application form and in the individual declarations might be sufficient as far as the parties are concerned for the purpose of submitting rule 89 observations, the Office notes that it might not be sufficient for any other steps entailed by the proceedings. Indeed, the information provided will not be sufficient to assess the credibility of the applicant and more importantly, a doubt will be cast on every single individual member of the

²¹ See the "Proposal on a partly collective application form for victims' participation", *supra* note 8, Annex A, par. 25.

group as to whether their application is the result of a free decision, when collective applications will be put forward, for example, by a leader of the community, be it the “*chef de village*” or any other authority exercising an important influence on the community itself.

25. Moreover, the Office notes that the collective application form does not take into account the real impact of certain gender crimes on individual victims. According to the practice of the OPCV, victims of gender crimes cannot be part of a collective action since, in most of instances, the crime suffered from is hidden from the community, and even from their own family. Encouraging the use of a collective form might therefore results in discouraging the participation of victims of gender crimes or in putting some of them in a very delicate and potentially traumatizing situation, which would clearly defeat the purpose of the application process and will violate the obligation of the Court pursuant to article 68(1) of the Rome Statute.

26. Finally, the Office would also like to present observations on the fact that the information contained in the form will render it impossible for the legal representative to be able to represent the distinct interests of each member of the Group as required by rule 90(4) of the Rules, since the information will be too succinct for him or her to have a clear understanding of these distinct interests. This will affect both participation and reparations’ requests and especially in instances where the imperatives of the proceedings demand for a rapid gathering of information from victims.

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 on the issue of the victims’ application process by way of submitting written observations on the Proposal of the Registry within a deadline established by the Chamber, in order to represent the general interest of victims.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 8th day of March 2012

At The Hague, The Netherlands