



Original: **English**

No.: **ICC-02/11-01/11**
Date: **14 February 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

**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**

Source: Office of Public Counsel for Victims

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, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Mr Emmanuel Altit

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

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

Mr. Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Ms. Silvana Arbia & Mr. Didier Preira

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms. Fiona McKay

Other

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 filed 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.

4. The Principal Counsel of the Office of Public Counsel for Victims (the “OPCV” or the “Office”) considers that the Report of the Registry and the Decision entail 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 specific issue of the victims’ application process, and in particular on the victims’ collective application approach.

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

5. 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”.

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.

6. 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.

7. The Office has in the past requested and been granted leave to appear on specific issues of general interest for victims⁵. The Office has also appeared on specific issues having an impact on victims' general interests directly at the request of a Chamber⁶.

8. 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*"⁷.

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

⁵ 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).

⁶ 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.

⁷ 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)”*⁸.

10. 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 both by the Registry in its Report and by the Single Judge in her Decision are of such nature to impact on the participation of victims in different ways.

11. Furthermore, considering that the Single Judge has already fixed the deadlines of 29 February 2012 and 12 March 2012 in order to implement in part the *“collective approach”*, the Office argues that this is the appropriate time for the OPCV to appear before the Pre-Trial Chamber in respect of the victims’ application process, and in particular on the victims’ collective application approach.

III. Issues on which the OPCV would like to appear

12. The Report of the Registry discusses its experience in gathering *“collective representations”* in the Kenya situation⁹. While recognising the substantial difference between the procedures provided in Articles 15(3) and 68(3) of the Rome Statute (the *“Statute”*) and Rule 89 of the Rules of Procedure and Evidence (the *“Rules”*), the Registry proceeds proposing the so called *“collective approach”* in processing victims’ applications (where *“many victims would be tied to one application”*), which it advocates as the way forward in light of the considerations of human resources, work load and

⁸ 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.

⁹ See Registry’s Report, *supra* note 1, par. 13.

budgetary/logistical constraints of the Court¹⁰. At the same time, the Registry acknowledges that the current system of “*individual treatment*” of victims’ applications is indeed provided in the statutory provisions of the Court, in particular Rule 89 of the Rules¹¹. However, the Registry argues that “[this collective approach] *would not exempt the Court from considering applications for participation on an - at least partially - individual basis in the same time*”¹². The Registry adds that a “*mixed approach*” would supposedly address and meet the individualised legal requirements within the “*collective approach*”¹³. The Registry concludes its line of arguments by acknowledging that “*the collective application process as one of the options that will be looked at. It is in any case a long term project which may imply substantial changes in the system of victim participation before the Court, including changes in the rules governing the Court. It thus seems too early to implement such radical changes in the following months in order to apply them in the case against Laurent Gbagbo for the confirmation hearing*”¹⁴.

13. The Office is deeply concerned by the lack of legal basis of the arguments raised by the Registry. The Registry’s suggestion about the legality and viability of the so called “*collective*” and “*mixed approach*” appears, at best, hypothetical and speculative in nature. Although, the Single Judge acknowledges the absence of merits of these submissions by stating that “*under the existing legal framework collective victim’s applications cannot be imposed*”, she proceeded to order the Registry to “*propose to the Chamber an application form that could be used for the purpose of encouraging collective applications in accordance with Rule 89(3) of the Rules*”¹⁵. In order to reach this conclusion, the Single Judge engages in a judicial interpretation of the said sub-rule in light of the need to ensure fair and expeditious proceedings, to “*enhance the efficiency and the substantive value of the victims’ participation by envisaging a system that takes into account the particular circumstances of the Case [such as] existing backlog in*

¹⁰ *Idem*, par. 18-23.

¹¹ *Ibid*, par. 25.

¹² *Ibid*.

¹³ *Ibid*, par. 26.

¹⁴ *Ibid*, par. 32.

¹⁵ See the Decision, *supra* note 3, par. 8.

processing victim application", and to "put in place a system [encouraging] a collective approach to victims' applications [which] could serve as valuable experience [for the future of a long term project]"¹⁶.

14. Although the full impact of the Single Judge's ruling in the judicial proceedings of the case remains to be seen, various unintended consequences could surely be expected, among which, the level of uncertainty it creates among the parties and participants, most importantly, the victims. It could further have erosive effect upon the well established system of individual participation of victims in the cases before the Court.

15. In particular, if its Request is granted, the Office would like to address the following issues:

The legal texts of the Court provide for a system of individual treatment of victims' applications

16. The Office will demonstrate that the relevant provisions of the Statute and the Rules are clear and unambiguous. 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.

17. The drafters of the founding instruments of the Court never contemplated such a "*collective approach*" nor did they intend a system where a victim would represent other multiple victims, notwithstanding their consent. Rather, the ordinary meaning of the terms of the said sub-rule, read in its context and 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.

¹⁶ *Idem*, paras. 5-7.

18. Without individual applications envisaged in the procedural norms, 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 supposed to express. That is also simply why, the submission of individual applications, ensuing individualised treatment of such applications, are intrinsically connected to the system of individual participation of victims in the judicial proceedings including in a case.

Interpretation of Rule 89(3) of the Rules of Procedure and Evidence

19. Moreover, the Office will demonstrate that the Single Judge’s interpretation of Rule 89(3) of the Rules verges on revising the explicit provisions of the Statute and the Rules, and will potentially erode the well established system of individual participation of victims before the Court.

20. Indeed, various Chambers of the Court have uniformly applied the ordinary meaning of the term, as designating *a victim* consenting to *a person* to represent him or her, contained in Rule 89(3) of the Rules¹⁷. As stated by the International Court of

¹⁷ See the “Corrigendum to Decision on the Registry Report on six applications to participate in the proceedings”, (Trial Chamber IV) No. ICC-02/05-03/09-231-Corr, 28 October 2011, par. 21. “*an application may be considered complete if it contains the following information: [...] (vi) if the application is made by a person acting with the consent of the victim, the express consent of the victim [...]*”. See also the “Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims” (Trial Chamber II), No. ICC-01/04-01/07-1491-Red-tENG, 23 September 2009, par. 16. “[...] Paragraph 3 of rule 89 further states that an application may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child, or, when necessary, a victim who is disabled. [...]”; the “Corrigendum to the ‘Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06’” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-423-Corr-tENG, 31 January 2008, par. 19. “*The Single Judge is of the opinion that where an application for participation is submitted by a person acting with the consent of the alleged victim, it must contain: (i) the express consent of the alleged victim; (ii) proof of identity of the alleged victim; and (iii) proof of identity of the person acting on the victim’s behalf. [...]*”; and the “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-282, 14 March 2008,

Justice, “[i]nterpretation must be based above all upon the text of the treaty.”¹⁸ Therefore, “the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter”¹⁹.

21. Moreover, the Appeals Chamber held that “[t]he context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety”²⁰. The Statute and the Rules, as well as the Regulations of the Court (and the massive body of the jurisprudence of the Court made in compliance with these statutory provisions), are replete with specific references requiring the victim applications be individually submitted and independently treated. Since both the Registry and the Single Judge acknowledge this, “under the existing legal framework” of victims’ participation, the Principal Counsel, for sake of efficiency, will not dwell on this issue.

22. However, as far as the object and purpose of the Rules are concerned, the Office will demonstrate that the legislative history of Rule 89(3) of the Rules clearly illustrates the intention of the drafters to simply enable the participation of “victims who are not able to make an application on their own” for some imperative reason such as, not exclusively, illiteracy or any other difficulties which could prevent them from

par. 7. “Rule 89(3) of the Rules states that an application for participation in the proceedings may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child, or, when necessary, a victim who is disabled. [...] The Single Judge also wishes to specify that both the identity of the applicant and the identity of the person acting with his or her consent or on his or her behalf must be confirmed by one of the above listed documents.”

¹⁸ See ICJ, *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 3 February 1994, par. 41.

¹⁹ See ICJ, *Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations*, 3 March 1950, p. 8. See also. ICJ, *Advisory Opinion, Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, 8 June 1960, General List No. 43, p. 13

²⁰ See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168, 13 July 2006, par. 33.

preparing a written application on their own²¹. Thus, the suggestion that Rule 89(3) of the Rules could provide for legal basis facilitating some sort of “*collective*” or “*mixed approach*” for processing victims’ applications is wholly misplaced.

23. Last but not least, the Decision of the Single Judge, and to a lesser extent the Report of the Registry, are *de facto* aiming at amending the provisions of both the Statute and the Rules notwithstanding the existence of Article 101 of the Statute and Rule 3 of the Rules which provide for a very clear and lengthy amendment procedure which will definitely not solve the issue at stake before the beginning of the confirmation of the charges hearing in the present case. Moreover, concerning the proposal to be made by the Registry with regard to “*an application form that could be used for the purpose of encouraging collective application*”²², Regulation 23(2) of the Regulations of the Court also renders the expeditiousness of the process uncertain, notwithstanding the legal implications thereof. Therefore, the Office will contend, together with the Registry, that the current system dealing with the processing of applications faces multiple challenges. However, rather than jeopardising the effectiveness of individual participation though revising crystal clear provisions, there is definitely a need to reinforce the technical, human and budgetary resources of the Registry urgently.

²¹ See GILBERT BITTI and HAKAN FRIMAN, “Participation of victims in the proceedings”, in ROY S. LEE (Ed.), *Elements of Crimes and the Rules of Procedure and Evidence*, p. 462. (Emphasis added.)

²² See the Decision, *supra* note 3, p. 7.

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 victims' application process by way of submitting written observations on both the Report of the Registry and the Decision of the Single Judge, 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", with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 14th Day of February 2012

At The Hague, The Netherlands