

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 5 April 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Single Judge

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

URGENT

Public document

Second decision on issues related to the victims' application process

Decision to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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Victims Participation and

Reparations Section

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Judge Silvia Fernández de Gurmendi, Single Judge for Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court”, respectively), responsible for carrying out the functions of the Chamber in relation to the situation in the Republic of Côte d’Ivoire and the cases emanating therefrom,¹ hereby issues the second decision on issues related to the victims’ application process.

I. Procedural history

1. On 5 December 2011, the first appearance of Laurent Gbagbo (“Mr Gbagbo”) took place before the Court. During the hearing, the Chamber scheduled the commencement of the confirmation of charges hearing for 18 June 2012.²

2. On 20 January 2012, the Registry filed a report entitled “Organisation of the Participation of Victims”, containing a proposal on the approach for the victim’s application process.³

3. On 6 February 2012, the Single Judge issued the “Decision on issues related to the victims’ application process”, ordering the Registry: (i) to start the mapping process in Côte d’Ivoire for the purposes of identifying the main communities or groups of victims, as well as persons who could act on behalf of multiple individual victims, with their consent, and encouraging potential individual applicants to join with others and consent to a single application being submitted on their behalf in accordance with Rule 89(3) of the Rules of Procedure and Evidence (“Rules”); and (ii) to propose to the Chamber an

¹ Oral Decision of the Chamber, 5 December 2011, ICC-02/11-01/11-T-1-ENG, page 8.61.

² ICC-02/11-01/11-T-1-ENG, p. 8.

³ ICC-02/11-01/11-29-Conf-Exp.

application form that could be used for the purpose of encouraging collective applications in accordance with Rule 89(3) of the Rules.⁴

4. On 15 February 2012, the Defence filed the «Requête de la Défense suite à la “Decision on issues related to the victims’ application process” (ICC-02/11-01/11-33)», wherein the Defence requested authorisation to present observations on the adoption of a collective system for victims’ applications for participation, and that a reasonable time limit be set for the transmission of applications for participation to the parties.⁵

5. On 29 February 2012, the Registry filed the “Proposal on a partly collective application form for victims’ participation”, including the application form requested by the Chamber together with a report on the practicalities of implementing a partly collective system of application for victim participation (“Registry’s Proposal”).⁶

6. On 2 March 2012, the Single Judge invited the Prosecutor and the Defence to present their observations on the Registry’s Proposal by 9 March 2012.⁷

7. On 2 March 2012, The Redress Trust (“REDRESS”) filed the “Application by Redress Trust for Leave to Submit Observations to Pre-Trial Chamber III of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence”,⁸ which was granted by the Single Judge on 8 March 2012.⁹

⁴ ICC-02/11-01/11-33.

⁵ ICC-02/11-01/11-41.

⁶ ICC-02/11-01/11-45 and annexes.

⁷ ICC-02/11-01/11-47.

⁸ ICC-02/11-01/11-46 and annex.

⁹ ICC-02/11-01/11-50.

8. On 9 March 2012, the OPCV filed the “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”, seeking leave to appear before the Chamber on the issue of the victims’ application process.¹⁰ On 13 March 2012, the Single Judge granted leave for the OPCV to submit observations on the practical implications of the Registry’s Proposal by 19 March 2012.¹¹

9. On 9 March 2012, the Prosecutor filed the “Prosecution’s observations in relation to victims’ application process”, submitting that he does not object to the Registry’s Proposal and that the four incidents forming the basis of the alleged charges should constitute the basis of a minimum of four collective applications, provided that a victim linked with more than one collective application may not be represented by more than one legal representative.¹²

10. Also on 9 March 2012, the Defence filed the “Observations de la Défense sur la proposition du Greffe d’un formulaire de participation partiellement collectif”, wherein it objects to the Registry’s Proposal on the grounds that the collective application form will not enhance the efficiency of the application process, but, to the contrary, will increase the amount of work for the parties.¹³ The Defence requests that the Registry’s Proposal be rejected or, in the alternative, that the Single Judge: (i) order the Registry to submit a new proposal, taking into account the concerns of the Defence; (ii) specify that only the Registry can assist applicants in the completion of the collective application forms and determine the extent of the assistance to be provided by the Registry to group applicants; (iii) order the Registry to carry out an evaluation on the ground to determine whether a collective application

¹⁰ ICC-02/11-01/11-51.

¹¹ ICC-02/11-01/11-57.

¹² ICC-02/11-01/11-54, para. 8.

¹³ ICC-02/11-01/11-52, paras 31-37.

process is relevant in the Ivorian context; (iv) order the Registry to notify the Defence of the report to be filed under Regulation 86(5) of the Regulations; and (v) set a reasonable time limit for the transmission of applications for participation to the parties.¹⁴

11. On 12 March 2012, the Registry filed a “Report on mapping of victims”, providing a preliminary report on civil society actors that work with or provide assistance to victims of post-electoral violence in Côte d’Ivoire.¹⁵ The Registry also informed the Chamber that the final report on the mapping of victims in Côte d’Ivoire is due on 5 April 2012.¹⁶

12. On 16 March 2012, REDRESS filed the “Redress Trust Observations to Pre-Trial Chamber I of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence”, outlining the practice and procedures and identifying challenges which had been encountered in the collective management of the participation of victims in a number of jurisdictions and other bodies.¹⁷

13. On 19 March 2012, the OPCV filed its “Observations on the practical implications of the Registry’s proposal on a partly collective application form for victims’ participation”, submitting that, given the major challenges that would be faced in the implementation of the Registry’s Proposal, as well as the detrimental impact it would have on victims’ participation and on the expeditiousness of proceedings, the Registry’s Proposal should not be put in place.¹⁸

¹⁴ *Ibid.*, para. 44.

¹⁵ ICC-02/11-01/11-55 and annexes.

¹⁶ ICC-02/11-01/11-55, para. 11.

¹⁷ ICC-02/11-01/11-62.

¹⁸ ICC-02/11-01/11-66.

14. On 20 March 2012, the Defence filed the “Réponse de la défense du Président Gbagbo aux Observations du Procureur du 9 mars 2012 concernant la procédure de participation des victimes à la procédure”.¹⁹

II. Applicable law

15. The Single Judge notes Articles 54(1)(a) and (b), 67 and 68 of the Rome Statute (“Statute”), Rules 16, 85, 89 and 90 of the Rules and Regulations 23(2) and 86 of the Regulations of the Court (“Regulations”).

III. Analysis and conclusions of the Single Judge

A. *The Registry’s Proposal*

16. As requested by the Chamber, the Registry’s Proposal offers to individual applicants the possibility of filing with others a single application form while recognising that applicants may apply for participation individually using the standard application form instead.²⁰ The form, developed to enhance the management of the application process solely for the purposes of the case at hand, does not – and could not – replace the standard form approved by the Presidency for the entire Court pursuant to Regulations 86(1) and 23(2) of the Regulations.

17. The Registry’s Proposal comprises two elements: (i) a group form, which allows for a number of individuals to describe elements common to them as a group (“Group Form”); and (ii) an individual declaration, which connects the individual application to the information provided in the Group Form and includes the information necessary under the statutory provisions (“Individual Declaration”).²¹

¹⁹ ICC-02/11-01/11-67.

²⁰ ICC-02/11-01/11-45-AnxA, para. 12.

²¹ ICC-02/11-01/11-45-AnxB.

18. The Registry envisages that group applicants may choose to: (i) consent to one person acting on their behalf within the meaning of Rule 89(3) of the Rules; or (ii) appoint a contact person who would facilitate future communication between the Court and the group, but would not be authorised to act on behalf of the group. In this regard, the Registry underlines that it would be important to clarify the mandate of the contact person after the Single Judge has decided on the victims' applications for participation.²²

19. The Single Judge notes that the Prosecutor, the Defence and the OPCV contend that the collective application form would include, overall, less information than the current standard application form and that additional details would be needed should a victim be called to testify²³

20. The Single Judge considers that the information required in the form would be sufficient to determine whether the applicant qualifies as a victim pursuant to Rule 85 of the Rules for the sole purpose of participation in the current proceedings. Should a victim be called to testify at the confirmation of charges hearing, further information could be provided, if needed, in order to allow proper questioning of the victims.

21. Furthermore, the Single Judge is of the view that the recollection of the events and harm common to the members of the group, provided in the Group Form, in conjunction with the information contained in the Individual Declaration fulfil the requirements of Regulation 86 of the Regulations. Accordingly, the collective application form will also provide the legal representative with sufficiently detailed information to enable him or her to

²² ICC-02/11-01/11-45-AnxB, p. 36.

²³ ICC-02/11-01/11-45, para. 5; ICC-02/11-01/11-52, para. 27, ICC-02/11-01/11-66, para. 24.

fulfil his or her mandate pursuant to Article 68(3) of the Statute and Rules 90 and 91 of the Rules.

22. The Defence contends that the proposed collective application form does not offer the same guarantees as the standard individual application form because it does not require applicants to state their date of birth and gender. The only source of this information would be the copy of an identity document attached to the collective application form.²⁴

23. The Single Judge observes that the identity document attached to the application is to be considered authoritative in demonstrating the applicants' identity. Accordingly, the identity information contained in the said document is sufficient for the Single Judge to determine whether the identity of the applicant has been satisfactorily established, and there is no need for the same information to be provided by the applicants in the Individual Declaration. In addition, the involvement of Victims Participation and Reparations Section ("VPRS") will provide a measure of control of supporting documents as indicated below.

24. The Registry submits that the direct assistance of VPRS staff will be necessary in completing the collective application form in order to maximise the envisaged efficiency gains of the new system and to ensure that a detailed account of the alleged crime and harm is provided, reflecting in an inclusive manner the perspective of each member of the group.²⁵

25. According to the Registry, this would introduce "a measure of quality control, as it would have the benefit of enabling a check on completeness of applications and supporting documents to be made on the spot, as well as a check on internal coherence between the group form and the appended

²⁴ ICC-02/11-01/11-52, paras 13-15.

²⁵ ICC-02/11-01/11-45-AnxA, paras 17 and 29-31.

individual declaration forms and the ability to identify individuals who did not fit in the group, individuals who submitted separate individual applications as well as signing the group form, etc".²⁶

26. The Defence and the OPCV express concern as to whether the assistance proposed by the Registry is compatible with the Registry's mandate and that of the VPRS, as stipulated in Rule 16 of the Rules and Regulation 86 of the Regulations.²⁷ At the same time, however, the Defence requests that the Single Judge specify that only the Registry staff can assist groups of applicants to complete the collective application form.²⁸

27. The Single Judge recalls that Rule 16(1)(c) of the Rules obliges the Registrar to assist victims "in participating in the different phases of the proceedings in accordance with rules 89 to 91" and Regulation 86(9) of the Regulations which expressly states that the VPRS "shall be responsible for assisting victims and groups of victims". In the particular circumstances of the case, the Single Judge considers that the involvement of the VPRS as proposed is essential for the efficient implementation of the collective application process proposed by the Registry and that only Registry staff can indeed assist applicants to complete the collective form. Therefore, question 2 in Part A of the Group Form should be replaced with a question asking whether the members of the group and/or the contact person have been assisted by a translator or an interpreter in the completion of the collective application form.

28. The direct involvement of the staff of the VPRS from the initial stages of the application process in the field will also minimise the risk of duplicate

²⁶ ICC-02/11-01/11-45-AnxA, para. 29.

²⁷ ICC-02/11-01/11-52, paras 38-41; ICC-02/11-01/11-66, para. 33.

²⁸ ICC-02/11-01/11-52 p. 16.

applications which was noted by the Registry.²⁹ In particular, it will be the responsibility of VPRS staff in the field to explain to victims that they may only apply once, either individually or collectively.

29. The Single Judge is mindful of the potential difficulties in creating a collective narrative of events as indicated by the Defence, REDRESS and OPCV, particularly in cases where sensitive categories of victims are involved, such as victims of sexual crimes.³⁰ Again, the Single Judge considers that the close involvement of VPRS staff is crucial. In this respect, when it becomes clear that there are areas of divergence between the group applicants with regard to their views or recollection of events or the nature and extent of their victimisation, it may be appropriate that VPRS staff suggest to the members of the group to submit instead separate individual applications or to constitute distinct and more homogeneous groups in order to ensure that sensitive categories of victims, especially victims of sexual crimes, are properly represented during the proceedings. In this regard, the Single Judge underlines that the Registrar – and the VPRS as the specialized unit under the authority of the Registrar assisting victims and groups of victims in accordance with Regulation 86(9) of the Regulations – is under an obligation, in accordance with Rule 16(1)(d) of the Rules to take “gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings”.

30. In relation to concerns raised by the Defence and the OPCV that the Registry’s Proposal would introduce the notion of collective harm to the detriment of personal, individual harm,³¹ the Single Judge emphasizes that the fact that individual victimisation will be alleged by the applicants within a

²⁹ ICC-02/11-01/11-45-AnxA, para. 21.

³⁰ ICC-02/11-01/11-52, paras 19-21, 26; ICC-02/11-01/11-62, paras 26-28; ICC-02/11-01/11-66, paras 16-18.

³¹ ICC-02/11-01/11-52, paras 24-25; ICC-02/11-01/11-66, para. 19.

common collective narrative does not mean that the harm will lose its individual character. In addition, the Individual Declaration provides an opportunity for applicants to provide particularities of their situation whenever they may not be entirely reflected in the Group Form. Hence, the personal character of the harm suffered by each of the applicants constituting the group will be fully retained.

31. As for the OPCV's objection that the Registry's Proposal would "not enable the applicants applying to participate collectively to apply for reparations on an individual basis, and *vice versa*",³² the Single Judge reiterates that the collective application form is only designed for participation in the proceedings and clarifies that she is not empowered to decide on whether the admitted victims are entitled to reparations and, if so, in what form. The Single Judge underlines that applying through the collective application form does not preclude that those victims, at the appropriate stage, request reparations on an individual basis. The rights of victims to participate in proceedings before the Court pursuant to Article 68 and the right to seek reparations pursuant to Article 75 of the Statute remain individual and distinct rights. Furthermore, should the charges against the suspect be confirmed, and should the case reach the reparation stage, additional information may be requested from the victims.

32. The Defence submits that question 30 in Part H of the Group Form, which relates to whether the applicants have any objection to the disclosure of their identities to the parties, may confuse applicants as to the distinction between disclosure of their identities to the parties and to the public.³³ The Single Judge observes that the question in the form is accompanied by a note explaining that "the identity of the members of the group [...] will not be

³² ICC-02/11-01/11-66, para. 19.

³³ *Ibid.*, para. 10.

revealed to the public while the application is being considered”.³⁴ The same explanatory note is contained in the standard individual application form currently used in situations and cases before the Court. Accordingly, the Single Judge is of the view that sufficient information is provided in question 30 of the Group Form to enable applicants to understand the distinction between communication of their identities to the public and to the parties.

33. Turning now to the role of the contact person envisaged by the Registry’s Proposal, the Single Judge notes that Rule 89(3) of the Rules foresees two alternatives to the direct submission by victims of applications, namely: (i) a person makes an application with the consent of the victim; or (ii) a person acts on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled. The first alternative addresses cases where one or more victims, by providing their consent, empower a third person to make an application for participation. The second alternative is confined to individuals who are not in position to apply themselves, such as children and disabled persons.

34. The Single Judge is of the view that only the first alternative applies in the current context. Individual victims could provide their consent for a third person (the “contact person”) to make a joint single application for all of them. Therefore, the role of the contact person would be limited to the submission of the application. In addition, the person could assist in further communications between the Court and the victims, if needed. Accordingly, question 14 in Part B of the Group Form should be deleted and section 4 of the Individual Declaration should be amended in order to indicate that in all

³⁴ ICC-02/11-01/11-45-AnxB, p. 6.

cases the individual only gives consent to the contact person to make the application.³⁵

35. The Single Judge underlines that applicants who apply through the collective application form will be, provided that they meet the necessary requirements, admitted to participate as individuals and will act on their own behalf, with the exception of children or disabled persons, as discussed above.

36. Persons acting on behalf of children or disabled persons could also join others in a single application and consent to a third person to make such application provided that they attach evidence of kinship or guardianship of the child or disabled person, as well as proof of identity of both the victim and the applicant on his or her behalf. Accordingly, the Individual Declaration should be amended to allow for this possibility.

B. Transmission of complete victims' applications for participation to the Chamber and the parties and related issues

37. The Single Judge considers it appropriate to set a deadline for the submission of victims applications for participation that takes into account the date of the confirmation of charges hearing as well as the need to allow sufficient time both for the Registry to implement the system in the field and to the parties to make observations pursuant to Rule 89(1) of the Rules. To this effect, complete collective or individual applications for participation should be submitted to the VPRS by 9 May 2012 at the latest, in order for the Registry to transmit those applications to the Chamber and the parties no later than 16 May 2012. The Single Judge urges the Registry to transmit applications to the Chamber and to the parties as soon as possible and, if appropriate, on a continuous basis.

³⁵ ICC-02/11-01/11-52, paras 28-30; ICC-02/11-01/11-66, para. 32.

38. According to Regulation 86(5) of the Regulations all applications are to be transmitted to the Chamber together with a report thereon. The Single Judge expects the VPRS to include in any report one paragraph in relation to each applicant, which presents the information contained in the applications in accordance with the requirements of Rule 85 of the Rules, including the location, time and the specific alleged event and the resultant harm suffered by the applicants.

39. The Single Judge notes that the Defence requests to be notified of the report prepared by the Registry pursuant to Regulation 86(5) of the Regulations.³⁶ However, consistent with the jurisprudence of the Court, the Single Judge considers that the purpose of the report pursuant to Regulation 86(5) of the Regulations is “to assist the Chamber in issuing only one decision in accordance with Rule 89(4) of the Rules”³⁷ and that, accordingly, the report is “not to be provided to the parties and participants”.³⁸

40. Under Rule 89(1) of the Rules, both the Prosecutor and the Defence are entitled to provide observations on the victims’ applications for participation. Given the proximity of the hearing on the confirmation of charges, the Single Judge deems it necessary to set 28 May 2012 as the deadline for the parties to submit, should they wish to do so, their observations on the victims’ applications for participation.

³⁶ ICC-02/11-01/11-52, para. 42.

³⁷ Pre-Trial Chamber I, “Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation”, ICC-01/04-374, para. 36.

³⁸ Pre-Trial Chamber I, “Decision on the Requests of the OPCD and the Legal Representatives of the Applicants Regarding the Transmission of the Report of the Registry under Rule 89 of the Rules of Evidence and Procedure”, ICC-02/05-93. See also Trial Chamber I, “Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5)”, para. 27.

41. Considering the current security situation in Côte d'Ivoire,³⁹ as well as the nature and purpose of the confirmation of charges proceedings, the Single Judge considers it appropriate, pursuant to Article 57(3)(c) of the Statute, to instruct the Registry to redact, as necessary, identifying information from the victims' applications transmitted to the Defence. In the view of the Single Judge, this provides an appropriate measure for the protection of victims, which is not, at this stage, prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Bearing in mind that redaction of information is an exception to the principle of full disclosure, the Single Judge reminds the Registry to respect the principle of proportionality enshrined in Article 68(1) of the Statute.

42. Conversely, the Single Judge is of the view that unredacted copies of complete victims' applications for participation should be transmitted to the Prosecutor, given the duties of the Prosecutor with respect to victim protection, pursuant to Articles 54(1)(b) and 68(1) of the Statute, and the fact that applications for participation in proceedings may contain exculpatory information that may be relevant to his investigative duties under Article 54(1)(a) of the Statute.⁴⁰

43. The Single Judge recalls that Pre-Trial Chamber II held in this regard that, in light of the autonomous duty of the Prosecutor to protect victims, providing the Prosecutor with unredacted copies of victims' application for participation permits the Prosecutor to properly discharge his statutory

³⁹ ICC-02/11-01/11-HNE-1-Conf-Exp.

⁴⁰ See Pre-Trial Chamber II, "Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case", ICC-01/09-01/11-169, paras 9-15; Pre-Trial Chamber I, "Decision requesting the Parties to submit observations on 14 applications for victims' participation in the proceedings", ICC-01/04-01/10-181, p. 5.

obligations, while it does not constitute a violation of the principle of equality of arms between the parties.⁴¹

C. Legal representation of victims

44. With a view to ensuring the meaningful participation by victims at the confirmation of charges hearing, the Single Judge considers it necessary that common legal representation of victims be organised by the Registry in accordance with Rules 16(1)(b) and 90 of the Rules as soon as possible. Accordingly, the Single Judge instructs the Registry to consult with applicants as to their wishes with regard to legal representation, to assess whether they could be further grouped for the purposes of common legal representation in accordance with Rule 90 of the Rules, to identify potential common legal representatives and to provide recommendations to the Chamber in this regard no later than 16 May 2012.

FOR THESE REASONS THE SINGLE JUDGE HEREBY

ORDERS the Registry to modify the collective application form as specified at paragraphs 27, 34 and 36 of the present decision;

ORDERS the Registry to transmit unredacted copies of complete victims' applications for participation to the Chamber and the Prosecutor and redacted copies of complete victims' applications for participation to the Defence as soon as possible and, if appropriate, on a continuous basis, no later than 16 May 2012;

⁴¹ ICC-01/09-01/11-169, para. 14.

ORDERS the Registry to submit to the Chamber each batch of victims' applications together with a report pursuant to Regulation 86(5) of the Regulations;

ORDERS the Prosecutor and the Defence to submit, should they wish to do so, their observations on the victims' applications for participation no later than 28 May 2012;

ORDERS the Registry to provide to the Chamber recommendations with regard to the legal representation for victims admitted to participate in the confirmation of charges hearing no later than 16 May 2012;

ORDERS the parties and participants in the proceedings to refer to the applicants only by the numbers assigned to them by the Registry.

Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this 5 April 2012

At The Hague, The Netherlands