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No.: ICC-02/04-01/15

Date: 26 May 2016

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

**Decision on the 'Request for a determination concerning legal aid' submitted by
the legal representatives of victims**

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Benjamin Gumpert

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of the Victims

Joseph Akwenyu Manoba and Francisco
Cox
Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court'), issues the following 'Decision on the "Request for a determination concerning legal aid" submitted by the legal representatives of victims' having regard to Rule 90 of the Rules of Procedure and Evidence ('Rules').

1. 2,062 victims currently participate in the present case.¹ 1,434 of these participating victims appointed as their legal representatives Joseph Akwenyu Manoba and Francisco Cox ('LRVs'). Paolina Massidda from the Office of Public counsel for victims ('OPCV') was appointed by the Court as common legal representative for the remaining, otherwise unrepresented, 592 victims.²
2. On 27 November 2015, the Single Judge exercising the functions of the Pre-Trial Chamber in the present case ('PTC Single Judge') issued the 'Decision on contested victims' applications for participation, legal representation of victims and their procedural rights'.³ In this decision, the PTC Single Judge, prompted by certain information provided by the Registry, clarified that the LRVs, as they were individually chosen by some participating victims in the exercise of their right under Rule 90(1) of the Rules, could not be considered 'a common legal representative chosen by the Court' and, accordingly, the victims who had chosen them as their legal representatives, were not entitled to financial assistance by the Court under Rule 90(5) of the Rules.⁴ The PTC Single Judge therefore instructed the LRVs to clarify to their clients that they do not qualify for financial assistance by the Court but may, if they so wish, benefit from legal

¹ See Annex 1 to the Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Anx1.

² See Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, 27 November 2015, ICC-02/04-01/15-350; Decision on issues concerning victims' participation, 15 December 2015, ICC-02/04-01/15-369; Second decision on contested victims' applications for participation and legal representation of victims, 24 December 2015, ICC-02/04-01/15-384.

³ ICC-02/04-01/15-350.

⁴ ICC-02/04-01/15-350, para. 18.

representation free of charge by the common legal representative appointed by the Court.⁵

3. The PTC Single Judge made the same clarification, and gave the same instruction to the LRVs in relation to further participating victims, in two subsequent decisions: the 'Decision on issues concerning victims' participation' issued on 15 December 2015⁶ and the 'Second decision on contested victims' applications for participation and legal representation of victims' of 24 December 2015.⁷
4. On 13 May 2016, the LRVs filed their 'Request for a determination concerning legal aid' ('Request'), requesting the Single Judge to direct the Registry: (i) 'that legal aid is available for lawyers appointed under rule 90(1) or rule 90(2)' and (ii) 'that accordingly any application for legal aid submitted by the Legal Representatives must be decided on its merits by the Registry under the Regulations of the Court, the Regulations of the Registry and any applicable policy documents'.⁸ In other words, the LRVs request 'that the Single Judge adopt a different approach for the trial proceedings of this case' than the approach adopted by the PTC Single Judge.⁹
5. Observations in response to the Request were filed, on 20 May 2016, by: (i) the Defence, which opposes the Request on the grounds that it is untimely, unfounded and not consistent with the current practice at the Court¹⁰ and (ii) by the Registry, which submits, while not taking a position on the merits, that it

⁵ ICC-02/04-01/15-350, para. 18.

⁶ ICC-02/04-01/15-369, para. 10.

⁷ ICC-02/04-01/15-384, para. 22.

⁸ ICC-02/04-01/15-434-Corr.

⁹ Request, ICC-02/04-01/15-434-Corr, para. 11.

¹⁰ Defence Response to the Pro-Bono Legal Representatives for Victims Request for Legal Aid, ICC-02/04-01/15-441.

would be in a position to deal with the matter, subject to the Chamber's disposal of the Request, as a matter of urgency.¹¹

6. Before engaging with the LRVs' proposed interpretation of Rule 90 of the Rules, the Single Judge will first consider which statutory provisions apply – and do not apply – to the present issue.
7. The relevant provision underlying the issue under consideration is Rule 90 of the Rules, according to which '[a] victim shall be free to choose a legal representative' (sub-rule (1)), subject to the possibility for a Chamber, '[w]here there are a number of victims' and 'for the purposes of ensuring the effectiveness of the proceedings', to organize common legal representation (sub-rules (2) to (4)). Rule 90(5) of the Rules is the legal basis for the provision of legal aid to victims participating in the proceedings. It states that '[a] victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance'.
8. Having considered the arguments put forward by the LRVs in the Request, the Single Judge sees no reason to depart from the determination of the PTC Single Judge. The fact that victims who individually choose their legal representatives before the Court do not qualify for financial assistance by the Court (contrary to those victims for whom a common legal representative is appointed by the Court) stems from the plain language of Rule 90(5) of the Rules. Any attempt to qualify this provision as 'permissive' rather than 'limiting'¹² is unpersuasive. Indeed, should the LRVs' interpretation of Rule 90(5) be upheld, the qualifier that such provision is only applicable with respect to 'a victim or group of victims

¹¹ Observations on the Request for a determination concerning legal aid, ICC-02/04-01/15-442.

¹² Request, ICC-02/04-01/15-434-Corr, para. 31. See also para. 13.

who lack the necessary means to pay for a common legal representative chosen by the Court' would be deprived of any meaning.

9. Also, the Single Judge does not consider it relevant that Regulation 83(2) of the Regulations of the Court contains no indication that legal aid funds are only available to pay for common legal representatives chosen by the Court.¹³ Apart from the fact that the Regulations of the Court are in any case subject to the Rules,¹⁴ Regulation 83(2) does not in itself provide any right, but merely states that the scope of legal assistance paid by the Court regarding victims is determined by the Registrar in consultation with the Chamber. The applicability of such provision is therefore dependent on a right to access legal aid grounded on the relevant legal basis, namely Rule 90(5) of the Rules. The same considerations apply with respect to the absence of an explicit indication in Regulation 113 of the Regulations of the Registry and in the 'Registry's single policy document on the Court's legal aid system'¹⁵ that legal representatives appointed under Rule 90(1) are ineligible for legal aid.¹⁶
10. Equally unpersuasive is the LRVs' reliance on Rule 21(1) of the Rules and the argument that this provision makes it clear that financial assistance to victims is not made subject to any other provisions in the Rules, including Rule 90(5).¹⁷ In this regard, it suffices to observe that Rule 21 of the Rules – together with Rules 20 and 22 – exclusively concern counsel for the defence rather than legal representative(s) of victims. Indeed, these situations are treated differently, as a suspect/accused, if indigent, qualifies for financial assistance also to pay a counsel of his or her own choice. Rule 90 of the Rules results from a different legislative choice made with respect to legal representation of victims.

¹³ See Request, ICC-02/04-01/15-434-Corr, para. 17.

¹⁴ Regulation 1(1) of the Regulations of the Court.

¹⁵ ICC-ASP/12/3, 4 June 2013.

¹⁶ See Request, ICC-02/04-01/15-434-Corr, paras 18-20.

¹⁷ See Request, ICC-02/04-01/15-434-Corr, para. 14.

11. In this regard, the Single Judge notes the LRVs' argument in support of their Request that '[i]nternational standard and comparative experience support the provision of legal aid to victims who participate in criminal proceedings'.¹⁸ However, the matter under consideration does not concern the availability of a mechanism by which participating victims who lack sufficient resources may benefit from legal aid before the Court. Indeed, this mechanism is provided for in Rule 90(5) of the Rules, and the PTC Single Judge stated precisely so when he requested the LRVs to inform their clients that they may benefit from legal representation free of charge by the common legal representative appointed by the Court. Therefore, in proceedings before the Court, including in the present case, victims who lack sufficient financial means do have access to legal aid for legal representation. Nonetheless, such representation is offered free of charge only in relation to the common legal representative(s) which the Court appoints. When, instead, victims elect to appoint a legal representative of their own choice – which, subject to a Chamber's power to trump such choice for the purposes of ensuring the effectiveness of the proceedings, is otherwise legitimate and provided for under Rule 90(1) of the Rules – they shall cover the related expenses.
12. The Single Judge clarifies that it is not in discussion in the present decision whether the Rules could have made a different choice and provided for financial assistance also for all victims who individually select their own legal representative(s). However, this is not the case under the scheme of Rule 90 of the Rules and the Single Judge does not consider that the 'policy' considerations advanced by the LRVs¹⁹ justify a different reading of this provision. The mere fact that a different legislative choice could have been made as concerns legal aid to victims does not mean that such alternative choice should be judicially

¹⁸ Request, ICC-02/04-01/15-434-Corr, para. 21.

¹⁹ Request, ICC-02/04-01/15-434-Corr, paras 29-39.

adopted in light of certain 'policy' reasons. Indeed, different policy considerations underlie the scheme established by Rule 90 of the Rules which is intended to provide a balance between the victims' right to choose their own legal representative(s), on the one hand, and the effectiveness of the proceedings and cost containment, while preserving victims' participatory rights before the Court, on the other hand. To accept the LRVs' interpretation would prejudice this balance and result in an inevitably unwieldy system whereby the Court, when upholding the right of victims to appoint counsel of their own choice, would also be obligated to provide financial assistance to any legal representative appointed by any victims' group, even if this results in dozens of such representatives being part of the legal aid scheme for a single case.

13. In conclusion, in light of the above considerations, the Single Judge rejects the Request and confirms that: (i) the legal representation provided by the LRVs, as they are not common legal representatives chosen by the Court, is not eligible for being covered by legal aid funds; and (ii) participating victims who lack the necessary financial means may benefit from legal representation free of charge by Paolina Massidda from the OPCV as the common legal representative of victims appointed by the Court in the present case.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request.

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

A handwritten signature in black ink, appearing to read 'BS', is written over a horizontal line.

**Judge Bertram Schmitt
Single Judge**

Dated 26 May 2016

At The Hague, The Netherlands