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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

**Observations on the practical implications of the Registry's proposal on a partly
collective application form for victims' participation**

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 HISTORY

1. On 20 January 2012, the Registry filed a report containing observations on the “Organization of the Participation of Victims”¹ 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 2012.²

2. On 6 February 2012, the Single Judge of Pre-Trial Chamber III issued a “Decision on issues related to the victims’ application process”³ (the “Decision of 6 February 2012”) 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 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 2012.⁶

4. On 29 February 2012, the Registry filed a “Proposal on a partly collective application form for victims’ participation” (the “Registry’s Proposal”)⁷ and on 2 March 2012, the Single Judge issued a “Decision inviting observations from the parties in relation to the victims’ application process.”⁸

¹ See the “Organization of the Participation of Victims”, No. ICC-02/11-01/11-29-Red, 6 February 2012.

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 of 6 February 2012”).

⁴ *Idem.*, par. 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.

⁷ 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 “Registry’s Proposal”).

⁸ 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.

5. On 2 March 2012, the Redress Trust filed an Application requesting leave to submit written observations in the matter,⁹ which was granted by the Single Judge on 8 March 2012.¹⁰ These observations were filed on 16 March 2012.¹¹

6. On 9 March 2012, the OPCV filed a “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” (the “Second Request”)¹² wherein it requested the Pre-Trial Chamber to be allowed to appear before the Chamber on the issue of the victims’ application process by way of submitting written observations on the Registry’s Proposal within a deadline established by the Chamber, in order to represent the general interest of victims.¹³

7. On the same day, the Prosecution and the Defence filed their observations in relation to the collective victims’ application process.¹⁴

8. On 13 March 2012, the Single Judge of the Pre-Trial Chamber issued a decision¹⁵ granting the OPCV leave to submit written observations on the practical implications of the Registry’s Proposal on a partly collective application form for

⁹ 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.

¹⁰ 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.

¹¹ See 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”, No. ICC-02/11-01/11-62, 16 March 2012.

¹² See 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”, No. ICC-02/11-01/11-51, 9 March 2012.

¹³ *Idem.*, p. 10.

¹⁴ See the “Prosecution’s observations in relation to victims’ application process”, No. ICC-02/11-01/11-54, 9 March 2012. See also the “Observations de la Défense sur la proposition du Greffe d’un formulaire de participation partiellement collectif (‘Proposal on a partly collective application form for victims’ participation’ - ICC-02/11-01/11-45)”, No. ICC-02/11-01/11-52, 9 March 2012.

¹⁵ See the “Decision on the OPCV’s ‘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’”, No. ICC-02/11-01/11-57, 13 March 2012.

victims' participation, by 19 March 2012.¹⁶ The Prosecution and the Defence were invited to file their observations by way of response, by 23 March 2012.¹⁷

9. Accordingly, the Principal Counsel of the Office respectfully submits the following observations on the practical implications of the Registry's Proposal on a partly collective application form for victims' participation.

II. OBSERVATIONS OF THE OFFICE

A. Practical implications of the Registry's Proposal as regards victims and their legal representatives

10. At the outset, the Office welcomes any practical measures aimed at improving and expediting victims' application process. In this regard, the Office submits that such measures must clearly respect the key principles in relation to victims' participation as set out in the legal framework of the Court. In particular, article 68(3) of the Rome Statute (the "Statute"), read in conjunction with rules 89 to 91 of the Rules of Procedure and Evidence (the "Rules"), clearly promote an effective and meaningful victims' participation in the proceedings before the Court.¹⁸ Moreover,

¹⁶ *Idem.*, p. 7.

¹⁷ *Ibid.*

¹⁸ In particular, the Single Judge of Pre-Trial Chamber I found that "*the object and purpose of article 68(3) of the Statute and rules 91 and 92 of the Rules is to provide victims with a meaningful role in criminal proceedings before the Court (including at the pre-trial stage of a case) so that they can have a substantial impact in the proceedings.*" 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. 157. Trial Chamber I found that "[t]he opportunities for participation by victims must be given meaningful effect by applying the plain language of the relevant provisions, but always ensuring that the implementation of this objective does not result in an unfair trial." See the "Decision on victims participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, par. 85. In this sense see also DONAT-CATTIN (D.), "Article 68: Protection of victims and witnesses and their participation in the proceedings", in TRIFFTERER (O.) (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition, C.H. Beck, Hart and Nomos, 2008, p. 1279. See also in this sense JORDA (C.) and HEMPTINNE (J.), "The Status and Role of the Victim", in CASSESE (A.), GAETA (P.) JONES (J.R.W.) (Ed.), *The Rome Statute of the International Criminal Court A Commentary*, Oxford University Press, pp. 1387 to 1419; SCHABAS (W.A.), *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2nd edition, 2004, p. 172; BITTI (G.) and FRIMAN (H.), "Participation of Victims In the Proceedings", in LEE (R.S.) (Ed.), *The International Criminal Court - Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers Inc, pp. 456 to 474; and CASSESE (A.), "The Statute of the International Criminal Court' Some Preliminary Reflections", *European Journal of International Law* No. 10 (1999), pp. 167 and 168.

article 68(1) of the Statute provides that *“the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims [...]. In so doing, the Court shall have regard to all relevant factors, including age, gender [...] and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children”*. The Office submits that in accordance with said provisions, in order to enable victims to effectively participate in the proceedings, the Court shall apply a strictly personalised and/or individualised approach to every person wishing to participate as victim.¹⁹

11. In this context, the Office recalls that the rights recognised to the victims by the founding instruments of the Court have been praised as constituting *“an essential feature of the Rome Statute system and an important contribution to international justice.”*²⁰ The Office also notes the recommendations of the Assembly of States Parties pleading for a review of the victims’ participation system with the view, however, *“to ensuring its sustainability, effectiveness and efficiency,”*²¹ which also mirrors the constant jurisprudence of the Court regarding *“the need to ensure that the participation of victims, through their legal representatives, is as meaningful as possible, as opposed to ‘purely symbolic.’”*²²

12. This need *“to enhance the efficiency and the substantive value of victims’ participation”* appears to be the major concern and the main goal of the Registry²³ when suggesting a new system based on a collective approach to victims’ application

¹⁹ In this sense 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”, *supra* note 5.

²⁰ See *inter alia* the “Corrigendum to Prosecution’s Observations on 218 Applications for Victim’s Participation in the Proceedings”, No. ICC-01/05-01/08-946-Corr, 14 October 2010, par. 5. This approach corresponds to the Prosecution’s constant approach of victims’ participation, reiterated in all pending situations and cases before the ICC to date.

²¹ See the Resolution adopted by the Assembly of States Parties at its ninth session on 21 December 2011, Resolution ICC-ASP/10/Res.5.

²² See *inter alia* the “Decision on common legal representation of victims for the purpose of trial” (Trial Chamber III), No. ICC-01/05-01/08-1005, 10 November 2010, par. 9; the “Decision on victims’ participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, paras. 116, 123-125; the “Order on the organization of common legal representation of victims” (Trial Chamber II), No. ICC-01/04-01/07-1328, 22 July 2010, par. 10.

²³ See the Registry’s Proposal, *supra* note 7, par. 8.

process, along with the Single Judge²⁴ who supports the Registry's proposal.²⁵ While being in full agreement with said goal, the Office submits that it ought not to be achieved through the Application Form for Group proposed by the Registry²⁶ (the "Application Form for Group") for the following reasons.

13. At the outset, the proposal of the Registry which corresponds to a "partly collective application form" not only appears questionable in itself but implies a "mixed approach" which will create confusion for the victims themselves. The distinction between such a mix approach and the possibility to continue to fill out individual application forms will undeniably create misunderstanding, confusion and will most probably baffle and uncertain their expectations. It is indeed the Registry contention that such a collective approach "*would not exempt the Court from considering applications for participation on an – at least partially – individual basis in the same time.*"²⁷

14. The Application Form for Group appears first to disregard the complexity and the magnitude of the crimes falling under the jurisdiction of the Court. Rather, the structure and spacing of this form seems to only fit when dealing with offenses which would constitute, at most, a crime, which was committed by singular individuals or groups at the same date and at the same place. In contrast, the crimes falling under the jurisdiction of the Court and currently adjudicated have involved multiple individuals, groups at various dates and different locations.

15. Furthermore, the proposed approach deprives victims' participation before the Court of its personalised and/or individualised character in favour of a clearly

²⁴ See the Decision of 6 February 2012, *supra* note 3, par. 6.

²⁵ The Office takes note that in the Decision of 6 February 2012, the Single Judge "[was] *simply exploring the possibility of adopting an alternative approach in respect of victims' applications, where no system has been adopted.*" 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.

²⁶ See the Registry's Proposal, *supra* note 7, Annex B, pp. 1 to 8.

²⁷ See the "Organization of the Participation of Victims", No. ICC-02/11-01/11-29-Red, 6 February 2012 (the "Registry's Report"), par. 25.

more generalised and/or collective one. On the one hand, this approach prevents the Court from duly fulfilling its obligation under article 68(1) of the Statute to take into account all the relevant factors specific to each person wishing to participate as a victim. On the other hand, this approach prevents a victim from providing the Court within a clear and comprehensively structured application form containing detailed information on all relevant factors specific to him/her and pertaining to his/her participation. Indeed, the Standard Individual Declaration prepared by the Registry²⁸ (the “Standard Individual Declaration”) does not allow a victim to comprehensively provide all said specific relevant factors, when compared to the current victim’s application form. In particular, a victim cannot provide the Court with his/her personal details and his/her current situation, with details on the specific circumstances in which crimes under jurisdiction of the Court were committed in his/her regard, with specific information on injury and/or harm suffered, with information on specific medical assistance and/or treatment provided, with specific concerns about his/her security and the security of his/her family and with indication on the stages of the proceedings in which he/she wishes to participate. Moreover, this approach prevents a victim from duly supporting and substantiating his/her application. In particular, the Standard Individual Declaration does not give a victim the possibility to provide specific details as regards temporal and territorial scope of the crimes allegedly committed. Furthermore, the Standard Individual Declaration does not seem to request from victims to submit documents attesting his/her current health conditions and/or his/her current situation, proofs of his/her kinship with family members in the event he/she acts on their behalf or alleges personal harm as a result of the commission of crimes in their regard as well as proof of identity of said family members.

²⁸ See the Registry’s Proposal, *supra* note 7, Annex B, p. 10.

16. Moreover, as accurately observed by the Defence,²⁹ when the views of victims are collected “publicly”, *i.e.* in the course of a meeting held with other victims, several risks are to be noted: some of the victims may not feel comfortable to share their full experience or to share what they would perceived as intimate information, with the other members of the “group.” As a result, the information contained in the collective part of the form might not be considered as reflecting accurately the views of every single applicant concerned or in some instances might even not be sufficient to establish the criteria under rule 85 of the Rules. In addition, some of them may be easily influenced or feel compelled to follow some views expressed by others members of the group or by the “leader” of the group even though it might not correspond to their own story or belief. Along the same line, the Office, together with the Defence,³⁰ is very concerned regarding the enlightened and true consent the applicants will be able to give to the information shared in such a collective form. Indeed, the Court, the parties and the legal representatives of victims need to be in a position to assess whether the consent given by each of the applicant is voluntary, indisputable and informed.

17. The Office considers that there exists an even more serious risk. Indeed, the Application Form for Group does not take into account the real impact of certain specific crimes on individual victims. According to the practice of the OPCV, victims of gender crimes, for instance, cannot be part of a collective action since, in most of instances, the crime they have been suffering from is hidden from the community, and very often even from their own family. Encouraging the use of a collective form might therefore discourage the participation of victims of these crimes or put some of them in a very delicate and potentially (re)-traumatizing situation, which would additionally clearly defeat the purpose of the application process and will violate the obligation of the Court pursuant to article 68(1) of the Statute.³¹

²⁹ See the “Observations de la Défense sur la proposition du Greffe d’un formulaire de participation partiellement collectif (“Proposal on a partly collective application form for victims’ participation” - ICC-02/11-01/11-45)”, *supra* note 14, paras. 20, 21 and 26.

³⁰ *Idem*, par. 30.

³¹ See *supra* par. 15.

18. The Office also notes that confidentiality for victims' applicants appears to be fundamental to make it possible for most of them to participate in the proceedings and is barely irreconcilable with such a collective approach. The Office can only insist on the fact that victims of crimes falling under the jurisdiction of the Court do not share in the least the same states of mind and physical state as a result of the related events. There are therefore enduring various states of fragility, sensitivity and trauma which may entail a different approach with regard to the confidentiality issue. Moreover, should the information included in the Application Form for Group not accurately mirror the diverse applicants' experiences, the establishment of the truth the Court is tasked with will virtually be an impossible task.

19. Along the same line, the Office is also not convinced by the notion of "collective harms." Undoubtedly the sum of individual harms would amount, at the scale of a society, to *collective* harms, but only when corresponding to the global impact of said harms on the society or community itself. To conclude otherwise would clearly made it impossible to draw a distinction between the natural persons referred to in rule 85(a) of the Rules and the other entities referred to in sub-rule (b) of the same provision. In addition, given that the distinction between the right of victims to participate and their right to reparations is not only statutorily guaranteed but also acknowledged by the various Chambers of the Court³², the Office is deeply concerned by the fact that the collective approach will not enable the applicants applying to participate collectively to choose to apply for reparations on an individual basis, and *vice-versa*. This would clearly defeat the purpose of the distinction made in rule 97(1) of the Rules which provides that "*the Court may award*

³² See *inter alia* 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-01/047-01/07-474, 13 May 2008, paras. 38-39: "*These interests [of victims] - namely the identification, prosecution and punishment of those who have victimized them by preventing their impunity - are at the root of the well established right to justice for victims of serious violations of human rights, which international human rights bodies have differentiated from the victims' right to reparations.*" See also the "Decision on the Modalities of Victim Participation at Trial" (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010, paras. 58-60.

reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.”

20. This new approach entails several consequences on the effectiveness of victims’ participation in the proceedings.

21. On the one hand, by preventing a victim from the possibility to provide the Court with specific details, the approach to victims’ application process as proposed by the Registry is very likely to deprive a victim of one of the constituting elements of his/her fundamental right to participate in the proceedings before the Court under article 68(3) of the Statute, namely the right to tell his/her personal story and to share his/her difficult experience with the judges as well as the well-established right to truth.³³

22. In this regard, the Office 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,”³⁴ 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.”³⁵ 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

³³ The Office’s experience shows that for most victims the possibility to tell their individual story and to share their difficult and traumatised experience with the judges, by way of participation as victim or as person enjoying dual status of victim-witness, constitutes the main reason for which victims decide to resort to the Court.

³⁴ See the “Decision on victims participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, par. 98.

³⁵ 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.

the competent body."³⁶ According to the Single Judge, the "*victims' core interest in the 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,*"³⁷ finding that is fully supported by international human rights jurisprudence and scholar studies.³⁸ 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."³⁹

23. On the other hand, and despite the Prosecution's assertion according to which "*the information provided is sufficiently detailed for the parties to submit their observations where necessary, pursuant to Rule 89(2), regarding the appropriateness of the applicant's participation,*"⁴⁰ the information provided will clearly and undoubtedly not be

³⁶ 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 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.

³⁷ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 36, par. 32.

³⁸ 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 Jurídico de la Justicia de Transición*, Tenus, Bogota, 2008, pp. 42 to 44.

³⁹ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 36, par. 34.

⁴⁰ See the "Prosecution's observations in relation to victims' application process", *supra* note 14, par. 5.

sufficient for them to efficiently participate in the proceedings. Indeed pursuant to rule 90(4) of the Rules, in case of selection of a common legal representative for a number of victims, the distinct interests of each victim are to be duly represented. Furthermore, in accordance with the Code of Professional Conduct for Counsel before the Court, a legal representative of victims *“shall take into account the client’s personal circumstances and specific needs, in particular where counsel is representing victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled,”*⁴¹ *“[shall] act in good faith when dealing with the client [...] [and] at all times with fairness, integrity and candour towards the client,”*⁴² and *“shall put the client’s interests before counsel’s own interest or those of any other person, organizations or State, having due regard to the provisions of the Statute, the Rules of Procedure and Evidence, and this Code.”*⁴³

24. In this regard, the Office submits that the approach to victims’ application process as proposed by the Registry, if implemented, would 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, as well as to duly exercise his/her mandate of counsel in good faith and in the best interests of his/her client. Indeed, neither the Application Form for Group nor the Standard Individual Declaration will provide a legal representative with sufficient and comprehensive information to have a clear understanding of specific needs and interests of each member of a group, of the precise nature of injury or harm suffered by each of them and of particular circumstances under which crimes under the jurisdiction of the Court were committed in respect of each of his/her clients. This issue would be all the more accurate when the legal representative represents dual status victims, *i.e.* also enjoying the status of witnesses. In those circumstances and in order to be able to duly fulfill his/her mandate, a legal representative will have to carry out additional investigations in order to gather the necessary information from his/her clients. This will certainly entail supplementary human and budgetary resources but would,

⁴¹ See article 9(2) of the Code of Professional Conduct for Counsel.

⁴² *Idem*, article 14(1).

⁴³ *Ibid.*, article 16(1).

however, not be an appropriate option in light of the current review of the Court's Legal Aid system implying considerable reducing of legal costs. Moreover, this is very likely to produce numerous stays and/or delays in the proceedings, especially in instances where the imperatives of the proceedings demand for a rapid gathering of information from victims.

B. Practical implications of the Registry's Proposal as regards the expeditiousness of the proceedings

25. The Office understands that the goal of the approach to victims' application process as proposed by the Registry is *inter alia* the expeditiousness of 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.⁴⁴ While agreeing on that principle, the Office contends that this goal might not be achieved through Application Form for Group as proposed by the Registry for the following reasons.

26. First, within its Proposal, the Registry itself identifies numerous major challenges it would face while implementing its approach to victims' application process.⁴⁵ The Office submits in this regard that those challenges are very likely to jeopardise the targeted goal needless to remind that the Confirmation of the Charges Hearing is currently scheduled to be held from 18 June 2012.⁴⁶

27. Second, the Registry appears to be inconsistent in substantiating its approach. In particular, while it submits that it "*has sought to ensure that each element set out in regulation 86(2) is addressed, at least to the extent it is addressed in the approved standard application form for individuals currently in use,*"⁴⁷ neither the Application Form for Group nor the Standard Individual Declaration gives to a victim the possibility to

⁴⁴ See the Registry's Proposal, *supra* note 7, par. 8. See also the Decision of 6 February 2012, *supra* note 3, paras. 5 and 6.

⁴⁵ See the Registry's Proposal, *supra* note 7, Annex A, paras. 6, 19, 21 and 25.

⁴⁶ See the Oral Decision (Pre-Trial Chamber III), No. ICC-02/11-01/11-T-1-ENG ET WT, 5 December 2011, p. 8, confirmed by the set of time-limits established by the Chamber in preparation of said hearing in the "Decision establishing a disclosure system and a calendar for disclosure" (Pre-Trial Chamber III, Single Judge), No. ICC-02/11-01/11-30, 24 January 2012.

⁴⁷ See the Registry's Proposal, *supra* note 7, Annex A, par. 13.

provide the Court with information on some crucial aspects addressed above.⁴⁸ By omitting to request the said information at the very beginning of the application process, the Registry artificially opens door to future delays in dealing with victims' applications as far as supplementary information from victims would be needed at a later stage.⁴⁹ Should these supplementary information be needed, a real question exists as to whom will be able to provide them to the Court, be it the contact person or the individual concerned.

28. More importantly, while submitting that “[a]dditional efficiencies for the Registry may arise from the direct involvement of its staff in completing the form in the field, including the ability to ensure the completeness of applications from the start, obviating the need to go back for supplementary information”⁵⁰ and that “[t]he presence of Registry staff throughout the process is viewed as essential for several reasons,”⁵¹ the Registry stresses that “in practice it will not have sufficient time and resources to assist all groups that wish to make an application using the collective form.”⁵² Moreover, the Registry seems to be looking for “potential intermediaries who might be in position to provide trustworthy assistance to the Registry in the conduct of its mandate, with a view to ensuring predictability, effectiveness and expeditiousness of the victims' participation process.”⁵³ In this regard, the Office submits that the Application Form for Groups as proposed by the Registry clearly indicates that the “Form is to be completed with the assistance of VPRS staff only”⁵⁴ and does not seem to imply that intermediaries could be involved in the completing the said form.

29. But the approach to victims' application process as proposed by the Registry is also not likely to expedite the management of victims' applications for the purpose of providing observations pursuant to rule 89 of the Rules. Indeed, the parties will have

⁴⁸ See *supra* par. 15.

⁴⁹ See *supra* par. 24.

⁵⁰ *Idem*, par. 17.

⁵¹ *Ibid.*, par. 29.

⁵² *Ibid.*, par. 19.

⁵³ See the “Report on mapping of victims”, No. ICC-02/11-01/11-55, 12 March 2012, par. 1.

⁵⁴ See the Registry's Proposal, *supra* note 7, Annex B, p. 1.

to comment on both the Application Form for Group and the Standard Individual Declaration. Despite the fact that the information provided in said forms might be sufficient as far as the parties are concerned for the purpose of submitting rule 89 observations,⁵⁵ the Office notes that it might not be sufficient for any other steps entailed by the proceedings, notwithstanding the representation of the victims themselves.⁵⁶ 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 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.

30. Indeed, pursuant to rule 89(3) of the Rules, “[a]n application referred to in this rule may also be made by a person acting with the consent of the victim.” According to a widely accepted understanding, the term “consent” means “*agreement, approval or permission as to some act or purpose given voluntarily by a competent person.*”⁵⁷ However, the Standard Individual Declaration does not provide the capacity to convey a communication that a given victim admits of no doubt or misunderstanding, and that as a result his/her consent is voluntary and indisputable. In contrast, the Chambers of the Court have always required that the consent given to a person by a victim under rule 89(3) of the Rules must be “*express.*”⁵⁸ It is worth noting that other international bodies have established sterner principles demanding that those purportedly representing other victims are also required showing that they have *real* and *specific authorization* from the victims to act on their behalf.⁵⁹ In this regard, it is the opinion of the Office that the Application Form for Group opens a door by which

⁵⁵ See *supra*, par. 23.

⁵⁶ See *supra*, par. 24.

⁵⁷ See *Black's Law Dictionary*, Abridged Seventh Version, St Paul, Minnesota, West Group, 2000, p. 244.

⁵⁸ See for example, 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.

⁵⁹ See Human Rights Committee, *Y v. Australia*, Communication No. 772/1997, U.N. Doc. CCPR/C/69/D/772/1997 (2000), par. 6.3 See Human Rights Committee, *E. H. P. v. Canada*, Communication No. 67/1980, U.N. Doc. CCPR/C/OP/1 (1984), par. 1.

anyone could file application in the name of victims since he or she is under no legal obligation to demonstrate the link between them. However, the international jurisprudence clearly establishes that those purportedly acting on behalf of other victims must show *“the precise extent to which the author and the other alleged victims can actually be said to be personally affected”* by the judicial litigation⁶⁰ and thus entities, such as political parties⁶¹, non-governmental organizations⁶², professional societies⁶³, native communities⁶⁴ or corporations⁶⁵ are not allowed to act in the name of victims.

31. In addition, the approach to victims’ application process as proposed by the Registry has been strongly criticized by the Defence and is deemed to be prejudicial to the rights of the suspect/accused.⁶⁶ Furthermore, the Prosecution submitted in particular that under the Registry’s Proposal *“information provided by applicants is certainly not sufficient when a victim is to be called to testify. Additional personal details and information must be provided in order for the parties to properly question a victim and in order to assist the Chamber in its truth seeking mission.”*⁶⁷

32. The Office also wishes to list some practical issues arising from the form itself as proposed by the Registry: there is no information allowing to draw relationships or family links between the applicants since the latter are not requested to indicate the names of their parents and since said information is not systematically mentioned on the identity document provided by the applicants; there is no information

⁶⁰ See Human Rights Committee, *Erkki Hartikainen v. Finland*, Communication No. 40/1978, U.N. Doc. CCPR/C/OP/1 (1984), par. 10.3 and *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Communication No. 35/1978, U.N. Doc. CCPR/C/OP/1 (1984), par. 9.2.

⁶¹ See Human Rights Committee, *J. R. T. and the W. G. Party v. Canada*, Communication No. 104/1981, U.N. Doc. CCPR/C/OP/2 (1984), paras. 1 and 2.1.

⁶² See Human Rights Committee, *Disabled and handicapped persons in Italy v. Italy*, Communication No. 163/1984, U.N. Doc. CCPR/C/OP/2 (1990), par. 6.1.

⁶³ See Human Rights Committee, *Jouni Lämsman et al. v. Finland*, Communication No. 1023/2001, U.N. Doc. CCPR/C/83/D/1023/2001 (2005), par. 6.1.

⁶⁴ See Human Rights Committee, *R. L. et al. v. Canada*, Communication No. 358/1989, U.N. Doc. CCPR/C/43/D/358/1989 (1991), paras. 1 and 6.2.

⁶⁵ See Human Rights Committee, *A newspaper publishing company v. Trinidad and Tobago*, Communication No. 360/1989, U.N. Doc. CCPR/C/36/D/360/1989 (1989), paras. 1 and 3.2.

⁶⁶ See the “Observations de la Défense sur la proposition du Greffe d’un formulaire de participation partiellement collectif (“Proposal on a partly collective application form for victims’ participation” - ICC-02/11-01/11-45)”, *supra* note 14, paras. 11 to 43.

⁶⁷ See the “Prosecution’s observations in relation to victims’ application process”, *supra* note 14, par. 5.

regarding the language spoken by the applicants individually nor on whether they are literate or illiterate; question 1 is likely not to assist the Court in identifying potential duplicates since first no further information is requested after the “yes” or “no” answer – and in this sense it appears to be redundant, partly, with part J of the form; the “creation” of a group name and the determination of its location (only one foreseen) seems to be rather artificial and not to correspond to the reality of the members of the group and second even if the victim is aware of such information, the practice has shown that it is unlikely that he/she answer said question; part B regarding the contact person creates confusion: is the contact person someone acting on behalf of all the applicants and incidentally one can legitimately wonders what will happen if the latter do not agree on the mandate of the contact person (question 14). The Office recalls that its quite extensive experience of representation of victims in different situations and cases has shown that these notions are very difficult to understand for the applicants and for the intermediaries themselves and are very often mix up with the issue of the capacity to act on the one’s own behalf; part D seems to conflict with the right to confidentiality the applicants are entitled to and with the risk of re-traumatisation; question 30 and the explanation given seems to be misleading for the applicants in particular in light of the distinction between disclosure to the parties and disclosure to the public; the requirement to complete sections E and F and to additionally inform about the wish regarding participation and reparations in the individual declarations also appears as confusing and potentially source of incompatible answers, all the more that the Standard Individual Declaration does not offer the possibility to distinguish between participation and reparation requests.

33. In addition, the Office shares the concerns put forward by the Registry⁶⁸ as well as by the Defence,⁶⁹ regarding duplicates. In the absence of the new Registry’s

⁶⁸ See the Registry’s Proposal, *supra* note 7, Annex A, paras. 19, 21, 22, 31 and 40.

⁶⁹ See the “Observations de la Défense sur la proposition du Greffe d’un formulaire de participation partiellement collectif (“Proposal on a partly collective application form for victims’ participation” - ICC-02/11-01/11-45)”, *supra* note 14, paras. 35 and 36.

database which – as indicated by the latter – will only be operational in 2013, there is a tangible risk that duplicates are not identified in a relatively short period of time. The assistance of the Registry as offered might be useful in this regard, but the Office shares the concern of the Defence⁷⁰ regarding the limits and potential contradictions between the mandate of the Registry and the proposed assistance.

34. Consequently, the Office submits that given the major challenges that the Registry would face while implementing the approach to victims' application process, as well as the detrimental impacts on victims' participation and on the expeditiousness of the proceedings that the implementation of the collective approach would entail, the Registry's Proposal should not be put in place as far as it is very likely to jeopardize the goals aimed to enhance the efficiency and the substantive value of victims' participation and to expedite the victims' application process. But the Office contends that the system of common legal representation thoroughly established by the Registry and implemented by the Chambers of the Court in all the situations and cases pending before the Court to date constitute a valid and in place option in itself, answering to the concerns and values hidden behind the concept of collective participation of victims as currently proposed. Indeed, when said system was first put in place the intent was clearly to ensure the effectiveness of the proceedings.⁷¹ Moreover, it was also with the view to give effect to rule 90(2) to (4) of the Rules, stating that “[w]here there are number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. [...] [They] shall take all reasonable steps to ensure that in [said] selection, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest I

⁷⁰ *Idem*, par. 40.

⁷¹ See *inter alia* the “Decision on victims' participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008; the “Order on the organization of common legal representation of victims” (Trial Chamber II), No. ICC-01/04-01/07-1328, 22 July 2010; the “Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims” (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-322, 16 December 2008, par 7; and the “Decision on common legal representation of victims for the purpose of trial” (Trial Chamber III), No. ICC-01/05-01/08-1005, 10 November 2010.

avoided." In line with said rule, the Registry already began to develop reflexions in relation to the criteria that could be applied in "grouping" some victims. The Office is consequently concerned that adding to said system a "partly collective" approach will unnecessarily create additional complex layers to victims' participation and representation. In other words, it is the Office view that the goals targeted by the collective approach as presented are already taken into account by the system of common legal representation of victims.⁷² Consequently, the Office would rather favour to perfect the system of common legal representation with a predictable positive immediate effect on all the situations and cases before the Court.

FOR THE ABOVE-MENTIONED REASONS, the Principal Counsel of the Office of Public Counsel for Victims respectfully requests the Pre-Trial Chamber to take these observations under consideration when ruling on the Registry's Proposal on a partly collective application form for victims' participation.



Paolina Massidda
Principal Counsel

Dated this 19th day of March 2012

At The Hague, The Netherlands

⁷² See the "Order on the organization of common legal representation of victims" (Trial Chamber II), No. ICC-01/04-01/07-1328, 22 July 2010, par. 17.