

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06

Date: 6 May 2013

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Confidential

Registry Observations in compliance with the Decision ICC-01/04-02/06-54-Conf

Source: Registry

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor

Counsel for the Defence
Mr Marc Desalliers

Legal Representatives of Victims

Legal Representatives of 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
Mr Herman von Hebel

Counsel Support Section

Deputy Registrar
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**
Ms Fiona McKay

Other

The Registrar of the International Criminal Court (the “Court”);

NOTING the Presidency’s Decision, notified on 15 March 2012, assigning the Situation in the Democratic Republic of the Congo to Pre-Trial Chamber II (the “Chamber”);¹

NOTING the Chamber’s Decision, notified on 21 March 2013, designating a Single Judge for carrying out the functions of the Chamber with respect to the case of *The Prosecutor v. Bosco Ntaganda*;²

NOTING the Single Judge’s Decision, notified on 26 April 2013 (the “Decision”),³ requesting the Victims Participation and Reparations Section of the Registry (the “VPRS”) to submit observations on the partly collective application process adopted in the case of the *Prosecutor v. Laurent Gbagbo*;

NOTING Regulations 23 *bis* (2) and 24 *bis* (2) of the Regulations of the Court (the “Regulations”);

CONSIDERING that since the Decision was filed with the status “Confidential”, the Registry submits the present filing under the same status in compliance with Regulation 23 *bis* (2);

¹ICC-01/04-02/06-32.

²ICC-01/04-02/06-40.

³ICC-01/04-02/06-54-Conf, paragraph 5 and page 4.

TRANSMITS to the Single Judge the following observations on the partly collective application approach implemented in the Gbagbo Case;

INFORMS the Single Judge that the Registry remains available for any additional information.

INFORMS the Single Judge that given that the observations presented below relate to a case that is before another Chamber, the Registry is not opposed to the transmission to Pre-Trial Chamber I of these observations into the record of the case *The Prosecutor v. Laurent Gbagbo*.

1. On 26 April 2013, the Single Judge issued a "Decision Requesting the Victims Participation and Reparations Section to Submit Observations",⁴ in which she ordered the Registry to file, by 6 May, observations "on the approach adopted in the Gbagbo case".
2. In the case *The Prosecutor v. Laurent Gbagbo* ("the Gbagbo case"), the Single Judge of Pre-Trial Chamber I had issued directions to the Registry on the victims' application process to be used for the purposes of making determinations on victim participation in the confirmation of charges hearing in the case. In a "Decision on issues related to the victims' application process", the Single Judge ordered the VPRS to start a mapping process in Cote d'Ivoire for the purpose of identifying the main communities or groups of victims and encouraging potential individual applicants to join with others and consent to a single application being submitted on their behalf, and 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.⁵ Following proposals made by the Registry on a partly collective approach,

⁴ ICC-01/04-02/06-54-Conf.

⁵ ICC-02/11-01/11-33.

the submission of observations by the parties and the Office of Public Counsel for Victims and the Redress Trust as amicus curiae⁶, the Single Judge issued the "Second decision on issues related to the victims' application process" dated 5 April 2012.⁷ In this decision, the Single Judge approved a collective application form to be distributed to applicants in accordance with Regulation 86(1) of the Regulations of the Court.

Main elements of the application process used in the Gbagbo case

3. The partly collective application process adopted in the Gbagbo case can be summarised as follows:
 - The process comprised two elements, both of which formed an essential part of the application: a) a group form, in which a number of individuals described the events falling within the scope of the case they had commonly experienced, and b) an individual declaration filled in and signed by each member of the group, which connected the individual to the common events described and provided individual information on the personal harm suffered and personal details. Applicants were required to support their applications by providing proof of identity and, where relevant, proof of kinship, in accordance with the usual practice. In proposing such an approach, the Registry had been mindful of the need to receive all the information required in Regulation 86(2) of the Regulations of the Court, which it considered could be satisfied by the two elements (group form and individual declarations) together. The Single Judge confirmed that in

⁶ Registry's « Proposal on a partly collective application form for victims' participation », 29 February 2012, ICC-02/11-01/11-45 and annexes; "Prosecution's observations in relation to victims' applications process", 9 March 2012, ICC-02/11-01/11-54; "Observations de la Défense sur la proposition du Greffe d'un formulaire de participation partiellement collectif", 9 March 2012, ICC-02/11-01/11-52 ; "Redress Trust Observations to Pre-Trial Chamber I of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence", 16 March 2012, ICC-02/11-01/11-62; OPCV's "Observations on the practical implications of the Registry's proposal on a partly collective application form for victims' participation", 19 March 2012, ICC-02/11-01/11-66; "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", 20 March 2012, ICC-02/11-01/11-67.

⁷ ICC-02/11-01/11-86.

her view, the information collected in the group form in conjunction with the individual declaration did fulfil the requirements of Regulation 86.⁸

- As recommended by the Registry, the Judge considered that the direct involvement of the VPRS was essential for the efficient implementation of the collective application process, and decided that only Registry staff could assist applicants to complete the collective form.⁹ This was a departure from the Registry's usual practice, which was to make available standard application forms to local intermediaries and to provide information and training to them to enable them to assist victims. The Registry had recommended a greater involvement for its staff based on the fact that the proposed approach was as yet untested, to maximise efficiency, ensure that the collective account of the events reflected in an inclusive manner the perspective of each member of the group, and introduce a measure of quality control. The Single Judge found that such a role was compatible with the Registry's duty under Rule 16(1)(c) of the Rules and Regulation 86(9) of the Regulations of the Court to assist victims in relation to participation in the proceedings, and added that the involvement of Registry staff would be important particularly in cases where sensitive categories of victims are concerned, such as victims of sexual crimes.
 - The partly collective approach resulted in the receipt of less information, overall, than the current standard application form. However the Single Judge considered that the information received would be sufficient to determine whether the applicant qualifies as a victim under Rule 85 of the Rules for the purpose of participation in the proceedings.¹⁰
4. The Single Judge ordered the Registry to encourage the use of the collective form, but specified that the collective form was developed to enhance the management of the application process solely for the purposes of the case at hand, and did not replace the standard application forms approved by the Presidency for the entire Court pursuant to Regulations 86(1) and 23(2) of the Regulations of the Court. As a result,

⁸ ICC-02/11-01/11-86, para. 21.

⁹ ICC-02/11-01/11-86, paras. 24-28.

¹⁰ ICC-02/11-01/11-86, para. 20.

applications could, and were, received from individuals or organisations using the standard application forms as well as the collective form.¹¹

Registry observations on the process adopted in Gbagbo

5. The Registry would firstly like to make two preliminary comments. First, that these observations are limited to the victim application process and to the experience of the Registry in implementing it, and do not seek to present in any way how the system was experienced by the Chamber, the parties or participants. Second, in proposing and implementing the approach adopted in Gbagbo the Registry expressly intended to contribute to a review of the victim application system currently under way that is aimed at identifying ways that could be found, whether within the existing legal framework or involving amendments to that framework, to improve efficiency and sustainability and effectiveness,¹² especially in cases involving potentially large numbers of victims, and through the Gbagbo experience, to test an approach with a view to its possible refinement and adoption as a standard model for other situations and cases. The Gbagbo experience provided an invaluable opportunity to test a more collective management of an application process for victims to see whether such an approach could be more practical and efficient, and already the lessons learnt in Gbagbo have been used in designing a victim registration process for victims in Kenya. Consequently, the following observations include some reflections on the suitability of the approach adopted in Gbagbo for future proceedings.
6. As noted above, the approach adopted in Gbagbo was in reality not a fully collective application system, and the Registry has been careful to describe it as a *partly* collective system. No notion of collective harm has been introduced, and indeed, although the alleged events are presented through a common narrative, the Single Judge in Gbagbo underlined that this does not mean the harm loses its individual

¹¹ A total of 57 individual applications using the standard application form were filed, in addition to 6 collective applications comprising 101 individual victims.

¹² See Assembly of States Parties, Ninth session, 21 December 2011, Resolution ICC-ASP/10/Res.5, underlining the "need to consider reviewing the victim participation system with a view to ensuring its sustainability, effectiveness and efficiency" and requesting the Court to conduct such a review "in close consultation with the Bureau and relevant stakeholders and to report thereon to the Assembly at its eleventh session".

character.¹³ Indeed, each applicant is asked to describe, in the individual declaration, the individual harm suffered. Victims are still admitted to participate as individuals, and there is no suggestion of collective participation – at least, only insofar as victims participate through a common legal representative, as occurs in most cases before the Court.

7. In its proposals to the Chamber in the Gbagbo case, the Registry had stated the view that dealing with victims in a more a collective way could well be viewed positively by victims as well as proving more efficient.¹⁴ In Uganda, Central African Republic and Kenya as well as Cote d'Ivoire, the VPRS has frequently met with victims in groups, such as to hold consultations on common legal representation, to inform victims about the status of their application, and to coordinate the completion of incomplete applications. This experience has highlighted the positive benefits for many victims of holding such group meetings with Court staff from the psychological point of view, wherever this is feasible, as this can make the application process and other interaction with the Court more satisfying for the victims. Through its experience the VPRS has also learnt that grouping victims already at the application stage not only facilitates the application process itself, but can also facilitate the actual participation of victims subsequently, for instance making it easier for victims' legal representatives to manage their own interaction with their clients if they are already organised in groups according to location or crime.
8. That said, one lesson learnt from the experience in Cote d'Ivoire and elsewhere is that it will not always be feasible or advisable to bring together groups of victims physically for the purposes of an application process. In some cases the security context may not be conducive for such meetings, in others not all victims feel comfortable speaking in front of groups, whether due to the nature of the harm suffered (such as victims of sexual violence) or generally due to tensions within a community, fear of stigmatisation, or other reason. In Gbagbo, where some of the groups were not pre-existing or self-identified, the lack of trust was manifested in a

¹³ ICC-02/11-01/11-86, para. 30.

¹⁴ ICC-02/11-01/11-29-Red, paras. 22-23.

reluctance to appoint a single contact person for the group even when it was explained that the only role of that person was to act as a point of contact with the Court and had no representational element. The Victims and Witnesses Unit ("VWU"), which provided the VPRS with its evaluation of the Gbagbo experience after its psychologists attended several of the group meetings held with victims, concluded that care is needed in defining which groups could be the beneficiaries of this type of approach, as a group artificially brought together for the purpose of completing a form could lead to a negative experience for the victims.

9. In order to take account of these realities, the Registry concludes that any collective system for dealing with applications needs to be sufficiently flexible to be capable of being applied whether or not it is feasible or appropriate to bring victims physically together in groups. For this reason, the VPRS would not recommend repeating the aspect of the Gbagbo approach that involved a division of the *formal* application into two elements, the group form and individual declarations. A more sound and flexible approach learnt as a result of the Gbagbo experience and the subsequent evaluation by the Registry is a collective process that involves the collection of core information from each victim, while other information pertaining to a group can be collected and stored separately by the VPRS (such as information concerning how and where to meet members of the group, vulnerable members, security concerns etc). This information can be linked to a group in VPRS's information systems. In this scenario, each victim would only complete a short form of one or two pages with information that is essential for assessing the application as well as minimum contact details. In other words, a form similar to the Individual Declaration used in Gbagbo could be used, but with the addition of a description of the events (which in Gbagbo was collected through a group form), so that form could then stand alone as the application, as it would include all the information required under the legal framework. When appropriate, victims could still gather together in order to complete applications at the same time; if not, the applications could be submitted separately, but either way, the VPRS could group them together and process them collectively.

10. One important reason for this recommendation is that it allows for more flexibility in processing: with the adoption of such an approach a victim is not permanently linked to one group but could subsequently be considered separately (whether as part of another group or individually) at another stage of proceedings or in another case. One disadvantage identified through the Gbagbo process is that if individual victims linked to a group were to later need to be considered separately from the group, it would be necessary to unravel the groups and recharacterise them in the database, which could be cumbersome and time consuming.

The role of Registry staff and intermediaries

11. As anticipated, there proved to be important benefits to having Registry staff (not only staff of VPRS but also of the VWU and the outreach unit of the Public Information and Documentation Section ("PIDS")) directly involved at the application stage. As well as allowing the Registry to guide the process and learn important lessons, it also enabled the Registry to directly provide explanations to victims and ensure they received accurate information. It also provided an opportunity to consult victims regarding common legal representation. Victims were given the opportunity to express themselves to Court staff, and not only to intermediaries.
12. One of the lessons learnt in Gbagbo was that even where VPRS staff are directly involved in the application process, they could make more use of intermediaries to help fill in the applications.¹⁵
13. Such a direct role for Registry staff may however not be feasible in every case due to lack of ICC field presence everywhere, shortage of resources, security concerns (it may not be safe for ICC staff and/or victims), tensions in the communities or other reasons. Intermediaries will in all cases need to be relied upon in any event, for the purposes of identifying and reaching victims. Experience in all situations and cases has shown that it is vital to assess, select, train and monitor intermediaries properly.

¹⁵ Some victims complained that the overall group application process was time consuming, and VPRS concluded that if a similar exercise were to be undertaken, greater use could be made of intermediaries as part of the process under the overall direction of Registry staff.

The Court-wide guidelines on intermediaries provide a valuable framework in that regard.¹⁶ Even if Registry staff are not directly assisting victims to fill in applications, therefore, a lesson learnt by VPRS in Cote d'Ivoire and elsewhere is the importance of ensuring a continuous presence, so far as possible, of Registry staff on hand to provide this support. This can also help to guard against abuse and the need for the Court to return later to verify applications.

14. The Registry is well aware of the importance of effective outreach, and observes that the VPRS works closely with the outreach unit of the PIDS to prepare and convey key messages containing relevant information whenever there is an opportunity for victims to apply to participate in proceedings, particularly at a new stage of a case and in the process leading up to confirmation of charges proceedings or trial. If advance sensitisation of the relevant communities is not done, there is a risk of receiving many applications from victims who will be rejected for being outside the scope of the case or incomplete, as well as a risk that lack of accurate information will lead to false expectations and exacerbate problems in already very sensitive contexts. The Registry observes that it is not only important to target such information campaigns at victims who may be linked to the relevant case, but also at wider affected communities, so as to foster an understanding of why only some of those who may be perceived as victims at the local level are given the opportunity to participate in ICC proceedings.
15. Another important lesson learnt in Gbagbo was that the presence of a psychologist and/or VWU support person was extremely important in order to make sure that the group process does not cause retraumatisation or other harm to the applicants, and is positive for victims. VPRS staff and intermediaries also benefit from such support in case of complications.

Observations on the impact of the Gbagbo process on efficiency

16. For the VPRS, collecting less information in a shorter application form had been expected to lead to less paperwork and therefore reduce the staff time needed to scan,


¹⁶ Guidelines governing the Relations between the Court and Intermediaries, Draft document of April 2012.

enter data into the database and analyse, and less information to redact in the versions prepared for transmission to the parties. In the Gbagbo case an unusual number of applicants provided numerous supplementary documents which somewhat reduced this effect, and significant challenges were faced in putting the documents in order. Overall, however, the effect of the approach used was indeed to reduce the amount of information needing to be treated and correspondingly, the amount of staff time required to deal with it. On the other hand, the direct involvement of Registry staff in the application process required more intensive engagement in the field. Many of the practical challenges faced by VPRS in Gbagbo could be met by improvements in internal organisation of the work methods based on lessons learnt, and by better advance knowledge and preparation regarding the context in the field.

17. The experience also showed up some of the complexities involved in dealing with groups of individuals as entities, which can in fact be more complicated than dealing with individuals in some respects. This led to a review of the way in which grouping should be done and adjustment to what would be recommended in future cases in that respect accordingly, as outlined above.
18. As already noted, the information collected in the individual and group parts of the application form together was sufficient to enable the VPRS to prepare the reports on applications envisaged in Regulation 86(5) of the Regulations of the Court for the Chamber. If the individual declaration element alone were to be adopted, more space would need to be added in order to collect sufficient information regarding the events to be able to assess the application.

Conclusion

19. Implementing the partly collective approach in the Gbagbo case presented an extremely valuable opportunity for the Registry to test an approach that could be more collective, efficient and simplified than previously, while still satisfying the legal requirements in the relevant applicable texts. Important lessons were learnt for the future development of a standardised approach.



Marc Dubuisson, Director DCS
per delegation of Herman von Hebel, Registrar

Dated this 6 May 2013

At The Hague, The Netherlands