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PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF
THE *PROSECUTOR V. PATRICE-EDOUARD NGAÏSSONA***

Public

With one Confidential *EX PARTE* Annex, only available to the Registry

**Registry Observations on Aspects Related to the Admission of Victims for
Participation in the Proceedings**

Source: Registry

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

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I. Introduction

1. In view of the confirmation of charges hearing presently scheduled to start on 18 June 2019,¹ the Registry hereby submits, pursuant to regulation 24*bis* of the Regulations of the Court ("RoC"), observations and recommendations on aspects related to the admission process for victims seeking to participate in the proceedings ("Admission Process") in the case of *The Prosecutor v. Patrice-Edouard Ngaïssona* ("Case").
2. The Registry further requests Pre-Trial Chamber II's ("Chamber") approval of the annexed proposed victim application form for participation and, as the case may be, reparations in the Case.²

II. Classification

3. Pursuant to regulation 23*bis*(1) of the RoC, the attached annex is classified confidential *ex parte*, only available to the Registry, in accordance with standard Registry practice as it contains a draft victim application form not yet approved for use by the Chamber.

III. Applicable Law

4. The Registry submits the present observations in accordance with articles 68(1), (3) and 75 of the Rome Statute ("Statute"), rules 16(1), 85, 89, 90 and 94 of the Rules of Procedure and Evidence ("Rules"), regulations 23(2)³, 23*bis*(1), 24*bis*, 86 and 88 of the RoC, and regulations 98, 106 to 111 of the Regulations of the Registry ("RoR").

¹ Transcript of 25 January 2019, ICC-01/14-02/18-T-1-ENG (ET WT), p. 9, lines 5-6.

² See attached annex.

³ The Registry notes that it has already carried out relevant consultations with the Presidency regarding the adjustments proposed to the Chamber in the presently annexed application form versus the 2017 standard form.

IV. Submissions

5. In the present submissions the Registry sets out its recommendations for, *inter alia*, the victim application process in the Case. The submissions will include specific recommendations on the following:

- The Admission Process;
- The Application Form; and
- Legal Representation.

A. The Admission Process

6. To prepare and organize the victim application process in light of the contextual realities present in the Case, the Victims Participation and Reparations Section ("VPRS") recommends the victim admission processes adopted in both the *Prosecutor v. Bosco Ntaganda* ("Ntaganda case") trial⁴ and the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* case ("Al Hassan case").⁵ The Admission Process (described in detail below) aims at enhancing procedural efficiencies and maximizing victims' access to the Court while at the same time respecting the accused's fair trial rights.

The Ntaganda and Al Hassan Approach

7. The following Admission Process recommendation is informed mostly by the approaches adopted in the aforementioned cases and mindful of relevant

⁴ Trial Chamber VI, "Decision on victims' participation in trial proceedings", 6 February 2015, ICC-01/04-02/06-449.

⁵ Pre-Trial Chamber I, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", 24 May 2018, ICC-01/12-01/18-37-tENG.

provisions of the Chambers Practice Manual.⁶ This approach includes the following features:

- The VPRS receives victim applications and assesses these applications against rule 85 of the Rules and any other criteria that the Chamber may find appropriate. Further, it categorizes the applicants into three groups:
 - Group A:** Applicants who clearly qualify as victims;
 - Group B:** Applicants who clearly do not qualify as victims;
 - Group C:** Applicants for whom the VPRS could not make a clear determination for any reason.⁷
- The VPRS transmits all complete applications to the Chamber, in accordance with the abovementioned grouping, on a rolling basis.
- The applications that, in the VPRS's view, are incomplete and/or fall clearly outside the scope of the concerned case are not transmitted to the Chamber.⁸
- The VPRS prepares reports that accompany each transmission and list the victim applications falling into the aforementioned three groups. These reports are notified to the Chamber, the parties and participants. The reports need not include application-by-application reasoning or analysis and need not justify the respective classifications.
- For Groups A and B, barring a clear, material error in the VPRS's assessment, the Chamber would ratify the assessments regarding these applicants through a decision.
- As regards the transmission of applications to the parties pursuant to rule 89(1) of the Rules, only Group C applications presenting unclear or borderline issues on which the VPRS is unable to make a clear

⁶ See https://www.icc-cpi.int/about/judicial-divisions/Pages/chambers_practice_manual.aspx, section C. I. (i).

⁷ Chambers Practice Manual, section C. I. (ii).

⁸ Chambers Practice Manual, section C. I. (ii), (iii), (iv).

determination would be transmitted to the parties (with the necessary redactions) for observations.⁹ The VPRS would also provide a report to the Chamber and parties that clearly highlights the issue(s) arising from the application forms that the VPRS was unable to make a clear determination on. Once the parties' observations have been received on the unclear applications, the Chamber would assess the Group C applications individually and determine whether the victims concerned shall be admitted to participate or not.¹⁰

8. The benefit of the abovementioned approach, as it can be observed in the proceedings in the *Ntaganda* and *Al Hassan* cases, is that the parties as well as the Chamber can concentrate on pre-assessed unclear or borderline issues arising from victim applications in a bundled fashion. In addition, the VPRS's processing and redaction obligations would extend to only a fraction of the relevant forms (*ie* only the Group C applications submitted to the parties), leading to considerable resource savings. This, in turn, would enable the VPRS to process the highest number of victim applications with a view to their timely participation in the proceedings leading up to the confirmation of charges hearing in the present proceedings. This is particularly relevant in the present circumstances, due to (1) security concerns faced in the Case¹¹; (2) the resulting likelihood for the administration of redactions; and (3) the potentially high number of victim applicants due to the broad scope of the Case.

⁹ The *Ntaganda/Al Hassan* practice of transmitting only group C applications to the parties would be in slight deviation from the Chambers Practice Manual, section C. I. (v). It is noted however that all forms would remain on file with the Registry and could be transmitted to the parties at any stage as necessary (with redactions as appropriate).

¹⁰ This suggested approach follows Trial Chamber VI, "Decision on victims' participation in trial proceedings", 6 February 2015, ICC-01/04-02/06-449, para. 24(iv), (vi) and (vii) and Pre-Trial Chamber I, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", 24 May 2018, ICC-01/12-01/18-37-tENG, pp. 28-30.

¹¹ See *infra*, at para. 9.

B. The Application Form

9. A standard two page application form for participation in the proceedings was approved by the Presidency in 2017 pursuant to regulation 23(2) of the RoC. Following the approach taken in the *Al Hassan* case, the VPRS proposes a deviation from this standard form ("Proposed Application Form") for the following reasons:

- lessons learned from the *Al Hassan* case¹² and the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*;¹³
- the need to have a tool that complies with the relevant legal requirements relating to reparations. The Registry notes in this context that rule 94 of the Rules sets out the minimum requirements that a request for reparations under article 75 of the Statute must include;¹⁴
- the overall need for procedural and economic efficiency in the application process in order to enable as many victims as possible

¹² The Registry notes that the modifications made from the standard form approved by the Presidency and the form used in the *Al Hassan* case in the Proposed Application Form stem from lessons learned through field implementation of the relevant forms. The Registry is of the view that the Proposed Application Form will be considerably easier for victims and intermediaries to successfully complete. The Registry will continue to monitor and assess the use of the form and stands ready to make adjustments as necessary.

¹³ The Registry notes that in the *Bemba* case, more than 3,600 forms were received on the seven-page joint participation/reparations form previously approved by the Presidency in 2009. While the length of the form (coupled with the admission system in use at the time) required considerable resources to process, the advantage of the joint application form was that a substantial portion of the work for participation and reparations was completed in a single instance. This avoided a scenario where victims would be approached a second time (at a later date) to complete another application form (requiring much of the same information) in order to exercise their rights to request reparations pursuant to rule 94(1) of the Rules. A joint approach also results in saving considerable resources in the field.

¹⁴ That includes, but is not limited to: a description of the injury, loss or harm; where restitution of assets, property or other tangible items is sought, a description of them; claims for compensation; claims for rehabilitation and other forms of remedy; and, to the extent possible, the requirement of any relevant supporting documentation, including names and addresses of victims (rule 94(1)(d)-(g) of the Rules. The requirements in rule 94(1)(a)-(c) of the Rules correspond to those for participation in the proceedings (regulation 86(2) RoC) and are already covered in the Presidency-approved form.

to exercise their procedural rights in the Case in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial;

- recommendations provided by experts on the victim application process before the Court;¹⁵ and
- the volatility of the security environment in the Central African Republic ("CAR"): the security situation is subject to frequent changes; group activity country-wide is unpredictable and could trigger serious deterioration of the security situation in the capital and other areas as well, and therefore travel restrictions could be imposed to relevant staff on short-notice.

10. The main differences between the two-page form approved by the Presidency and the Proposed Application Form attached in the annex include: 1) a slight amendment to the question pertaining to harm;¹⁶ and 2) the inclusion of a question on reparations.¹⁷ The purpose of the first two pages of the Proposed Application Form is to collect all the information necessary for the Chamber to make a determination on the victim's participatory status¹⁸ and for the victim to submit a valid request for reparations pursuant to rule 94(1) of the Rules. The third and fourth pages of the Proposed Application Form are designed to capture the personal information of the victim. In line with

¹⁵ Amnesty International and REDRESS, "Independent Panel of Experts Report on Victim Participation at the ICC", July 2013, para 64.v; Registry, "Public Redacted Version of 'Annex, 28 November 2017, ICC-01/05-01/08-3575-Conf-Exp-Anx-Corr2'", 30 November 2017, ICC-01/05-01/08-3575-Anx-Corr2-Red, para. 51; relevant correspondence on the Proposed Application Form with actors in the Rome Statute system.

¹⁶ The present question 6 amalgamates the previous open question regarding the victim's personal harm suffered with a standardised tick-box approach regarding main types of harm as it was entailed in the reparations section in the *Al Hassan* form. The present solution streamlines the questioning process in uniting all information requirements pertaining to the victim's harm in one single question.

¹⁷ Question 7 solicits relevant information from the victim regarding personal preferences while suggesting some key forms of reparations as foreseen in article 75(1) of the Statute and rule 94(1) of the Rules to assist the victim. A similar question was included in the *Al Hassan* form, albeit in a less user-friendly fashion (based on Registry user feed-back from the field).

¹⁸ See Chambers Practice Manual, section C. I. (i).

prevailing practice at the Court, the VPRS would systematically split the application after page two and, in accordance with, *inter alia*, article 68(1) of the Statute, keep the victims' personal information from being transmitted on the case record.¹⁹

11. Given the changeable security situation on the ground, collecting information on participation and reparations at the same time enables the VPRS to safely secure all procedurally relevant victim-related information through a single application process. This in turn increases the efficiency of the Registry's field activities. Simultaneous collection of reparations-related information would also enable the VPRS to provide relevant notifications to the Defence at the start of trial in accordance with rule 94(2) of the Rules.
12. In addition, should the Case reach the reparations phase, relevant processes would be accelerated since core information related to reparations would have already been securely registered in the VPRS's database.²⁰ Accordingly, in satisfying its obligation to afford victims with a standard means to request reparations under regulation 88(1) of the RoC, the VPRS would not need to develop and disseminate a separate form for victims to request reparations.
13. Conversely, should the Case not reach the reparations phase, the information collected may still be of relevance for the Trust Fund for Victims ("TFV") in

¹⁹ The Registry notes that where a "dual status" victim/witness is scheduled to testify, the personal information of the witness may become relevant and therefore transmitted onto the case file. The practice of splitting forms (*see* Chambers Practice Manual, section C. I. (vi)) has been adopted in the *Ntaganda* case, the case of the *Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15), and the *Al Hassan* case.

²⁰ The Registry notes that having this information at the early stage does not replace the need for the legal representative(s) of the victims or the Registry to seek updated information from the victims through consultation regarding reparations at a later stage of the proceedings as was done in the *Prosecutor v. Germain Katanga* case, Trial Chamber II, "Order instructing the Registry to report on applications for reparations", 27 August 2014, ICC-01/04-01/07-3508.

the implementation of potential activities relating to the TFV's assistance mandate.²¹

14. By including a question on reparations in the Proposed Application Form in advance of a conviction of an accused, the Registry is cognisant that victims' expectations will need to be managed. The VPRS has relevant experience in this regard, most recently in the *Al Hassan* case, and will tailor its communication in the field accordingly.²² Applicants will be made aware that requesting reparations in their application form does not imply that reparation awards will follow automatically. Applicants are also informed that if reparations were to be awarded after a conviction, it is likely to occur a number of years after the victim application process and may be subject to the availability of funds.

15. The Registry would also like to inform the Chamber that concomitant to the Proposed Application Form presently submitted, the VPRS has developed the following tools that would be available for use in the present Case:²³

- an electronic version of the Proposed Application Form (if approved), which would allow the collection of victims' applications in the field electronically with a relevant device. This initiative aims to increase the

²¹ See for instance in *Bemba*, Trial Chamber III, "Final decision on the reparations proceedings", 3 August 2018, ICC-01/05-01/08-3653, paras 11-15.

²² The VPRS is of the view that victims' expectations for *inter alia* reparations are high as soon as the Court announces that it will intervene in one way or another in a situation country. The VPRS considers that the best way to "manage" those expectations is through clear and consistent information up-front. Following the dissemination of accurate and comprehensive information on the Court's reparations mandate, enabling victims to exercise their right to "request" reparations pursuant to rule 94(1) of the Rules at an early stage may actually serve as a tool for relieving any residual tension caused by initial, elevated expectations. By including a question on reparations: 1) victims will be informed in advance about limitations of the Court's reparations mandate, 2) will be in a position to make an informed decision about whether or not to apply, and 3) if they so choose, victims will be afforded the opportunity to make a formal request for reparations at the same time they apply to participate in proceedings.

²³ The Registry would be using these tools, where feasible and appropriate, in addition to the paper version of the form.

efficiency and safety of the application process both in the field and at headquarters. It may also enhance the protection of sensitive information provided by victims;²⁴

- an online version of the Proposed Application Form (if approved) on the Court's webpage, which would facilitate access to the proceedings to those potential applicants who may be out of the VPRS's physical reach and who have access to internet. The online version of the application would allow victims:
 - to download the application form (as well as related guidelines on how to fill in the form) and send the filled form back to the Court; or
 - to fill in an application form directly online, including uploading all required documentation to complete the application form (for both participation in the proceedings and reparations).

C. Legal Representation


16. Finally, in line with prior practice in pre-trial proceedings,²⁵ the Registry stands ready to submit, in a timely manner, preliminary observations on how an approach that prioritizes victims' choice of counsel may proceed, in accordance with rule 90 of the Rules. These observations would include a description of the steps and time necessary for the Registry to provide a final report on this issue before the confirmation of charges hearing.

²⁴ Relevant information can be sent through a secure channel to headquarters every time the device connects to the internet; once sent, the information is cleared from the device. Furthermore, the device can be 'wiped' remotely in case of theft or loss. The electronic form has not yet been used in previous proceedings.

²⁵ See in particular, Pre-Trial Chamber I, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", 24 May 2018, ICC-01/12-01/18-37-tENG, para(s) 64-71.

V. Conclusion

17. The Registry respectfully requests the Chamber's approval of the annexed Proposed Application Form for the purpose of victim participation in the upcoming confirmation of charges hearing in the Case. It also seeks the Chamber's guidance as to its preferred *modus operandi* in relation to the Admission Process and legal representation of victims.



Marc Dubuisson, Director, Division of Judicial Services
On behalf of Peter Lewis, Registrar

Dated this 6 February 2019

At The Hague, The Netherlands