

**Cour
Pénale
Internationale**

**International
Criminal
Court**

No.: ICC-01/04

Date: 15 August 2005

Original: English

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr. Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

CONFIDENTIAL

Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo
Mrs. Fatou Bensouda
Mr. Ekkehard Withopf
Ms. Lyne Décarie

Counsel for the Applicants

Mr. Emmanuel Daoud

Ad Hoc Counsel for Defense

Mr. Joseph Tshimanga

Background:

1. The Prosecution, following the Decision of the Pre-Trial Chamber of 21 July 2005 ("Decision"), submits its Reply to the Applications for Participation in the Proceedings No. 01/04-1/dp to 01/04-6/dp¹ ("the Applications") and to the Memorandum in Support of Applications No. 01/04-1/dp to 01/04-6/dp ("the Memorandum") that were all filed *ex parte* on 26 May 2005.
2. The Prosecution would like to point out that it is making these written submissions without having had access to the "Answers to the Questions Asked in the Annex of the Order of Pre-Trial Chamber I of 27 May 2005" filed *ex parte* on 10 June 2005, the "Response of the FIDH to the Order Requesting Additional Information" filed *ex parte* on 21 June 2005, transcripts or audio-recording of the *ex parte* hearing held on 12 July 2005 and the "Observations of the Registry's Victims and Witnesses Unit on the Protection of Witnesses and Victims in the Democratic Republic of Congo" filed *ex parte* on 18 July 2005, which are all referred to in the Decision of the Pre-Trial Chamber of 21 July 2005.
3. The Prosecution will first outline its position on how an application for participation under Article 68 (3) of the Rome Statute ("the Statute") should be viewed. Secondly, the human rights caselaw referred to in the Memorandum, and the conclusions inferred from it, will be discussed, and thirdly other assertions made in the Memorandum that go to the substance of the Applications will be addressed. Given that the Prosecution has been invited "to reply to the Applications", the Prosecution will not respond to various general statements or asserted legal conclusions in the Memorandum that are not directly related to the decision sought in the Applications.

Prosecution's Position:

Outline

4. At the outset, the Prosecution stresses that the development of a body of procedural rights afforded to victims by the Statute and the Rules of Procedure and Evidence ("the Rules"), allowing victims to make their independent voice be heard during various instances of the Court's process, is a major development in international criminal law, and one that the Prosecution strongly supports. To make these rights operational and maximise the impact of

¹ All were signed between the 4 and 15 October 2004, at which time they also appointed their legal representative. These applications were sent to Registry on 6 May 2005.

the victims in the Court activities they must be interpreted in a manner consistent with the fundamental principles of the Statute, and in particular with the Court's duty to effectively and impartially exercise jurisdiction over crimes of international concern.

5. The Prosecution respectfully submits that, while the Applicants appear to qualify as victims under Rule 85 (a),² their Applications for participation under Article 68 (3) are premature. The Statute and the Rules provide a comprehensive and carefully defined regime for the participation of victims in various phases, with specific rights to participate in decisions on whether to authorise an investigation (Article 15 (3)) and on questions of jurisdiction or admissibility (Article 19 (3)), a right to participate in the review of a decision not to proceed with an investigation or prosecution (Article 53 and Rule 92 (2)), and a general right to participate in proceedings once the investigation has been completed (Articles 61 and 68 (3) and Rule 92 (3)). The Prosecution therefore submits that the Chamber cannot grant the Applications at this stage, but that they could appropriately be reconsidered once specific proceedings are initiated.

Qualification of victim under Rule 85 (a) of the Rules in the context of an application under Article 68 (3) of the Statute

6. According to Rule 89 (2), the Chamber must first decide if the applicants qualify as "victims" according with the definition found at Rule 85.

7. Rule 85 reads as follows:

For the purpose of the Statute and the Rules of Procedure and Evidence:

(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

There are two possible interpretations of "victim" as defined in Rule 85 (a):

(a) A narrow interpretation is when a person has suffered harm from a crime over which the Court is exercising jurisdiction. If such an interpretation was taken, it would be impossible for the Pre-Trial Chamber to make a decision at this stage, since the scope of the investigation is, and must remain confidential. Until it is disclosed, no decision can be made on whether one is a "victim" and any application is premature.

² The Prosecution is taking the events described in the Applications at face value. It ignores what steps have been taken by Registry, if any, to verify, even in general terms, the accuracy of this description.

(b) A broader interpretation is that a person is a “victim” when related to the whole situation which is within the jurisdiction of the Court, no matter what the scope of the investigation or what cases are to be brought before the Court. The Pre-Trial Chamber could then decide whether the Applicants should be considered “victims”.

8. The broader interpretation of “victim” appears to be more consistent with the wide range of circumstances in which “victim” is used in the Statute and the Rules.³ However, in the context of participation in proceedings, commentators have cautioned that victims should be considered “potential victims”, as no crime has yet been proved and an accused is entitled to the presumption of innocence.⁴

9. The Prosecution also submits that the broad interpretation of “victim” in Rule 85 (a) means that not every person who qualifies as a victim will have the right to access every procedural avenue potentially open to victims under the Statute.⁵

The right to participate under Article 68 (3) of the Statute at the investigation stage

10. If the Pre-Trial Chamber decides that the Applicants are victims, it must then decide whether the Applications fulfil the conditions laid down in Article 68 (3) of the Statute.

(a) Interpretation of “proceedings” under Article 68 (3) of the Statute

11. Throughout the Statute and the Rules the term “proceedings” is used in both a strict sense, where two parties participate such as in the trial phase, and in a more general way to refer to all activity before the Chambers of the Court. The Applications are based on Article 68 (3), hence the “proceedings” must be viewed in the context of this Article. Likewise Article 68 (3) must be considered in the context of the overall scheme that grants rights to victims, and not be read as covering the full range of victims’ rights of participation itself.

12. In contrast to the Applicants’ assertion that “the Chamber may authorise participation as early as the investigation stage” (paragraph 6 of the Memorandum), the Prosecution submits

³ Such as in Article 15(3) and Rules 16(3) and 92 (2).

⁴ “the assessment of the applicant’s status as a ‘victim’ may have to be of a summary and preliminary nature, since the evidence will only be properly presented and evaluated at trial” - Bitti and Friman, “Participation of Victims in the Proceedings” in Lee (ed), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001) at p. 461; “This formula may pose problems for the presumption of innocence, as it appears to presuppose that a crime has been committed – whereas that remains to be proved at trial” – Jorda and de Hemptinne, “The Status and Role of the Victim” in Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court* (2002) at p. 1403.

⁵ For example, reparations can only be made against a convicted person (Art 75 (2); Rule 98 (1)).

that victims may only participate under Article 68 (3) once certain formal proceedings before the Pre-Trial Chamber capable of providing an adequate forum for victim participation have been initiated.

13. The Prosecution respectfully submits that there are no “proceedings” within the meaning of Article 68 (3) during the investigation phase. Both the Statute and the Rules make a clear distinction between “investigation” and “proceedings”. Examples are provided by Article 127 (2) which refers to “criminal investigations and proceedings”, Rule 49 (1) also referring to “investigations or proceedings” and Rule 111 which refers to questioning made in connection “with an investigation or with proceedings”. These provisions support the Prosecution’s strict interpretation of “proceedings” under Article 68 (3), and the conclusion that investigations are a separate phase which does not form part of any proceedings. Consistent with this interpretation, commentators have also agreed that victims “may not participate in the investigation undertaken by the Prosecutor”.⁶

14. The Prosecution submits that the “proceedings” which a victim may apply to participate in under Article 68 (3) can commence (a) with the finalization of the preliminary analysis phase, if the Prosecution decides not to open an investigation; or (b) with the end of the investigation. These proceedings will include the holding of a confirmation hearing under Article 61 (and obviously the subsequent criminal proceedings before a Trial Chamber, if and when charges are confirmed),⁷ but also the proceedings that take place once the Prosecutor informs the Pre-Trial Chamber of a decision not to proceed with an investigation under Article 53 (1) or the conclusion that there is no basis for prosecution under Article 53 (2).

15. Rule 92 supports the general right to participate under Article 68 (3) commencing at these stages. Sub-rules (2) and (3) require the Court to notify victims of a decision that will trigger the procedures under Articles 53 or 61 “[i]n order to allow victims to apply for participation in the proceedings in accordance with rule 89” (and therefore under Article 68 (3), see rule 89 (2)). This is consistent with the Court maximising the ability of victims to participate once the proceedings that they are legitimately entitled to participate in commence. However, this carefully drafted notification regime would become an incomprehensible system if participation in the investigative stage is possible under Article 68 (3): victims would

⁶ Jorda and de Hemptinne at p 1406.

⁷ Even commentators who advocate for extensive rights of victim participation consider that such a right only exists “from the first hearing of confirmation of the charges (Article 61), to the entire course of the Trial, Appeal and Review proceedings.” See Donat-Cattin “Article 68” in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) at p. 880, [23].

effectively be invited by the Court to participate mid-way through the process (i.e., at the Article 53 or 61 stages), despite their arguable entitlement to participate much earlier. An interpretation that would render the notification regime in Rule 92 redundant, ineffective or both cannot provide an adequate vehicle to determine the scope of Article 68 (3).

16. Rule 92, and in particular sub-rule (1), strongly implies that States Parties saw the rights of a victim to participate being divided into two categories: the right to participate in specific instances in Part 2 of the Statute (under Articles 15 (3) and 19 (3)), and a general right to participate in proceedings under Article 68 (3) and Rule 89, which are triggered either by the decision not to investigate or to prosecute under Article 53 (Rule 92, sub-rule (2)) or by the decision to hold a confirmation hearing under Article 61 (sub-rule (3)).

17. The Applicants contend that the language in Rule 92, sub-rule (2) and (3) that the “notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court” supports an earlier right to general participation under Article 68 (3) (paragraph 9 of the Memorandum). The Prosecution submits that this inference is misplaced. The language included in sub-rules (2) and (3) must be seen, contrary to the Applicants’ position, as referring to the *specific provisions* for victim participation provided for in Part 2 of the Statute, and therefore covering victims who have participated in Article 15 (3) or Article 19 (3) proceedings, as well as those victims who have otherwise communicated with the Court, and not to the general right to participate in proceedings under Article 68 (3).

(b) Drafting history

18. The drafting history of Article 68 and the relevant Rules confirms that the right of victims to participate under Article 68 was firstly seen as a right to participate in proceedings relating to a trial.⁸ Even though Rule 89 is found in Chapter 4 of the Rules which is entitled

⁸ This is reflected in the commentaries by Donan-Cattin and by Jorda and de Hemptinne, cited at fn 6 and 7 above. Schabas also comments that “Victims are entitled to intervene at the trial stage, when their ‘personal interests’ are affected” – *An Introduction to the International Criminal Court* (2nd ed) (2004) at p. 173. Reaching a similar conclusion, A.Orie, “Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC” in Cassesse et al (eds), *Op. Cit.*, p. 1478. See also B. Timm “The Legal Position of Victims in the Rules of Procedure and Evidence”, in: Fischer/Kress/Lüder (eds), *International and National Prosecution of Crimes Under International Law* (2001), p. 295: “Typically victims should contact the Court after confirmation of the charges by the Pre-Trial Chamber, so that it can rule in a comprehensive manner on their further participation in the trial”. Also linking victim participation to trial proceedings, E. Haslam, “Victim Participation at the ICC”, in McGoldrick, Rowe and Donnelly (eds.), *The Permanent International Criminal Court* (2004), p. 326.

“Provisions relating to various stages of the proceedings”, it is important to note that Article 68 is in Part 6 of the Statute which is entitled “The Trial”.

19. The right of victims to participate was initially discussed in the framework of compensation, and in many drafts the right to present views and concerns in the proceedings was coupled with a right of the legal representative of the victims to “participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility as a foundation for their right to pursue civil compensation.”⁹ Despite the fact that the explicit right of legal representatives of victims to present evidence was eventually dropped,¹⁰ this remains a clear indication that “the proceedings” contemplated by the drafters of the Statute as appropriate for the participation of victims, and the presentation of their views and concerns, referred to proceedings in a particular case against an individual or individuals for the purpose of establishing criminal responsibility.

20. In drafting the Rules of Procedure and Evidence, States Parties generally confirmed that the right of victims to participate under Article 68 (3) firstly related to judicial proceedings against an individual or individuals. Rule 92 (3) confirmed that those proceedings commenced with the confirmation hearing under Article 61. Rule 93 empowered the Chamber to proactively seek the views of victims on certain key procedural decisions, each of which involves a case against an individual or individuals.¹¹

21. However States Parties did extend the proceedings that victims could present their views and concerns at under Article 68 (3) in one logical, yet limited, regard through Rule 92(2).¹² Under the existing scheme, victims had a right to present their views when the Pre-Trial Chamber is deciding whether to authorize an investigation (Article 15 (3)), and when the Pre-Trial Chamber is considering the Prosecutor’s decision to initiate criminal proceedings (Article 61 and 68 (3)). However a decision by the Prosecutor not to proceed in a situation, either with an investigation or prosecution, would preclude future participation by victims and could therefore affect their interests. Accordingly, it was appropriate for States Parties to

⁹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Proposals), UN Doc. A/51/22 , 13 September 1996, p 204; Decisions Taken by the Preparatory Committee at Its Session Held from 4 to 15 August 1997, UN Doc. A/AC.249/1997/L.8/Rev.1, 14 August 1997, p. 37; Report of the Inter-Sessional Meeting in Zutphen, U.N. Doc. A/AC.249/1998/L.13, 4 February 1998, p. 117; 1998 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p 109; UN Doc. A/CONF.183/C.1/WGPM/L.58, 6 July 1998, p 2.

¹⁰ Eventually removed on 6 July 1998 - A/CONF.183/C.1/WGPM/L.58/Rev. 1, p 2 (draft article 68).

¹¹ Rules 125, 128, 136 and 139 are procedural relating to individual cases. Rule 191 is also related to a specific case, particularly to assurances given to a specific witness or expert. Rules 107 and 109 are addressed below.

¹² And the associated inclusion of Rules 107 and 109 in Rule 93.

grant victims a chance to present their views and concerns on this decision, rather than deny them any voice, as this could be the last proceeding in that situation.

22. The drafting history therefore shows that the participation of victims under Article 68 (3) was debated and decided within the framework of judicial proceedings before a Chamber. In every case, the participation of victims is predicated on a public decision of the Prosecutor, which the victims are then given an opportunity to express their views and concerns on. At no stage in their drafting did the Statute or the Rules contemplate giving victims the right to participate in an ongoing investigation. Rather, the opportunities for participation are at the commencement of the investigation, and once the examination or investigation has concluded.

(c) Under Article 68 (3) of the Statute, the Court must determine if the personal interests of the victims are affected

23. As set out above, the Prosecution respectfully submits that during an investigation there are no “proceedings” within the meaning of Article 68 (3) and that therefore the Chamber cannot grant the Applications. The Prosecution further submits that at this stage it is not possible to determine whether the Applicants’ personal interests are affected by the Court’s ongoing activities, within the terms of Article 68 (3).

24. The Applicants assert that their personal interests are “indisputably at stake” because they have suffered harm from a crime within the jurisdiction of the Court, meaning that their personal interests are at stake by virtue of their status as a victim (paragraph 7 of the Memorandum).¹³ The Prosecution respectfully submits that this interpretation is incorrect.

25. Article 68 (3) expressly places a condition on victims which the Court may allow to participate directly in proceedings. Those victims must show that their personal interests are affected. If the personal interests of every victim were affected by virtue of their status as a victim, then this clause would be rendered without meaning, in contravention of basic principles of treaty interpretation.¹⁴ It is submitted that the interplay between Rule 85 and

¹³ Counsel for the Applicants specifically refers to their claim to be victims (section II) to sustain his claim that their personal interests are affected.

¹⁴ “A treaty shall be interpreted in good faith *in accordance with the ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose” – Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art 32(1) (emphasis added).

The “principle of effectiveness” expressly provides that as the parties must have intended that each provision have a certain effect, a provision ought not be given an interpretation that leaves it meaningless or without effect – see *The Corfu Channel Case (merits)* ICJ Reports (1949) at p. 24 (and cases cited therein); Jennings and Watts (ed), *Oppenheim’s International Law (9th ed)* (1992), Vol I at para 633(9).

Article 68 (3) must be read as one establishing a natural progression of requirements for the purposes of allowing victim participation, rather than creating a normative tautology.

26. The independence of an individual's status as a victim from the determination of whether that victim's personal interests are affected is further supported by Rule 89 (2). This Rule provides two different reasons for the Chamber to reject an application: where the Chamber considers that the person is not a victim, and where the remaining criteria in Article 68 (3) are not met. The only other criterion in Article 68 (3) is that the personal interests of the victim are affected.¹⁵ If these criteria are met, then the Chamber "shall" allow their views and concerns to be presented, and all that remains is for the Chamber to determine the appropriate stage and manner for the presentation of those views and concerns. The Prosecution therefore respectfully submits that Article 68 (3) requires that, in addition to being a "victim", within the terms of Rule 85, an applicant also show that his or her personal interests are directly affected by the proceedings that he or she is applying to participate in.

27. This interpretation is also supported by the practical application of Rule 89 (2), which further provides that "[a] victim whose application has been rejected may file a new application later in the proceedings". As set out above, an application can be rejected on the basis that a person is not a victim, or that their personal interests are not affected. A person's status as a victim (or not) is unlikely to change during the course of the proceedings.¹⁶ What is likely to change as proceedings develop is whether a victim's personal interests are directly affected by those proceedings.

28. These reasons firmly support the conclusion that there must be a "judicially recognisable personal interest"¹⁷ in order for an application for participation under Article 68 (3) to succeed. That personal interest must necessarily go beyond an applicant's status as a victim, and must relate to the *specific matters* being discussed within the framework of the Court's proceedings, and not to the fact that crimes within the Applicant's situation are being investigated. The Prosecution thus submits that the question whether "the personal interests of the victim are affected" within the meaning of Article 68 (3) can only be properly dealt with once there are formal proceedings related to specific crimes, commencing with confirmation

¹⁵ See also Bitti and Friman, pp. 456 and 461.

¹⁶ This is premised on the Chamber adopting the broad interpretation of victim outlined in paragraph 7 above. If the Chamber instead adopts the narrow interpretation, then an individual's status as a victim could change as the proceedings develop, however this would lead to a similar practical outcome.

¹⁷ Haslam, p. 326.

of charges brought against persons allegedly involved in those crimes,¹⁸ or when a formal decision has been taken not to investigate or not to prosecute crimes pertaining to the situation (in which case a victim may apply to participate in the specific proceedings under Article 53). Both categories of proceedings enable meaningful victim participation as they relate to decision-making processes with well defined parameters, properly disclosable to third parties. At the same time, inherent to these proceedings is the provision of all necessary information for the purposes of determining whether the “personal interests” of the victims that seek to participate are affected by them. For instance, in the context of a confirmation hearing, the Pre-Trial Chamber (as well as any applicants) will have at its disposal information pertaining to the identity of the alleged perpetrators, a complete description of the crimes charged, including a statement of the relevant criminal events and the time and place of their alleged commission, as well as the Prosecution’s legal characterization of the relevant crimes.¹⁹

29. The Prosecution further submits that this interpretation of the relevant provisions, while providing for adequate participation, averts the dangers that an overly expansive approach to victim participation may entail. For instance, in the context of an investigation of crimes committed in an inter-ethnic conflict, the Court could, if no determination of whether any specific “personal interests being affected” is made, end up granting participation to victims belonging to the same ethnic group as the alleged perpetrators of crimes that are being investigated by the Prosecution, with apparent potentially detrimental consequences for the integrity and success of any investigation and/or prosecution. During the investigative stage, however, the Chamber is in no position to make this determination. If instead, any decision on victim participation is deferred until a case against specific individuals is formed, then the Chamber will have all the relevant information to properly determine whether those victims’ personal interests could be truly deemed to be affected by the proceedings, avoiding the dangers just described.²⁰

¹⁸ A number of commentators allude to the necessity of a link between the harm allegedly suffered by the victim and the subject matter of the proceedings that they have a right to participate in – see for example the authorities cited in footnote 4.

¹⁹ See Article 61 and Regulation 52.

²⁰ These dangers could only be minimized by forcing the Prosecution to disclose the details of its investigation. This “solution”, however, would have serious consequences for the safety and well-being of victims and witnesses and the integrity and efficiency of the investigation and even of any future pre-trial process. Some of these dangers are discussed in the following paragraphs of this brief.

(d) Appropriateness

30. The Prosecution further submits that it would be inappropriate to grant the participation sought by the Applicants. Firstly, allowing for third party intervention at the investigation stage could jeopardize the appearance of integrity and objectivity of the investigation. Secondly, participation in an investigation could be seen as necessarily entailing disclosure of the scope and nature of the investigation. The Prosecution submits that it is inconsistent with basic considerations of efficiency and security to disclose these details to third parties during an ongoing investigation.²¹

31. The inclusion of victim representation in the Statute and its accompanying Rules is a major development in international criminal law. The broad rights of participation offered by the Statute and the Rules to victims and witnesses are unknown to other international criminal jurisdictions, and go beyond the rights offered by a number of national jurisdictions.²² These rights, however, are not unlimited, and must be interpreted in the broader context of the Court's mandate to effectively exercise jurisdiction over the most serious crimes of concern to the international community.²³ The Prosecution submits that the Statute and the Rules strike a careful balance between the entitlement of victims to participation in the Court's process, on the one hand, and the need to provide for fair, efficient and objective investigations and prosecutions of international crimes, on the other. This balance should be preserved by the Court's interpretation of the relevant statutory provisions.²⁴

32. The Prosecution is bound by certain key duties during an investigation: it must remain *independent*, under Article 42 (2), a principle that has been characterized as an "*objective and valuable resource*, which needs to be protected and safeguarded from external attacks, threats or limitations".²⁵ The Prosecution must also observe the principle of objectivity under Article 54 (1) (a), and in so doing ensure that the investigation covers all relevant circumstances for the establishment of the truth and is not influenced or affected by partisan interests or other

²¹ This is not only supported legally by the Rome Statute and the Rules of Procedure and Evidence (e.g. Article 54, Rule 81), but has also been flagged by legal authors who have highlighted the 'essentially accusatorial procedure provided for by the Statute', see Orie, pp. 1477, 1485; Cassese, *International Criminal Law* (2003) p. 387; Jorda and de Hemptinne, pp. 1388 and 1411.

²² See Bitti and Friman, p. 457.

²³ Preamble to the Rome Statute and Article 1.

²⁴ The concerns that inclusion of victim participation could entail for the efficient administration of the Court are reflected by the footnote included in then draft article 43 in the August 1997 Preparatory Committee session, maintained in the so-called Zutphen draft, calling for "further reflection" on the draft provision. See 1997 Decisions Taken by the Preparatory Committee, U.N. Doc. A/AC. 249/1997/L.8/Rev.1, p. 46, fn. 9, and 1998 Report of the Inter-Sessional Meeting at Zutphen, U.N. Doc. A/AC. 249/1998/L.13, pp. 148-151, at 149, fn. 286.

²⁵ G. Turone, *Powers and Duties of the Prosecutor*, in: Cassese, Op. Cit., p. 1140 (emphasis in the original).

factors. The integrity of the investigation is thus safeguarded by the fact that it is solely conducted by the Prosecution, acting as an “impartial organ of justice”,²⁶ not subject to any external influences or pressures, and involving, where required, the Pre-Trial Chamber’s review functions. All investigative functions, including the determination of the incidents warranting investigation and of the crimes and perpetrators that should be prosecuted, must accordingly unfold pursuant to these principles of independence and objectivity. Allowing victim participation at this stage introduces an external factor into the investigative process, capable of interfering with the said principles of independence and objectivity and even of giving rise to aspersions of partisan influence during the investigative activities.²⁷

33. The Prosecution further submits that during the investigative stage all related information must be kept confidential. In the particular context in which the Court operates, removed from the territory in which the alleged crimes have been committed, and with a limited ability to operate in the field, the confidentiality of the Prosecution’s investigative activities is one of the main safeguards against intimidation of, or retaliation against, victims and witnesses, as well as against other forms of interference with the investigation, such as the destruction of evidence. A breach of confidentiality could seriously jeopardize not only the investigation itself, but also put the victims and witnesses at risk, including perhaps the same Applicants.²⁸ If the current focus of the investigation were revealed, further victimization of those perceived as being in a position to collaborate with the ICC could take place, and the Prosecution’s ability to conduct investigative activities could be seriously compromised.

34. While an investigation is ongoing its scope and focus can also change, depending on what information is collected and its evaluation as to admissibility and credibility. New information obtained, analysed and evaluated can seriously impact on the focus and nature of the investigation. It is not until an investigation is completed, that a decision is made by the Prosecutor as to what crimes will be covered in the application for arrest warrants and against whom arrest warrants will be sought, if at all.

²⁶ Turone, p. 1165.

²⁷ The Prosecution further notes that, if the Applicants’ application is successful, there would be victim participation, but no balancing participation by the defence, since no persons have been yet identified as accused persons by the Prosecution. Appointing a defence counsel *ex officio* to represent the defence interests by actively intervening during the entire investigation (as opposed to at specific steps, such as in Article 56 procedures), however, would fundamentally alter the nature of the investigation, in manner contrary to the model of investigation adopted by the Statute, with unavoidable costs in terms of efficiency of the investigation and security for victims and witnesses.

²⁸ That the Applicants are well aware of the potential risks is reflected by the fact that the current applications were originally filed *ex parte*.

Whether there is a human right for victims to participate in an investigation

(a) Preliminary considerations

35. The stated basis of the Applications in Article 68 (3). In substantiating their argument that this article justifies participation during the investigative phase, the Applicants seek to demonstrate *inter alia* that “it is appropriate to accept the application under the rules of international law”.

36. The Applicants argue that the rules of international law are part of the ICC’s applicable law. It is their belief that read together, Articles 21 (1) (b) and (3) require victims’ rights to be effectively taken into account from the moment proceedings have been initiated”. The caselaw of the Human Rights Committee (“HRC”), the Inter-American Court on Human Rights (“IACHR”) and the European Court on Human Rights (“ECHR”), analysed in this Reply, is cited in support of this argument.

37. In order to understand the appropriate weight to be given to this caselaw, a few points must be made. Contrary to what the Applicants seem to assert, Articles 21 (1) (b) and (3) *in and of themselves* do *not* require the Court to allow victims’ participation during the investigation. What they mandate is that the Court interpret the applicable law in a manner that is consistent with internationally recognised human rights. According to the Applicants those rules (or emerging customary rules) require that victims’ rights be “effectively taken into account” (paragraph 12 of the Memorandum), and the Applicants specifically identify a range of obligations: to initiate an investigation, to inform victims,²⁹ of access to justice, to prosecute the perpetrators, to offer an effective remedy³⁰ and to offer reparations (paragraphs 13 and 14 of the Memorandum). The Applicants seem to reach the conclusion that “effectively” taking victims’ rights into account requires them to participate during the

²⁹ The right to be informed of proceedings should not be confused with the right to participate in them. The Court conducts outreach programs to inform potential victims of its activities and there is an obligation to inform victims of the outcome of an investigation, whether in the form of the confirmation of charges under Article 61 or a decision not to prosecute under Article 53 – see Rule 92 (2) and (3). Jorda and de Hemptinne also make this point at p. 1404 (“the victim enjoys a limited right to be informed of progress in the criminal proceedings”).

³⁰ The Applicants suggest that they have a right to an effective remedy from the Court, that “they enjoy the right for an investigation to be carried out if crimes within the jurisdiction of the Court and in violation of their fundamental rights have been committed,” (paragraph 7 of the Memorandum) and that a right “to an effective remedy implies a right to be involved in investigations and prosecutions” (paragraph 14 of the Memorandum). While the Prosecutor notes that there is an obligation on States to provide such an effective remedy, the Prosecutor also notes that the Court is not designed for the prosecution of every person responsible for every crime that falls within its jurisdiction (see for example Articles 17 (1) (d) and 53 (2) (c)). The Prosecution submits that the right to an effective remedy does not require or support a right to participate in investigations.

investigation stage.³¹ The Prosecution submits that none of the specific obligations identified by the Applicants involve a right to participate during the investigation stage.

(b) Caselaw and documents cited in the Memorandum

38. The Applicants rely on a range of authorities in the Memorandum. In the interest of procedural economy, this Reply will only deal with the most important cases. Many of the cases not directly addressed merely reaffirm the key passages of the decisions distinguished below at paragraphs 39-49,³² and can be equally distinguished by their facts. Other cases simply underline States' general duty to investigate and prosecute and the right to an effective remedy, which do not seem to have any bearing on the instant proceedings.³³ Many of the authorities cited in the Memorandum, rather than supporting a right to participate in the investigation under Article 68 (3), identify rights provided elsewhere in the Statute.³⁴ The Prosecution submits that cases relied on by the Applicants, when read in context, do not support a right to be involved in investigations, but at most to be informed of investigations, to participate in any resulting trial, and to challenge a decision not to prosecute.

39. In support of their contention that victims "must be personally involved in the investigations and proceedings", the Applicants first rely on the caselaw of IACHR. Specifically, the Applicants claim that "*The Inter-American Court insists that victims must have full access to the case file and the capacity to intervene during all stages of the investigations, and before all the competent courts in the framework of the investigations.*" The case relied upon as authority for this assertion is Caracazo, a case arising from the undue delay the investigative authorities of Venezuela incurred in keeping the investigation under reserve or secrecy ("secreto sumarial") for a period of over nine years, a delay that had been

³¹ The Applicants related, more general, contention that the requirement to consider the interests of victims requires their participation is dealt with below, at paragraph 51 below.

³² ECHR, *Tekin v. Turkey*, Judgment, 9 June 1998; and ECHR, *Buyukdag v. Turkey*, Arrêt, 21 décembre 2001, both reaffirm *Aksoy v. Turkey*. The ECHR decisions *Güleç v. Turkey*, Judgment, 27 July 1998 and *Oğur v. Turkey*, Judgment, 20 May 1999, follow the same line as *McKerr v. United Kingdom*.

³³ This is the case with ICCPR Article 2 (3), HRC General Comment No. 31, the cited HRC cases: *Joaquin Herrera Rubio and his deceased parents v. Colombia*, 2 November 1987, CCPR/C131/D/161/1983; *Marcel Mulezi and his wife v. the Democratic Republic of the Congo*, 23 July 2004, CCPR/C/81/D/962/2001; and IACHR cases: *Manfredo Velásquez Rodríguez v. Honduras*, 29 July 1988, C ser. No. 4; *Ernest Rafael Castillo Páez v. Peru*, 3 November 1997, C Ser. No. 34; *Ana Elizabeth Paniagua Morales v. Guatemala*, 8 March 1998, C Ser. No. 37; *Bámuca Velásquez v. Guatemala*, 25 November 2000, C Ser. No. 70.

³⁴ For example the Council of Europe Committee of Ministers decision cited at paragraph 15 of the Memorandum supports a right to review of a decision not to prosecute, which is provided (more extensively, including decision not to investigate) by Article 53 and Rule 92 (2). The case of *Perez v France* cited in paragraph 16 of the Memorandum refers to a right of "parties to the trial" to submit observations and to have those "duly considered by the trial court" (ECHR, *Perez v France*, Judgment, 12 February 2004, para 80). This properly falls within Article 68 (3) and Rule 91, but does not support a right to participate in the investigation.

termed by Venezuela's own Supreme Court (once proceedings were referred to it ten years after the facts) as an "offensive denial of Justice."

40. It must be noted that in this case, as with most of the cases cited in the Memorandum, the human rights violations complained of had been perpetrated and were being investigated by the same entity, the State. The prolonged delay in reaching conclusions in the investigation was therefore an abuse by state agents, in their own interests, of what is otherwise a legitimate feature of the criminal investigation in numerous jurisdictions: that the investigation remains reserved in its early stages. The abuse by the State was aggravated by the motivation for the delay, which was indicative of a desire to shield those responsible for the crimes from being brought to justice.

41. The Inter-American Commission on Human Rights, which brought the case to the Court's attention, requested that the Court declare that Venezuela had violated *inter alia*

*"The right to a fair trial and judicial protection of the 44 victims in this case, because their next of kin and lawyers **were not heard with due guarantees within a reasonable time** by a competent tribunal, since access to the case files was restricted for over ten years."* (emphasis added)

It is thus in light of the delay that the Court's decision that "*the next of kin of the victims and the surviving victims must have full access and the power to act at all stages and in all proceedings during said investigations*" must be interpreted. The case ultimately refers to a situation where failure by the national authorities to complete their investigation during a reasonable period of time led to the frustration of the victims' rights to participate in any court proceedings, a situation completely distinguishable from the instant circumstances surrounding this application. The case does not, therefore, establish a right for victims to be given access to the case file during the investigation stage.³⁵

42. In Aksoy v. Turkey, a case relied on by the Applicants, the ECHR held that

*"where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible **and including***

³⁵ The Prosecution notes that Chambers of this Court are vested with sufficient authority to prevent undue delays in criminal proceedings taking place before them by provisions such as Article 60 (4), 61 (1) and 67 (1) (c). While primarily aimed at protecting arrested and accused persons, these provisions can be equally beneficial to the interests of victims participating in the Court's proceedings.

effective access for the complainant to the investigatory procedure” (emphasis added).

43. The ECHR’s statement that the right to an effective remedy entails a thorough investigation including effective access to the investigatory procedure must be understood in light of the facts of the case. Aksoy, a Turkish citizen, had been detained and tortured by Turkish officials. Upon his release, Aksoy went to see the public prosecutor and, according to him, complained that he had been tortured while in custody. While the ECHR was unable to determine whether he had really made a complaint, it did find that the meeting with the public prosecutor took place. The Court held that, even if it were accepted that Aksoy made no complaint, *“the injuries he had sustained must have been clearly visible during their meeting. However, the prosecutor chose to make no inquiry as to the nature, extent and cause of these injuries, despite the fact that in Turkish law he was under a duty to investigate.”*

44. In this case, the ECHR was referring to the right to have a complaint registered by the authorities and to trigger an investigation, and not (as it could appear from the Memorandum’s citing of this case without reference to the facts) to any other, more concrete rights. The facts in this case do not disclose any attempts by Aksoy to actually “participate in the investigation”. His attempt to get the authorities involved in his case was limited to his self-initiated meeting with the public prosecutor, at which he allegedly complained of having been tortured. The case, thus, merely lends further support to the rights that individuals enjoy *vis-à-vis* states to have an effective domestic remedy, but not about any “specific rights of victims in the context of the investigation”. The lack of “effective access for the complainant to the investigatory procedure” which the *Aksoy* judgement addresses, is the lack of action by Turkish authorities in the face of a complaint made by the victim, and not a more extensive or specific participation in the “investigatory procedure”.³⁶

45. In *McKerr v. United Kingdom*, a further case relied on by the Applicants, the ECHR found that an “element of public scrutiny of the investigation or its results” is necessary *“to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests”*.

³⁶ It is also noteworthy that under Article 15 (1) individuals are given an opportunity to submit information to the Prosecutor on alleged crimes falling within the jurisdiction of the Court, and the Prosecutor is obliged to consider all such substantiated information under Article 42 (1). Persons submitting information are entitled to notification of the decision reached by the Prosecutor under Article 15 (6) and Rules 49 and 50.

46. The passage of McKerr cited in the Memorandum is part of ECHR's statements about the *general principles* applied by the Court. Later in the decision, the Court appears to restrict the scope of this principle in its section entitled *Application in the present case* by saying:

"As regards the lack of public scrutiny of the police investigations, the Court considers that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures."

47. To reach a conclusion on whether this duty to provide access had been complied with, the ECHR took account of all proceedings which had been conducted in respect of the killing of McKerr and others. Its ultimate finding that the State had failed to allow the victims to be *"involved in the procedure to the extent necessary to safeguard his or her legitimate interests"* (passage cited in the Memorandum) was based on the State's failure to provide for appropriate participation in the proceedings as a whole, rather than at a specific stage.

48. What this case acknowledges explicitly, thus, is that the duty of the investigative authorities is to provide interested parties –throughout the proceedings– with sufficient information, so as to enable them to safeguard their legitimate interests, and *not*, as it would seem from the Applicant's reliance on this case, to provide such information specifically at the investigation stage. Rather, the same case acknowledges that access to the investigative files by third parties can be detrimental to the investigation and other relevant interests, and that therefore it is appropriate and consistent with internationally recognized human rights standards to deny such access during the course of an investigation.

49. Furthermore, the extent to which the ECHR did find the participation of the next-of-kin in the proceedings to be insufficient in McKerr and cases cited in McKerr³⁷ referred specifically to participation at key stages of the case (such as the decision not to prosecute³⁸ and the questioning of witnesses³⁹) which *are* already provided for in the Statute and the Rules.⁴⁰

³⁷ McKerr, para 115.

³⁸ Güleç, cited above, p. 1733, § 82.

³⁹ McKerr, para 157.

⁴⁰ The right to participate in the decision not to prosecute is contained in Article 53 and Rule 92 (2). The right to question witnesses relates to trial proceedings, and it provided in Article 68 (3) and Rule 91.

50. A review of the case-law cited by the Applicants reveals no rule of international human rights law mandating victim participation at the investigative stage. Rather, the emerging principle appears to be that national systems are required to provide adequate opportunities for the victims to express their interests and be informed of the progress of the case. It is submitted that the full range of provisions in the Statute and the Rules, read together, ensure proper notification of, and participation in, the relevant proceedings and amply conform to this principle without allowing participation in the investigative stage.

Other observations

51. Paragraphs 8 and 10 of the Memorandum assert that the obligation on the Court to consider the interests of victims requires the participation of victims at this stage. The requirement to consider the interests of victims is very different to any right of victim to participate. One does not require the other. A duty imposed on the Court does not automatically give rise to procedural rights; rather, procedural rights, such as the victims' right to participation, emerge from specific provisions recognizing those rights and establishing their limits and manner of exercise.⁴¹

52. In reference to paragraph 10 of the Memorandum where it says:

"Moreover, the participation of victims or their legal representatives at the investigation stage, and even before any confirmation hearing in particular, is fully in line with the objectives of the Court as stated in the Statute and the Rules of Procedure and Evidence";

the Prosecution submits that, as already demonstrated, there is no provision in the Statute or the Rules providing for victims' participation during the investigation phase. Rather, the Statute establishes a carefully drafted system of tabulated participation, linked to the existence of proceedings of critical importance taking place before Chambers of this Court. It is *this system* what provides an adequate balance between the right to participation granted to victims by the Statute, and the need to provide for fair, objective and efficient criminal investigations and prosecutions, consistent with the objectives of the Court to "put an end to impunity for the perpetrators" of crimes of international concern by effectively exercising jurisdiction over such crimes.⁴²

⁴¹ The Prosecution notes that Article 54 (1) (c) equally requires the Prosecution to "[f]ully respect the rights of persons arising under this Statute". This duty, however, could never be seen as somehow giving rise to a right of persons suspected of having committed crimes to participate in an investigation.

⁴² Preamble to the Rome Statute.

53. Finally, the Prosecution notes that the Applicants have also referred to the Standard Application Form to Participate in Proceedings,⁴³ produced by the Registrar, to support the Applications (paragraph 11 of the Memorandum). Firstly, the Prosecution submits that subsidiary documents, such as a form produced by the Registry, cannot broaden the scope of victim participation, as defined by the Statute and the Rules. In any event, although the form does give four options of stages in which a person wishes to participate (Preliminary Examination Stage, Pre-Trial Stage, Trial Stage and Appeal Stage), the Prosecution submits that the form does not support the Applications. The Statute and the Rules do permit victims to participate at various stages under a range of provisions (for example under articles 15 (3), 19 (3), and 53). The form does not govern participation under Article 68 (3) exclusively,⁴⁴ and nowhere does it reflect participation at the investigative phase.

Conclusion

54. The Statute and the Rules provide a comprehensive framework for the participation of victims; for them to voice their concerns and represent their interests. This framework goes well beyond what is provided in most national systems or what is required by human rights norms, and includes the rights of victims:

- (a) to present their views when the Prosecutor asks for authorisation to commence an investigation, under Article 15 (3)
- (b) to submit observations in any determination of jurisdiction or admissibility of a case, under Article 19 (3)
- (c) to be informed of the results of the preliminary examination and analysis, and of any investigation, under Articles 15 (6) and 53 and Rules 92 (2) and (3)
- (d) to apply for participation, and present their views and concerns, when the Pre-Trial Chamber reviews a decision by the Prosecutor not to initiate an investigation or not to pursue prosecutions, under Article 53 and Rules 89, 92 (2), 93, 107 and 109
- (e) to apply for participation, and present their views and concerns, in criminal proceedings, commencing with the confirmation hearing, under Article 68 (3) and Rules 89 and 92 (3)
- (f) to provide views on specific procedural steps in criminal proceedings if sought by the Chamber, such as whether to hold the confirmation hearing in the absence of the

⁴³ Such forms were not used by the Applicants. See also Letter from Mr. Sidiki Kaba dated 6 May 2005.

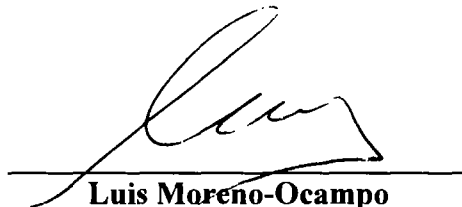
⁴⁴ Similar principles apply to the Applicants' claim in the same paragraph regarding regulation 115 of the draft Regulations of the Registry.

accused, amendment of charges, joinder and proceedings on admission of guilt,
under Rules 93, 125, 128, 136 and 139

(g) to request reparations under Article 75 and Rules 94 to 98

55. The rights set out above are the product of careful compromise, yet constitute the most comprehensive provisions for the rights of victims in an international criminal jurisdiction and fully implement all of the relevant rights of victims in international human rights law. It is not necessary for the Chamber to stretch the bounds of Article 68 (3) well beyond what was intended by the drafters in order to safeguard the interests of victims. It is the strict application of the regime for victim participation adopted by the Statute and the Rules what will best guarantee efficient and meaningful exercise of these rights in the Court's process.

56. The Prosecution therefore respectfully submits that, while the Applicants may be victims within the meaning of Rule 85, the Applications cannot be granted during the investigation. This does not mean that the Applications might not be appropriately considered and granted at a later time, for example once the Prosecutor seeks confirmation of charges under Article 61.



Luis Moreno-Ocampo
Prosecutor

Dated this 15th day of August 2005

At The Hague, The Netherlands