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**International
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PRE-TRIAL CHAMBER I

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

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR vs. THOMAS LUBANGA DYILO**

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**Prosecution's 25 August 2006 Observations on the Applications for Participation of
Applicants a/0047/06 - a/0052/06**

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Background

1. On 10 February 2006, the Pre-Trial Chamber issued a warrant of arrest against Thomas LUBANGA DYILO in which he is alleged to have committed the crimes of enlisting, conscripting and using children to participate actively in hostilities under Article 8(2) of the Rome Statute ("Statute") on several occasions between July 2002 and December 2003.¹
2. On 31 July 2006 and on 3 and 4 August 2006, forty-one applicants filed confidentially and *ex parte* forty-three applications² to participate in the proceedings in the case of *The Prosecutor v. Thomas LUBANGA*. The Single Judge³, issued, on 4 August 2006, the "Décision autorisant le Procureur et la Défense à déposer des observations sur les demandes des requérants a/0004/06 à a/0009/06, a/0016/06 a/0046/06 et a/0047/06 à a/0052/06 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo" (Decision), in which she invited the Parties to comment on the applications by 16:00 hours on 18 August 2006, at the latest.
3. On 16 August 2006, the Office of the Prosecutor (OTP or Prosecution) requested a one week extension to comment on applications a/0047/06 to a/0052/06.⁴ The same day, the Single Judge⁵, granted a one-week extension to both Parties to file their observations on all the applications.⁶

¹ Arrest Warrant, 10 February 2006, p. 4.

² Applications a/0004/06 to a/0009/06, a/0016/06 to a/0046/06 and a/0047/06 to a/0052/06.

³ "Décision désignant un Juge unique dans l'affaire *Le Procureur c/ Thomas LUBANGA DYILO*", filed on 22 March 2006.

⁴ Prosecution's Request for an extension of a time limit, filed on 16 August 2006.

⁵ See Decision on the Temporary Substitution of the Single Judge, filed on 11 August 2006.

⁶ Décision relative aux requêtes de la Défense et de l'Accusation concernant la prorogation de délai, filed on 16 August 2006.

4. On 22 August 2006, the Prosecution filed "Prosecution's Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06 and a/0016/06 to a/0046/06".⁷

Scope of the present submission

5. The present brief will only address applications a/0047/06 to a/0052/06 (Applications). Moreover, the request of applicants a/0047/06 to a/0052/06 (Applicants) to participate in the proceedings is limited to the case of *The Prosecutor v. Thomas LUBANGA DYILO*.⁸ Therefore, the focus of the present submission is to determine whether the Applicants should be granted a right to participate in the case at hand.

Legal Qualification of "Victim"

6. Pursuant to Rule 89(2) of the Rules of Procedure and Evidence (Rules) to determine whether an applicant may participate in the proceedings, the Chamber must first decide if he/she qualifies as a "victim" as defined in Rule 85.
7. According to Rule 85 (a),

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

⁷ Prosecution's Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06 and a/0016/06 to a/0046/06, filed on 22 August 2006.

⁸ See Decision, p. 3.

8. As the Pre-Trial Chamber determined, for the status of a victim to be recognized four criteria must be satisfied: (a) the victim must be a natural person; (b) he or she must have suffered harm; (c) the crime from which the harm resulted must fall within the jurisdiction of the Court; and (c) a causal link between the crime and the harm must exist.⁹
9. Moreover, the Applicants must demonstrate that there is a sufficient causal link between the harm they suffered and the crimes for which there are reasonable grounds to believe that Thomas LUBANGA DYILO is criminally responsible and the commission of which is the subject of the arrest warrant issued by the Pre-Trial Chamber.¹⁰
10. Article 68(3) of the Rome Statute (Statute) provides that the Chamber shall allow participation of an individual (as defined by Rule 85) where the personal interests of the individual are affected. The Prosecution submits that Article 68(3) of the Statute and Rule 85, viewed together, establish a two-stage process for the Chamber to determine if an individual qualifies as a victim with standing to participate in proceedings: first, the applicant must fulfil the criteria set out in Rule 85, then the Chamber must be satisfied that the personal interests of the victim are directly affected by the proceedings in which he or she is applying to participate.¹¹

⁹ See Decision on the Applications on participation in the proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the *Prosecutor v. Thomas Lubanga Dyilo* and of the investigation in the Democratic Republic of Congo, p.7.

¹⁰ *Ibid*, p. 9.

¹¹ See Pre-Trial Chamber's "Décision sur les Demandes de Participation à la Procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", filed on 17 January 2006, para. 62.

11. For an application to be successful pursuant to Article 68(3) of the Statute, the applicant must have a “judicially recognisable personal interest”¹² in the case. The personal interest of the applicant must be related to the *specific matters* at issue within the framework of the Court’s proceedings.¹³

Factual analysis

12. The charges against Thomas LUBANGA DYILO currently include (1) enlisting children under the age of fifteen years, (2) conscripting children under the age of fifteen years, and (3) using children under the age of fifteen years to participate actively in hostilities.¹⁴
13. In the present case, the following individuals have applied to qualify as victims in order to be permitted to participate in the case of *The Prosecutor vs. Thomas LUBANGA DYILO*:

Applications a/0047/06- a/0052/06

Application a/0047/06

14. Mr. REDACTED, acting on behalf of Mr. REDACTED, a minor, describes in his application how Mr. REDACTED was forcibly enrolled in the ranks of the UPC from the beginning of 2003 and during 11 months. At the time of the events, Mr. REDACTED was 13 years of age. The application depicts how the victim was subject to harsh treatment during his training in the ranks of the UPC. Mr. REDACTED asserts that he took part in combat and acknowledges that, on such

¹² See E. Haslam, “Victim Participation at the ICC”, in McGoldrick, Rowe and Donnelly (eds.): *The Permanent International Criminal Court* (2004), at page 326.

¹³ Emphasis added.

¹⁴ Arrest Warrant, 10 February 2006.

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occasions, he killed and mutilated enemies, set houses, schools and churches on fire and plundered and looted the areas attacked. He further acknowledges that UPC troops first raped young girls before killing them. He suffered REDACTED and still suffers from the injury. As a result of his forced enrollment in the UPC, he suffers from emotional trauma and has been unable to complete his studies.

Application a/0048/06

15. Mr. REDACTED, acting on behalf of Mr. REDACTED, a minor, describes in his application how Mr. REDACTED was forcibly enrolled in the ranks of the UPC in 2003 and during a period of 10 months. At the time of the events, Mr. REDACTED was 12 years of age. The application depicts how the victim was subject to harsh treatment during his training in the ranks of the UPC. Mr. REDACTED asserts that he took part in combat and acknowledges that, on such occasions, he was ordered to kill Lendu villagers and mutilate their sexual organs, set houses, schools, offices and churches on fire and plunder and loot the areas attacked. During battle he was wounded REDACTED. Furthermore, as a result of the harsh training in REDACTED camp, REDACTED.

Application a/0049/06

16. Mr. REDACTED, acting on behalf of Ms. REDACTED, a minor, describes in his application how Ms. REDACTED was forcibly enrolled when she was barely 15 years of age, in the ranks of the UPC in 2003 and during a period of more than 6 months. The application depicts how the victim was subjected to harsh and humiliating treatment during her training in the ranks of the UPC. Ms. REDACTED asserts that, while confined to Commander REDACTED's

residence, he raped her. The victim suffers from emotional and psychological trauma due to the sexual assault she endured.

Application a/0050/06

17. Mr. REDACTED acting on behalf of Ms. REDACTED, a minor, describes in his application how Ms. REDACTED was forcibly enrolled when she was barely 15 years of age, in the ranks of the UPC from approximately January to December 2003. The application depicts how the victim was subjected to harsh and humiliating treatment during her training in the ranks of the UPC. The victim asserts that she was also tortured to compel her to follow orders. Ms. REDACTED declares that, while she took part in combat, she was ordered to kill inhabitants of Lendu villages and ordered to set houses, schools and churches on fire; to destroy and loot the areas attacked. The victim was wounded during battle and was traumatized by the events she endured.

Application a/0051/06

18. Mr. REDACTED acting on behalf of Ms. REDACTED, a minor, describes in his application how Ms. REDACTED was forcibly enrolled when she was 14 years of age, in the ranks of the UPC in 2005 (*sic*).¹⁵ The application depicts how the victim was subjected to harsh and humiliating treatment during her training period in the ranks of the UPC. The victim asserts that, while she took part in combat she was ordered to kill Lendu villagers and set their villages on fire as well as to set on fire, to plunder and to mutilate during attacks. The victim was

¹⁵ The Prosecution asserts that it has evidence that Ms. REDACTED was forcibly enrolled in the UPC during the time frame identified in the Arrest Warrant.

wounded during battle REDACTED and was traumatized by the events she endured.

Application a/0052/06

19. Mr. REDACTED, acting on behalf of Mr. REDACTED, a minor, describes in his application how Mr. REDACTED was forcibly enrolled by "REDACTED" when he was 11 years of age, in the ranks of the UPC in January 2003. The application depicts how during his training period, Mr. REDACTED was subjected to harsh and humiliating treatment and torture during his two-month training at the UPC's "REDACTED" in REDACTED. After the training period he was sent into combat and remained in the UPC until the first trimester of 2004. During combat, he was ordered to kill Lendu villagers and set their villages and schools on fire and to plunder other goods in all areas occupied by the UPC. He was shot REDACTED and is emotionally disturbed because of the killings and the mutilations he witnessed. He expresses regret. He mentions that he has fallen behind at school.

20. The Prosecution submits that, in relation to the above-mentioned alleged crimes the applicants meet the criteria for participation as "victims" in the case of *The Prosecutor v. Thomas LUBANGA DYILO*. The information provided in the Applications relating to the alleged crimes is causally linked to the crimes and the charges against *Thomas LUBANGA DYILO* as identified in the Arrest Warrant issued by the Chamber. The crimes alleged in the Applications are covered by the scope of Article 8(2) of the Statute and occurred between July 2002 and

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December 2003.¹⁶ The Applicants identified the perpetrators as members of the UPC.

21. The Prosecution submits that the accounts provided in the Applications reveal discrepancies with the evidence gathered by the OTP. The Prosecution posits that the evidence obtained by the OTP, in the form of a written and signed statement, is more reliable than the second-hand summary obtained by the Applicants' representative. Furthermore, the statement obtained by the OTP was gathered at a time closer to the commission of the crime and certainly prior to the filing of the Applications. Therefore, and based on the evidence obtained by the OTP, the Prosecution asserts that the Applicants should be considered "victims" authorized to participate in the proceedings in the case at hand.

The Applicants are identified as Prosecution witnesses

22. While agreeing that participation should be allowed, the Prosecution also submits that the granting of victim-participant status should not be permitted to hinder the Applicants' pre-existing status as OTP witnesses. The Prosecution has already identified to the Pre-Trial Chamber each of the Applicants as key Prosecution witnesses. The Prosecution seeks by this filing to request that the Applicants be viewed as having dual status as victim-participants and witnesses of the OTP. As examples, the OTP intends to rely on their statements at the Confirmation hearing and to call them to the stand during trial as Prosecution witnesses. Also, to continue preparing these key witnesses for trial it respectfully

¹⁶ Arrest Warrant, 10 February 2006, p. 4.

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requests access to its witnesses, the Applicants, if they consent to the meeting, after the Prosecution has given adequate notice to their legal representative.¹⁷

23. The remainder of this submission demonstrates that the Rome Statute and general principles of law support the view that nothing prevents a victim-participant in a criminal proceeding from also serving in the status of a witness. For this reason, an individual who serves as victim-participant and witness of a party may be contacted by the party, and proffered at confirmation hearing or at trial by that party, in the manner equivalent to other witnesses.

24. The arguments presented in this document address only the confined question of whether a person can maintain his or her status as a witness, and in particular a witness for the Prosecution, once that person has simultaneously been admitted as a victim participant in the Court's proceedings. This filing does not address the scope of the procedural rights, including admissible modalities of participation, that a person acquires by virtue of his or her status as a victim participant. This matter, in particular in relation to the upcoming confirmation hearing, is the subject of a separate filing being made today by the Prosecution.

There is no incompatibility in granting an individual joint status as a victim and a witness

25. Pursuant to Article 21 of the Statute, the Prosecution has examined the Court's texts, decisions emanating from the United Nations General Assembly and European institutions and mechanisms from pertinent national systems. The study of the latter is relevant because the Court's victim participation principle

¹⁷ The Single Judge has ruled on 24 August 2006 that the OTP may not contact the Applicants, until a further ruling on the matter.

was inspired by these systems. These systems are in agreement that participation or status as a victim does not disqualify the victim from serving as a potential witness. From this review, the Prosecution determines that there is *no incompatibility with an individual's joint status as victim and witness*.

Court's texts

26. The Prosecution submits that since the Court's texts do not address the issue of individuals having both the status of witness and victim throughout the proceedings, such a possibility cannot be excluded. For instance, Article 68 of the Statute, which addresses victims' participation in the proceedings, provides few tools indicating how the participation should be effectuated, but does not forbid or disapprove an individual from taking the dual role of victim and witness. This article stresses merely that victim participation should consider principles of fairness and grants the Court (the Pre-Trial Chamber or the Chamber) the discretion to determine how victims shall submit their views. Significantly, the provisions in Part 6 relating to the trial testimony of witnesses do not exclude or limit in any way the ability of a victim to testify at trial as a witness. Article 69 of the Statute and Rule 66 provide that, in order to testify before the Court, a witness must make a solemn undertaking. Therefore, there is no textual incompatibility for an individual to have a joint status as a victim and potential witness in proceedings before the Court. In fact, some commentators of the texts have argued that based on articles 64.6(e) and 68(1) and (2) of the Statute "in addition to participating in his personal capacity [...] the victim may obviously be heard as a witness".¹⁸ This position is based on the

¹⁸ Claude Jorda and Jérôme de Hemptinne, *The Status and the Role of the Victim in The Rome Statute of the International Criminal Court*, Vol. II, p. 1403.

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truism that a victim is usually in the best position to provide first-hand knowledge on the crime committed.

United Nations Guidelines

24. The content of some of the provisions of the United Nations General Assembly's (GA) "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", annexed to Resolution 40/34¹⁹, suggests that the GA did not consider the status of victim to be incompatible with that of a witness called by a party. To respond to the concerns of protecting victims and their privacy during court proceedings and ensuring their safety, the Declaration mentions that judicial and administrative processes should, *inter alia*: "[allow] the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system"; and "[provide] proper assistance to victims throughout the legal process"²⁰. The Declaration does not exclude a victim's ability to be treated simultaneously as a witness. Rather, Resolution 40/34 urges State Parties to implement specific protection programmes for "victim-witnesses"²¹.

¹⁹ United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985, annexed to Resolution 40/34.

²⁰ UNGA Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985 annexed to Resolution 40/34, paragraph 6 (b), (c) and (d) of the Declaration. This Declaration is observed, amongst others, in the Manual that rules the police forces taking part in UN Peace-Keeping Operations.

²¹ *Ibid*, para. 5 (b) and 7 of the Resolution.

European texts

25. A number of European texts equally reveal that European institutions do not see a contradiction with between participating as a victim and also being relied upon or asked to testify at trial by a party as a witness, even in systems where victims have acquired the status of a full party. Rather, these texts reveal the legislative intent to enhance participation of victims in criminal justice systems by also permitting them to be regarded as witnesses. For instance, the “Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure”²², adopted by the Committee of Ministers of the Council of Europe focuses in particular on the “victim-witness”. The Recommendation provides that a fundamental function of a criminal justice system is to respond to the needs of victims and safeguard their interests. This text further stresses the need for a victim to trust the criminal justice system and to encourage his co-operation, especially in his capacity as a witness²³. Part C of the Recommendation sets guidelines for Member States regarding the questioning of the victim and assumes that victims might serve in a dual capacity as witnesses: “[a]t all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity.”²⁴

26. A more recent “Resolution on the protection of witnesses in the fight against international organized crime”²⁵, adopted by the Council of the European

²² Recommendation No. R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure, adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers’ Deputies.

²³ Op. cit, para 5 of the preamble.

²⁴ Emphasis added.

²⁵ Ref.: 95/C 327/04. Official Journal C 327, 07/12/1995 P. 0005.

Union defines a 'witness' as "any person, whatever his legal status, who possesses intelligence or information regarded by the competent authority as being material to criminal proceedings and liable to endanger that person if divulged".²⁶ Victims are clearly encompassed in the scope of this definition of witnesses.

27. Lastly, the EU "Council Framework Decision on the Standing of Victims in Criminal Proceedings" further shows that, according to European legislation, an individual's status as a victim does not categorically preclude him or her from holding simultaneously the status of a witness.²⁷ This text notes that the right to provide and receive information and the right to be protected at the various stages of the proceedings are among victims' essential rights.²⁸ Irrespective of the part played by victims in the proceedings of various legal systems of EU Member States, this Framework Decision provides that victims have a real and appropriate role to play in criminal legal systems²⁹ and that each Member State must safeguard the victims' ability to be heard during proceedings and to provide evidence.³⁰ Furthermore, the Framework Decision applies to cases in which victims also have the status of witnesses or parties to the proceedings³¹ and requests that protective measures for victim-witnesses are provided.³² The text admits of

²⁶ Emphasis added.

²⁷ Ref.: 2001/220/JHA, Official journal L82/1, 22/03/2001.

²⁸ Op. cit. para (8). N.B.: the Spanish version provides: "(...) su derecho a declarar y ser informada; whereas the French version provides: "leur droit à informer et à être informées". However, Article 3 dispels any doubt as to the ambit of this provision.

²⁹ Op. cit. Art. 2 (1).

³⁰ Op. cit. Art. 3.

³¹ Op. cit. Art. 4 and 7.

³² Op. cit. Art. 8.

the possibility that a victim may also give evidence in open court and testify [at trial as a witness of a party].³³

National systems

28. In Argentina, for instance the Code of Criminal Proceedings of the Province of Buenos Aires (ACPP)³⁴, provides that the victim has the right to participate in criminal proceedings both as “civil actor” and as “affected person” (*particular damnificado*³⁵). In both cases, this condition does not preclude the victims from fulfilling their obligation to testify.³⁶

29. Similarly, the latest reform of Costa Rica’s Code of Criminal Procedure (adopted in 1996 and in force since 1998; (NCPP)), aims at having the victim take an active part in the proceedings.³⁷ The NCPP allows for victims’ participation in both the private and public prosecution. The victim is also entitled to initiate a civil action.³⁸ Once a party to the proceedings, victims are nonetheless still constrained by the duty to testify, like every other citizen.³⁹

30. In Spain, for instance, a victim may, *inter alia*, take part in criminal proceedings as a “private prosecutor” (*acusación particular, acusación privada*

³³ Op. cit. Art. 8.

³⁴ According to Section 1 of the Argentinean Constitution, Argentina’s legal system is a Federal system whereby each Province has its own Constitution and Criminal Codes.

³⁵ See Arts. 83-88 ACPP.

³⁶ See Arts. 67 and 80 ACPP. Emphasis added.

³⁷ Art. 71 (a) NCPP.

³⁸ Art. 72 NCPP.

³⁹ See Art. 81 NCPP. See also Art. 80 NCPP which provides: (...) La querella no alterará las facultades concedidas al Ministerio Público respecto del ejercicio de los criterios de oportunidad y la suspensión del proceso a prueba. El querellante podrá interponer los recursos que este Código autoriza al Ministerio Público. La intervención como querellante no eximirá del deber de declarar como testigo. Emphasis added.

or *acusación popular*) but nonetheless remains subject to the obligation of testifying as a witness.⁴⁰

Certain national systems have imposed limitations on victims' manner of testifying

30. However, the Prosecution's review of systems which accord victims rights additional rights beyond those granted for testifying reveals that some national systems set limitations on the ability of an individual to have a joint status of victim and witness during trial proceedings. In the French system, for instance, once an individual has acquired the status of victim (*partie civile*) he cannot testify at trial under oath.⁴¹ Nonetheless, there are a number of procedural tools under which the victim may function also as a witness in the French system. The victim may, for instance, be heard under oath prior to petitioning to acquire the status of a *partie civile*.⁴² Furthermore, an "under oath testimony" of a *partie civile* may be admitted if the parties do not object to it.⁴³ The victim *partie civile* may also be heard

⁴⁰ Arts. 410 and 416 of the "Ley de enjuiciamiento criminal".

⁴¹ Article 335 of the French Code of Criminal Procedure provides: "Ne peuvent être reçues sous la foi du serment les dépositions : 1° Du père de la mère ou de tout autre ascendant de l'accusé, ou de l'un des accusés présents et soumis au même débat ;

2° Du fils, de la fille ou de tout autre descendant ;

3° Des frères et sœurs ;

4° Des alliés aux mêmes degrés ;

5° De mari ou de la femme ; cette prohibition subsiste même après le divorce ;

6° De la partie civile ;

7° Des enfants au-dessous de l'âge de seize ans.

(Emphasis added).

⁴² See Cass. crim., 12 mars 1986: *Bull.* 106 and Cass. crim., 23 nov. 1994: *Bull.* 373) cited in French Code of Criminal Procedure (2005), Article 335, note 5.

⁴³ See French Code of Criminal Procedure (2005), Article 336.

by the Court without taking the oath. His declaration on the stand will, then, be considered “information” rather than evidence.⁴⁴

31. In the Brazilian and Portuguese systems the victim is entitled to be heard, present facts and substantiate the evidence.⁴⁵ However, these systems also draw a distinction between the status of the victim (*ofendido*) and that of the witness (*testemunha*). To avoid an apparent conflict of interest, the Brazilian and Portuguese systems rest on the principle that a “victim-interested party” provides “information” on the stand without a solemn undertaking.⁴⁶

The limitations in the French, Brazilian and Portuguese systems do not apply in proceedings before the Court

31. The study of these various national systems, pursuant to Article 21 of the Statute, is relevant because the principle of victim participation, which extends beyond the role of witnesses testifying about a crime, as adopted by the Court, is derived from such national systems. However, the analogy to the French, Brazilian and Portuguese systems is limited because victim participation at the Court bears a fundamental difference with the one established under these systems. In the systems surveyed in the prior section of this filing, the victim is a party to the proceedings and, as such, is afforded the same guarantees as the accused.⁴⁷ For that reason,

⁴⁴ *Ibid.*

⁴⁵ See Brazilian Código de Processo Penal (BCPP), Art. 271 and Portuguese Código de Processo Penal (PCPP), Arts. 69, 339 (2) and 341.

⁴⁶ BCCP, Arts. 201-203 and PCPP, Arts. 145(4) and 346-348.

⁴⁷ The *partie civile* has, for example, access to all the elements of the file (*dossier*) and the list of witnesses (see arts. 279-282 of the French Code of Criminal Procedure). Similarly to the accused, the *partie civile* may file motions (*conclusions*) (article 315 of the French Code of Criminal Procedure); it has the right to provide a closing statement and a right of reply as long as the accused or his counsel speaks last; it can object to the testimony of a witness if it

limitations on one person serving jointly as victim and witness may be imposed to avoid an apparent conflict of interest. In the ICC, by contrast, according to the Court's texts and the intent of the legislator, victims are not a party to the proceedings before the Court.⁴⁸

32. Victims are afforded the right to participate in the Court's proceedings, but have carefully defined exercisable rights⁴⁹ and must rely, instead, on the Court's discretion in order to submit their views and concerns and on how to do so.⁵⁰ Therefore, the limitations imposed on the joint status of victim and witness in the French system, for instance, are not applicable to proceedings before this Court.

has not been properly notified of his/her identity; the *partie civile* can call its own witnesses; it can request the removal from the courtroom of a witness who has completed his/her testimony; it can object to the interpreter; it can request that variations of a witness testimony be noted in the record; it can request a continuance; it can request that a witness suspected of false testimony be held until the decision is rendered (see arts. 323-346 of the French Code of criminal procedure); the *partie civile* also has a right to appeal orders taken (article 186).

⁴⁸ See Claude Jorda and Jérôme de Hemptinne, *The Status and the Role of the Victim in The Rome Statute of the International Criminal Court*, Vol. II, p. 1405: "Nonetheless, the victim does not become a true party to the trial in the sense of having rights and powers equivalent to those enjoyed by the prosecution or the defence".

⁴⁹ See Article 68 (3) and Rules 16, 50(1), 59 and 86. A number of other articles of the Statute and Rules pertain to the protection of victims or the "interests of the victims" in general terms, such as Articles 43(6), 53(2)(c), 54(1)(b), 57, 64, 65 of the Statute and Rules 17, 18 and 43.

⁵⁰ See articles 15(3), 19(3), 75(3) and 110 of the Statute and Rules 50(3) and 69. Furthermore, Article 68 (3) provides, in part, that the Court shall permit victims to present their views and concerns when their personal interests are affected. However, the article does not specify when and how these views may be presented. The last part of this article suggests that this presentation is subject to the Court's discretion. Indeed, the article states that the legal representative may present views and concerns where the Court considers it appropriate. (Emphasis added). Rule 93 further emphasizes the Chamber's discretionary power regarding this matter.

Parties should be entitled to call victims to testify as trial witnesses, assuming the victim's willingness to testify at trial as a witness of the party

33. The Court's proceedings are essentially a two party presentation of evidence. Therefore, as provided in a number of national jurisdictions, parties' ability to question witnesses, summoned for the most part by them and called in the order of their choice⁵¹ should likewise be protected in the proceedings before the Court, as long as it is not contrary to the defendant's right to a fair trial. In fact, commentators of the Court's texts, based on the International Criminal Tribunal for the former Yugoslavia practice, have acknowledged that if in theory once a witness takes the oath at trial, he is testifying on behalf of international justice, he retains a formal connection to the party calling him to the stand. These commentators specifically posited this principle in the context of discussion "victim-witnesses".⁵²

34. Pursuant to the Court's texts, the onus to prove the case rests, at every stage of the proceedings, on the Prosecution.⁵³ In fact, the Prosecution has the burden to establish each and every element of the crime charged

⁵¹ See Cross on Evidence (6th Australian Ed. 2000), para. 17070; see Watt's Manual of Criminal Evidence (2003), p.173, §18.04. See also but to a lesser extent article 281 of the French Code of Criminal Procedure.

⁵² See Claude Jorda and Jérôme de Hemptinne, The Status and the Role of the Victim in The Rome Statute of the International Criminal Court, Vol. II, pp. 1396-1397:

As judges of the ICTY have rightly pointed out on several occasions, a victim, after taking the oath, should testify on behalf of international justice and not on behalf of the prosecution or defence counsel by whom he has been called to give evidence. He nevertheless remains formally connected with that counsel: he is called to give evidence only insofar as his testimony precisely corroborates the argument of the parties, and what he has to say is kept strictly within the bounds of the examination and cross-examination to which he is subjected.

⁵³ See Articles 61 and 66 of the Statute.

beyond a reasonable doubt.⁵⁴ Because of this heavy burden, the Prosecution should enjoy the broad discretion to request the cooperation of a victim, proffer the statement of a victim, or call a victim to testify, so long as the victim has relevant information, and the Prosecution is otherwise complying with Statute and its purposes of promoting the interests of justice and a fair trial.⁵⁵ The Defence, no less, should have the ability to request victims to serve as potential Defence witnesses.

35. From these principles, the Prosecution posits that it must be afforded the right to continue to have access to the Applicants, as a means of continuing to advance the case, to rely on their statements at the Confirmation hearing, and to retain the option of calling the Applicants as trial witnesses. To restrict the ability of the Prosecution to continue to treat its witnesses as witnesses, simply by virtue of their dual status as victims, would most importantly artificially constrain the Prosecution's broad powers to establish the truth under the Court's texts.

The Prosecutor has wide powers to establish the truth

36. The Court's texts grant the Prosecution wide powers to investigate and collect evidence in order to establish the truth. For instance, pursuant to article 54(1)(a) of the Statute, the Prosecutor has the duty to establish the truth and, in order to do so, has the power "to extend the investigation to cover all facts and evidence". Denying the Prosecution its customary access to victims with first hand-knowledge would seem contrary to such

⁵⁴ Article 66. See also *The Prosecutor v. Enver Hadžihasanović and Amir Kubura*, case no. IT-01-47-T, 15 March 2006, paras. 200-248.

⁵⁵ See, for instance, *R v. Russell-Jones* [1995] 1 Cr App R 538; *R v. Grays Justices ex parte Tetley* (1980) 70 Cr. App. R. 11.

principle. Furthermore, Article 54(3) clearly grants the Prosecutor broad powers to collect evidence. This implicitly extends to the ability to approach victims of the crime being investigated and use their testimony at trial in support of its case. Last, the Statute enables the Prosecutor to question victims and witnesses.⁵⁶ This clearly implies that the Prosecution has the ability to treat victims also as Prosecution witnesses, subject to the victim's voluntary cooperation.

Alternative argument

37. The Prosecution argues, in the alternative, that if the Pre-Trial Chamber is of the view that the victim status of the Applicants is incompatible with their ability to serve as Prosecution witnesses, it respectfully requests that the Applicants participate in the proceedings as victims after having testified at trial in support of the Prosecution case.

Practical concerns

38. Finally, the Prosecutor wishes to stress that it has striven, for security reasons and due to the vulnerability of the Applicants, to limit the number of intermediaries who have contact with them. Over the course of the two-year investigation, these Applicants have established a bond of trust with investigators from the OTP who worked on the case at hand.⁵⁷ The Prosecution stresses that restricting the OTP's ability to communicate and meet with the Applicants would run counter to the interests of the Applicants as well as to this case.

⁵⁶ Article 54(3)(b) of the Statute.

⁵⁷ See Transcripts of Hearing of 23.08.2006, pp. 89-91.

Classification of the present filing

39. Because of security and safety concerns of the applicants, the Prosecution has filed the present submission as a "Public Redacted Document" document.

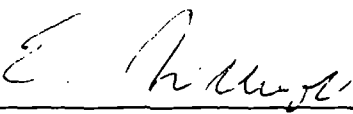
Request

40. For the foregoing reasons, the Prosecution requests that the Pre-Trial Chamber grant the Applicants the right to participate as victims in the case of *The Prosecutor vs. Thomas LUBANGA DYILO* because the harm they suffered has a causal link to the charges in the case at hand.

41. The Prosecution further requests that it be authorized to have access to the Applicants with their consent and after giving appropriate notice to their legal representative, in order to be able to continue to prepare its case and determine truth. The apparent discrepancies between the information contained in the Applications and the Prosecution's evidence lend further support to the Prosecution's request to have access to the Applicants in order to ensure the accuracy and consistency of the evidence upon which the Prosecution intends to rely at the confirmation hearing and to comply with any consequent disclosure obligations pursuant to Article 67(2) of the Statute.

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42. If such request is denied, the Prosecution argues in the alternative, that Applicants be granted the right to participate as victims once they have testified in the proceedings as Prosecution witnesses.




Luis Moreno-Ocampo
Prosecutor

Dated this 6th day of September 2006
At The Hague, The Netherlands