

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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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 THE CONGO

Public with Confidential – *Ex Parte*-Prosecution only Annex

**Prosecution's Observations on the Applications for Participation of Applicants
a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and
a/0105/06**

The Office of the Prosecutor

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Mr. Jean Flamme
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Mr. Joseph Tshimanga

Background

1. The situation in the territory of the Democratic Republic of the Congo ("DRC") was referred to the Prosecutor on 3 March 2004 by the DRC authorities in accordance with articles 13(a) and 14 of the Rome Statute ("Statute").¹ Upon receipt of this letter the Prosecutor initiated an investigation in the territory of the DRC on 16 June 2004.²
2. On 26 May 2005, six individuals (VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6) applied to participate in the proceedings of the DRC as victims.³ The *ad hoc* counsel for the Defence filed a response to the application on 8 August 2005⁴ and on 15 August 2005, the Prosecution filed its response.⁵
3. On 17 January 2006, the Pre-Trial Chamber issued the "Decision on the Applications for participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" ("17 January 2006 Decision"), in which it accorded the status of victims in the situation of the DRC to the six applicants (VPRS 1 to 6) and held that they could participate in the proceedings at the investigation stage.⁶

¹ See "Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" filed 17 January 2006 (confidential ex-parte) (ICC-01/04-101), at para. 84 citing the letter of referral dated 3 March 2004. The letter is annexed to "Prosecutor's Request for Measures under Article 56", 25 April 2005, ICC-01/04-17-Conf., Annex 1.

² See 17 January 2006 Decision, para. 84. See also ICC-01/04-20-Conf, para. 4.

³ Please refer to the individual memorandum in support of each application (ICC-01/04-31-Conf-Exp-tEN; ICC -01/04-25-Conf-Exp-tEN; ICC -01/04-26-Conf-Exp-tEN; ICC -01/04-27-Conf-Exp-tEN; ICC -01/04-28-Conf-Exp-tEN; ICC -01/04-29-Conf-Exp-tEN; and ICC -01/04-30-Conf-Exp-tEN).

⁴ ICC-01/04-81-Conf.

⁵ "Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp", filed 15 August 2005.

⁶ 17 January 2006 Decision, at p. 41.

4. The Prosecution sought leave to appeal this decision, in particular, opposing the right of applicants to participate at such an early stage.⁷
5. 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 Statute between July 2002 and December 2003.⁸
6. On 31 March 2006, the Pre-Trial Chamber denied the Prosecution's request for leave to appeal its decision allowing individuals granted the status of victim the right to participate in the investigation stage.⁹ On 24 April 2006, the Prosecution brought an application for extraordinary review of this decision to the Appeals Chamber.¹⁰ On 31 July 2006, the Appeals Chamber denied the application on the basis that the procedural remedy requested is not available but did not enter into any discussion on the merits of the application.¹¹
7. On 7 June 2006, 31 July 2006, 3 and 4 August 2006 and 6 September 2006, fifty-three applicants filed fifty-five applications to participate, *inter alia*, in the

⁷ Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6, filed 23 January 2006 (Public) (ICC-01/04-103).

⁸ Arrest Warrant, 10 February 2006, page 4.

⁹ Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6 (Public) (ICC-01/04-135-tEN).

¹⁰ Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 24 April 2006 (Public), (ICC-01/04-141).

¹¹ Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 31 July 2006, (Public) (ICC-01/04-168).

proceedings in the case of *The Prosecutor v. Thomas LUBANGA DYILO* and in the situation of the DRC.¹²

8. On 22 September 2006, the Pre-Trial Chamber issued its “*Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure de a/0004/06 to a/0009/06, a/0016/06 à a/0063/06 et a/0071/06*”¹³ (“22 September 2006 Decision”), in which it invited the Parties to comment, *inter alia*, on these applications for victim status and for participation in the investigation phase in the situation of the DRC.¹⁴ In the 22 September 2006 Decision, the Pre-Trial Chamber directed, in part, the Prosecution and the *ad hoc* Defence counsel to file submissions on the applicants’ requests to participate in the investigation of the situation of the DRC, by 1 December 2006, at the latest.¹⁵
9. In addition, on 14 and 25 September 2006 ten applicants filed applications to participate in both the proceedings in the case of *The Prosecutor v. Thomas LUBANGA DYILO* and in the situation of the DRC.¹⁶
10. In its “*Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06*”, issued on 29 September 2006¹⁷ (“29 September 2006 Decision”), the Pre-Trial Chamber directed, in part, the Prosecution and the *ad hoc* Defence counsel to make their

¹² Applicants a/0004/06 to a/0009/06 and a/0016/06 to a/0063/06 and a/0071/06.

¹³ *Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06*, Public, 22 September 2006.

¹⁴ The Decision also addresses the applicants’ request for participation in the case of *The Prosecutor v. Thomas LUBANGA DYILO*. Such requests to participate in the case of *The Prosecutor v. Thomas LUBANGA DYILO* were the subject of other filings and will, therefore, not be addressed in the present one.

¹⁵ 22 September 2006 Decision, at page 5.

¹⁶ See *Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06*.

¹⁷ *Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06*, issued on 29 September 2006 (Public) (ICC-01/04-01/06-494).

submissions on the applicants' requests to participate in the investigation of the situation of DRC, by 8 December 2006, at the latest.

Scope of the Present Submission

11. The Prosecution notes that it has already provided its observations on the participation of applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06 in the case of *The Prosecutor v. Thomas LUBANGA DYILO* in other submissions.¹⁸ Therefore, in the present submission, the Prosecution will only present its observations on the participation of applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06 (Applicants and Applications, respectively) in the situation of the DRC.
12. In addition, and further to the 29 September 2006 Decision, the Prosecution has in the present filing included its observations on the participation of Applicants a/0072/06 to a/0080/06 and a/0105/06 in the situation of the DRC.

¹⁸ "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 22 August 2006 (Confidential – *Ex parte* – Prosecution Only) (ICC-01/04-01/06-342) with Public Redacted and Formatted version filed on 22 August 2006 (ICC-01/04-01/06-345); "Prosecution's Observations on the Applications for Participation of Applicants a/0047/06-a/0052/06", filed 25 August 2006 (Confidential – *Ex Parte* – Prosecution Only) (ICC-01/04-01/06-354) with Public Redacted and Formatted version filed on 6 September 2006 (ICC-01/04-01/06-390); "Prosecution's Observations on the Applications for Participation of Applicants a/0053/06 to a/0063/06 and a/0071/06" (Confidential – *Ex Parte* – Prosecutor Only), filed 12 October 2006 (ICC-01/04-01/06-559) with Public Redacted version filed on the same date (ICC-01/04-01/06-560); and "Prosecution's Observations on the Applications for Participation of Applicants a/0072/06 to a/0080/06 and a/105/06" filed on 18 October 2006 (Confidential – *Ex Parte* – Prosecutor Only) (ICC-01/04-01/06-584) with Public Redacted version filed on 19 October 2006 (ICC-01/04-01/06-589).

Legal Qualification of “Victim”

13. Pursuant to Rule 89(2) of the Rules of Procedure and Evidence (“Rules”), the Chamber must first decide if an applicant qualifies as a “victim” as defined in Rule 85 before determining whether the applicant may participate in the proceedings.

14. 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.”

15. The Pre-Trial Chamber has determined¹⁹ that the following four criteria must be satisfied in order to grant the status of ‘victim’, irrespective of the stage of the proceedings in which the applicants wish to participate: (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 (d) a causal link between the crime and the harm must exist.²⁰

16. The Pre-Trial Chamber further elaborated that applicants will be permitted to participate in the proceedings in the context of the investigation into the situation of the DRC, after having demonstrated that there are grounds to believe that they have suffered harm as a result of crimes committed that fall

¹⁹ 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”, 28 July 2006 (28 July 2006 Decision). The Pre-Trial Chamber had previously enunciated these criteria in the 17 January 2006 Decision, pp. 20-21.

²⁰ 28 July 2006 Decision, p. 7.

under the jurisdiction of the Court.²¹ For a crime to fall within the jurisdiction of the Court, there are three conditions that must be met: (i) the crime must be listed in article 5 of the Statute as either the crime of genocide, crimes against humanity or war crimes, (ii) the crime must meet the conditions of article 11 of the Statute and, (iii) the crime must meet one of the two conditions described in article 12 of the Statute.²²

17. The Prosecution submits that if the Applicants are determined to be 'victims', then the Pre-Trial Chamber must consider whether the Applicants meet the criteria of Article 68(3). Article 68(3) of the Statute provides that the Chamber shall permit 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, second 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.²³ The personal interest of the Applicants in relation to the specific matters at issue in a proceeding can only be determined with certainty once a case has been commenced, and cannot be determined as such by the mere fact that crimes are being investigated.

²¹ 28 July 2006 Decision, pp. 14-15.

²² 28 July 2006 Decision, p. 15. In the 17 January 2006 Decision, the Pre-Trial Chamber elaborated on the criteria that must be met in order to establish that the alleged crime falls within the jurisdiction of the Court, pp. 21-24, at paras. 83-93.

²³ See 17 January 2006 Decision, para. 62.

The Prosecution's Main Submission

Victims should Not be Permitted to Participate in the Situation

18. As an initial observation, in the Prosecution's view, the jurisprudence on the participation of victims in the situation remains unsettled. The Prosecution's challenge to the 17 January 2006 Decision before the Appeals Chamber was denied on procedural grounds without a review of the substance of the issue. Accordingly, to date there was no secondary review on the merits of this issue at the appellate level.

19. The Prosecution maintains its previous submission that it is inappropriate to grant applications for victims' participation during the investigation phase of a situation on the following grounds:²⁴

- (i) Granting such applications can jeopardize the appearance of integrity and objectivity of the investigations, and impact of the investigative functions which the Prosecutor must conduct pursuant to the principle of independence, including the determination of incidents warranting investigation and of the crimes and perpetrators to be prosecuted;
- (ii) The confidentiality of all information related to the investigation must be maintained, as it is one of the primary safeguards against intimidation of or retaliation against victims and witnesses, and against other forms of interference with the investigations such as the destruction of evidence. The granting of applications for victims'

²⁴ Reference is made to the "Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp" filed 15 August 2005.

participation during the investigation phase would be contrary to the need to maintain the confidentiality of all information related to the investigation, including its scope, and to basic considerations of efficiency and security; and

- (iii) The participation of victims during the investigative phase in a situation can undermine the defined investigative strategies of the Office of the Prosecutor. There is a real risk that this system of participation may be abused through improper requests for access to files and/or evidence or to furnish information regarding the status of ongoing investigations, which are intended to influence prosecutorial authority, accordingly affecting the independence of the Office of the Prosecutor along with the integrity and efficiency of its investigative tasks.²⁵

20. Additionally, giving victims the right to participate in the situation *before* a judicial proceeding has commenced produces significant uncertainty and frustration in respect of the ultimate participatory status the victims may or may not be accorded. In particular, once victims are granted status to participate in the situation, there is a presumption or expectation on their part that their participation will continue, thereby affording them the right to additional procedural avenues such as reparations in the event of an ultimate

²⁵ The Prosecution refers, in particular, to its submissions contained in two recent filings on actual manifestations of its concerns: (i) "Prosecution's Response to 'Observations et demande de mesures spécifiques du représentant légal de VPRS 1, 4 et 5 sur le document 'Prosecutor's Information on the Further Investigation' du 28 juin 2006'", 20 September 2006, (Confidential, *ex parte*, Legal Representative of VPRS 1, 4 and 5 only) - ICC-01/04-01-226; and (ii) "Prosecution's Response to 'Observations et demande de mesures spécifiques du représentant légal de VPRS 2, 3 et 6'", 25 September 2006 (Confidential, *ex parte*, Legal Representative of VPRS 2,3 and 6 only) - ICC-01/04-01-230.

conviction. The Prosecutor, however, in his statutory discretion may prosecute only a limited number of crimes to which, on secondary analysis, those earlier granted the status as victims in the situation may not be permitted to proceed any further. In the end result, the individuals who have been recognized by the Court as victims then have no further right to participate in the “case” if the harm they have suffered is unrelated to the defined charges.²⁶

The Prosecution’s Alternative Submission

21. In the alternative, and in the event that the Pre-Trial Chamber decides to follow its reasoning in the 17 January 2006 Decision, the Prosecution does not oppose the participation of the Applicants in the situation of the DRC, except as expressly detailed below.

Factual analysis

22. As indicated in paragraphs 8 and 10 above, in the present submission the Prosecution must provide its observations with respect to sixty-five Applications for participation in the situation of the DRC (Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06). The Prosecution has previously summarized the factual substance of these Applications in earlier filings.²⁷ Accordingly, given the restrictions to

²⁶ The Prosecution refers to the recent example of this situation with respect to Victims VPRS 1-6.

²⁷ “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 22 August 2006 (Confidential – *Ex parte* – Prosecution Only) (ICC-01/04-01/06-342) with Public Redacted and Formatted version filed on 22 August 2006 (ICC-01/04-01/06-345); “Prosecution’s Observations on the Applications for Participation of Applicants a/0047/06-a/0052/06”, filed 25 August 2006 (Confidential – *Ex Parte* – Prosecution Only) (ICC-01/04-01/06-354) with Public Redacted and Formatted version filed on 6 September 2006 (ICC-01/04-01/06-390); “Prosecution’s

page limits, it is not possible to repeat the factual details of each of the sixty-five Applications within the body of the present submission. In this regard, the Prosecution refers the Pre-Trial Chamber to its earlier filings, and, for ease of reference, attaches the sixty-five summaries hereto.²⁸

23. The Applicants have allegedly suffered harm in Ituri, Orientale Province of the DRC at various times after 1 July 2002 as a result of crimes that fall within the jurisdiction of the Court. The Prosecution notes, however, that four Applications do not reveal the date of the alleged harm - Applications a/0018/06, a/0026/06, a/0027/06, and a/0038/06 - thereby providing insufficient information to determine whether the harm allegedly suffered falls within the jurisdiction of the Court.

24. Accordingly, with the exception of the four Applications set out in paragraph 24, there may be grounds to believe that these Applicants have suffered harm as a result of crimes committed that fall under the jurisdiction of the Court.

Observations on the Applications for Participation of Applicants a/0053/06 to a/0063/06 and a/0071/06" (Confidential – *Ex Parte* – Prosecutor Only), filed 12 October 2006 (ICC-01/04-01/06-559) with Public Redacted version filed on the same date (ICC-01/04-01/06-560); and "Prosecution's Observations on the Applications for Participation of Applicants a/0072/06 to a/0080/06 and a/105/06" filed on 18 October 2006 (Confidential – *Ex Parte* – Prosecutor Only) (ICC-01/04-01/06-584) with Public Redacted version filed on 19 October 2006 (ICC-01/04-01/06-589).

²⁸ The Prosecution attaches hereto as Confidential – *Ex Parte* – Prosecutor Only, Annex 1, the factual overview for each of the sixty-five Applications.

Request

25. For the foregoing reasons, the Prosecution requests that the Pre-Trial Chamber deny Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06 the right to participate as victims in the situation of the DRC. In the alternative, the Prosecution does not oppose the Applications for participation in the situation of the DRC, with the exception of Applications a/0018/06, a/0026/06, a/0027/06 and a/0038/06 which the Prosecution requests that the Pre-Trial Chamber deny.




Luis Moreno-Ocampo
Prosecutor

Dated this day of 30 November 2006
At The Hague, The Netherlands