

**Cour
Pénale
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**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Redacted Version

**Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants
a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06,
a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

Legal Representatives of the Applicants

Ms Carine Baptista Buyangandu
Mr Sylvestre Bismwa
Mr Michael Verhaeghe
REDACTED

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

Background

1. Between 16 October 2006 and 25 April 2007, a total of seventy-five Applications (the “Applications”)¹ to participate as victims were filed in the situation in the Democratic Republic of the Congo (the “DRC”).
2. Of the present seventy-five applications, sixty-five applicants ask to be granted victim status to participate in the investigation phase of the situation of the DRC.² Sixty-eight applicants request to be recognized as victim in the pre-trial phase³ and seventy-four applicants seek participation as victim in the trial proceedings.⁴ Finally, fifty-seven applicants demand participation in appeal procedures.⁵ One application did not indicate any stage of the proceedings the applicant wishes to participate in.⁶

¹ Application a/0106/06 (ICC-01/04-264-Conf-Exp, ICC-01/04-264-Conf-Exp-Anx) filed in the situation of the Democratic Republic of the Congo on 7 December 2006; Applications a/0107/06 (ICC-01/04-265-Conf-Exp), ICC-01/04-265-Conf-Exp-Anx), a/0108/06 (ICC-01/04-266-Conf-Exp, ICC-01/04-266-Conf-Exp-Anx.), a/0109/06 (ICC-01/04-267-Conf-Exp, ICC-01/04-267-Conf-Exp-Anx.), a/0110/06 (ICC-01/04-268-Conf-Exp) filed in the situation in the DRC on 16 October 2006; Application a/0188/06 (ICC-01/04-324-Conf-Exp-Anx I) filed in the situation in the DRC on 21 March 2007; Applications a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06 and a/0214/06 filed in the situation in the DRC on 11 April 2007 (ICC-01/04-325-Conf-Exp, Annexes 1 to 40); Applications a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06 and a/0240/06 filed in the situation in the DRC on 23 April 2007 (ICC-01/04-326-Conf-Exp, Annexes 1 to 13), and Applications a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06 filed in the situation of the DRC on 25 April 2007 (ICC-01/04-327-Conf-Exp, Annexes 1 to 20).

² Sixty-five applications for participation as victim in the investigation stage: a/0109/06, a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0214/06, a/0220/06 to a/0222/06, a/0225/06 to a/0228/06, a/0231/06 to a/0233/06, a/0235/06 to a/0237/06, a/0239/06 to a/0250/06.

³ Sixty-eight applications for participation as victim in the pre-trial phase: a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0214/06, a/0220/06 to a/0222/06, a/0225/06 to a/0228/06, a/0231/06 to a/0233/06, a/0235/06 to a/0237/06, a/0239/06 to a/0250/06.

⁴ Seventy-four applications for participation as victim in the trial proceedings: a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06 to a/0250/06.

⁵ Fifty-seven applications for participation as victim in the appeals proceedings: a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06 to a/0229/06, a/0234/06 to a/0237/06, a/0239/06 to a/0241/06, a/0249/06, a/0250/06.

⁶ Application a/0203/06.

3. On 23 May 2007, the Single Judge⁷ rendered the “*Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure*” (the “*Decision*”),⁸ inviting the Prosecution and the Office of Public Counsel for the Defence (OPCD) to submit their observations on the applications to participate in the investigation of the situation in the DRC by 25 June 2007.

Scope of the Prosecution’s Submission

4. The Decision invites observations on the Applicants’ requests to participate in the investigation in the situation in the DRC. In this context, the Prosecution notes that the large majority of the Applicants in their applications signified their intention to participate during all stages, including both the “situation” and the “case”.⁹ As the Decision limits the Prosecution to submitting observations on the participation in the situation, the Prosecution limits its observations accordingly.¹⁰

The Prosecution’s Main Submission

Preliminary Observations

5. The Rome Statute (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”) make a distinction between situations and cases.¹¹ The Pre-Trial Chamber defined “situations” generally by temporal, territorial and,

⁷ On 10 May 2007, the Pre-Trial Chamber appointed Judge Sylvia Steiner as Single Judge of Pre-Trial Chamber I for the Situation in the DRC and any related case from that date until otherwise decided, see “*Decision on the Designation of a Single Judge*”, public, 10 May 2007, ICC-01/04-328-tEN.

⁸ “*Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure*”, public, 23 May 2007, ICC-01/04-329.

⁹ Reference is made to para. 2.

¹⁰ The Prosecution requests that it be permitted to file its observations prior to any decision being made on whether the applicants should be permitted to participate in the “case”.

¹¹ Some of the most relevant examples include Articles 13, 14, 15 (5) and (6), 17, 18, 19, 53 of the Statute.

possibly, personal parameters.¹² By contrast, in the jurisprudence of the Pre-Trial Chamber, “cases” comprise specific incidents during which one or more crimes within the jurisdiction of the Court and in the context of a situation under investigation seem to have been committed by one or more identified suspects. They are thus subject to proceedings that take place after the issuance of a warrant of arrest or a summons to appear.¹³

6. The Prosecution firstly wishes to reiterate its position on the issue of victim participation, as a whole, as reflected in prior filings before this and other Chambers of the Court:¹⁴ The development of a body of procedural rights afforded to victims by the legal framework governing the Court, which allows victims to make their independent voice heard during various instances of the Court's process, is a major development in international criminal law, and one that the Prosecution strongly supports. It is nevertheless critical to ensure that these rights are implemented in a manner which is consistent with the Court's legal framework. Additionally, the Prosecution maintains its position that participation rights should be implemented in a way which maximizes the impact of the victims' views

¹² *Ibid.*

¹³ *Ibid.*; “Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the case of the Prosecutor v. Thomas Lubanga Dyilo”, public, 29 June 2006, ICC-01/04-01/06-172-tEN; “Decision for 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”, public, 28 July 2006, ICC-01/04-01/06-228-tEN; “Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo”, public, 20 October 2006, ICC-01/04-01/06-601.

¹⁴ Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp”, public, 15 August 2005, ICC-01/04-84; “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 and VPRS 6”, public, 23 January 2006, ICC-01/04-103; “Prosecutor's Reply to ‘Observations of the Legal Representative of VPRS 1 to VPRS 6 Following the Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in Proceedings of VPRS 1 to 6’”, public, 6 February 2006, ICC-01/04-111; “Prosecution's Reply under Rule 89(1) for Participation of Applicants a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation”, public, 28 February 2007, ICC-02/04-85; “Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 in the Situation in Darfur, the Sudan”, public, 8 June 2007, ICC-02/05-81.

and concerns in Court proceedings without further exposing them and other persons to risks to their well-being and safety.¹⁵

Legal Qualification of "Victim"

7. Pursuant to Rule 89(2), the Chamber must first decide whether an applicant qualifies as a victim as defined in Rule 85 before determining whether the applicant may participate in the proceedings. Pursuant to Rule 85(a), "victims" mean "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."
8. The Pre-Trial Chamber has determined that irrespective of the stage of the proceedings in which they wish to participate, the following four criteria that must be met by an applicant for him or her to be accorded the status of victim: (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.¹⁶
9. The Pre-Trial Chamber further elaborated that an applicant would be permitted to participate in the proceedings in the context of the investigation, after having demonstrated that there were grounds to believe that he or she suffered harm as a result of crimes committed that fall under

¹⁵ "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 and VPRS 6", public, 23 January 2006, ICC-01/04-103; "Prosecutor's Reply to 'Observations of the Legal Representative of VPRS 1 to VPRS 6 Following the Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in Proceedings of VPRS 1 to 6'", public, 6 February 2006, ICC-01/04-111; "Prosecution's Reply under Rule 89(1) for Participation of Applicants a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation", public, 28 February 2007, ICC-02/04-85.

¹⁶ "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", public, 28 July 2006, ICC-01/04-01/06-228-tEN. The Pre-Trial Chamber had previously enunciated these criteria in their "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", public, 17 January 2006, ICC-01/04-101-tEN-Corr.

the jurisdiction of the Court.¹⁷ Three conditions are to be met: (i) the crime must be listed in Article 5 of the Statute as either genocide, a crime against humanity or a war crime, (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.¹⁸

10. The Prosecution submits that for an applicant to qualify for the status of “victim” with a right to participate in proceedings, he or she must meet the criteria set out in Rule 85 and satisfy the conditions for participation set out in Article 68(3). The combined effect of these provisions establishes a two-stage process for the Single Judge to determine whether an individual qualifies as a victim with standing to participate in proceedings. The Single Judge must be satisfied firstly, that the Applicants fulfil the criteria set out in Rule 85 and, secondly, that the “personal interests”¹⁹ (Article 68(3)) of the Applicants are directly affected by the proceedings in which he or she is applying to participate.²⁰

Victim Participation in the “Situation”

11. The Prosecution maintains its view, as it has in submissions in other situations,²¹ that regardless of whether the applicants may qualify as victims

¹⁷ “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”, public, 28 July 2006, ICC-01/04-01/06-228-tEN.

¹⁸ Condition (iii) applies when the investigation is based on a UNSC referral under Article 13(b).

¹⁹ “Prosecution’s Reply under Rule 89(1) for Participation of Applicants a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation”, public, 28 February 2007, ICC-02/04-85.

²⁰ “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, public, 17 January 2006, ICC-01/04-101-tEN-Corr.

²¹ “Prosecution’s Reply under Rule 89(1) for Participation of Applicants a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation”, public, 28 February 2007, ICC-02/04-85; “Prosecution’s Reply under Rule 89(1) to the Applications for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 in the Situation in Darfur, the Sudan”, public, 8 June 2007, ICC-02/05-81.

under Rule 85(a), their applications for participation in the situation should be denied under the provisions of Article 68(3).²²

12. The experience gained in the past year and almost a half since the decision to grant applicants the right to participate in the investigation of a situation was rendered²³ must also be taken into account. During this time, a total of 149 applications for participation as victims have been filed in the DRC situation.²⁴ The vast majority of these applications, namely 140, are pending decision.²⁵ In the Uganda situation, all 49 applications remain under consideration. Given both the content and nature of these applications and the experience in the situations outlined above, a significant number of the applicants are unlikely to qualify to participate in the case. In this context, the Prosecution notes that in its view out of the total number of 149 applicants in the DRC situation only approximately 35 are likely to qualify for participation in the case. This is due to the breadth of the conflicts, the perpetrators, and the crimes, as compared to the necessarily limited focus of the prosecutions of the Court. It is also the result of the differences in the

²² "Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp", public, 15 August 2005, ICC-01/04-84; "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 and VPRS 6", public, 23 January 2006, ICC-01/04-103; "Prosecutor's Reply to 'Observations of the Legal Representative of VPRS 1 to VPRS 6 Following the Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in Proceedings of VPRS 1 to 6'", public, 6 February 2006, ICC-01/04-111. On the matter of the admissibility of "situation victims" before the Pre-Trial Chamber, see also: "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", public, 17 January 2006, ICC-01/04-101-tEN-Corr; "Observations of the Legal Representative of VPRS 1 to VPRS 6 following the Prosecutor's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in Proceedings of VPRS 1 to VPRS 6", public, 27 January 2006, ICC-01/04-105-tEN; "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, 31 March 2006, ICC-01/04-135-tEN.

²³ "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", public, 17 January 2006, ICC-01/04-101-tEN-Corr.

²⁴ The total number of applications listed includes the present 75 Applications (a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06).

²⁵ *Ibid.*

scope of a “situation” and “case,” given the manner in which those terms have been defined by the Chambers and are currently being applied.

13. The legal framework of the Court provides specific rules allowing the *ad hoc* participation of victims in proceedings which take place when the preliminary analysis phase is finalized or at the end of the investigation of the situation.²⁶ In addition, there is a general right for the victims to participate in proceedings, but, in the Prosecution’s view, such participation can only become meaningful once an arrest warrant or a summons to appear has been issued and there is a case presented by the Prosecution before a Pre-Trial Chamber.

14. In addition, it is when a case is formed that the Chamber will have all the information relevant to determine whether those victims’ personal interests could be truly deemed to be affected by the proceedings. In respect of the present Applications, the Prosecution notes that almost all Applicants have expressed their interest to also participate in the case.²⁷ The Prosecution submits that in this situation, as in others, granting participation to the Applicants who qualify to participate in the case is the appropriate avenue to provide victims a meaningful way of expressing their views and concerns.

²⁶ For example, the rights to present their views when the Prosecutor asks for authorisation to commence an investigation (Article 15 (3)); to be informed of the results of the preliminary examination and analysis, and of any investigation (Articles 15 (6) and 53 (1) and Rule 92 (2)); 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 (Article 53 and Rules 89, 92 (2), 93, 107 and 109); and to submit observations in any determination of jurisdiction or admissibility of a case (Article 19 (3)).

²⁷ Reference is made to para. 2.

The Right to Participate

Article 68(3) does not apply to the investigation

15. 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.
16. The Prosecution submits, as it has argued on prior occasions, that an investigation does not form part of the concept of "proceedings", within the meaning of Article 68(3).²⁸ Rather, "proceedings" in Article 68(3) refers to formal proceedings before a Chamber of the Court. Therefore Article 68(3) does not grant victims the right to participate in the situation.
17. The term "proceedings" contemplated in the Statute and the Rules, as appropriate for the participation of victims, does not anticipate an ongoing investigation, but instead refers to proceedings in a particular case against

²⁸ "Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp", public, 15 August 2005, ICC-01/04-84; "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 and VPRS 6", public, 23 January 2006, ICC-01/04-103; "Prosecutor's Reply to 'Observations of the Legal Representative of VPRS 1 to VPRS 6 Following the Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in Proceedings of VPRS 1 to 6'", public, 6 February 2006, ICC-01/04-111. On the matter of the admissibility of "situation victims" before the Pre-Trial Chamber, see also: "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", public, 17 January 2006, ICC-01/04-101-tEN-Corr; "Observations of the Legal Representative of VPRS 1 to VPRS 6 following the Prosecutor's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in Proceedings of VPRS 1 to VPRS 6", public, 27 January 2006, ICC-01/04-105-tEN; "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, 31 March 2006, ICC-01/04-135-tEN; "Prosecution's Reply under Rule 89(1) for Participation of Applicants a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation", public, 28 February 2007, ICC-02/04-85. The Prosecution notes that this application is still pending decision.

an individual or individuals for the purpose of establishing criminal responsibility.²⁹ Thus victims are allowed to participate under Article 68(3) only once certain formal proceedings before the Pre-Trial Chamber have been initiated.³⁰

The “personal interests” and “appropriateness” requirements of Article 68(3) are not satisfied

18. The Prosecution submits, however, that even if Article 68(3) can be construed to permit the participation of victims in the investigation of the situation, the additional requirements set out in that article are not satisfied. The article requires a determination of whether the “personal interests” of the victim are affected and whether the participation now sought is “appropriate.” The Prosecution submits that, when applied in this situation, these requirements are not met.

19. The “personal interest” to be affected must be something more than the general interest of any victim in the progress and outcome of the investigation – otherwise the criterion would be rendered meaningless. This is the manner in which the Appeals Chamber has interpreted these terms when requiring that even victims who had already been granted participation status should re-apply to participate in “proceedings”; they should include in their applications a specific statement in relation to whether, and how, their personal interests are affected by the particular proceedings.³¹ The Appeals Chamber has further stressed that “an

²⁹ “Prosecution’s Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp”, public, 15 August 2005, ICC-01/04-84.

³⁰ *Ibid.*

³¹ *The Prosecutor v Thomas Lubanga Dyilo*: “Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”, public, 13 February 2007, ICC-01/04-01/06-824; this finding was upheld and further developed by the Appeals Chamber in its recent Decision, see “Decision of the Appeals Chamber on the

assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.”³² The Prosecution therefore submits that the applicants should be required to show that his or her “judicially recognisable personal interest”³³ is affected by the proceedings in which he or she is applying to participate.

20. The Prosecution submits that a determination whether at this stage in the proceedings it is “appropriate” to admit the pending applications should be made with the benefit of the experience the Court gained in the situations to date.

Consequences of Allowing Broad Participation by “Situation Victims”

Effect on Court’s Proceedings

21. One of the consequences of the ruling that victims may participate in the situation has already been experienced by the Court. A significant amount of time and resources have been used by the Prosecution in its efforts to address applications for victim participation. Submissions and decisions related to applications for participation, and issues ancillary to those applications, have become numerous over the past year and a half.
22. The ability of the Court to manage the participation of “situation victims” in Darfur, Northern Uganda, and the DRC is necessarily assessed in light of the situations addressed by the Court – i.e. mass criminality, potentially

Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the ‘Directions and Decision of the Appeals Chamber’ of 2 February 2007”, public, 13 June 2007, ICC-01/04-01/06-925 OA8.

³² *Ibid*, at para. 28.

³³ E. Haslam, “Victim Participation at the ICC”, in McGoldrick, Rowe and Donnelly (eds.), *The Permanent International Criminal Court* (2004), p. 326.

involving very significant numbers of potential victims. Furthermore, if the Chambers continue to apply the definitions of “situation” and “case” which are now becoming settled, however, significant numbers of “situation” victims may not qualify as case victims. This consideration applies even more in light of the mass criminality which falls within the scope of the situation.³⁴

23. In the Prosecution’s view, permitting any person who claims to have suffered as a result of a crime falling within the jurisdiction of the Court to participate in the situation is likely to have a significant impact upon the limited resources of the Court. With respect to the applications submitted to date, the Pre-Trial Chamber has been obligated to adjudicate the applications as well as to consider other claims made by situation victims, such as protective measures and the scope of any anticipated intervention. Issues have arisen about who may legitimately represent these applicants – even before they have been accepted as situation victims. The Prosecution, defence counsel, *ad hoc* defence counsel, and sections of the Registry have been required to consider and respond to the views and requests put forward by all victim participants. The Registry has been required to perform numerous functions, such as provision of legal advice and organization of legal representation for all applicants who apply in the context of the entire situation that has been referred to the Court. These activities necessarily divert resources and are likely to impair the presentation and adjudication of an expeditious and focused investigation and case.

³⁴ “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 and VPRS 6”, public, 23 January 2006, ICC-01/04-103; “Prosecution’s Reply under Rule 89(1) for Participation of Applicants a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation”, public, 28 February 2007, ICC-02/04-85.

24. In addition, it is important to emphasize that devoting resources to the management of issues raised by situation victims also arguably impairs rather than enhances the participation of victims in proceedings. The presentation of views and concerns of the victims in the *Lubanga* case – specifically at the recent confirmation proceedings – was a milestone in meaningful victim participation as anticipated in the Statute. It should remain a priority to enhance forms of victim participation which are specifically identified in the Statute and represent the core participation rights at confirmation and trial.

25. In the context of the investigation in the situation of the DRC, applying the prior ruling of the Pre-Trial-Chamber would mean that any person who claims to have suffered prejudice or harm as a result of a crime falling within the jurisdiction of the Court and which occurred in the context of the DRC situation since 1 July 2002, could participate in the situation. This would be regardless of whether the person demonstrates any connection to (a) the actual focus of the Prosecution's investigation, (b) the case which has already commenced and (c) the personal interest affected. A very high number of individuals reportedly have been affected by the ongoing conflict in the DRC to varying degrees. Under the Pre-Trial Chamber's prior ruling, tens or hundreds of thousands of these individuals could be considered victims of crimes falling within the jurisdiction of the Court and therefore qualify as participants in the situation.

Impact on the Court's ability to protect victims and witnesses

26. The prospect that the Victims and Witness Unit ("VWU") may be called upon to extend its protective efforts to cover those victims who have successfully requested participation in the investigation of a situation

should also be considered.³⁵ Such a development would dilute the VWU's limited resources and impact negatively on the effectiveness of protective measures relating to witnesses relevant to the case. In light of these considerations, the Prosecution submits that protective efforts and resources should remain focused on ensuring that persons approached in the course of ongoing investigative efforts do not suffer harm as a result of their cooperation with the investigation.

Impact on the integrity of the investigation

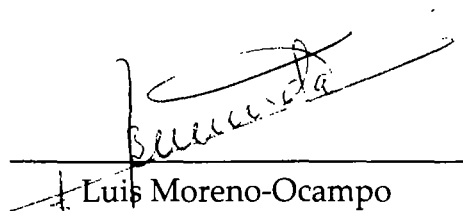
27. The Prosecution reiterates its concern that the integrity of the investigation can also be affected by victim participation in the situation. Prior to commencement of the case, under the terms of the Statute, the investigation is conducted by the Office of the Prosecutor, which is intended to act independently and not subject to any external factors. 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 this principle of objectivity. Allowing victim participation in the situation could give rise to the perception that the Prosecution is subject to external influences into the investigative process.³⁶

³⁵ The Legal Representative of VPRS 1 to VPRS 6 already expressed his opinion that the protective duties of Article 68(1) extend to all those victims admitted to participate in the proceedings. See "Observations of the Legal Representative of VPRS 1 to VPRS 6 following the Prosecutor's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in Proceedings of VPRS 1 to VPRS 6", public, 27 January 2006, ICC-01/04-105-tEN.

³⁶ Additional concerns would arise if applicants for participation were allowed to provide documentation or other evidentiary material and have access to confidential material. If granted, these entitlements would open the possibility that the Pre-Trial-Chambers will consider, as part of their decision-making, material collected outside the investigation conducted by the Prosecution, in compliance with the requirements and safeguards of Article 54(1). This evaluation in turn could lead to consideration by the Chamber of unreliable material which might be prejudicial to the Prosecution or the Defence. The Pre-Trial Chamber considered that controlling the extent of the victims' participation would suffice to safeguard the appearance of integrity and objectivity, as well as the efficiency and security, of the investigation of the situation (See "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", public, 17 January 2006, ICC-01/04-101-tEN-Corr). By granting situation victims the right to file documents/material, to request specific measures, and, upon decision of the Chamber, to gain access to non-public documents contained in the situation record and to participate in specific confidential

Conclusion

28. In light of the aforementioned considerations, the Prosecution requests that the Single Judge deny the applications for participation as victims in the situation.



Luis Moreno-Ocampo
Prosecutor

Dated this 25th June 2007

At The Hague, The Netherlands

proceedings (*Id*), however, the Pre-Trial Chamber offered the victims multiple points of entry into the investigation. Importantly, as the Lubanga proceedings have advanced, the Pre-Trial Chamber has denied situation-victims routine access to confidential or sensitive information and also has carefully limited the entitlement of anonymous victim-participants in the case to submit evidence or information, see "Décision sur les modalités de participation des victimes a/0001/06, a/0002/06 et a/0003/06 à l'audience de confirmation des charges", public, 22 September 2006, ICC-01/04-01/06-462.