

**Cour
Pénale
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**International
Criminal
Court**

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PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

***IN THE CASE OF
THE PROSECUTOR***

***vs. JOSEPH KONY, VINCENT OTTI, RASKA LUKWIYA, OKOT ODHIAMBO and
DOMINIC ONGWEN***

Public Document

**Prosecution's Reply under Rule 89(1) to Applications for participation of Applicants
a/0010/06 and a/0064/06 to a/0070/06 and a/0081/06 to a/0104/06 and a/0111/06 to
a/0127/06 in the Case of The Prosecutor vs. JOSEPH KONY, VINCENT OTTI, RASKA
LUKWIYA, OKOT ODHIAMBO and
DOMINIC ONGWEN**

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Preliminary Statement

The Office of the Prosecutor (“OTP”) respectfully presents its Reply to the applications for participation in the case of The Prosecutor vs. Joseph KONY, Vincent OTTI, Raska LUKWIYA, Okot ODHIAMBO, and Dominic ONGWEN (“Case”), pursuant to Rule 89(1) of the Rules of Procedure and Evidence (“Rules”). The OTP is filing separately its observations on the applications made by the same applicants for participation in relation to the Uganda situation (“Situation”) (“Reply to the Situation Applications”).

I. Background

1. On 8 July 2005, the Pre-Trial Chamber issued warrants of arrest, under seal¹, naming Joseph KONY² (amended on 27 September 2005)³, Vincent OTTI⁴, Raska LUKWIYA⁵, Okot ODHIAMBO⁶ and Dominic ONGWEN⁷, and charging these alleged LRA

¹ See “Decision On The Prosecutor’s Application For Warrants Of Arrest Under Article 58,” ICC-02/04-01/05-1, 8 July 2005; “Warrant Of Arrest For Joseph Kony,” (under seal) ICC-02/04-01/05-2-US-Exp, 8 July 2005; “Warrant Of Arrest For Vincent Otti,” (under seal) ICC-02/04-01/05-4-US-Exp, 8 July 2005; “Warrant Of Arrest For Raska Lukwiya,” (under seal) ICC-02/04-01/05-6-US-Exp, 8 July 2005; “Warrant Of Arrest For Okot Odhiambo,” (under seal) ICC-02/04-01/05-8-US-Exp, 8 July 2005; “Warrant Of Arrest For Dominic Ongwen,” (under seal) ICC-02/04-01/05-10-US-Exp, 8 July 2005. Also on 8 July 2005, the Chamber issued corresponding Requests for Arrest and Surrender addressed solely to Uganda. See ICC-02/04-01/05-12-US-Exp (under seal) to ICC-02/04-01/05-16-US-Exp, 8 July 2005.

² “Warrant of Arrest for Joseph KONY” (under seal), ICC-02/04-01/05-2-US-Exp, 8 July 2005. KONY was charged in relation to six specific incidents, with twelve counts of crimes against humanity (covering sexual enslavement, rape, enslavement, cruel treatment, murders, inhumane acts), and twenty one counts of war crimes (covering inducing of rape, attack against the civilian population, enlisting of children, pillaging, murders, cruel treatment).

³ See “Decision On The Prosecutor’s Urgent Application Dated 26 September 2005,” ICC-02/04-01/05-27-US-Exp, 27 September 2005 (“27 September 2005 Decision”), at p. 5; “Warrant of Arrest for Joseph KONY issued on 8 July 2005 as amended on 27 September 2005” (under seal), ICC-02/04-01/05-28-US-Exp, 27 September 2005.

⁴ “Warrant of Arrest for Vincent OTTI” (under seal), ICC-02/04-01/05-4-US-Exp, 8 July 2005. OTTI was charged in relation to six specific incidents, with eleven counts of crimes against humanity (covering sexual enslavement, enslavement, cruel treatment, murders, inhumane acts), and twenty one counts of war crimes (covering inducing of rape, attack against the civilian population, enlisting of children, pillaging, murders, cruel treatment).

⁵ “Warrant of Arrest for Raska LUKWIYA” (under seal), ICC-02/04-01/05-6-US-Exp, 8 July 2005. LUKWIYA was charged in relation to one specific incident, with one count of crime against humanity (enslavement) and three war crimes (covering cruel treatment, attack against the civilian population, and pillaging).

⁶ “Warrant of Arrest for Okot ODHIAMBO” (under seal), ICC-02/04-01/05-8-US-Exp, 8 July 2005. ODHIAMBO was charged in relation to two specific incidents, with three counts of crime against humanity (covering murders, enslavement), and seven counts of war crimes (covering murder, enlisting of children, attack against the civilian population, pillaging).

⁷ “Warrant of Arrest for Dominic ONGWEN” (under seal), ICC-02/04-01/05-10-US-Exp, 8 July 2005. ONGWEN was charged in relation to one specific incident, with three counts of crimes against humanity (murder, enslavement,

leaders with crimes against humanity and war crimes⁸ (“Arrest Warrants”). On 13 October 2005, the Chamber ordered the unsealing of the Arrest Warrants and Requests for Arrest and Surrender; and public redacted versions of the Arrest Warrants were issued.⁹

2. On 1 February 2007, the Single Judge rendered the “Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and 1/0111/06 to a/0127/06”¹⁰ (“1 February 2007 Decision”). The 1 February 2007 Decision notified the OTP and the public that: (1) on 21 August 2006, the Registrar had filed in the record of the Case victims’ applications for participation in the proceedings¹¹ and: (2) on 4 September 2006¹², 16

inhumane acts), and four counts of war crimes (covering murder, cruel treatment, attack against the civilian population, pillaging).

⁸ See *Supra* note 1 to 7.

⁹ “Decision on the Prosecutor’s Application for Unsealing of the Warrants of Arrest” (public), ICC-02/04-01/05-52, 13 October 2005, pp. 7-8; “Warrant of Arrest for Joseph KONY issued on 8 July 2005 as amended on 27 September 2005” (public redacted), ICC-02/04-01/05-53, 27 September 2005; “Warrant of Arrest for Vincent OTTI” (public redacted), ICC-02/04-01/05-54, 8 July 2005; “Warrant of Arrest for Raska LUKWIYA” (public redacted), ICC-02/04-01/05-55, 8 July 2005; “Warrant of Arrest for Okot ODHIAMBO” (public redacted), ICC-02/04-01/05-56, 8 July 2005; “Warrant of Arrest for Dominic ONGWEN” (public redacted), ICC-02/04-01/05-57, 8 July 2005. On 27 September 2005, the Court ordered that the Registrar transmit under seal Requests for Arrest and Surrender to the governments of Uganda, Sudan and DRC. Annexed to those Requests and also transmitted confidentially were the warrants issued on 8 July 2005 for OTTI, LUKWIYA, ODHIAMBO and ONGWEN and an amended warrant of arrest for KONY. See 27 September 2005 Decision, ICC-02/04-01/05-27-US-Exp.

¹⁰ See “Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation 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” (public), ICC-02/04-01/05-134, 1 February 2007 (“1 February 2007 Decision”).

¹¹ See *Supra* note 10, see 1 February 2007 Decision, footnote 4, p. 2: Application for participation in proceedings number a/0010/06, ICC-02/04-01/05-98-Conf-Exp; Application for participation in proceedings number a/0064/06, ICC-02/04-01/05-99-Conf-Exp; Application for participation in proceedings number a/0065/06, ICC-02/04-01/05-100-Conf-Exp; Application for participation in proceedings number a/0066/06, ICC-02/04-01/05-102-Conf-Exp; Application for participation in proceedings number a/0068/06, ICC-02/04-01/05-103-Conf-Exp; Application for participation in proceedings number a/0069/06, ICC-02/04-01/05-104-Conf-Exp.

¹² See *Supra* note 10, see 1 February 2007 Decision, footnote 8, p. 3: “Report to Pre-Trial Chamber II on application a/0010/06 in accordance with Rule 89(1) of the Rules and Regulation 86(5) of the Regulations of the Court (“Regulations”)” (confidential), ICC-02/04-01/05-109-Conf-Exp.

October 2006¹³, 26 October 2006¹⁴ and 16 November 2006¹⁵ the Registrar had filed *ex parte* reports attaching additional victims' applications for participation in the Case. By 1 February 2007, 49 applications for participation in the Case had been filed on a confidential basis with the Chamber, requesting participation at all stages of the proceedings including "preliminary examination, pre-trial, trial, and appeals stages"¹⁶("Applications"). Nine of the Applications were provided by the Registry to

¹³ See *Supra* note 10, see 1 February 2007 Decision, footnote 9, p. 3: "Report to Pre-Trial Chamber II on applications a/0064/06 to a/0070/06 in accordance with Rule 89(1) of the Rules, and Regulation 86(5) of the Regulations" (confidential), ICC-02/04-01/05-120-Conf-Exp.

¹⁴ See *Supra* note 10, see 1 February 2007 Decision, footnote 10, p. 3: "Report to Pre-Trial Chamber II on applications a/0081/06 to a/0104/06 in accordance with Rule 89(1) of the Rules, and Regulation 86(5) of the Regulations" (confidential), ICC-02/04-01/05-123-Conf-Exp.

¹⁵ See *Supra* note 10, see 1 February 2007 Decision, footnote 11, p. 3: "Report to Pre-Trial Chamber II on applications a/0111/06 to a/0127/06 in accordance with Rule 89(1) of the Rules, and Regulation 86(5) of the Regulations" (confidential), ICC-02/04-01/05-128-Conf-Exp.

¹⁶ See *Supra* note 10, para. 1, p. 4, footnote 13. Filed 21.08.06: Application for participation in proceedings number a/0010/06 (ICC-02/04-01/05-98-Conf-Exp) (ICC-02/04-01/05-165-Conf); Application for participation in proceedings number a/0064/06 (ICC-02/04-01/05-99-Conf-Exp) (ICC-02/04-01/05-158-Conf); Application for participation in proceedings number a/0065/06 (ICC-02/04-01/05-100-Conf-Exp) (ICC-02/04-01/05-159-Conf); Application for participation in proceedings number a/0066/06 (ICC-02/04-01/05-101-Conf-Exp) (ICC-02/04-01/05-160-Conf); Application for participation in proceedings number a/0067/06 (ICC-02/04-01/05-102-Conf-Exp) (ICC-02/04-01/05-161-Conf); Application for participation in proceedings number a/0068/06 (ICC-02/04-01/05-103-Conf-Exp) (ICC-02/04-01/05-162-Conf); Application for participation in proceedings number a/0069/06 (ICC-02/04-01/05-104-Conf-Exp) (ICC-02/04-01/05-163-Conf); Application for participation in proceedings number a/0070/06 (ICC-02/04-01/05-105-Conf-Exp) (ICC-02/04-01/05-164-Conf); Filed 26.10.06 as annexes to the Report (ICC-02/04-01/05-123-Conf-Exp): a/0081/06: (ICC-02/04-01/05-123-Conf-Exp-Anx1) (ICC-02/04-01/05-168-Conf); a/0082/06: (ICC-02/04-01/05-123-Conf-Exp-Anx2) (ICC-02/04-01/05-169-Conf); a/0083/06: (ICC-02/04-01/05-123-Conf-Exp-Anx3) (ICC-02/04-01/05-170-Conf); a/0084/06: (ICC-02/04-01/05-123-Conf-Exp-Anx4) (ICC-02/04-01/05-171-Conf); a/0085/06: (ICC-02/04-01/05-123-Conf-Exp-Anx5) (ICC-02/04-01/05-172-Conf); a/0086/06: (ICC-02/04-01/05-123-Conf-Exp-Anx6) (ICC-02/04-01/05-173-Conf); a/0087/06: (ICC-02/04-01/05-123-Conf-Exp-Anx7) (ICC-02/04-01/05-174-Conf); a/0088/06: (ICC-02/04-01/05-123-Conf-Exp-Anx8) (ICC-02/04-01/05-175-Conf); a/0089/06: (ICC-02/04-01/05-123-Conf-Exp-Anx9) (ICC-02/04-01/05-176-Conf); a/0090/06: (ICC-02/04-01/05-123-Conf-Exp-Anx10) (ICC-02/04-01/05-177-Conf); a/0091/06: (ICC-02/04-01/05-123-Conf-Exp-Anx11) (ICC-02/04-01/05-178-Conf); a/0092/06: (ICC-02/04-01/05-123-Conf-Exp-Anx12) (ICC-02/04-01/05-179-Conf); a/0093/06: (ICC-02/04-01/05-123-Conf-Exp-Anx13) (ICC-02/04-01/05-180-Conf); a/0094/06: (ICC-02/04-01/05-123-Conf-Exp-Anx14) (ICC-02/04-01/05-181-Conf); a/0095/06: (ICC-02/04-01/05-123-Conf-Exp-Anx15) (ICC-02/04-01/05-182-Conf); a/0096/06: (ICC-02/04-01/05-123-Conf-Exp-Anx16) (ICC-02/04-01/05-183-Conf); a/0097/06: (ICC-02/04-01/05-123-Conf-Exp-Anx17) (ICC-02/04-01/05-184-Conf); a/0098/06: (ICC-02/04-01/05-123-Conf-Exp-Anx18) (ICC-02/04-01/05-185-Conf); a/0099/06: (ICC-02/04-01/05-123-Conf-Exp-Anx19) (ICC-02/04-01/05-186-Conf); a/0100/06: (ICC-02/04-01/05-123-Conf-Exp-Anx20) (ICC-02/04-01/05-187-Conf); a/0101/06: (ICC-02/04-01/05-123-Conf-Exp-Anx21) (ICC-02/04-01/05-188-Conf); a/0102/06: (ICC-02/04-01/05-123-Conf-Exp-Anx22) (ICC-02/04-01/05-189-Conf); a/0103/06: (ICC-02/04-01/05-123-Conf-Exp-Anx23) (ICC-02/04-01/05-190-Conf); a/0104/06: (ICC-02/04-01/05-123-Conf-Exp-Anx24) (ICC-02/04-01/05-191-Conf); Filed 16.11.06 as annexes to the Report (ICC-02/04-01/05-128-Conf-Exp): a/0111/06: (ICC-02/04-01/05-128-Conf-Exp-Anx1) (ICC-02/04-01/05-192-Conf); a/0112/06: (ICC-02/04-01/05-128-Conf-Exp-Anx2) (ICC-02/04-01/05-193-Conf); a/0113/06: (ICC-02/04-01/05-128-Conf-Exp-Anx3) (ICC-02/04-01/05-194-Conf); a/0114/06: (ICC-02/04-01/05-128-Conf-Exp-Anx4) (ICC-02/04-01/05-195-Conf); a/0115/06: (ICC-02/04-01/05-128-Conf-Exp-Anx5) (ICC-02/04-01/05-196-Conf); a/0116/06: (ICC-02/04-01/05-128-Conf-Exp-

the OTP on 13 February 2007¹⁷, 39 on 14 February 2007¹⁸ and one on 15 February 2007.¹⁹ All Applications were provided in redacted form.

3. In the 1 February 2007 Decision, the Single Judge granted the OTP and *ad hoc* Defence until Monday, 26 February 2007 to submit their observations on the Applications.²⁰ On 6 February 2007 the OTP applied to the Single Judge to lift the

Anx6) (ICC-02/04-01/05-197-Conf); a/0117/06: (ICC-02/04-01/05-128-Conf-Exp-Anx7) (ICC-02/04-01/05-198-Conf); a/0118/06: (ICC-02/04-01/05-128-Conf-Exp-Anx8) (ICC-02/04-01/05-199-Conf); a/0119/06: (ICC-02/04-01/05-128-Conf-Exp-Anx9) (ICC-02/04-01/05-200-Conf); a/0120/06: (ICC-02/04-01/05-128-Conf-Exp-Anx10) (ICC-02/04-01/05-166-Conf); a/0121/06: (ICC-02/04-01/05-128-Conf-Exp-Anx11) (ICC-02/04-01/05-201-Conf); a/0122/06: (ICC-02/04-01/05-128-Conf-Exp-Anx12) (ICC-02/04-01/05-202-Conf); a/0123/06: (ICC-02/04-01/05-128-Conf-Exp-Anx13) (ICC-02/04-01/05-203-Conf); a/0124/06: (ICC-02/04-01/05-128-Conf-Exp-Anx14) (ICC-02/04-01/05-204-Conf); a/0125/06: (ICC-02/04-01/05-128-Conf-Exp-Anx15) (ICC-02/04-01/05-205-Conf); a/0126/06: (ICC-02/04-01/05-128-Conf-Exp-Anx16) (ICC-02/04-01/05-206-Conf); a/0127/06: (ICC-02/04-01/05-128-Conf-Exp-Anx17) (ICC-02/04-01/05-207-Conf).

¹⁷ ICC-02/04-01/05-158-Conf.pdf: Application for participation in proceedings number a/0064/06; ICC-02/04-01/05-159-Conf.pdf: Application for participation in proceedings number a/0065/06; ICC-02/04-01/05-160-Conf.pdf: Application for participation in proceedings number a/0066/06; ICC-02/04-01/05-161-Conf.pdf: Application for participation in proceedings number a/0067/06; ICC-02/04-01/05-162-Conf.pdf: Application for participation in proceedings number a/0068/06; ICC-02/04-01/05-163-Conf.pdf: Application for participation in proceedings number a/0069/06; ICC-02/04-01/05-164-Conf.pdf: Application for participation in proceedings number 1/0070/06; ICC-02/04-01/05-165-Conf.pdf: Application for participation in proceedings number a/0010/06; ICC-02/04-01/05-166-Conf.pdf: Reference Number: a/0120/06.

¹⁸ ICC-02/04-01/05-168-Conf.pdf: Reference Number: a/0081/06; ICC-02/04-01/05-169-Conf.pdf: Reference Number: a/0082/06; ICC-02/04-01/05-170-Conf.pdf: Reference Number: a/0083/06; ICC-02/04-01/05-171-Conf.pdf: Reference Number: a/0084/06; ICC-02/04-01/05-172-Conf.pdf: Reference Number: a/0085/06; ICC-02/04-01/05-173-Conf.pdf: Reference Number: a/0086/06; ICC-02/04-01/05-174-Conf.pdf: Reference Number: a/0087/06; ICC-02/04-01/05-175-Conf.pdf: Reference Number: a/0088/06; ICC-02/04-01/05-176-Conf.pdf: Reference Number: a/0089/06; ICC-02/04-01/05-177-Conf.pdf: Reference Number: a/0090/06; ICC-02/04-01/05-178-Conf.pdf: Reference Number: a/0091/06; ICC-02/04-01/05-179-Conf.pdf: Reference Number: a/0092/06; ICC-02/04-01/05-180-Conf.pdf: Reference Number: a/0093/06; ICC-02/04-01/05-181-Conf.pdf: Reference Number: a/0094/06; ICC-02/04-01/05-182-Conf.pdf: Reference Number: a/0095/06; ICC-02/04-01/05-183-Conf.pdf: Reference Number: a/0096/06; ICC-02/04-01/05-184-Conf.pdf: Reference Number: a/0097/06; ICC-02/04-01/05-185-Conf.pdf: Reference Number: a/0098/06; ICC-02/04-01/05-186-Conf.pdf: Reference Number: a/0099/06; ICC-02/04-01/05-188-Conf.pdf: Reference Number: a/0101/06 (Incorrectly labelled on disk as ICC-02/04-01/05-187-Conf.pdf); ICC-02/04-01/05-189-Conf.pdf: Reference Number: a/0102/06; ICC-02/04-01/05-190-Conf.pdf: Reference Number: a/0103/06; ICC-02/04-01/05-191-Conf.pdf: Reference Number: a/0104/06; ICC-02/04-01/05-192-Conf.pdf: Reference Number: a/0111/06; ICC-02/04-01/05-193-Conf.pdf: Reference Number: a/0112/06; ICC-02/04-01/05-194-Conf.pdf: Reference Number: a/0113/06; ICC-02/04-01/05-195-Conf.pdf: Reference Number: a/0114/06; ICC-02/04-01/05-196-Conf.pdf: Reference Number: a/0115/06; ICC-02/04-01/05-197-Conf.pdf: Reference Number: a/0116/06; ICC-02/04-01/05-198-Conf.pdf: Reference Number: a/0117/06; ICC-02/04-01/05-199-Conf.pdf: Reference Number: a/118/06; ICC-02/04-01/05-200-Conf.pdf: Reference Number: a/0119/06; ICC-02/04-01/05-201-Conf.pdf: Reference Number: a/0121/06; ICC-02/04-01/05-202-Conf.pdf: Reference Number: a/0122/06; ICC-02/04-01/05-203-Conf.pdf: Reference Number: a/0123/06; ICC-02/04-01/05-204-Conf.pdf: Reference Number: a/0124/06; ICC-02/04-01/05-205-Conf.pdf: Reference Number: a/0125/06; ICC-02/04-01/05-206-Conf.pdf: Reference Number: a/0126/06; ICC-02/04-01/05-207-Conf.pdf: Reference Number: a/0127/06.

¹⁹ ICC-02/04-01/05-187-Conf.pdf: Reference Number: a/0100/06.

²⁰ See *Supra* note 10, see 1 February 2007 Decision, p. 19.

redactions from the applications for victims' participation ("6 February 2007 Application").²¹ On 15 February 2007 the OTP provided further submissions to its 6 February 2007 Application and requested an extension of time to file its Reply to the applications for victim participation under Rule 89(1) of the Rules²² ("15 February 2007 Submissions").

4. On 20 February 2007 the Single Judge dismissed the Prosecution's requests contained in the 6 February 2007 Application and 15 February 2007 Submissions, including the request for an extension of the time-limit, on procedural grounds and without considering the merits ("20 February 2007 Decision").²³ On 21 February 2007 *ad hoc* counsel for the Defence submitted an application, including for an extension of time.²⁴ On 23 February 2007 the Single Judge rendered a decision granting the Defence an extension of time until 6 March 2007 and the OTP an extension of time until 28 February 2007.²⁵ On 26 February 2007, the OTP requested from the Single Judge leave to appeal the 20 February 2007 Decision ("Application for Leave to Appeal").²⁶

II. The limited scope of this reply

²¹ "Application to Lift Redactions from Applications to Victims' Participation to be Provided to the OTP" (public), ICC-02/04-01/05, 6 February 2007 ("6 February 2007 Application").

²² See "Prosecution's further submissions supplementing its 'Application to Lift Redactions from Applications for Victims' Participation to be Provided to the OTP', dated 6 February 2007, and request for extension of time" (public), ICC-02-04-01/05-208, 15 February 2007, ("15 February 2007 Submissions").

²³ See "Decision on the Prosecutor's Application to lift redactions from applications for Victims' Participation to be provided to the OTP" and on the Prosecution's further submissions supplementing such Application, and request for extension of time" (public), ICC-02/04-01/05-209, 20 February 2007.

²⁴ See "Requête de la Défense en extension de délai afin de répondre aux 'Observation(s) de la Défense sur les demandes de participation à la procédure a/0010/06, a/0064/06 à a/0070/06, a/0070/06, a/0081/06 à a/104/06 et a/0111/06 à a/0127/06 » (public), ICC-02/04-01/05-210, 21 février 2007.

²⁵ See "Decision on Requête de la Défense en extension de délai afin de répondre aux 'Observation(s) de la Défense sur les demandes de participation à la procédure a/0010/06, a/0064/06 à a/0070/06, a/0070/06, a/0081/06 à a/104/06 et a/0111/06 à a/0127/06 » (public), ICC-02/04-01/05-211, 23 February 2007 (« 23 February 2007 Decision »).

²⁶ See "Prosecution's Request for Leave to Appeal the Decision Denying the 'Application to Lift Redactions From Applications for Victims' Participation to be Provided to the OTP" (public), ICC-02/04-01/05-212, 26 February 2007 ("Application for Leave to Appeal").

5. The OTP respectfully submits, as already advanced in its prior submissions²⁷, that it is in no position to file an informed reply under Rule 89(1), due to the protective measure imposed by the 1 February 2007 Decision, namely the significant redaction of the Applications provided to the OTP. The current brief focuses more upon an analysis of the legal tests, which it respectfully submits should apply in examining the Applications, rather than upon any meaningful factual evaluation. The OTP accordingly does not consider this document to be the meaningful reply envisioned by Rule 89 (1), capable of both assisting the Chamber as well as providing a vehicle for the OTP to be heard fully on the important issue of victim participation. It files this document in an effort to provide assistance to the Single Judge upon legal matters not addressed in the 1 February 2007 Decision, and to obviate any misunderstanding about the OTP's position regarding the legal standards and methodology relevant to assessing whether to grant the right to participate as a victim in a case.

6. The OTP filed on 26 February 2007 its Application for Leave to Appeal.²⁸ If as a result of this submission, or otherwise, the protective measure ordered by the Single Judge is varied and the redactions lifted from the Applications provided to the OTP, the OTP will assess the material afresh and intends to request leave to file supplementary submissions.

III. Relevant Legal Tests and Method of Examination of Applications

²⁷ See *Supra* note 21; and 22.

²⁸ See *Supra* note 26, see 26 February 2007 Application for Leave to Appeal.

a. OTP's right to adequate notice and to be heard on applicable legal tests and method for examination of the Applications

7. Pre-Trial Chamber II, when assigning the Single Judge to deal with victims' issues,²⁹ and the Single Judge in the 1 February 2007 Decision³⁰, referred to the applications as applications for participation in the Situation in Uganda and also in the Case. There is, however, no notice or discussion in the prior decisions of Pre-Trial Chamber II, or the Single Judge, of the legal test to be applied in assessing whether any given application for participation in the Situation or in the Case should be granted.
8. For the purposes of making this submission, the OTP has assumed that the Single Judge will apply the same legal test adopted by the Pre-Trial Chamber I in assessing applications for participation in the case of *The Prosecutor vs. Thomas Lubanga Dyilo* ("Lubanga case").³¹ In particular, the OTP respectfully submits that the rulings of Pre-Trial Chamber I should be followed insofar as that Pre-Trial Chamber has defined a "case," the kinds of proceedings encompassed by a case, and the applicable law and method of determining whether to grant an applicant the right to participate in a case as a victim.

²⁹ See "Decision Designating a Single Judge on Victims' Issues" (public), ICC-02/04-01/05-130, 22 November 2006. On 22 November 2006 Pre-Trial Chamber II designated a Single Judge for victims' issues, namely all issues arising in connection with victims' participation in the proceedings in respect of the situation in Uganda ("Situation") and of the Case.

³⁰ See *Supra* note 10, pp. 2-3 and para.1, pp. 4-5.

³¹ See "Decision on the Applications for the participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6", ICC-01/04-101-tEN-Corr (public redacted), 17 January 2006, ("17 January 2006 Decision"); see "Décision sur les demandes de participation à la procédure présentées par les Demandeurs VPRS1 à VPRS6 dans l'affaire *le Procureur c. Thomas Lubanga Dyilo* ", ICC-01/04-01/06-172, 29 juin 2006 (« 29 June 2006 Decision »); see "Decision on the Applications for Participation in the Proceedings of a/001/06, 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 the Congo*; ICC-01/04-01/06-228-tEN (public redacted), 24 July 2006, ("24 July 2006 Decision"); see "Décision sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 dans le cadre de l'affaire *le Procureur c. Thomas Lubanga Dyilo*" (public expurgé), ICC-01/04-01/06-601, 20 octobre 2006 (« 20 October 2006 Decision »),

9. If the Single Judge proposes to adopt a different legal standard or methodology when assessing the Applications for participation as victims in the Case, the OTP respectfully submits that it should be afforded notice of this intention and an opportunity to be heard, before the Single Judge grants participation rights based upon a different legal test or methodology.³²

b. Legal qualification of ‘Victim’ and examination criteria for determining ‘victim’ status to participate in the Case

10. Pursuant to Rule 89(2) of the Rules, to determine whether an applicant may participate in the proceedings, the Chamber must first examine if he or she qualifies as a ‘victim’ as defined in Rule 85. Rule 85(a) of the Rules defines a ‘victim’ as “natural persons who have suffered harm as a result of the commission of any crimes within the jurisdiction of the Court.”
11. As Pre-Trial Chamber I determined, for the status of a victim to be recognised Rule 85(a) requires four criteria to be satisfied: (a) the victim must be a natural person, i.e. a human being; (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) there must be a causal link between the crime and the harm.³³
12. Additionally, the status of victim-participant may only be accorded to those applicants who meet the legal definition of victims as set out in Rule 85 of the Rules

³² The OTP has previously submitted briefing to this Chamber on the principle of judicially provided notice and an opportunity to be heard. *See, e.g.* “Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration and Motion for Clarification” (public), ICC-02/04-01/05-58, 18 October 2005, paras. 3-4. *See* “Prosecution’s Application to Attend 12 February 2007 Hearing” (public), ICC-02/04-01/05-153, 8 February 2007, at para. 9.

³³ *See Supra* note 31, 17 January 2006 Decision, ICC-01/04-101-tEN-Corr, pp. 20-25; and 24 July 2006 Decision, ICC-01/04-01/06-228-tEN, p. 7.

*in relation to the relevant case.*³⁴ Pre-Trial Chamber I has ruled that a case is defined by the warrants of arrest and comprises “...specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects.”³⁵ In addition, the jurisprudence of Pre-Trial Chamber I has established that participation in a case relates to proceedings that take place after the issuance of a warrant of arrest or a summons to appear.³⁶

13. The examination criteria applicable to applications to participate in a case are more restrictive than those which apply when adjudging an application to participate in a situation.³⁷ To participate in the Case, the Chamber or Single Judge must determine that there are reasonable grounds to believe that there is a direct, close and genuine causal link between the harm suffered by the applicant and the crimes that form the basis of the charges identified in the warrants of arrest;³⁸ *i.e.*, the crimes for which

³⁴ See *Supra* note 31, see 17 January 2006 Decision, ICC-01/04-101-tEN-Corr, para. 66.

³⁵ Emphasis added. See *Supra* note 31, see 17 January 2006 Decision, ICC-01/04-101-tEN-Corr, para. 65, in the context of the DRC situation. See 24 July 2006 Decision, ICC-01/04-01/06-228-tEN, p. 9: “...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 [Lubanga] is criminally responsible and for whose commission the Chamber issued an arrest warrant...” (emphasis added); see 29 June 2006 Decision, ICC-01/04-01/06-172, p. 7: “les Demandeurs doivent démontrer qu’un lien de causalité suffisant existe entre le préjudice qu’ils ont subi et les crimes dont il y a des motifs raisonnables de croire que [Lubanga] est responsable pénalement et pour la commission desquels la Chambre a délivré un mandat d’arrêt » (emphasis added).

³⁶ See *Supra* note 31, see 17 January 2006 Decision, ICC-01/04-101-tEN-Corr, para. 68. Article 68(3) requires that the Court only permit victim participation by presenting their views and concerns “at stages of proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” The OTP submits that this participation in a case would only be appropriate after there is a public issuance of a warrant of arrest or summons to appear; and that after the issuance of an arrest warrant or summons to appear the first meaningful stage of participation only arises from the moment of the hearing to confirm the charges. See as well the OTP’s Reply to the Situation Applications.

³⁷ See *Supra* note 31, at para. 98. See the OTP’s Reply to the Situation Applications; whereby the OTP maintains its position that the decision of Pre-Trial Chamber I that victims have a broad right to participate in a situation under Article 68(3) of the Statute is not in conformity with the Statute and Rules.

³⁸ See *Supra* note 31, see 29 June 2006 Decision, ICC-01/04-01/06-172, pp. 7 and 8; see *Supra* note 31, 20 October 2006 Decision, ICC-01/04-01/06-601, pp. 8 and 9. Both decisions establish that applicants who were not harmed by the crimes referenced in the warrant of arrest – *i.e.*, were not children enlisted, conscripted or used in active hostilities – were excluded from participating in the case. These decisions refer to the need for a “sufficient” and “direct” causal link. See 29 June 2006 Decision referring to a “un lien de causalité suffisant”(p7), and harm that is “directement lié aux crimes contenus dans le mandat d’arrêt (p9); 20 October 2006 Decision, “un préjudice directement lié aux crimes exposés dans le mandat d’arrêt”(p9). See also, *supra* note 31, 24 July 2006 Decision, at p. 3, where Pre-Trial Chamber I refers to a “genuine and close link between the harm they have suffered and the

there are reasonable grounds to believe that the named suspects are criminally responsible.³⁹ There must also be reasonable grounds to believe that the applicant suffered the harm.⁴⁰

14. In the *Lubanga* case, the Pre-Trial Chamber before issuing warrants of arrest found reasonable grounds to believe that Lubanga had enlisted and conscripted children, and used children to participate actively in hostilities.⁴¹ It found additionally that the armed group of which Lubanga was the leader – the UPC/FPLC – engaged from July 2002 and December 2003 in a policy/practice of enlisting, conscripting and using children in hostilities, and that “all instances of” conscription, enlistment, and use of children in hostilities should be treated as continuous war crimes.⁴² On this basis, Pre-Trial Chamber I granted the right of participation in the case only to applicants who demonstrated that they had suffered harm from crimes of the enlistment,

charges against Thomas Lubanga Dyilo”. In the 24 July 2006 Decision, ICC-01/04-01/06-228-tEN, Pre-Trial Chamber I stated at p. 9, that: “the causal link required by Rule 85 of the Rules with regard to the stage of the case is demonstrated once the victim...provides sufficient evidence to establish that that person has suffered harm directly linked to the crimes set out in the arrest warrant or that that person has suffered harm by intervening to assist the direct victims in the case or to prevent these victims from becoming victims as a result of these crimes being committed.” See also 29 June 2006 Decision, p. 8 ; and 20 October 2006 Decision, p. 8; where Pre-Trial Chamber I referred to “*la victime, ainsi que, le cas échéant, la famille proche ou les personnes à charge de cette victime directe, charge de cette victime directe,*» Accordingly, the OTP submits that a victim applicant must demonstrate a sufficiently direct link between their harm to the crimes forming the basis of the charges set out in the Arrest Warrants irrespective of whether they are a direct victim, or close relative or dependant of that direct victim of crimes under the Arrest Warrants, suffering harm from the crimes set out in the arrest warrant or by intervening to assist the direct victim of a crime in the Case or by seeking to prevent a victim from becoming a victim of such crimes in the Case.

³⁹ See *Supra* note 31, see 24 July 2006 Decision, ICC-01/04-01/06-228-tEN, p. 9.

⁴⁰ See *Supra* note 31, see 17 January 2006 Decision, ICC-01/04-101-tEN-Corr, para. 98, pp.24-25; and 24 July 2006 Decision, ICC-01/04-01/06-228-tEN, p.10, 12, 13: Pre-Trial Chamber I determined that on the facts there were reasonable grounds to believe that the applicants a/0001/06, a/0002/06, a/0003/06 and their respective children whom they represented had suffered harm.

⁴¹ See “Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents in the Record of the Case against Mr. Thomas Lubanga Dyilo” and Annex I to that decision (under seal), ICC-01/04-01/06-8-US-Corr, 24 February 2006, (“Decision unsealing parts of 10 February 2006 Decision”) paras. 93 and 94.

⁴² See *Supra* note 41, see Decision unsealing parts of 10 February 2006 Decision, para. 91 and para. 95.

conscription and use of children in active hostilities, as perpetrated by the UPC/FPLC and committed between July 2002 and December 2003.⁴³

15. The appropriate legal standard with respect to the Applications in this Case therefore is that an application for participation in the Case should be granted only when the Application demonstrates that the Applicant suffered harm as a result of the crimes and perpetrators identified in the thirty-three counts related to one or more of the six specific, dated incidents set out in the Arrest Warrants.⁴⁴ As in the *Lubanga* case, participation in the case should be deemed appropriate only if the applicant is a victim of the crimes previously found by the Chamber.
16. Accordingly, the OTP submits that to be recognised as a victim with rights of participation in the Case, an individual who submits an Application (“Applicant”) must provide sufficient information to establish reasonable grounds to believe⁴⁵ that: a) the Applicant is a natural person; b) who has suffered harm; c) the crime from which the harm resulted must fall within the jurisdiction of the Court (i.e. complying with articles 5, 11 and 12 of the Rome Statute (“Statute”)⁴⁶); and d) there is a sufficiently direct and genuine causal link between that harm suffered by him or her and crimes set out in the Arrest Warrants relating to any one or more of the

⁴³ See *Supra* notes 31 and 38. See 29 June 2006 Decision, ICC-01/04-01/06-172, pp. 7 to 8; and 20 October 2006 Decision, ICC-01/04-01/06-601, pp. 8 and 9. See also 20 October 2006 Decision, ICC-01/04-01/06-601, p.12: « La Chambre rappelle que les crimes contenus dans le mandat d'arrêt concernent que la période de juillet 2002 à décembre 2003 et qu'en conséquence elle ne tiendra compte que des actes criminels commis lors de cette période lorsqu'elle déterminera s'il convient de déterminer la qualité de victime aux demandeurs. »

⁴⁴ See *Supra* notes 1 to 9.

⁴⁵ See *Supra* note 31, see 17 January 2006 Decision, ICC-01/04-101-tEN-Corr, para. 98; and 29 June 2006 Decision, ICC-01/04-01/06-172, pp. 7 and 8; and 20 October 2006 Decision, ICC-01/04-01/06-601, pp. 8 and 9.

⁴⁶ See *Supra* note 31, see 17 January 2006 Decision, ICC-01/04-101-tEN-Corr, pp. 21-23. The crime must be one of those mentioned in article 5 of the Statute; it must have been committed within the time period laid down in article 11; and meet one of the two alternative conditions described in article 12 of the Statute. Article 12(2) provides the Court may exercise its jurisdiction if one or more of the following States are Parties to the Statute or have accepted jurisdiction of the Court, namely the State on the territory of which the conduct in question occurred or the State of which the person accused of the crime is a national.

specific incidents (“Incidents”), and for which there are reasonable grounds to believe one or more of the identified suspects (i.e. KONY, OTTI, ODHIAMBO, or ONGWEN) are criminally responsible.⁴⁷

17. Article 68(3) of the Statute provides that the Chamber shall allow participation of a victim (as defined by Rule 85), when his or her “personal interests” are affected by the proceedings. Pre-Trial Chamber I considered that the “personal interests” criterion set out in Article 68(3) of the Statute constitutes an additional criterion to be met by victims, over and above the victim status accorded to them.⁴⁸
18. Accordingly, the Prosecution submits that Article 68(3) of the Statute and Rule 85 of the Rules, 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 of the Rules, then under Article 68(3) of the Statute, 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.⁴⁹
19. To satisfy Article 68(3) of the Statute, the applicant must have a “judicially recognisable personal interest” in the Case.⁵⁰ The OTP respectfully submits that

⁴⁷ Since no case can proceed against LUKWIYA, the Prosecution submits that it would not be appropriate to permit participation if the applicant is alleging harm caused by LUKWIYA.

⁴⁸ See *Supra* note 31; See Pre-Trial Chamber I’s 17 January 2006 Decision, ICC-01/04-101-tEN-Corr, para. 62.

⁴⁹ See *Supra* note 31; See Pre-Trial Chamber I’s 17 January 2006 Decision, ICC-01/04-101-tEN-Corr, para. 62 and para. 64. See also Jorda and de Hemptinne, “The Status and Role of the Victim” in Cassese, Gaeta & Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press: 2002), p. 140: “If ...it considers that the person is not a victim or that the application does not fulfil the conditions laid down in article 68(3) of the [Statute], it dismisses it.”

⁵⁰ See E. Haslam, “Victim Participation at the ICC: a Triumph of Hope Over Experience?”, in McGoldrick, et al (eds), *The Permanent International Criminal Court* (Oxford: Hart, 2004), p. 326. This interpretation is supported by the practical application of Rule 89(2), which provides that “[a] victim whose application has been rejected may file a new application later in the proceedings.” A person’s status as a victim (or not) is unlikely to change during the course of the proceedings. Rather, it is the issue of whether a victim’s personal interests are directly affected by the

under this test, the personal interest of the applicant cannot be affected by the proceedings absent harm suffered as a result of the *specific matters at issue* within those proceedings, *i.e.* the crimes being prosecuted. Otherwise, the victim's participation is void of any meaningful purpose for himself or herself, could result in significant prejudice to the accused, and could effectively undermine the fair and expeditious conduct of proceedings.⁵¹

IV. Factual evaluation of the Applications and implications for the Prosecution's Rights and Obligations

20. The Single Judge found that without prejudice to the decision on their substance and merits, all Applications have been filed by natural persons.⁵² Thus the first requirement appears to be fulfilled.⁵³
21. In relation to twelve out of the 49 redacted Applications⁵⁴, OTP submits that from the face of those Applications, as redacted, it appears that the twelve Applicants did not provide any information that they suffered harm from any crimes forming the

proceedings that is likely to change, depending on the scope of the crimes with which a person is charged. See "Prosecution's Reply on the Applications for Participation" (confidential), ICC-01/04-01/dp to 01/04-6/dp", ICC-01/04-84-Conf, 15 August 2005, p. 9.

⁵¹ See "Prosecution's Observations concerning the Status of Applicants VPRS1 to 6 and their Participation in the Case of the *Prosecutor vs. Thomas Lubanga Dyilo*" (public), ICC-01/04-01/06-73, 7 April 2006 ("7 April 2006 Submissions"), para. 11, p. 5. First, the accused should not be required to defend against and oppose or challenge interventions, questions and/or submissions pertaining to alleged crimes that do not form part of the issued arrest warrant or formal charges. Second, the exercise of the procedural rights afforded to victim participants, notably the posing of questions or the making of submissions on issues, events or persons unrelated to the crimes being prosecuted may lead to negative consequences for the accused. In particular, it may allow other allegations of misconduct to colour the evidence admitted in connection with the precise crimes being prosecuted. The OTP also refers to its previous submissions to Pre-Trial Chamber I, See 7 April 2006 Submissions, ICC-01/04-01/06-73, paras. 12-15, pp. 5-7, in which it referred to jurisprudence from national legal systems illustrating that victims seeking to participate in proceedings generally are obligated to show that they have suffered harm strongly and directly linked to the crimes being prosecuted.

⁵² See *Supra* note 10, para. 1, p. 5.

⁵³ Not being able to access the identity of the Applicants, the Prosecution is relying entirely on the Single Judge's determination.

⁵⁴ Applications a/0064/06; a/0067/06; a/0068/06; a/0069/06; a/0088/06; a/0089/06; a/0092/06; a/0097/06; a/0101/06; a/0102/06; a/0114/06; a/0126/06.

basis of the charges specified in the Arrest Warrants. Two of those twelve Applicants refer to alleged events that do not appear to correspond to any of the Incidents forming the basis of charges in the Arrest Warrants.⁵⁵ Ten of the twelve Applicants allege that they were abducted, or suffered harm from another alleged crime, in a year when none of the specific Incidents that form the basis of the Arrest Warrants took place. Further, these Applicants do not provide any information of harm related to any other crime that may be relevant to any of the Incidents.⁵⁶ (Four of the Applicants who specify that they suffered harm in a year in which none of the Incidents took place may also be referring to alleged events taking place outside the Court's temporal jurisdiction, if the events they relate occurred prior to 1 July 2002.⁵⁷) On this basis, the OTP would respectfully submit that these twelve Applications to participate in the Case should be denied. The OTP reiterates that this assessment is being made on the basis of the limited information that has been made available to it.

22. As regards the remaining 37 Applications, the OTP observes that it is unable to make any proper assessment or submit any meaningful Reply. The existing jurisprudence of Pre-Trial Chamber I, and reiterated by the Single Judge, is that "the

⁵⁵ Application a/0092/06: The Applicant alleges that he was abducted whilst walking along the road in 2003 and makes no reference to any other event that may be related to any of the Incidents. Application a/0102/06: The Applicant alleges that she was abducted whilst travelling along the road in 2004 and makes no reference to any other event that may be related to any of the Incidents.

⁵⁶ Application a/0064/06: The Applicant alleges that he was abducted in 2001; Application a/0067/06: The Applicant alleges that he escaped in 2002 before all the Incidents.; Application a/0068/06: The Applicant alleges that he was abducted in 2002, before all the Incidents; Application a/0069/06: The Applicant alleges that he was abducted and escaped in 2002, before all the Incidents; Application a/0088/06: The Applicant alleges that he was abducted in 2002, before all the Incidents; Application a/0089/06: The Applicant alleges that he was abducted in 1998 and whilst it is not clear when he escaped it may have been during 2001 or 2002, before any of the Incidents.; Application a/0097/06: The alleged attack occurred after any of the Incidents; Application a/0101/06: The Applicant alleges that he was abducted in 2002, before all the Incidents; Application a/0114/06: The Applicant alleges that he was abducted in 2001, before all the Incidents; Application a/0126/06: The Applicant alleges that she was abducted in 2002, before all the Incidents.

⁵⁷ Applications a/0067/06; a/0068/06; a/0069/06; a/0089/06. The Applicants may refer to alleged events taking place outside the Court's temporal jurisdiction if those events occurred prior to 1 July 2002. However, OTP cannot make a determination of this as the relevant dates are redacted.

scope of the redactions cannot exceed what is strictly necessary in light of the applicant's security situation and *must allow for a meaningful exercise by the Prosecution and the Defence of their right to reply to the application for participation.*"⁵⁸ In this instance, however, the OTP has been prevented from providing an informed and meaningful assessment and adequately exercising its right to Reply to the Applications under Rule 89(1), because of the heavily redacted nature of the Applications provided to the OTP.⁵⁹

23. In particular, and in conformity with the rulings in the 1 February 2007 Decision, the OTP has been prevented from reviewing any information regarding the Applicant's identity, including "any detail of the alleged incident which might lead to the identification of the victim, whether due to its specificity or the uniqueness of a fact".⁶⁰ Also redacted are identifying details related to alleged events including dates, locations, name of the alleged commander of the incident, type of treatment received⁶¹ and, in most instances, any description of whether identified suspects are alleged to be criminally responsible for that alleged event. These redactions make it impossible for the OTP to assess whether an Applicant alleges harm caused by any of the Incidents or crimes specified in the Arrest Warrants, and therefore whether the Applicant should qualify as a victim entitled to participate in the Case.

⁵⁸ Emphasis added. See *Supra* note 10, 1 February 2007 Decision, para. 23, p17. Referring at footnote 37 to PTC1, "Decision Appointing ad hoc counsel and establishing a deadline for the prosecution and the ad hoc counsel to submit observations on the applications of Applicants a/0001/06 to a/0003/06" (public), ICC-01/04-147, p. 3; PTC 1, "Decision 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 expurgé), ICC-01/04-228, pp. 4-5; PTC 1, "Decision Establishing a deadline for the Prosecution and the defence to submit observations on the Applications of Applicants a/0001/06 to a/0003/06" (public). ICC-01/04-01/06-107, 18 May 2006, p. 3.

⁵⁹ See *Supra* notes 21 and 22.

⁶⁰ See *Supra* note 10, see 1 February 2007 Decision, paras. 21 and 22, p. 16. Refer to the 6 February 2007 Application, *ibid* 21, at paras. 1, 3 to 5.

⁶¹ See *Supra* note 10, see 1 February 2007 Decision, para. 22, p. 16.

24. Most of the specific details of the injury, loss or harm allegedly suffered are also redacted,⁶² making it equally impossible to assess if the Applicants demonstrate reasonable grounds to believe that there is a sufficiently direct and genuine causal link between the *alleged harm* suffered and the crimes forming the basis of the charges in the Arrest Warrants.
25. Consequently, while the OTP has made an attempt with respect to the twelve Applicants discussed above, based on incomplete information, it is not possible for the OTP to properly assess under Rule 85 of the Rules whether any of the Applicants have provided sufficient information to establish reasonable grounds that they suffered harm resulting from a crime that falls within the jurisdiction of the Court and that there is a causal link between that harm and the Incidents, crimes and perpetrators set out in the Arrest Warrants. It is also not possible to assess whether the Applicants have demonstrated that their “personal interests” as victims were affected as required under Article 68(3) of the Statute.
26. The circumstance that the OTP is already privy to information concerning crimes arising from Incidents, including the same type of victim-related information which has been redacted from the applications, underscores the lack of necessity of the redactions, vis-à-vis the OTP.
27. In these circumstances, the OTP respectfully submits that the protective measure imposed of redacting information from Applications provided to OTP pursuant to the 1 February 2007 Decision is not as “strictly necessary in light of the applicants’

⁶² See *Supra* note 10, see 1 February 2007 Decision, para. 21, p. 16.

security situation”⁶³ nor consistent with the “principle of proportionality”⁶⁴; and that the continued denial of access to unredacted Applications prevents the OTP from providing a meaningful reply under Rule 89(1) and fulfilling any of its obligations that may be owed to any Applicants under article 68(1).⁶⁵

28. The OTP submissions thus far have been confined to the issue of whether participation in the Case should be granted. They do not address the modalities of any such participation, an issue which it respectfully submits should be discussed separately and in relation to each procedural step in the case, after provision of an opportunity to provide a meaningful reply upon the entitlement of the Applicants to participate in the Case.⁶⁶

Conclusion

The OTP is gravely concerned that it is unable to provide an informed and meaningful Reply under Rule 89(1) as regards the Applications. The maintenance of the redactions vis-à-vis OTP has prevented it from fairly addressing the Applications. The current circumstances also impact upon OTP’s potential rights and obligations in relation to the Applicants. The OTP stresses that the only available avenue to resolve this undesirable and potentially very serious state of affairs which also, it is respectfully submitted, limits the information available to the Single Judge, is through variation of protective measures under Regulation 42.⁶⁷ If the Single Judge determines to vary the protective

⁶³ See *Supra note* 10, see 1 February 2007 Decision, at para. 23, p. 17. ; see OTP’s 6 February 2007 Application, *ibid* 20, at para. 5, pp5 to 6; See as well paras. 7 and 9 regarding OTP’s request for clear reasons for non disclosure of such information to OTP.

⁶⁴ See *Supra note* 10, see 1 February 2007 Decision, at para. 24, p. 17.

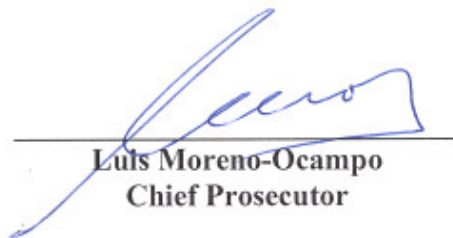
⁶⁵ See *Supra note* 21, see 6 February 2007 Application, para. 8; and see *Supra note* 22, 15 February 2007 Application, pp. 5-6.

⁶⁶ See *Supra note* 31, see 17 January 2006 Decision, ICC-01/04-101-tEN-Corr, para. 64. The OTP observes that the Single Judge in the 1 February 2007 Decision at para. 14, implies that only after determining whether participation in the proceedings be granted will any determination be made regarding manner in which such participation is considered appropriate.

⁶⁷ See “Decision on Defence Motion to Leave to Appeal” (public), ICC-01/04-01/06-338, 18 August 2006 (‘PTC-I’s 18 August 2006 Decision”), p. 8. Pre-Trial Chamber I held, in similar factual circumstances, that a participant: “could have filed a motion requesting the lifting of all or part of the redactions and, in the alternative, leave to appeal

measure and provide unredacted Applications to the OTP⁶⁸, the OTP intends to seek leave to submit further submissions after review of those Applications in order to provide a meaningful and informed Reply required under Rule 89(1).

The OTP also respectfully requests that if the analysis of the twelve applications described above in para. 21 is not affected by review of the portions redacted from the OTP, Applications a/0064/06; a/0067/06; a/0068/06; a/0069/06; a/0088/06; a/0089/06; a/0092/06; a/0097/06; a/0101/06; a/0102/06; a/0114/06; a/0126/06 should be denied, insofar as participation in the Case has been requested.



Luis Moreno-Ocampo
Chief Prosecutor

Dated this 28th day of February 2007
At The Hague, The Netherlands

against the Decision Establishing a Deadline; [and] that neither after the issuance of the Decision Establishing the Deadline nor after the receipt of the redacted versions of the Applications, did the Defence do so.”

⁶⁸ If required, the OTP is willing to submit a new application, under Regulation 42 of the Regulations.