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**International
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PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

Public Document

**Prosecution's Reply under Rule 89(1) to the Applications 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**

The Office of the Prosecutor

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Preliminary Statement

The Office of the Prosecutor (“OTP”) respectfully submits its Reply to the victims’ applications presented in relation to the Uganda situation, pursuant to Rule 89 (1) of the Rules of Procedure and Evidence (“Rules”). The Prosecutor is separately filing its reply on the same applications for participation in the case of *The Prosecutor vs. Joseph KONY, Vincent OTTI, Raska LUKWIYA, Okot ODHIAMBO and Dominic ONGWEN* (“OTP Simultaneous Reply on the Case”).

I. Background of Proceedings

1. In 22 November 2006, Pre-Trial Chamber II, appointed the Single Judge to deal with all issues in connection with victims’ applications for participation in the Uganda situation and in the single existent case¹.
2. On 1 February 2007², the Single Judge notified the OTP that the Registrar had filed in the record of the Uganda Situation, victims’ applications for participation in the proceedings, on 19 June 2006³ and 17 August 2006⁴, and *ex parte* reports attaching victims’ applications for participation in the Situation on 23 October 2006⁵ and 16 November 2006⁶. As of 1 February

¹ See “Decision Designating A Single Judge on Victims’ Issues” (“Decision Designating Single Judge”) (public), ICC-02/04-01/05-130, 22 November 2006, p. 3.

² 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 1/0111/06 to a/0127/06; ICC-02/04-01/05-134, 1 February 2007 (‘1 February 2007 Decision’).

³ Application to participate in the proceedings, number a/0010/06 (ICC-02/04-22-Conf-Exp) (ICC-02/04-76-Conf).

⁴ Application for participation in proceedings number a/0064/06 (ICC-02/04-23-Conf-Exp) (ICC-02/04-77-Conf); Application for participation in proceedings number a/0065/06 (ICC-02/04-24-Conf-Exp) (ICC-02/04-78-Conf); Application for participation in proceedings number a/0066/06 (ICC-02/04-25-Conf-Exp) (ICC-02/04-79-Conf); Application for participation in proceedings number a/0067/06 (ICC-02/04-26-Conf-Exp) (ICC-02/04-80-Conf); Application for participation in proceedings number a/0068/06 (ICC-02/04-27-Conf-Exp) (ICC-02/04-81-Conf); Application for participation in proceedings number a/0069/06 (ICC-02/04-28-Conf-Exp) (ICC-02/04-82-Conf); Application for participation in proceedings number a/0070/06 (ICC-02/04-29-Conf-Exp) (ICC-02/04-83-Conf).

⁵ Filed 23.10.06 as annexes to the Report (ICC-02/04-32-Conf-Exp): a/0081/06: (ICC-02/04-32-Conf-Exp-Anx1) (ICC-02/04-36-Conf); a/0082/06: (ICC-02/04-32-Conf-Exp-Anx2) (ICC-02/04-37-Conf); a/0083/06: (ICC-02/04-32-Conf-Exp-Anx3) (ICC-02/04-38-Conf); a/0084/06: (ICC-02/04-32-Conf-Exp-Anx4) (ICC-02/04-39-Conf); a/0085/06: (ICC-02/04-32-Conf-Exp-Anx5) (ICC-02/04-40-Conf); a/0086/06: (ICC-02/04-32-Conf-Exp-Anx6) (ICC-02/04-41-Conf); a/0087/06: (ICC-02/04-32-Conf-Exp-Anx7) (ICC-02/04-42-Conf); a/0088/06: (ICC-02/04-32-Conf-Exp-Anx8) (ICC-02/04-43-Conf); a/0089/06: (ICC-02/04-32-Conf-Exp-Anx9) (ICC-02/04-44-Conf); a/0090/06: (ICC-02/04-32-Conf-Exp-Anx10) (ICC-02/04-45-Conf); a/0091/06: (ICC-02/04-32-Conf-Exp-Anx11) (ICC-02/04-46-Conf); a/0092/06: (ICC-02/04-32-Conf-Exp-Anx12) (ICC-02/04-47-Conf); a/0093/06: (ICC-02/04-32-Conf-Exp-Anx13) (ICC-02/04-48-Conf); a/0094/06: (ICC-02/04-32-Conf-Exp-Anx14) (ICC-02/04-49-Conf); a/0095/06: (ICC-02/04-32-Conf-Exp-Anx15) (ICC-02/04-50-Conf); a/0096/06: (ICC-02/04-32-Conf-Exp-Anx16) (ICC-02/04-51-Conf); a/0097/06: (ICC-02/04-32-Conf-Exp-Anx17) (ICC-02/04-52-Conf); a/0098/06: (ICC-02/04-32-Conf-Exp-Anx18) (ICC-02/04-53-Conf); a/0099/06: (ICC-02/04-32-Conf-Exp-Anx19) (ICC-02/04-54-Conf); a/0100/06: (ICC-02/04-32-Conf-Exp-Anx20) (ICC-02/04-55-Conf); a/0101/06: (ICC-02/04-32-Conf-Exp-Anx21) (ICC-02/04-56-Conf); a/0102/06: (ICC-02/04-32-Conf-Exp-Anx22) (ICC-02/04-57-Conf); a/0103/06: (ICC-02/04-32-Conf-Exp-Anx23) (ICC-02/04-58-Conf); a/0104/06: (ICC-02/04-32-Conf-Exp-Anx24) (ICC-02/04-59-Conf).

2007, 49 applications for victims' participation in the proceedings ("Applications") had been filed both in the record of the Uganda situation and in the above mentioned case. The OTP and *ad hoc* defence counsel were granted until 26 February 2007 to submit observations in reply to the applications, under Rule 89(1).⁷ The redacted copies of 47 of those Applications, insofar as they requested participation in the Situation, were provided to the Prosecutor on 13 February 2006 and two on 14 February 2006.⁸

3. On 6 February 2007⁹, the OTP applied to the Single Judge to lift the redactions from the Applications provided to the OTP, in order to allow a meaningful reply pursuant Rule 89 (1). On 15 February 2007¹⁰, the OTP provided additional submissions to its Application to Lift Redactions and requested an extension of time to file its Reply to the victims' Applications under Rule 89(1) of the Rules. On 20 February 2007, the Single Judge dismissed the requests contained in the Prosecutor's Application to Lift Redactions and the 15 February Submissions on procedural grounds, without considering the merits.¹¹ On 26 February 2007, the OTP requested from the Single Judge leave to Appeal the Decision of 20 February 2007.¹²

⁶ Filed 16.11.06 as annexes to the Report (ICC-02/04-33-Conf-Exp): a/0111/06: (ICC-02/04-33-Conf-Exp-Anx1) (ICC-02/04-60-Conf); a/0112/06: (ICC-02/04-33-Conf-Exp-Anx2) (ICC-02/04-61-Conf); a/0113/06: (ICC-02/04-33-Conf-Exp-Anx3) (ICC-02/04-62-Conf); a/0114/06: (ICC-02/04-33-Conf-Exp-Anx4) (ICC-02/04-63-Conf); a/0115/06: (ICC-02/04-33-Conf-Exp-Anx5) (ICC-02/04-64-Conf); a/0116/06: (ICC-02/04-33-Conf-Exp-Anx6) (ICC-02/04-65-Conf); a/0117/06: (ICC-02/04-33-Conf-Exp-Anx7) (ICC-02/04-66-Conf-Corr); a/0118/06: (ICC-02/04-33-Conf-Exp-Anx8) (ICC-02/04-67-Conf); a/0119/06: (ICC-02/04-33-Conf-Exp-Anx9) (ICC-02/04-68-Conf); a/0120/06: (ICC-02/04-33-Conf-Exp-Anx10) (ICC-02/04-84-Conf); a/0121/06: (ICC-02/04-33-Conf-Exp-Anx11) (ICC-02/04-69-Conf); a/0122/06: (ICC-02/04-33-Conf-Exp-Anx12) (ICC-02/04-70-Conf); a/0123/06: (ICC-02/04-33-Conf-Exp-Anx13) (ICC-02/04-71-Conf); a/0124/06: (ICC-02/04-33-Conf-Exp-Anx14) (ICC-02/04-72-Conf); a/0125/06: (ICC-02/04-33-Conf-Exp-Anx15) (ICC-02/04-73-Conf); a/0126/06: (ICC-02/04-33-Conf-Exp-Anx16) (ICC-02/04-74-Conf); a/0127/06: (ICC-02/04-33-Conf-Exp-Anx17) (ICC-02/04-75-Conf).

⁷ See '1 February 2007 Decision', ICC-02/04-01/05-134, p. 19.

⁸ A copy of application a/0117/06 (ICC-02/04-33-Conf-Exp-Anx7) (ICC-02/04-66-Conf-Corr) was received for the first time on the 14 February 2006 (both for the situation and the case). Application a/0120/06 (ICC-02/04-84-Conf.pdf), however, had been received on the 13 February 2007, but only in relation to the case.

⁹ See "Application to Lift Redactions From Applications for Victims" (public), ICC-02/04-01/05-150, 6 February 2007 ('Application to Lift Redactions').

¹⁰ 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 Submissions').

¹¹ See "Decision on 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 ('20 February 2007 Decision').

¹² See "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 ('Prosecution Leave to Appeal').

4. On 21 February 2007, *ad hoc* counsel for the defence requested an extension of time to reply to the Applications.¹³ On 23 February 2007, the Single Judge granted the defence an extension of time until 6 March 2007 and OTP an extension of time until 28 February 2007.¹⁴

II. Victims' Application to Participate in the Uganda Situation

5. Both in the Decision Designating Single Judge¹⁵ and in the 1 February 2007 Decision¹⁶, the Pre-Trial Chamber II and the Single Judge acknowledged that the Applications were presented both in relation to the Uganda situation and to the case *The Prosecutor vs. Joseph KONY, Vincent OTTI, Raska LUKWIYA, Okot ODHIAMBO and Dominic ONGWEN*.
6. The Statute and the Rules make a distinction between situations and cases,¹⁷ and the Prosecution concurs in the definition of "situation" adopted by Pre-Trial Chamber I¹⁸. 'Situations' are generally defined in terms of temporal, territorial and in some cases personal parameters.¹⁹ They entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation, as well as the investigation as such²⁰. The Prosecution will follow the definitions of 'situation' and 'case' as set out by Pre-

¹³ 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;

¹⁴ 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 février 2007 ('23 February 2007 Decision').

¹⁵ See Decision Designating Single Judge, ICC-02/04-01/05-130, 22 November 2006, pp. 2 and 3;

¹⁶ See '1 February 2007 Decision', ICC-02/04-01/05-134, p. 2.

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

¹⁸ See "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" ('PTC I 17 January 2006 Decision on DRC Situation Victims') (public redacted), ICC-01/04-101-tEN-Corr, 17 February 2007, para. 65.

¹⁹ See 'PTC I 17 January 2006 Decision on DRC Situation Victims', ICC-01/04-101-tEN-Corr, para. 65. The Uganda situation parameters were settled by the referral from the Government of Uganda on 16 December 2003 and the OTP's interpretation of that referral, in accordance with the principles of the Rome Statute, when a decision was taken to open the investigation of the Uganda situation on 28 July 2004. The scope of the Uganda investigation encompasses all crimes committed in Northern Uganda, since 1 July 2002, in the context of the ongoing conflict involving the Lords Resistance Army ('LRA').

²⁰ See 'PTC I 17 January 2006 Decision on DRC Situation Victims', ICC-01/04-101-tEN-Corr, para. 65. By contrast, according to PTC I, '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 entail the proceedings that take place after the issuance of a warrant of arrest or a summons to appear. See PTC I decisions: 'PTC I 17 January 2006 Decision on DRC Situation Victims', ICC-01/04-101-tEN-Corr, para. 65; "Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo" (public redacted), ICC-01/04-01/06-172, 22 (29) June 2006, p. 7 and 8; "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 redacted), ICC-01/04-01/06-228-tEN, 24 (28) July 2006, p. 8-10; "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 redacted), ICC-01/04-01/06-601, 20 Octobre 2006, p. 8 and 9.

Trial Chamber I and respond to the Applications presented in the Uganda situation accordingly. If the Single Judge's concept of 'situation' and/or 'case' differs from the definitions set out by Pre-Trial Chamber I, the Prosecution requests notice and the opportunity to be heard on this matter before it is determined whether the Applicants should be permitted to participate.²¹

7. While agreeing with the definitions of 'situation' and 'case' articulated by Pre-Trial Chamber I, the Prosecution respectfully maintains its view that the ruling of Pre-Trial Chamber I permitting general victim participation in a situation has no basis in the Statute, as explained below.

III. Victims' General Participation in the Investigation of a Situation is not Envisioned by the Statute or Rules

8. The Statute and the Rules provide a comprehensive framework for the participation of victims which allows them to voice their concerns and represent their interests. The development of a body of procedural rights afforded to victims by the documents 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 rights should be implemented in a way which maximizes the impact of the victims' views and concerns in Court proceedings, without unfairly raising expectations or further exposing victims and other persons to risks to their well-being and safety.
9. Bearing these considerations in mind, the Prosecution respectfully submits that the applications to participate in the situation, under Article 68(3), should not be granted. The Prosecution notes, as an initial matter, that there is an existing case in the Uganda proceedings, and each of the 49 Applicants has also sought participation in that case. The Prosecution submits that granting participation to the Applicants who qualify to participate in

²¹ See *Prosecutor v Goran Jelusic*, ICTY Case No. IT-95-10-A, Judgment on Appeal, 5 July 2001, para 27. 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.

the case is a much more appropriate way to provide victims a meaningful way of expressing their views and concerns.

10. The Prosecution has consistently maintained, in the context of the DRC situation²², the inadmissibility of so-called “situation victims” – i.e. victims (under Rule 85(a)) who were granted the right, under Article 68(3) of the Statute, to participate in the investigation of a situation²³. The OTP respectfully submits that the Single Judge should not follow the jurisprudence set out by that Chamber on the concept of “situation victims.” The OTP recognizes that decisions from other Chambers of the Court enjoy authoritative status and should be fully considered by a different Chamber. In this case, however, the jurisprudence established by that Pre-Trial Chamber I continues to raise a number of concerns.
11. The scenario facing the Single Judge with these Applications differs from that which Pre-Trial Chamber I addressed in its earlier decisions. As has already been noted in these proceedings, a case exists in which applicants can qualify to be admitted to participate. In addition, the Court as a whole has the benefit of having experienced the early stages of its operation, and thus to foresee more readily the consequences of granting a general right to participate in the situation – a right which the Prosecution has consistently maintained is extra-statutory.

(a) The emerging consequences of interpreting the right to participate more broadly than set forth in the Rome Statute

(i) Participation by “situation victims” significantly affects the expeditious conduct of the proceedings

²² See “Prosecution’s Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp” ICC-01/04-84, 15 August 2005 (‘Prosecution’s Reply in DRC Situation’), (reclassified as public on 16 May 2006, pursuant to decision ICC-01/04-140); “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), ICC-01/04-103, 23 January 2006 (‘Prosecution’s Leave to Appeal in DRC Situation’); “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), ICC-01/04-111, 6 February 2006 (‘Prosecution’s Reply to Legal Representative of Victims in DRC Situation’).

On the matter of the admissibility of “situation victims” before Pre-Trial Chamber I, see also: ‘PTC I 17 January 2006 Decision on DRC Situation Victims’, 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), ICC-01/04-105-tEN, 27 January 2006; “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, 31 March 2006.

²³ As opposed to a “case victim” – a person who has suffered harm caused by an event that constitutes a crime (or crimes) for which an arrest warrant or a summons to appear against a person (or persons) was issued, with the right to participate in the proceedings regarding that specific case.

12. If the approach set out by Pre-Trial Chamber I is applied by the Single Judge, and the concept of “situation victims” is admitted under Article 68 (3), it will impact on the timely and efficient conduct of proceedings; not only of the investigation, but also of the cases that flow from it.²⁴ That concern is all the more important in light of the situations that this Court addresses: mass criminality involving potentially hundreds of thousands of potential victims contrasted with focused investigations and cases which are the result of limited investigative and judicial resources. It should seriously be considered whether the Court has the resources to manage the participation of the so-called situation victims in Darfur, Northern Uganda, the DRC and any future situation, and to manage the consequences of that participation, including applications for protective measures sought by such victims. It can also be anticipated that permitting broad participation in the situation could raise expectations about participation and potentially even reparations in a manner which could ultimately be detrimental to the Court and to the interests of victims.
13. In the context of the Uganda investigation, applying the expansive approach of Pre-Trial Chamber I would mean that any person who claims to have suffered prejudice or harm as a result of an international criminal act which occurred in Northern Uganda in the context of the conflict with the Lord’s Resistance Army (“LRA”), since 1 July 2002, could participate in the situation, regardless of whether the person demonstrates any connection to the actual focus of the Prosecution’s investigation or the case which has already commenced. Because the Court does not work with unlimited resources, virtually unlimited participation of victims in the investigation will create a serious burden in the ability of the different organs of the Court to conduct proceedings in an expeditious and efficient manner.
14. For example, as has already been demonstrated in Pre-Trial Chamber I, the Chamber will be obligated to decide with respect to each particular applicant whether the individual qualifies as a victim,²⁵ to deal with petitions coming from situation victims, and to decide litigation on

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

²⁵ Since the start of the investigation of the situation in the Democratic Republic of the Congo, 74 applications for participation in the investigation of the situation were filed (the last group of applications was filled in September 2006), but so far only 9 have been granted. A decision from the Chamber is still pending regarding the admissibility of the remaining 65 applicants as victims. The Chamber seems to be already facing some difficulties in responding, in a timely and expeditious manner, to the situation victims

matters such as the scope of their intervention. The Prosecution will be required, as a matter of fairness, to consider and respond to the views and requests put forward by all victim participants, which in turn diverts resources from presenting an expeditious and focused investigation and case.²⁶ The Registrar will be required to perform numerous functions *vis-à-vis* all applicants who claim that they have suffered harm in the context of the entire situation that has been referred to the Court.²⁷ The impact that this open-ended participation, disconnected from the core functions and obligations of the organs, may continue to have on the operations of the Court, is evidence that such participation is not appropriate.

(ii) Victims' participation in the situation will impact upon the Court's ability to protect victims and witnesses

15. If the interpretation of Article 68(1) of the Statute and Rule 17 of the Rules is expanded as a result of an expansive interpretation of Article 68(3)²⁸, the Victims and Witness Unit may be called upon to extend its protective efforts to cover those victims who have successfully requested participation in the investigation of a situation. The number of people who seek such protection thus could increase exponentially. Moreover, even if the form of protection sought is comparatively modest, each application and proposed measure will require evaluation by the Chamber and the VWU. Establishing such a system would dilute the VWU's limited resources, based on the desire of parties unrelated to any case before this Chamber or to the focus of the investigation, and impact negatively on the effectiveness of protective measures relating to witnesses and other victims who are at higher risk because

applications and in rendering effective their participation in the situation See "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 0071/06"; ICC-01/04-228, 22 september 2007 (public), pp. 2 and 3 ; "Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et 105/06"; ICC-01/04-241, 29 september 2007 (public), p. 2.

²⁶ These implications would be even greater if participants are permitted routinely to file information and evidence to the Court. The Prosecution notes that Pre-Trial Chamber I granted the situation victims, amongst others, the right to participate in confidential proceedings relating to the investigation of the situation upon decision of the Chamber. It is, therefore, in the power of the Chamber to decide on whether victims have or not access to confidential information. (ICC-01/04-101-tEN-Corr; 17 January 2006; para 69 to 76 and p. 49). That Chamber nonetheless has carefully limited the extent to which victims are entitled, for example, to confidential filings and investigative material. To the extent that such extended modalities of participation are granted, the concerns of the Prosecution identified above would be amplified.

²⁷ Including, *inter alia*, to notice, to provide legal advice, and to organize legal representation, as provided for in Rules 16, 90, 92 and Regulation 86

²⁸ In the DRC situation, the legal representatives of the victims already expressed their 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", ICC-01/04-105-tEN, 27 January 2006, para. 27.

they are pertinent to the focus of the Prosecution's investigation. The Prosecution respectfully submits that protective efforts and resources should be 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.²⁹

(iii) Victims' participation in the situation will impact upon the Court's ability to protect victims and witnesses

16. Allowing a broad category of persons to participate in the proceedings, without the statutory safeguards against abuse which apply in other contexts, could also create difficulties in maintaining the integrity of the investigation and court proceedings. Particularly given the need to safeguard the rights of deserving applicants, the possibility that broadening participation rights may lead to requests for participation which are fabricated or misleading, and aimed either at obstructing the investigation and/or prosecution or falsely claiming participation rights or reparations, should not be discounted. In the Uganda case, for example, the hostility to the ICC investigation and case in certain quarters is a matter of public record. In addition, some sub-section of those who sympathize with the LRA have a ready opportunity to seek participation in the situation, because former LRA members also can characterize themselves as victim-abductees.³⁰
17. The point is not that such risks are likely, but that instead that the risks and costs of opening the door to such consequences should be weighed against the limited benefit that accrues from permitting broadly participation in the situation, as opposed to the case. Persons who have connections to the individuals named in the warrants of arrest, or who are otherwise opposed to an ICC intervention, could seek participation in the situation as a means of obtaining information from the Court or providing false or misleading "views" to the Chamber. It would fall upon the OTP to investigate any such attempts, as a means of safeguarding the integrity of the investigation and the protection of victims and witnesses. The mis-use of the right of participation as also could undermine the integrity of the

²⁹ The majority of the situations in which the Court is investigating are areas of on-going conflict. Any participation of people in the situation as victims raises the need of the Court to also carefully manage unreasonable expectations on the side of the victims of those conflicts on what the Court can do regarding protective measures, or otherwise people's natural aspirations to a more secure life can be in itself a reason to apply for participation in the situation.

³⁰ It is public that the LRA has an active network of collaborators and sympathizers. Their role of providing support to the LRA extends itself not only in the regions in North Uganda, but has also international ramifications.

proceedings before the Chamber, because the Chamber lacks the investigative authority which would enable it to evaluate fully the *bona fides* of applications.

18. The implications for the security of victims, witnesses, and staff should not be underestimated. The introduction of false or misleading views or concerns, in the types of investigations conducted in the Court, always will carry the possibility of endangering victims, witnesses and staff. In addition, if the expansion of participation rights were to lead to expanded disclosure of information relating to the Prosecution's investigative activities,³¹ this impairment of confidentiality would deprive the Court of one of the main safeguards against intimidation of, or retaliation against, victims and witnesses, as well as against other forms of interference with the investigation, such as the destruction of evidence. Expansion of the availability of information about the investigative activities thus could seriously jeopardize not only the investigation itself, but also put the victims and witnesses at risk.
19. In light of the seriousness and weight of the dangers that victim participation in the situation might bring, including the risks of jeopardizing the privacy, safety and well-being of victims and witnesses, and the integrity of ongoing proceedings, the Prosecution respectfully submits that such participation is not appropriate.

(b) The scope of the right to participate under Article 68 (3) of the Statute

20. The pragmatic consequences just discussed are not to be considered in isolation, but against the argument, continuously maintained by the Prosecution, that no broad right to participate in a situation can be found in the texts which govern the Court. The Prosecution respectfully submits that not every person who would qualify as a victim under Rule 85(a), will necessarily have the right to access every procedural avenue potentially open to victims under the Statute.³² The Statute and the Rules provide a carefully defined regime for the participation of victims in specific proceedings that take place before an investigation, at the end of an investigation or after an investigation, including the rights:

³¹ The Prosecution respectfully submits that any disclosure of confidential information, including on the scope and nature of the investigation, to third parties during an ongoing investigation of a situation is inconsistent with basic considerations of efficiency and security. This is not only supported legally by the Statute and the Rules (see for example Article 54, Rule 81), but has also been flagged by legal authors who have highlighted the 'essentially accusatorial procedure provided for by the Statute', see Orie, pp. 1477, 1485; Cassese, *International Criminal Law* (2003) p. 387; Jorda and de Hemptinne, pp. 1388 and 1411.

³² For example, reparations can only be granted vis-à-vis a convicted person (Art 75 (2); Rule 98 (1)).

- to present their views when the Prosecutor asks for authorisation to commence an investigation, under Article 15 (3);
- to be informed of the results of the preliminary examination and analysis, and of any investigation, under 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, under Article 53 and Rules 89, 92 (2), 93, 107 and 109;
- to submit observations in any determination of jurisdiction or admissibility of a case, under Article 19 (3);
- to apply for participation, and present their views and concerns, in criminal proceedings, commencing upon the issuance of an arrest warrant or a summons to appear, including the the confirmation hearing, under Article 68 (3) and Rules 89 and 92 (3);
- to provide views on specific procedural steps in criminal proceedings if sought by the Chamber, such as whether to hold the confirmation hearing in the absence of the accused, amendment of charges, joinder and proceedings on admission of guilt, under Rules 93, 125, 128, 136 and 139; and
- to request reparations under Article 75 and Rules 94 to 98.

21. Specific rules were designed to allow 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. In addition, there is a general right for the victims to participate in proceedings, but only 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. The Prosecution submits that the system of victims' participation in the proceedings established by the Statute and the Rules does not grant victims the right to participate in the investigation of a situation based on Article 68 (3), as it seems to be one objective of the Applicants.

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

22. Throughout the Statute and the Rules, the term “proceedings” is used in both to determine the procedural moments in which two or more parties participate such as in the trial phase, and in a more general way to refer to all activity before the Chambers of the Court. The Prosecution submits that “proceedings” under Article 68(3) refers only to formal proceedings before the

Chambers of the Court. In the overall scheme of victim participation, outside of the specific Pre-Trial proceedings envisioned in the Statute, the investigation of a situation is a phase which does not form part of the concept of proceedings as defined in that Article.³³

23. The Statute must be interpreted according to “its wording read in context and in light of its object and purpose”.³⁴ The Prosecution submits, as above, that the ordinary meaning of “proceedings” does not include the investigation of a situation.³⁵ Proceedings are specific judicial processes; “criminal proceedings” have been defined as “A proceeding instituted to determine a person’s guilt or innocence or to set a convicted person’s punishment; a criminal hearing or trial”.³⁶ Such proceedings are therefore linked with an identified accused; not the

³³ See ‘Prosecution’s Reply in DRC Situation’, ICC-01/04-84, 15 August 2005, paras. 11-17. In that Reply, the Prosecution identified Article 127 (2), and Rules 49 (1) and 111 as examples where “proceedings” is used in a strict sense and is clearly differentiated from “investigation”. Additional examples from the Statute also indicate that “investigation” is distinguished from “proceedings”, such as Article 93(8) and Article 58(1)(b)(ii).

³⁴ “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (public), ICC-01/04-168, 13 July 2007, para. 33; based on the *Vienna Convention on the Law of Treaties*, Articles 31 and 32.

³⁵ The Prosecution notes that Pre-Trial Chamber I never considered the ordinary meaning of “proceedings”, choosing instead to focus on a “terminological argument” based on different language versions of the Statute. The Prosecution submits that where there are differences between equally authentic texts, the Court should adopt “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty” - *Vienna Convention on the Law of Treaties*, Article 33.

It should also be noted that “*la procédure*”, the French equivalent of the English word “*proceedings*”, is capable of expressing two concepts. The first is a broad, generic sense that suggests a process to be followed, and to which the English equivalent is “*procedure*” (see, for example, Statute Articles 36(4)(a), 70(2), 88, 96(2)(d) and 112(7)(b)). The second is more restrictive and refers to situations where there is participation of parties within procedural acts before Chambers, such as a trial or hearing, and to which the English equivalent is “*proceedings*” (see, for example, Statute Articles 58(1)(b)(ii), 64(8)(b), 67(1)(f), 68(2), 72(1), 81(1)(b)(iv), 93(8)(a) and 127(2)). To illustrate, “*procédure(s)*” is mentioned in the French version of the Statute 126 times. In the English version, its two equivalent terms, “*procedure*”, and “*proceeding(s)*” are referred to 79 and 51 times respectively. As a result, the French version does support a narrow reading of “proceedings” which would exclude the investigation stage.

The other language versions of the Rome Statute should also be considered as they are all equally authentic according to Article 128. The Spanish version of Article 68 (3) uses the word “*juicio*”, which is defined by the Spanish dictionary of the Spanish Language Royal Academy (RAE) as the “exposition of the case regarding which the judge is to pass sentence”; this is the Spanish equivalent of the English word “trial”. The RAE makes a clear distinction between “*juicio*” and “*procedimiento*” (Dictionary of the Spanish Language Royal Academy (2001, 22nd ed.), available at <http://www.rae.es/Juicio>). The Chinese version of article 68 (3) is also narrowly drawn; it uses the term “*诉讼*” which means “case” or “lawsuit”. The Russian version of Article 68 (3) uses “*sudebnoye razbiratel'tvo*”, which means “court proceeding” or “judicial trial”. According to the leading Russian legal dictionary, the “court proceeding” is the second phase of proceedings after the investigation part is concluded. See: Sukharev A. Y., Zorkin V. D., Krutskikh V. E., Bolshoy Yuridichesky Slovar, “INFR – M”, 2004. The Arabic version uses “*ijraat*” in Article 68 (3) which translates as “proceedings”. According to the Faruqi’s Law Dictionary, “proceedings” are “the steps before the trial”. See: Harith Suleiman Faruqi, *Faruqi’s Law Dictionary* (Librairie du Liban, 2000), p. 555.

The survey of the different language versions suggests that at least three of the versions of article 68(3) (Spanish, Chinese and Russian) use a narrow concept of proceedings that clearly *excludes* the investigation stage. The other three versions (English, French and Arabic) are also capable of this interpretation. This strengthens the Prosecution’s position that the investigation stage *as a whole* is not part of proceedings.

³⁶ See Bryan A. Garner (ed), *Black’s Law Dictionary* 8th ed., (West Group 2004). This definition ties the concept of proceedings with the identification of an accused. To the extent that there may be proceedings before the Pre-Trial Chamber prior to the identification of an accused, the Prosecution submits that the Statute provides for such participation is specific provisions such as Articles 15(3),

investigation at large. The Prosecution also submits that the context of the provision also supports this interpretation.³⁷

24. The Prosecution further submits that the object and purpose³⁸ of the Statute makes it clear that the investigation is not considered “proceedings” for the purpose of the participation of victims. The Statute and the Rules strike a careful balance between the entitlement of victims to participate in the Court’s process, on the one hand, and the need to provide for fair, efficient and objective investigations and prosecutions of international crimes, on the other.³⁹ The drafting history of Article 68 and the relevant Rules⁴⁰ confirms that the right of victims to participate under Article 68 was seen as a right to participate in proceedings in a particular case against an individual or individuals for the purpose of establishing criminal responsibility before a Chamber and of receiving reparations.⁴¹ Consistent with this

19(3) and Rule 92. Such provisions, in particular Article 19(3) and Rule 92, would be rendered redundant if there was a general right to participate in all proceedings prior to the formation of a case.

³⁷ Article 68 is located in Part IV of the Statute (The Trial or ‘Le Procès’). Article 68(1), refers specifically to “the investigation and prosecution”, while Article 68 (3) only makes reference to “proceedings”. Pre-Trial Chamber I appears to draw an inference that as the investigation is not explicitly excluded in this Article, it must be included (ICC-01/04-101, para 45). However, the principle works just as easily in reverse – the investigation is explicitly included in article 68 (1), and therefore the silence in Article 68 (3) suggests that it is not included. In fact, because this Article is located in the Part called the Trial, the Prosecution submits that such an explicit reference is required to extend Article 68(3) to other stages of the proceedings; the overall approach throughout the Statute is to highlight when an individual provision has a particular application - see, e.g., articles 27(1), 54(1)(b), 56(1)(b), 65(4), 68(2), 110(4)(b), 112(3)(b), and 115(b) of the Statute.

The Prosecution also submits that Rule 92 supports the reading of Article 68 (3) as applying to specific proceedings that take place at or after the end of an investigation (see below para. 27). Section II of the Rules (Victims and Witnesses), is located in Chapter 4 (Provisions relating to the various stages of proceedings). The Prosecution rejects the interpretation of PTC I that because Chapter 4 precedes Chapters 5 (Investigation and prosecution), 6 (Trial procedure), 7 (Penalties), 8 (Appeal and revision), thereby reflects “a logical progression in the proceedings before the Court” and articles in that Chapter apply to the investigation stage (See DRC 17 January 2006 Decision on Situation Victims, ICC-01/04-101, para. 37). The earlier chapters (Chapter 1 on general provisions, Chapter 2 on composition and administration of the Court, and Chapter 3 on Jurisdiction and admissibility) suggest that Chapter 4 is the continuation of the general ruling of the previous chapters and deals with a range of procedural issues. Accordingly, each provision within Chapter 4 must be read individually to assess whether it applies to the investigation stage and, if so, in what manner. Additionally, the Prosecutor notes that the Rules are subordinate to the Statute (Article 51 (5)), but submits that they can still be used as a guide to the interpretation of the Statute, especially where the Statute is silent or ambiguous. The Rules are after-the-fact evidence of what states intended to regulate when they drafted the Statute. In the present case, Rule 92 does not limit an otherwise clear article, but can be used to interpret the proper and intended scope of Article 68 (3), which makes an express reference to the Rules.

³⁸ “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (public), ICC-01/04-168, 13 July 2007, para. 33. *Vienna Convention on the Law of Treaties*, Articles 31 and 32.

³⁹ See paragraphs 2, 4, 5 of the Preamble of the Rome Statute, which acknowledge the centrality of victims to the purpose of the Court, but also affirms the importance of effective investigations and prosecutions and the ultimate goal of ending impunity for the most serious crimes of international concern.

⁴⁰ See also ‘Prosecution’s Reply in DRC Situation’, ICC-01/04-84, 15 August 2005, paras. 18-22.

⁴¹ This is reflected in the commentaries by Donat-Cattin, David, “Protection of the victims and witnesses and their participation in the proceedings: article 68” in Triffterer, Otto (ed), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999), pp. 869-888, and by 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), pp. 1387-1419. Schabas also comments that “Victims are entitled to intervene at the trial stage, when their ‘personal interests’ are affected” – See *An Introduction*

interpretation, commentators have also agreed that victims “may not participate in the investigation undertaken by the Prosecutor.”⁴²

25. Consequently, a teleological interpretation of “proceedings” in Article 68(3) imposes a balancing between the rights of the victims with the rights of the accused for an expeditious and fair trial and the overall interest of ending impunity for crimes of international concern.
26. Based on the reasons set out above, the Prosecution submits that “proceedings” under Article 68(3) commence: (a) once the Prosecutor informs the Pre-Trial Chamber of a decision not to proceed with an investigation under 53(1) or the conclusion that there is no basis for a prosecution in a situation under Article 53(2); (b) upon the issuing of an arrest warrant or a summons to appear under Article 58, including the holding of a confirmation hearing under Article 61 (and obviously the subsequent criminal proceedings before a Trial Chamber, if and when charges are confirmed).
27. The notification system set out in Rules 92(2) and (3) of the Rules⁴³ also supports the reading that the general right for victims to participate in the proceedings under Article 68 (3) has as its starting point the procedures which take place at the end of an investigation, at the earliest: a decision not to investigate or not to prosecute pursuant to Article 53, or the commencement of a case by the consideration of a confirmation or charges (or by analogy, the issuance of an arrest warrant or summons to appear). This notification regime would become incomprehensible if general participation during the investigative stage of a situation would be possible under Article 68 (3): victims would be invited by the Court to participate mid-way through the process despite their arguable entitlement to participate much earlier. An

to the *International Criminal Court* (2nd ed) (Oxford University Press: 2004), p. 173. Reaching a similar conclusion, Orié, A., “Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC” in Cassesse et al (eds) (2002), *Op. Cit.*, p. 1478. See also Timm B., “The Legal Position of Victims in the Rules of Procedure and Evidence”, in Fischer et al (eds), *International and National Prosecution of Crimes Under International Law* (Berlin: Spitz, 2001), p. 295; 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), pp. 315-334, p. 326.

⁴² See Jorda and de Hemptinne at p 1406. Even commentators who advocate for extensive rights of victim participation consider that such a right only exists “from the first hearing of confirmation of the charges (Article 61), to the entire course of the Trial, Appeal and Review proceedings.” See Donat-Cattin *Supra* note 45, p. 880.

⁴³ Sub-rules (2) and (3) require the Court to notify victims of a decision that will trigger the procedures under Articles 53 (decision not to investigate or decision not to prosecute) or 61 (confirmation hearing) “[i]n order to allow victims to apply for participation in the proceedings in accordance with rule 89” and therefore under Article 68 (3) (see rule 89 (2)). See also ‘Prosecution’s Reply in DRC Situation’, ICC-01/04-84, 15 August 2005, paras. 15-7.

interpretation that renders the notification regime in Rule 92 redundant and/or ineffective cannot provide an adequate vehicle to determine the scope of Article 68 (3).⁴⁴

***(d) Under Article 68 (3) of the Statute, the Court must determine if the
“personal interests” of the victims are affected***

28. The interplay between Rules 85(a) and Article 68(3), clearly set out in Rule 89(2), establishes a two stage process to determine if an individual qualifies as a victim with standing to participate in a proceeding. First, the Chamber must decide if he or she qualifies as “victim” under the definition set forth in Rule 85. Then, the Chamber must further determine whether the applicant fulfils the additional conditions laid down in Article 68 (3): a) whether the ‘personal interests’ of the victim are directly affected by the proceedings in which he or she is applying to participate; b) whether the victims’ participation at the relevant stage of the proceedings is appropriate; and c) whether the participation of the victim in the relevant stage of the proceedings is prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
29. It follows that the definition of ‘personal interest’ must be something more than the general interest of any victim in the progression and outcome of the investigation⁴⁵. Every person who qualifies as a victim has such an interest, and to allow such an interpretation would render meaningless the legal requirement of the victims’ personal interests to be affected by the proceedings in which they are participating meaningfully.⁴⁶

⁴⁴ The fact that Rule 92, sub-rules (2) and (3) state that “notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court” should be understood as referring to the specific provisions for victim participation provided for in Part 2 of the Statute (and clearly excluded from Rule 92 (see sub-rule (1)), and therefore covering victims who have participated under Article 15(3) and 19(3), but also to victims participation under Article 53(3) proceedings in relation to Rule 92(3).

⁴⁵ PTC I correctly identified “that the ‘personal interests’ criterion expressly set out in article 68(3) constitutes an additional criterion to be met by victims, over and above the victim status accorded to them,” see PTC I 17 January 2006 Decision on DRC Situation Victims’, ICC-01/04-101-tEN-Corr, 17 February 2007, para. 62. However, by considering that “the interests of victims are affected *in general* at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered” (*Id.*, para. 63, emphasis added), the Chamber interpreted and applied this criterion in such a broad and contradictory way as to render it meaningless. By finding that the investigation as a whole constituted proceedings for the purposes of Article 68 (3), PTC I put itself in a position where it was unable to make a finding of whether the personal interest of a victim was affected that differed in any way from the finding that they were a victim.

⁴⁶ The “principle of effectiveness” expressly provides that as the parties must have intended that each provision have a certain effect, a provision ought not be given an interpretation that leaves it meaningless or without effect – see *The Corfu Channel Case (merits)* ICJ Reports (1949), p. 24 (and cases cited therein); Jennings and Watts (ed), *Oppenheim’s International Law* (9th ed) (London: Longman, 1992), Vol I, para 633(9).

30. The personal interest of the applicant must be a “judicially recognisable personal interest”⁴⁷. It must relate directly to the specific subject matters being discussed within the Court proceedings in which he or she is applying to participate. The Prosecution thus submits that the question whether “the personal interests of the victim are affected”, within the meaning of Article 68(3), can only be properly addressed once there are formal proceedings related to specific crimes and against persons allegedly involved in those crimes, or when a formal decision has been taken not to investigate or not to prosecute crimes pertaining to the situation (Article 53). When a case is formed, then the Chamber will have all the relevant information to properly determine whether those victims’ personal interests could be truly deemed to be affected by the proceedings. In contrast, during the investigation of a situation, and with no knowledge of the focus of the OTP investigation, the Chamber is in no position to make such determination. The Prosecution therefore submits that in the context of an investigation of a situation it is not possible to determine whether the Applicants’ personal interests are affected by the Court’s activities, within the terms demanded by Article 68(3).⁴⁸

(e) Victims’ Participation at the relevant stage of the proceedings needs to be appropriate

31. The Prosecution further submits that it would also be inappropriate to grant the participation sought by the Applicants in the Uganda situation, because such participation has the potential to affect the appearance of integrity and objectivity of the investigation, the expeditiousness of the proceedings, and the ability of the Prosecution to investigate and prosecute.
32. During an investigation the Prosecution is bound by duties to act independently,⁴⁹ to observe the principle of objectivity under Article 54 (1) (a) by ensuring that the investigation covers all relevant circumstances for the establishment of the truth and is not influenced or affected by external factors. The integrity of the investigation is safeguarded by the fact that it is solely conducted by the Prosecution, acting as an “impartial organ of justice”⁵⁰ not subject to any external influences or pressures, and involving, when required, the Pre-Trial Chamber’s review functions. All investigative functions, including the determination of the incidents for

⁴⁷ Haslam, *Supra* note 45, p. 326.

⁴⁸ See further ‘Prosecution’s Reply in DRC Situation’, ICC-01/04-84, 15 August 2005, paras. 23-29.

⁴⁹ Article 42 (1): a principle that has been characterized as an “objective and valuable resource, which needs to be protected and safeguarded from external attacks, threats or limitations”, Turone, G., *Powers and Duties of the Prosecutor*, in Cassese et al (eds) (2002), *Op. Cit.*, p. 1140 (emphasis in the original).

⁵⁰ *Id.*, p. 1165.

investigation and the crimes and perpetrators that should be prosecuted, must thus unfold pursuant to these principles of independence and objectivity.

33. Allowing victim participation in the investigation of a situation introduces an external factor into the investigative process, which could be perceived to impair independence and objectivity, and to open the door for future allegations that the inquiry was subject to undue influence and bias⁵¹.
34. For example, any determination about the admissibility of victims' participation in the situation, pursuant to Rule 85(a), will require a factual determination by the Chamber on the existence of crimes within the jurisdiction of the Court in the situation under investigation⁵². That determination can also affect the appearance of objectivity of the investigation and the impartiality of the Chamber. Such a determination would be made beyond the provisions of the Statute and the Rules, in part because it would proceed in advance of the presentation of any evidence by the Prosecutor, under Article 58 or any other provision of the Statute or Rules.
35. Also, to be capable of determining that the harm suffered by the applicant was caused by a crime within the Court's jurisdiction, the Court will likely be obliged to engage in fact-

⁵¹ 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 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 Defense. Pre-Trial Chamber I 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 PTC I 17 January 2006 Decision on DRC Situation Victims', ICC-01/04-101-tEN-Corr; 17 January 2006; paras. 57-60). 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 proceedings (Id., paras 69-76), however, Pre-Trial Chamber I offered the victims multiple points of entry into the investigation. Importantly, as the Lubanga proceedings have advanced, Pre-Trial Chamber I 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), ICC-01/04-01/06-462, 22 septembre 2006, pp. 7 and 9.

⁵² PTC I adopted criteria to determine, on a case-by-case basis, whether a person who seeks participation in the investigation of the DRC situation assumes the status of victim, pursuant to Rule 85. The burden of proof imposed on each applicant, at the investigation stage, was to demonstrate with "grounds to believe" (criteria taken out of Article 55 (2)), to have suffered harm, that there is a crime within the jurisdiction of the Court and the geographical and temporal boundaries of the situation (pursuant Articles 5, 11 and 12) and that there is a causal link between the two ('PTC I 17 January 2006 Decision on DRC Situation Victims', ICC 01/04-101-tEN-Corr, para. 97 and 98; "Décision sur les demandes de participation à la procédure a/0001/06, a/0002/06 et a/0003/06 dans le cadre de l'affaire *Le Procureur c. Thomas Lubanga Dyilo et de l'enquête en République démocratique du Congo*" (public expurgé), ICC-01/04-177, 31 July, p. 13). For the examination criteria PTC I developed for victims' participation in a case see Prosecution's Simultaneous Reply on the Case.

finding activities which are not set forth in the Court's governing documents. That activity will be based exclusively or nearly exclusively on information provided by the applicants themselves⁵³. This circumstance may lead the Chamber to premature or unfounded factual conclusions, which could in turn be based on applications based either knowingly or unwittingly upon false or misleading information.

36. The making of a determination, for the purposes of Rule 85, that crimes within the jurisdiction of the Court and the situation exist, also opens the door to the criticism that the Chamber is simultaneously prejudging, at a minimum, whether the crimes in question have been committed. That determination can potentially affect the integrity of any subsequent determination under Article 58. For example, the Chamber may be entering findings on issues it will be required to determine later, such as the involvement of an armed group in a given geographical area, the existence of an extended attack on a civilian population or the membership of individuals in an armed group. The absence of additional information presented by the Prosecution, and the potential for the Chamber to open itself to criticism that it has prejudged issues which might form the substance of future cases, demonstrates that the participation of victims at this stage should not be deemed appropriate.⁵⁴
37. Under the Statute and the Rules, the issuance of an arrest warrant or summons to appear is the first opportunity for a Pre-Trial Chamber to reach factual conclusions on the existence of crimes within the jurisdiction of the Court under the "reasonable grounds" test contained in Article 58.⁵⁵ The Court's governing documents require that this initial conclusion be reached *exclusively* on the basis of the information provided by the Prosecution.⁵⁶ This principle

⁵³ Pre-Trial Chambers of this Court are not investigative chambers and were not intended to perform investigative functions beyond their specific instances of intervention at the investigation stage. Accordingly, they are not equipped with the necessary tools and resources to efficiently gather and analyse material as it is required in inquiry activities, including determining the reliability of sources. PTC I, in the 'PTC I 17 January 2006 Decision on DRC Situation Victims', clarified that to assess with grounds to believe the status of the applicants as victims, would first consider the statements of the applicants, and then the submissions made by the Prosecution and the *ad hoc* counsel. Subsequently, the Chamber will resort to "other sources" such as UN official reports. On the basis of this material, the Chamber will make its determination. (See ICC 01/04-101-tEN-Corr, para 101).

⁵⁴ These issues, especially the question of prejudgement, may also make the participation of victims at this stage "prejudicial to or inconsistent with" the rights of a future accused, contrary to the last requirement of Article 68(3).

⁵⁵ A determination on jurisdiction, for instance under Article 19 (2), will only deal with the discreet question of whether the crimes, as *alleged*, fall within the jurisdiction of the Court.

⁵⁶ See Schlunck, A., "Issuance by the Pre-Trial Chamber of a Warrant of Arrest or a Summons to Appear" in: in Triffterer, Otto (ed), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999), p. 756: "The Pre-Trial Chamber will not initiate investigations by itself. If the Prosecutor does not present sufficient evidence to underpin his or her application, the Pre-Trial Chamber is not obliged to investigate further. *The basis for its decision is solely the information presented by the Prosecutor*" (emphasis added). Having victims providing evidence during the investigation could in fact open the door for the

constitutes a fundamental safeguard for the rights of persons and the integrity of the proceedings⁵⁷. It protects the quality of the Chamber's determination, as only information, collected under the safeguards applicable during the OTP's investigation will form the basis of the decision.⁵⁸ The Prosecution respectfully submits that a system which would implement broad victim participation in a situation substantially departs from this Statutory model.

(f) Victims' Participation in the situation is prejudicial to the rights of the accused and a fair and impartial trial

38. The participation of victims in the situation also affects the rights of potential defendants and a fair and impartial trial.⁵⁹ Such victims are placed in a unique position potentially to influence the outcome of pre-trial proceedings by their representations and interventions,⁶⁰ because they could claim a range of procedural rights that no person under investigation enjoys under the Statute or the Rules before the issuance of warrant of arrest or a summons to appear. The right therefore affects the balance between victims and the defence during the investigation of a situation, and is capable of jeopardizing the fairness and integrity of the proceedings.
39. The circumstance that this balance is affected is demonstrated by the interventions of Lubanga's counsel in the *Lubanga* case, in which counsel has consistently opposed forms of victim participation in the case and thereby necessitated rulings of the Pre-Trial Chamber accommodating the competing interests. Within a situation, the problem of adequate representation of the views of the defence is more acute. The Prosecution submits that while

Pre-Trial Chamber to use in this determination under Article 58 the evidence presented by the victims - who have a 'personal interest' in the proceedings and are not obliged to follow a principle of objectivity. In abstract, Chambers could even consider evidence provided by the victims to the situation, but disregarded by the Prosecution, for example for not having been considered to be reliable. This is an interpretation of the Statute and Rules that would undermine all its basic principles.

⁵⁷ By ensuring that any determination in relation to alleged crimes is reached only on the basis of information collected by an independent organ of the Court in the course of an investigation aimed at establishing the truth; and also by precluding any external influence affecting this determination (either by way of submissions made by third parties or information provided by sources other than the Prosecution).

⁵⁸ In its "Decision on the Prosecution's Application for Leave to Appeal" (public), ICC-01/04-135-tEN, 31 March 2006, Pre-Trial Chamber I ruled upon the arguments presented by the Prosecution on this matter in its 'Prosecution's Leave to Appeal in DRC Situation', ICC-01/04-103, 23 January 2006, paras. 23-28) by finding "that the issuance of a warrant of arrest or summons to appear would also constitute a prejudgement with respect to a decision on the confirmation of charges and would therefore be detrimental to the fairness of the proceedings" (para. 59). The operative distinction, however, is that a judgement that crimes have been committed based on the "reasonable grounds" standard pursuant to Article 58 is clearly approved in the Statute and pursuant to statute must be based exclusively upon evidence presented by the Prosecution.

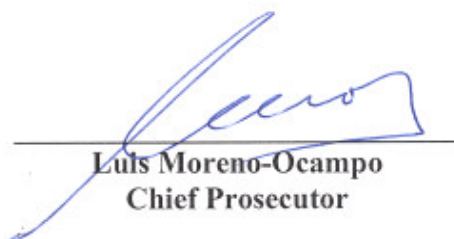
⁵⁹ See also "Prosecutor's Leave to Appeal in DRC Situation", IC-01/04-103, 23 January 2006, para. 20 and 22.

⁶⁰ Again, the concern is acute if that participation is deemed to include an ability to place evidentiary material before the Chamber. In those circumstances, the system would be closer to a *partie civile*, but situation-wide rather than limited to particular crimes being investigated.

the system of *ad hoc* counsel may be appropriate for confined and specific procedures (such as Article 56 evidence gathering steps) it is inadequate to effectively react to broad participation throughout the entire investigative stage. Representation is manifestly less effective in the context of an investigation, when *ad hoc* counsel is forced to rely on more abstract argumentation than is available to counsel for a named person.

Conclusion

40. The Prosecution respectfully submits that the Statute and the Rules strike a careful balance between the entitlement of victims to participation in the Court's process, on the one hand, and the need to provide for fair, efficient and objective investigations and prosecutions of international crimes, on the other. This balance, the product of a careful compromise, constitutes the most comprehensive set of provisions on the rights of victims in an international criminal jurisdiction. It is not necessary for the Court to stretch the bounds of Article 68 (3) well beyond what was intended by the drafters, as the Prosecution submits was done by Pre-Trial Chamber I, in order to safeguard the interests of victims. It is the strict application of the regime for victim participation adopted by the Statute and the Rules that will best guarantee efficient and meaningful exercise of these rights in the Court's process.
41. For the foregoing reasons, the Prosecution respectfully requests the Single Judge to reject the Applications for participation as victims in the investigation of the Uganda situation.



Luis Moreno-Ocampo
Chief Prosecutor

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