

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/06
Date: 30 November 2007

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

Registrar: Mr Bruno Cathala

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

Public

**Prosecution's Response to Trial Chamber's Order of 27 November 2007
regarding participation of OPCV**

The Office of the Prosecutor

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

Legal Representatives of Victims

a/0001/06 to a/0003/06 and a/0105/06

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Office of Public Counsel for Victims

Ms Paolina Massida

Introduction

1. The Prosecution does not object to the OPCV making submissions on the confined issues as delimited by the Trial Chamber's Order. However, the Prosecution wishes to raise certain concerns regarding the nature of the legal basis for OPCV's participation and some of the legal submissions on which OPCV based its Request.¹

Procedural Background

2. In the context of the situation, on 20 August 2007 Pre-Trial Chamber I ordered that OPCV be appointed as legal representative for a number of unrepresented victim-applicants.²
3. On 14 November 2007, the Trial Chamber scheduled a hearing to cover a series of issues including, *inter alia*, a prior request of OPCV for access to documents in the case, and protective measures for victims' applicants.³
4. On 21 November 2007, OPCV filed a request⁴ to be permitted to make submissions (either at the hearing or in writing) on protective measures for

¹ OPCV's Request was filed on 21 November 2007, and therefore the 4 December 2007 hearing will take place before the expiration of the time limit for parties to file their responses (Regulation 34(b)). As the Trial Chamber noted, it was "considering the short time available before the hearing" that it granted the OPCV permission to make submissions on certain issues at the hearing, subject to any objections of the parties and participants. While the Prosecution does not object to the ultimate outcome of OPCV making submissions in these particular circumstances, the OPCV's Request was based on certain legal arguments with which the Prosecution disagrees, and to which the Prosecution has not had an opportunity to respond. Therefore, without prejudice to any future order by the Chamber for submissions on the general role of OPCV, the Prosecution considered that it should respond to these issues, lest the Chamber's authorisation of OPCV to submit observations, and the silence of the parties, be taken as an endorsement of legal arguments on which OPCV based its request.

² ICC-01/04-374, p. 24. This appointments was made as the Pre-Trial Chamber considered that OPCV should "be available to provide support and assistance to [otherwise unrepresented] applicants until such time as the procedural status of victim is granted to them and a legal representative is chosen" (para. 43). The letters of appointment of OPCV as legal representative of the victims was filed in the record of the situation on 31 August 2007 (ICC-01/04-380, with the letters filed as confidential annexes) and 27 September 2007 (ICC-01/04-401-Conf, with the letters filed as confidential annexes).

³ ICC-01/04-01/06-1027. As a result of orders amending the schedule for the hearing (ICC-01/04-01/06-1031; ICC-01/04-01/06-1044), the hearing will be held on 4 December 2007.

⁴ ICC-01/04-01/06-1038 (hereinafter "OPCV's Request").

victims' applicants and the dual status of witnesses/victims, in addition to submissions on its request for access to documents in the case.

5. On 27 November 2007, the Trial Chamber ordered that OPCV may make oral submissions at the hearing on 4 December 2007 on protective measures for victim applicants;⁵ and on the dual status of witnesses/victims "if the issue remains extant",⁶ which the Prosecution understands to mean to the extent that the discussion of the issue has not been exhausted, i.e. to the extent that it has not been subject of a prior ruling by the Chamber, and that the submissions of OPCV do not replicate the submissions of the parties and other participants.⁷
6. The authorisations were granted on an exceptional basis, and subject to any objections of the parties or participants which were to be filed by 30 November 2007.⁸ The Chamber also noted that the OPCV's Request raised more generally the role of OPCV in its capacities as legal representative of victim applicants and as an independent body established to provide support and assistance to legal representatives of victims and to victims, and foreshadowed that the Chamber may list this issue for submissions in due course.⁹ The Prosecution's observations below are made without prejudice to any future submissions on the role of OPCV pursuant to such a further order of the Chamber.

Submissions

7. The Prosecution notes that while the applicants represented by OPCV have outstanding applications for participation in the situation, many of those applicants are not presently (to the Prosecution's knowledge) applicants for participations in the case. It is unclear from OPCV's Request which victim-

⁵ ICC-01/04-01/06-1046 (hereinafter "Trial Chamber's Order"), para. 2.

⁶ Trial Chamber's Order, para. 3. The procedural history relating to the issue of submissions on the dual status of witnesses/victims is set out in the Trial Chamber's Order.

⁷ The Oxford English Dictionary defined "extant" as "Continuing to exist; that has escaped the ravages of time, still existing" (<http://dictionary.oed.com/>).

⁸ Trial Chamber's Order, paras. 2-4.

⁹ Trial Chamber's Order, para. 5.

applicants OPCV is representing in relation to the case. OPCV's application to access documents in the record of the case identifies some 38 applicants that OPCV is representing and has linked with the case.¹⁰ The applications for participation in the case of 29 of these applicants were rejected by the Pre-Trial Chamber on 20 October 2006, on the basis that they had not provided sufficient evidence to show that there were reasonable grounds to believe that the harm they had suffered was directly linked to the crimes which are the subject of this case.¹¹ The Prosecution is aware that OPCV is also representing other applicants in the situation.¹² However the Prosecution is unaware of any applications in relation to these other applicants being registered in the case or being transmitted to the Trial Chamber,¹³ since no such applications have been notified to the Prosecution in the case. The Prosecution therefore submits that, to the best of its knowledge, any such additional victims represented by OPCV are not victim-applicants in the case for the purposes of the hearing.¹⁴

8. To the extent that OPCV is representing applicants who do have outstanding applications for participation in the case,¹⁵ the Prosecution does not object to it making submissions on the issue of protective measures for victim-applicants. However, the Prosecution does not consider that such submissions constitute an

¹⁰ ICC-01/04-01/06-987; namely applicants a/0004/06 to a/0008/06, a/0019/06, a/0020/06, a/0022/06 to a/0024/06, a/0026/06, a/0027/06, a/0029/06, a/0030/06, a/0033/06, a/0035/06, a/0036/06, a/0039/06 to a/0041/06, a/0043/06, a/0046/06 to a/0052/06, a/0072/06 to a/0080/06 and a/0110/06.

¹¹ ICC-01/04-01/06-601-tEN, pp. 9-10.

¹² See footnote 2 above; see also "Request of the OPCV to access documents in the situation record related to applicants a/0004/06 to a/0008/06, a/0019/06, a/0020/06, a/0022/06 to a/0024/06, a/0026/06, a/0027/06, a/0029/06, a/0030/06, a/0033/06, a/0035/06, a/0036/06, a/0039/06 to a/0041/06, a/0043/06, a/0046/06 to a/0052/06, a/0072/06 to a/0080/06 and a/0110/06", public, 18 October 2007, ICC-01/04-407.

¹³ Or previously to the Pre-Trial Chamber in the context of the case.

¹⁴ This also applies to applicant a/0110/06.

¹⁵ Nine applicants which are covered by OPCV's request to access documents in the case were not rejected by the Pre-Trial Chamber in relation to the case (decision ICC-01/04-01/06-601-tEN): the applications of a/0008/06 and a/0019/06 were not considered because they had not explicitly indicated that they intended to participate at the Pre-Trial Stage (p. 8); applicants a/0047/06 to a/0052/06 had provided sufficient evidence of a link between their harm and the crimes forming the subject of this case, however their participation was not considered appropriate at that stage of proceedings (pp. 10-11); and application a/0110/06 was not considered as part of that decision, as it does not appear to have been before the Pre-Trial Chamber at that time (pp. 2-3). In relation to the other victim-applicants represented by OPCV, the Prosecution is unaware of any application for participation in the case yet being registered in the case-file or transmitted to the Chamber, and no such application for participation in the case has been notified to the parties.

expression of views and concerns, or are authorised, under Article 68(3). Rather, the Prosecution submits that, as has been the practice before other Chambers,¹⁶ where a victim-applicant is the object of protective measures or proposed protective measures, then the legal representative of such a victim-applicant has an autonomous, yet confined, right to be heard on those measures.

9. The Prosecution disputes OPCV's submission that Article 68(3) grants the right to submit views and concerns to applicants who have not yet been granted a right to participate in the proceedings.¹⁷ To the contrary, the Prosecution submits that the right to express views and concerns set out in Article 68(3) is afforded to those victims who have been authorised to participate under Rules 89 to 91. Those Rules give form to, and prescribe the procedure for the implementation of, the right in Article 68(3). The language of Rule 89 itself makes this clear: "In order to present their views and concerns, victims shall make written application ... the Chamber shall then specify the proceedings and the manner in which participation is considered appropriate".¹⁸ Thus only those victims who have applied for participation under Rule 89 and whose participation the Chamber has authorised under that provision may be heard through Article 68(3), in accordance with the terms of the authorisation granted by the Chamber.

¹⁶ For example, in the *Situation in the DRC*, the Single Judge ruled on a number of requests by legal representatives of applicants relating to protection (ICC-01/04-330; ICC-01/04-332) without making reference to Article 68(3), and held that "if it considers it necessary, the Chamber will decide on a case-by-case basis whether it will hear the applicants' Legal Representatives on issues pertaining to their protection and security" (ICC-01/04-342-tEN). Similarly, in the *Situation in Darfur*, the Single Judge also held that "if and when the need arises, the Chamber will hear the Legal Representatives of the applicants on matters related to their protection and safety and that such decision will be taken on a case-by-case basis," without mentioning or relying upon Article 68(3) (ICC-02/05-79; see also requests ICC-02/05-75; ICC-02/05-90).

¹⁷ OPCV's Request, para. 20.

¹⁸ Emphasis added. The commentary on Rule 89 confirms that an application is required for victims to be able to present their views and concerns, and that giving the Chamber the power to determine when and in what manner participation was to be permitted was "part of the compromise reached at the Rome Conference and an important element for making the scheme workable in case of a large number of victims" (Bitti and Friman, "Participation of Victims in the Proceedings" in Lee (ed) *The International Criminal Court : elements of crimes and rules of procedure and evidence* (2001), p. 460). The Prosecution submits that these objectives would be undermined if all victim-applicants were granted a right to be heard, and to petition to be heard, under Article 68(3) prior to ruling by the Chamber. In contrast, it is only in respect of specific instances enshrined in the Statute (Articles 15 and 19, which are not regulated by Rule 89) that the authors considered that the right to submit 'observations' or 'representations' "should not require a prior request and ruling by the Court under Rule 89" (*ibid*, p. 459, emphasis added).

10. The Prosecution submits that to find otherwise would also make redundant Rule 93, which expressly and exceptionally grants the Chamber the right to seek views of victims who are not participating under Rules 89 to 91, in addition to those who are. Such a provision and distinction would be unnecessary if non-participating victims could express views and concerns under Article 68(3).
11. The Regulations governing the participation of victims in proceedings are also premised on the victim applying for, and being granted, participation under Rule 89.¹⁹ The Prosecution submits that the lack of any regulation or implementation of a right to express views and concerns outside of the schema of participation in Rule 89 reinforces that the participation of victims under Article 68(3) is conducted through Rule 89 and the subsidiary regulations. This regime would be undermined by an additional general right to express views and concerns outside of a grant of participation under Rule 89.
12. The Prosecution notes that this Chamber has previously ruled that legal representatives of applicants may not participate in prior hearings related to matter requiring early determination by the Chamber.²⁰ In so doing, the Chamber appeared to indicate that the appropriate avenue for any expression of views by a legal representative of a victim who has applied for, but has not yet been granted, the status of a victim participant in the case would be where the Chamber seeks their views under Rule 93.
13. The Prosecution recognises that there may be issues of sufficient importance that would warrant the Chamber seeking the views of victims who are not yet participating in the proceedings, and that there may be circumstances in which these views might conveniently and properly be provided by OPCV.²¹ The

¹⁹ See e.g. Regulations 24(2) (regulating the right of victims to respond) and 86.

²⁰ ICC-01/04-01/06-1004; ICC-01/04-01/06-1005-Conf. This approach would appear to conflict with OPCV's submission that it, as legal representative of applicants, should be permitted to present the views and concerns of those applicants on the basis that the underlying issue affects their views and concerns – see OPCV's Request, para. 23.

²¹ The Prosecution considers that the participation of OPCV in response to such a request would most likely be in its role under Regulation 81(4)(b), namely providing assistance to unrepresented victims by appearing before

Prosecution submits that such views should only be sought by the Chamber on an exceptional basis, in relation to points of important principle, and most likely where the parties and participants may not be in a position to provide the Chamber with the full range of perspectives.

14. In this regard, the Prosecution submits the Regulations do not grant OPCV an autonomous right to appear before the Chamber in respect of any issue.²² While recognising the institutional role of OPCV, the proper conduct of proceedings requires that any such presentation of submissions be linked to one of OPCV's functions: as the legal representative of a victim who has the right to make submissions on an issue; providing assistance to other participating victims or legal representatives by appearing on their behalf and at their request;²³ or, exceptionally, to present the views of victims at the request of the Chamber under Rule 93.

15. The Prosecution notes that in the present proceedings, the Chamber has granted OPCV permission to present its views "on an exceptional basis", and because "the Chamber may be assisted by the views of [OPCV] on these issues of principle."²⁴ The Prosecution, as stated above, does not object to the OPCV assisting the Chamber on these particular matters in the present circumstances, but submits that considerations outlined above may affect the appropriate

the Chamber in respect of a specific issue. In certain circumstances, it might also be possible to seek the views through OPCV of victim-applicants who it represents and whose applications are pending, however in such a situation the Prosecution submits that fairness may require the Chamber to consider extending the invitation to all legal representatives of victim-applicants with pending applications.

²² The Regulations give OPCV the functions of representing unrepresented victims (Regulation 80(2)), and providing advice, research and support to victims and their legal representatives (Regulation 81(4)). The Regulations grant similar functions to the Office of Public Counsel for the Defence (Regulations 76(2) and 77(4) and (5)). Thus to grant OPCV an autonomous right to intervene in the general interests of victims could imply that the OPCD likewise has an autonomous right to make submissions on matters of general interest to the defence, including in a specific case where there is already a represented accused who has not requested the assistance of OPCD. The impact of granting such extra-statutory rights of audience to both organs - thereby effectively adding two actors to the litigation of issues before the Chamber - on the expeditiousness of the proceedings should be apparent.

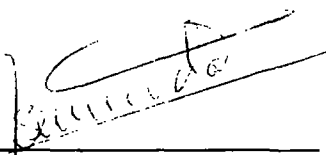
²³ Regulation 81(4)(b). In such cases, if OPCV is also acting as legal representative of victims in the same case, then any potential conflict of interest may have to be considered.

²⁴ Trial Chamber's Order, para. 5.

manner and scope of submissions to be made by OPCV, and the consideration to be given to those submissions.

Conclusion

16. Without prejudice to any future submissions on the role of OPCV as a legal representative of victim applicants and as an independent body under Rule 81(4),²⁵ the Prosecution requests that the Trial Chamber consider the submissions set out above in determining the manner and scope of the submissions made by OPCV at the hearing on 4 December 2007.



Luis Moreno-Ocampo
Prosecutor

Dated this 30th day of November, 2007
At The Hague, The Netherlands

²⁵ The possibility of the Trial Chamber requesting such submissions was foreshadowed in the Trial Chamber's Order, para. 5.