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Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: 8 June 2007

**PRE-TRIAL CHAMBER I**

**Before: Judge Akua Kuenyehia, Single Judge**

**Registrar: Mr Bruno Cathala**

**SITUATION IN DARFUR, SUDAN**

**Public Document**

**Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 in the Situation in Darfur, the Sudan**

**The Office of the Prosecutor**

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## Background

1. On 31 March 2005 the United Nations Security Council adopted UNSC Resolution 1593 (2005) referring the situation in Darfur since 1 July 2002 to the International Criminal Court ("the Court"). Following the referral, the Prosecutor initiated an investigation in relation to the situation in Darfur, the Sudan on 1 June 2005.
2. On 27 June 2006, five individuals ("the Applicants"), a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 filed confidential, *ex parte* applications in which they sought, *inter alia*, recognition of their right to participate as victims at all stages of the proceedings in the situation in Darfur, the Sudan.<sup>1</sup>
3. On 27 April 2007, Pre-Trial Chamber I issued arrest warrants for Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") in the Situation in Darfur, the Sudan.<sup>2</sup>
4. On 10 May 2007, Pre-Trial Chamber I appointed a single judge ("the Single Judge") to carry out the functions of the Pre-Trial Chamber concerning the case of the *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* and in the Situation in Darfur, the Sudan.<sup>3</sup>

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<sup>1</sup> Application for participation in proceedings: a/0011/06, ICC-02/05-4-Conf-Exp; Application for participation in proceedings: a/0012/06, ICC-02/05-5-Conf-Exp; Application for participation in proceedings: a/0013/06, ICC-02/05-6-Conf-Exp; Application for participation in proceedings: a/0014/06, ICC-02/05-7-Conf-Exp; Application for participation in proceedings: a/0015/06, ICC-02/05-8-Conf-Exp.

<sup>2</sup> "Decision on the Prosecution Application under Article 58(7) of the Statute", 27 April 2007, ICC-02/05-01/07-1-Corr; "Warrant of Arrest for Ahmad Harun", 27 April 2007, ICC-02/05-01/07-2-Corr; "Warrant of Arrest for Ali Kushayb", 27 April 2007, ICC-02/05-01/07-3-Corr.

<sup>3</sup> "Decision on the Designation of a Single Judge", 10 May 2007, ICC-02/05-01/07-6; "Decision on the Designation of a Single Judge", 10 May 2007, ICC-02/05-73.

5. By a decision rendered on 23 May 2007 ("the Decision") the Single Judge requested the Prosecution and the Office of the Public Counsel for the Defence to file, within 15 days, their observations on the requests of the Applicants to participate in the proceedings in the Situation.<sup>4</sup> The Prosecution hereby files its observations in reply.<sup>5</sup>

### Scope of the Prosecution's Submissions

6. The Rome Statute ("the Statute") and the Rules of Procedure and Evidence ("the Rules") make a distinction between situations and cases.<sup>6</sup> Pre-Trial Chamber I has also defined "situations" in terms of temporal, territorial and, in some cases, personal parameters.<sup>7</sup> 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 such.<sup>8</sup>

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<sup>4</sup> ICC-02/05-74.

<sup>5</sup> The Prosecution has based its calculation of the time limit for filing this Reply on the interpretation of Regulation 33(1)(b) set out in a previous decision of this Pre-Trial Chamber, whereby neither the day of notification nor the day of filing is counted *Situation in DRC: "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6"*, 31 March 2006, ICC-01/04-135-tEN, para. 9. If the Single Judge takes a different interpretation, then the Prosecution submits that these differing interpretations constitute good cause and requests an extension of time, pursuant to Regulation 35(2), of one day.

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

<sup>7</sup> "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 17 January 2006, ICC-01/04-101-tEN-Corr.

<sup>8</sup> "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 17 January 2006, ICC-01/04-101-tEN-Corr, para. 65. By contrast, according to Pre-Trial Chamber 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; "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 17 February 2007, ICC-01/04-101-tEN-Corr; "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", 29 June 2006, ICC-01/04-01/06-172-tEN; "Decision for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo, and of the investigation in the Democratic Republic of Congo", 28 July 2006, ICC-01/04-01/06-228-tEN; "Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06

7. The Decision invites observations on the Applicants' requests to participate in the "situation" in Darfur, the Sudan. The Prosecution notes however, that in their applications, all the Applicants signified their intention to participate during all stages of proceedings i.e. both the "situation" and the "case". As the Decision limits the Prosecution to submitting observations on the issue of participation in the Situation, the Prosecution accordingly limits its observations to this issue. The Prosecution respectfully requests that it be permitted to file its observations prior to any decision being made on whether the applicants should be permitted to participate in the "case".
  
8. The development of a body of procedural rights afforded to victims by the legal framework governing the Court, which allows victims to make their independent voice heard during various instances of the Court's process, is a major development in international criminal law, and one that the Prosecution strongly supports. It is nevertheless critical to ensure that these rights are implemented in a manner which is consistent with the Court's legal framework. Additionally, the Prosecution maintains that participation rights should be implemented in a way which maximizes the impact of the victims' views and concerns in Court proceedings without further exposing them and other persons to risks to their well-being and safety.<sup>9</sup>

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to a/0080/06 and a/0105/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, 20 October 2006, ICC-01/04-01/06-601.

<sup>9</sup> *Situation in Uganda*: "Prosecution's Reply under Rule 89(1) for Participation of Applicants a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation", 28 February 2007, ICC-02/04-85. *Situation in DRC*: "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", 23 January 2006, ICC-01/04-103; "Prosecutor's Reply to 'Observations of the Legal Representative of VPRS 1 to VPRS 6 Following the Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in Proceedings of VPRS 1 to 6'", 6 February 2006, ICC-01/04-111.

## The Prosecution's Main Submissions

### *Legal Qualification of "Victim"*

9. Pursuant to Rule 89(2), the Chamber must first decide whether an applicant qualifies as a victim as defined in Rule 85 before determining whether the applicant may participate in the proceedings. According to Rule 85(a), "victims" mean "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."
  
10. Pre-Trial Chamber I has determined in the Democratic Republic of Congo ("DRC") proceedings that irrespective of the stage of the proceedings in which they wish to participate, the four criteria that must be met by an Applicant for him or her to be accorded the status of victim: (a) the victim must be a natural person; (b) he or she must have suffered harm; (c) the crime from which the harm resulted must fall within the jurisdiction of the Court; and (d) a causal link between the crime and the harm must exist.<sup>10</sup>
  
11. The Chamber further elaborated in the DRC proceedings that an applicant would be permitted to participate in the proceedings in the context of the investigation into the situation of the DRC, after having demonstrated that there were grounds to believe that he or she suffered harm as a result of crimes committed that fall under the jurisdiction of

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<sup>10</sup> "Decision on the Applications on participation in the proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of Congo", 28 July 2006, ICC-01/04-01/06-228-tEN. The Pre-Trial Chamber had previously enunciated these criteria in their "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 17 January 2006, ICC-01/04-101-tEN-Corr.

the Court.<sup>11</sup> There are three conditions to be met: (i) the crime must be listed in Article 5 of the Statute as either genocide, a crime against humanity or a war crime, (ii) the crime must meet the conditions of Article 11 of the Statute, and (iii) the crime must meet one of the two conditions described in Article 12 of the Statute.<sup>12</sup>

12. The Prosecution submits that for an applicant to qualify for the status of "victim" with a right to participate in proceedings, he or she must meet the criteria set out in Rule 85 and satisfy the conditions for participation set out in Article 68(3). The combined effect of these provisions establishes a two-stage process for the Single Judge to determine whether an individual qualifies as a victim with standing to participate in proceedings. The Single Judge must be satisfied firstly, that the Applicant fulfils the criteria set out in Rule 85 and, secondly, that the "personal interests"<sup>13</sup> (Article 68(3)) of that Applicant are directly affected by the proceedings in which he or she is applying to participate.<sup>14</sup>

#### *Victim Participation in the "Situation"*

13. The Prosecution maintains, as it has in submissions in other situations,<sup>15</sup> that regardless of whether the Applicants may qualify as victims under

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<sup>11</sup> "Decision on the Applications on participation in the proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of Congo", 28 July 2006, ICC-01/04-01/06-228-tEN..

<sup>12</sup> Condition (iii) applies when UNSC referral under Article 13(b).

<sup>13</sup> *Situation in Uganda*: "Prosecution's Reply under Rule 89(1) for Participation of Applicants a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation", 28 February 2007, ICC-02/04-85.

<sup>14</sup> *Situation in DRC*: "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 17 January 2006, ICC-01/04-101-tEN-Corr.

<sup>15</sup> *Situation in DRC*: "Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp", 15 August 2005, ICC-01/04-84; "Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 23 January 2006, ICC-01/04-103; "Prosecutor's Reply to

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

14. The experience gained in the year a half since the decision to grant applicants the right to participate in the investigation of a situation<sup>16</sup> is also relevant. In that time, approximately 150 applicants have sought to participate in the DRC situation; a significant number of these applications are pending decision. In the Uganda situation, at least 49 applications remain under consideration. The experience in both situations, and the content of those applications, shows that a significant number of the applicants are unlikely to qualify to participate in post-arrest proceedings. This is due to the breadth of the conflicts, the perpetrators, and the crimes, as compared to the necessarily narrow focus of the prosecutions of the Court. It is also the result of the differences in the scope of a "situation" and "case," given the manner in which those terms have been defined by the Chambers and are currently being applied.

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

<sup>16</sup> *Situation in DRC*: "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 17 January 2006, ICC-01/04-101-tEN-Corr.

15. The legal framework of the Court provides specific rules allowing the *ad hoc* participation of victims in proceedings which take place when the preliminary analysis phase is finalized or at the end of the investigation of the situation.<sup>17</sup> 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. It potentially dilutes the meaningful nature of victim participation – and upsets other balances in the Statute relating to the respective rights of the participants – for victims to be granted rights to participation beyond these rights.

16. In addition, it is when a case is formed that the Chamber will have all the information relevant to determining whether those victims' personal interests could be truly deemed to be affected by the proceedings. The Prosecution notes that a case has already materialised in the Darfur situation, and each of the five Applicants has also sought participation in that case. The Prosecution submits that in this situation, as in others, granting participation to the Applicants who qualify to participate in the case is the appropriate avenue to provide victims a meaningful way of expressing their views and concerns.

### **The Right to Participate**

*Article 68(3) does not apply to the investigation*

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<sup>17</sup> For example, the rights to present their views when the Prosecutor asks for authorisation to commence an investigation (Article 15 (3)); to be informed of the results of the preliminary examination and analysis, and of any investigation (Articles 15 (6) and 53 (1) and Rule 92 (2)); to apply for participation, and present their views and concerns, when the Pre-Trial Chamber reviews a decision by the Prosecutor not to initiate an investigation or not to pursue prosecutions (Article 53 and Rules 89, 92 (2), 93, 107 and 109); and to submit observations in any determination of jurisdiction or admissibility of a case (Article 19 (3)).



17. The Prosecution respectfully submits, as has been submitted in the DRC<sup>18</sup> and Uganda<sup>19</sup> situations, that an investigation does not form part of the concept of “proceedings”, within the meaning of Article 68(3). Rather, “proceedings” in Article 68(3) refers to formal proceedings before a Chamber of the Court. Therefore Article 68(3) does not grant victims the right to participate in the situation.

18. The term “proceedings” contemplated in the Statute and the Rules, as appropriate for the participation of victims, does not anticipate an ongoing investigation, but instead refers to proceedings in a particular case against an individual or individuals for the purpose of establishing criminal responsibility.<sup>20</sup> Thus victims are allowed to participate under Article 68(3) only once certain formal proceedings before the Pre-Trial Chamber have been initiated.<sup>21</sup>

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<sup>18</sup> *Situation in DRC*: “Prosecution’s Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp”, 15 August 2005, ICC-01/04-84; “Prosecution’s Application for Leave to Appeal Pre-Trial Chamber I’s Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, 23 January 2006, ICC-01/04-103; “Prosecutor’s Reply to ‘Observations of the Legal Representative of VPRS 1 to VPRS 6 Following the Prosecution’s Application for Leave to Appeal Pre-Trial Chamber I’s Decision on the Applications for Participation in Proceedings of VPRS 1 to 6’”, 6 February 2006, ICC-01/04-111. On the matter of the admissibility of “situation victims” before Pre-Trial Chamber I, *see also*: “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, 17 January 2006, ICC-01/04-101-tEN-Corr; “Observations of the Legal Representative of VPRS 1 to VPRS 6 following the Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber I’s Decision on the Applications for Participation in Proceedings of VPRS 1 to VPRS 6”, 27 January 2006, ICC-01/04-105-tEN; “Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 And VPRS 6”, 31 March 2006, ICC-01/04-135-tEN.

<sup>19</sup> *Situation in Uganda*: “Prosecution’s Reply under Rule 89(1) for Participation of Applicants a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation”, 28 February 2007, ICC-02/04-85. The Prosecution notes that this application is still pending decision.

<sup>20</sup> *Situation in DRC*: “Prosecution’s Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp”, 15 August 2005, ICC-01/04-84.

<sup>21</sup> *Situation in DRC*: “Prosecution’s Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp”, 15 August 2005, ICC-01/04-84.

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

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

20. The “personal interest” to be affected must be something more than the general interest of any victim in the progress and outcome of the investigation – otherwise the criterion would be rendered meaningless. The Appeals Chamber took this approach in requiring that victims applying to participate in “proceedings” before it should include a specific statement in their application in relation to whether, and how, their personal interests are affected by the particular proceedings.<sup>22</sup> The Prosecution therefore submits that the applicant should be required to show that his or her “judicially recognisable personal interest”<sup>23</sup> is affected by the proceedings in which he or she is applying to participate.

21. Whether this is a stage in the proceedings “appropriate” to admit the pending applications should be determined with the benefit of the experience gained thus far in the situations.

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<sup>22</sup> *The Prosecutor v Thomas Lubanga Dyilo*: “Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”, 13 February 2007, ICC-01/04-01/06-824.

<sup>23</sup> E. Haslam, “Victim Participation at the ICC”, in McGoldrick, Rowe and Donnelly (eds.), *The Permanent International Criminal Court* (2004), p. 326.

## Consequences of Allowing Broad Participation by “Situation Victims”

### *Effect on Court's Proceedings*

22. One of the consequences of the ruling that victims may participate in the situation has already been experienced by the Court. This has had an impact upon the timely and efficient conduct of investigations. Submissions and decisions related to applications for participation, and issues ancillary to those applications, have become numerous over the past year and a half.

23. The ability of the Court to manage the participation of “situation victims” in Darfur, Northern Uganda, and the DRC is necessarily assessed in light of the situations addressed by the Court – i.e. mass criminality potentially involving very significant of potential victims. Furthermore, if the Chambers continue to apply the definitions of “situation” and “case” which are now becoming well settled, however, significant numbers of “situation” victims may not qualify as case victims, particularly in light of the mass criminality which falls within the scope of the situation.<sup>24</sup>

24. It is manifest that permitting any person who claims to have suffered as a result of an international criminal act to participate in the situation could have a grave impact upon the limited resources of the Court. With respect to the applications submitted thus far, the Chamber has been obligated to adjudicate the applications as well as to consider

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<sup>24</sup> *Situation in DRC*: “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”, 23 January 2006, ICC-01/04-103. *Situation in Uganda*: “Prosecution's Reply under Rule 89(1) for Participation of Applicants a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation”, 28 February 2007, ICC-02/04-85.

other claims made by situation victims, such as protective measures and the scope of any anticipated intervention. Issues have arisen about who may legitimately represent these applicants – even before they have been accepted as situation victims. The Prosecution, defence counsel, *ad hoc* defence counsel, and sections of the Registry have been required to consider and respond to the views and requests put forward by all victim participants. The Registry has been required to perform numerous functions, such as provision of legal advice and organization of legal representation for all applicants who apply in the context of the entire situation that has been referred to the Court. These activities necessarily divert resources and impair the presentation and adjudication of an expeditious and focused investigation and case.

25. In addition, it is important to emphasize that devoting resources to the management of issues raised by situation victims also arguably impairs rather than enhances the participation of victims in proceedings. The presentation of views and concerns of the victims in the *Lubanga* case – specifically at the recent confirmation proceedings – was a milestone in meaningful victim participation as anticipated in the Statute. It should remain a priority to enhance forms of victim participation which are specifically identified in the Statute and represent the core participation rights at confirmation and trial
26. In the context of the Darfur investigation, applying the prior ruling of the Chamber would mean that any person who claims to have suffered prejudice or harm as a result of an international criminal act which occurred in Darfur in conflict between the Government of the Sudan and the rebel forces since 1 July 2002, could participate in the situation. This would be regardless of whether the person demonstrates any connection to (a) the actual focus of the Prosecution's investigation, (b)

the case which has already commenced and (c) personal interest affected. Millions of individuals reportedly have been affected by the ongoing conflict in Darfur to varying degrees. Tens or hundreds of thousands of these individuals could be considered victims of crimes falling within the jurisdiction of the Court and therefore qualify as participants in the situation under this Chamber's prior ruling.

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

27. The prospect that the Victims and Witness Unit ("VWU") may be called upon to extend its protective efforts to cover those victims who have successfully requested participation in the investigation of a situation should also be considered.<sup>25</sup> Such a development would dilute the VWU's limited resources and impact negatively on the effectiveness of protective measures relating to witnesses relevant to the case proceedings and other victims who are at higher risk.<sup>26</sup> The Prosecution respectfully submits that protective efforts and resources should remain focused on ensuring that persons approached in the course of ongoing investigative efforts do not suffer harm as a result of their cooperation with the investigation.

*Impact on the integrity of the investigation*

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<sup>25</sup> 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", 27 January 2006, ICC-01/04-105-tEN.

<sup>26</sup> While, to the Prosecution's knowledge, there has been no such request for protection to date, the chances of such a request being made increase if further victims are granted broad participation rights in the investigation – especially in the investigation of a highly insecure region such as Darfur. Such requests could result in time and resources being diverted to issues unrelated to the main proceedings.

28. The integrity of the investigation can also be affected by victim participation in the situation. Prior to commencement of the case, under the terms of the Statute, the investigation is conducted by the Prosecution, which is intended to act independently and not subject to any external factors. All investigative functions, including the determination of the incidents warranting investigation and of the crimes and perpetrators that should be prosecuted, must accordingly unfold pursuant to this principle of objectivity. Allowing victim participation in the situation could give rise to the perception that the Prosecution is subject to external influences into the investigative process.<sup>27</sup>

### **Experiences of the Court since the 17 January 2006 Decision**

29. In the DRC situation there have been approximately 150 applications from potential victims seeking participation in the situation, while in the Uganda situation, there have been at least 49. There remains the likelihood that many more applications will be received in both

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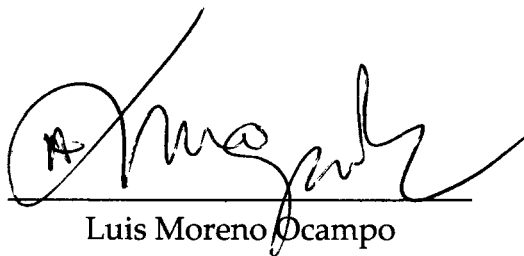
<sup>27</sup> Additional concerns would arise if applicants for participation were allowed to provide documentation or other evidentiary material and have access to confidential material. If granted, these entitlements would open the possibility that the Chambers will consider, as part of their decision-making, 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 Defence. 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* "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 17 January 2006, ICC-01/04-101-tEN-Corr). By granting situation victims the right to file documents/material, to request specific measures, and, upon decision of the Chamber, to gain access to non-public documents contained in the situation record and to participate in specific confidential proceedings (*Id.*), 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 », 22 septembre 2006, ICC-01/04-01/06-462.

situations. This eventuality would make all the difficulties highlighted above the more likely.

30. The Darfur situation is yet unique and different in the breadth of the criminality and the persons arguably affected. While only 5 applications from potential victims have been disclosed to the Prosecution so far, a recent filing received from Legal Representatives to the Applicants indicates that many others have already lodged applications for consideration. The Prosecution is also aware of a release on the website of the same Legal Representatives to the effect that they "have identified and compiled data from potential victims of the Darfur Diaspora in Sudan, Chad, and the United States, including Indiana, Maine, New Hampshire and New York", and are inviting further applications. This raises the possibility of many more Applicants coming forward who, ultimately may not qualify for participation in a case in the Darfur situation.

## Conclusion

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

for   
Luis Moreno Ocampo  
Prosecutor

Dated this 8 June 2007

At The Hague, The Netherlands