

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04
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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

**Prosecution's Observations on the Applications
of Applicants a/0001/06 to a/0003/06**

The Office of the Prosecutor
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Background

1. On 18 May 2006 the Single Judge of Pre-Trial Chamber I (Single Judge) issued its “Decision Appointing *Ad Hoc* Counsel and Establishing a Deadline for the Prosecution and the *Ad Hoc* Counsel to Submit Observations on the Applications of Applicants a/0001/06 to a/0003/06” (18 May 2006 Decision). In the 18 May 2006 Decision, the Single Judge noted that three applications for participation as victims in the situation in the Democratic Republic of the Congo (DRC) (Applications) and in the case against Thomas LUBANGA DYILO had been received from applicants a/0001/06, a/0002/06 and a/0003/06 (Applicants) on 5 May 2006.
2. In the 18 May 2006 Decision the Single Judge ordered the Registrar to provide the Prosecution with un-redacted copies of the Applications as soon as practicable, and gave the Prosecution fifteen days from the notification of the Applications to reply to them. On 22 May 2006 the un-redacted versions of the Applications¹ were notified to the Prosecutor.²

¹ Demande de participation à la procédure: a/0001/06, filed by the Registry on 9 May 2006 (ICC-01/04-144-Conf-Exp), Demande de participation à la procédure: a/0002/06, filed by the Registry on 9 May 2006 (ICC-01/04-145-Conf-Exp) and Demande de participation à la procédure: a/0003/06, filed by the Registry on 9 May 2006 (ICC-01/04-146-Conf-Exp).

² The Prosecution notes that *ad hoc* Counsel for the Defence was only notified of the (redacted) copies of the Applications on or after 2 June 2006. This results in a situation that the deadline for filing the respective replies for the Prosecution and *ad hoc* Counsel for the Defence differ significantly. Whilst in the present case the Prosecution does not believe it necessary to discuss this matter further it reserves its right to make additional submissions and to request adjustment of its deadline in future similar situations.

Scope of the present submission

3. The Prosecution hereby files its observations to the Applications as they relate to participation in the situation. The Prosecution is simultaneously filing, separately, its observations to the applications for participation in the case against Thomas LUBANGA DYILO of applicants a/0001/06 to a/0003/06 (Simultaneous Observations).
4. In light of the Prosecution's request in the Simultaneous Observations, the present submissions are limited to the aspects of the Applications in respect of which the Prosecution has requested the Pre-Trial Chamber to reject the applications for participation in the case against Thomas LUBANGA DYILO.³ In the Prosecution's view, this is consistent with paragraph 64 of the Pre-Trial Chamber's 17 January 2006 "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 Decision).⁴

Legal Qualification as "Victims"

5. According to Rule 89(2) of the Rules of Procedure and Evidence (Rules), the Chamber must first decide if the applicants qualify as "victims" in

³ Specific reference is made to paragraphs 15, 18 and 21 of the Simultaneous Observations.

⁴ The Prosecution notes that it has sought leave to appeal that Decision. After the Pre-Trial Chamber had rejected that application, the Prosecution on 24 April 2006 filed the "Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" which is pending with the Appeals Chamber.

accordance with the definition contained in Rule 85. According to Rule 85(a),

“Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.

6. In the Prosecution’s view, the Applicants meet the criteria to be qualified as “victims” in terms of Rule 85 for most of the crimes alleged in the Applications.⁵ In respect of those crimes, the Prosecution has requested the Pre-Trial Chamber to grant their applications for participation as victims in the case against Thomas LUBANGA DYILO. The Prosecution makes reference to paragraph 23 of its Simultaneous Observations.

No right to participate during the investigation phase of a situation pursuant to Article 68(3) of the Rome Statute

7. Article 68(3) of the Rome Statute (Statute) provides that the Chamber shall permit participation of an individual (as defined by Rule 85) where the personal interests of the individual are affected. The Prosecution submits that Article 68(3) of the Statute and Rule 85, viewed together, establish a two-stage process for the Chamber to determine if an individual qualifies as a victim with standing to participate in a proceeding: first, the applicant must fulfil the criteria set out in Rule 85, then the Chamber must satisfy itself that the personal interests of the victim are directly affected by the proceedings in which he or she is applying to participate.

⁵ The Prosecution makes reference to paragraphs 14, 17 and 20 of its Simultaneous Observations.

8. With respect to the crimes regarding which the Prosecution has requested the Pre-Trial Chamber to reject the applications for participation in the case against Thomas LUBANGA DYILO, the Prosecution submits that the Applicants do not have a right to participate in the investigation.

9. The Prosecution makes reference to its 15 August 2005 "Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp" (Prosecution's 15 August 2006 Reply),⁶ and in particular to the following arguments in that submission:
 - a. Prior to the issue of an arrest warrant, the right for victims to participate in the proceedings pursuant to article 68(3) of the Rome Statute is limited to cases in which the Prosecutor decides not to open an investigation or to prosecute in accordance with Article 53 of the Statute.⁷ Given that the DRC investigation is ongoing, victims' participation is limited to cases, which exist from the issue of an arrest warrant;

 - b. It must be shown that there is a "judicially recognisable personal interest" which goes beyond the applicants' status as victims and which must relate to specific matters being discussed within the framework of the Court's proceedings. The fact that the alleged

⁶ The Prosecution acknowledges that the Prosecution's submissions were rejected by the Pre-Trial Chamber. The Prosecution, however, on 24 April 2006 has sought extraordinary review before the Appeals Chamber in respect of these issues. Accordingly, the Prosecution is of the view that the respective substantive matters are not settled in the Court's jurisprudence.

⁷ Prosecution's 15 August 2006 Reply, paras 13, 14, and 23.

crimes of which an individual is a victim fall within the scope of the investigation does not amount to a “judicially recognisable personal interest”;⁸

c. It is inappropriate to grant applications for victims’ participation during the investigation phase of a situation:

i. Granting such applications can jeopardize the appearance of integrity and objectivity of the investigations, and impact of the investigative functions which the Prosecutor must conduct pursuant to the principles of independence and objectivity, including the determination of incidents warranting investigation and of the crimes and perpetrators to be prosecuted;⁹

ii. The confidentiality of all information related to the investigation must be maintained, as it is one of the main safeguards against intimidation of or retaliation against victims and witnesses, and against other forms of interference with the investigation such as the destruction of evidence. The granting of applications for victims’ participation during the investigation phase would be

⁸ Prosecution’s 15 August 2006 Reply, para 28.

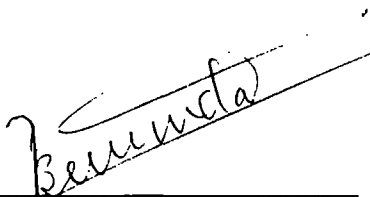
⁹ Prosecution’s 15 August 2006 Reply, para 32. In addition, this includes the potential negative impact on the rights of the Defence; see the 23 January 2006 Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber I’s Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, paras 20 to 22.

contrary to the need to maintain the confidentiality of all information related to the investigation, including its scope,¹⁰ and to basic considerations of efficiency and security.

Request

10. In light of the fact that the Prosecution's application for extraordinary review¹¹ is pending before the Appeals Chamber, the Prosecution requests the Pre-Trial Chamber to stay or suspend the consideration of the Applications.

11. In the alternative, for the foregoing reasons and in light of the unsettled jurisprudence, the Prosecution requests the Pre-Trial Chamber to reject the Applications for participation as victims in the investigation phase of the situation.



Fatou Bensouda
Deputy Prosecutor (Prosecutions)

Dated this 6th day of June 2006
At The Hague, The Netherlands

¹⁰ Prosecution's 15 August 2006 Reply, para 33.

¹¹ See footnotes 4 and 6.