Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04**
Date: **31 August 2007**

PRE-TRIAL CHAMBER I

Before: **Judge Sylvia Steiner, Single judge**

Registrar: **Mr Bruno Cathala**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public

Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e)

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer
Legal Representative of the Applicants

Office of Public Counsel for the Defence
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Ms. Paolina Massida, Principal Counsel

1. Introduction

1. On 17 July 2007, the Honourable Single Judge issued a "décision autorisant le dépôt d'observations sur les demandes de participation à la procédure",[1] in which the Single Judge ordered the Registry to transmit the applications to participate as victims to the Office of Public Counsel for the Defence (OPCD), and granted the OPCD the right to file observations in relation to these applications within 30 days of notification of the applications and the Report of the Registry.
2. On 20 August 2007, the Honourable Pre-Trial Chamber issued an ancillary decision,[2] in which the Chamber, *inter alia*, ordered the Registry to contact the applicants with a view to obtaining additional documentation, and stated that the deadline for filing the observations of the OPCD would commence to run upon notification of these completed applications.
3. On 31 July 2007, the OPCD wrote a letter[3] to the Victims, Participation and Reparation Section (VPRS) to request, *inter alia*, the following information:

i. If any of the applicants claiming physical harm had suffered from a pre-existing medical condition, and if so, the nature of this condition;

ii. If any of the applicants have been investigated or convicted in national proceedings, or if there are reasons to believe that the applicant may have committed a serious criminal offence;

iii. If the applicants have a relationship with any other persons who have previously filed applications before the court, and if so, the pseudonym of these related applicants and the link between them;

iv. If the applicants had participated in national or international proceedings about crime they allege before ICC or were in the process of doing so, whether it would be possible to obtain details of the legal proceedings in question;

v. If the applicants had received any kind of remedy (such as reparations or damages) or any kind of protective measures (such as asylum or relocation) before other jurisdictions in connection with the alleged harm set out in their applications?

vi. If the applicants had not filed such an action before domestic, regional or international judicial entities, whether the applicants have indicated that by

[1] ICC-01/04-358
[2] Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation ICC-01/04-374 -
[3] Confidential Annex A

virtue of filing their application before the ICC, they would be willing to waive their entitlement to seek damages before any other jurisdictions?

vii. If the interpreters and the witnesses present during the application requests could provide identity cards to the OPCD;

viii. If the interpreters and the witnesses present during the application process have any kind of relation with the applicants, and if they themselves have submitted an application before the Court in the DRC situation;

ix. In terms of the presence of an interpreter during the application requests, confirmation as to whether the persons named in the application forms as an interpreter are licensed/certified court interpreters;

4. The OPCD addressed these inquiries to the VPRS due to the ambiguity surrounding the legal representation of the applicants.

5. On the 10 August 2007, the VPRS responded to these inquiries,[4] arguing that without legal representatives, they were under no obligation to directly disclose any of the aforementioned information, and that if the OPCD required any further information to prepare its observations, then the OPCD should address its requests to Pre-Trial Chamber I.

6. Subsequent to the Pre-Trial Chamber's Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation,[5] the VPRS informed the OPCD that the applicants had designated a legal representative.[6] The VPRS had therefore transmitted the requests of the OPCD to the legal representative.

7. Pursuant to Regulation 86(7) of the Regulations of the Court, the OPCD hereby files a request to the Honourable Singe Judge to order the legal representative of the applicants to respond to the aforementioned inquires, and to disclose the requested material. In the alternative, should such information not be forthcoming, the OPCD submits that pursuant to Rule 89(2) of the Rules of Procedure and Evidence, the applications should be dismissed *in limine* due to their non-compliance with Regulation 86(2) of the Regulations of the Court.

2. Submissions

[4] Confidential Annex B
[5] Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, ICC-01/04-374, 17 August 2007.
[6] Confidential Annex C

2. 1 Legal Basis for the Request

8. Regulation 86 (2) of the Regulations of the Court stipulates that in completing the applications forms, applicants to participate as victims shall, to the extent possible, provide "any relevant supporting documentation".
9. The OPCD respectfully submits that if the Chamber or the parties identify a particular cadre of information as being relevant, the phrase "shall contain, to the extent possible" clearly places an onus on the applicants to provide such documentation, or to provide an explanation as to why they are not in a position to provide the information in question.
10. In this regard, the Honourable Single Judge in Pre-Trial Chamber II recently stated in the context of the Uganda situation that whilst it may be difficult to require applicants residing in countries ravaged by conflict, with communication difficulties to obtain certain documentation, nonetheless, "given the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings, it would be equally inappropriate not to require that some kind of proof meeting a few basic requirements be submitted".[7]
11. The OPCD further notes that the victim application process is a voluntary process and that potential applicants are expressly advised that they may be required to submit confidential documentation to both the Chambers and the parties.[8]
12. As such, the applicants who have freely chosen to participate as victims must necessarily accept any legal obligations which flow from such participation, or waive the right to participate. Alternatively, if applicants do not wish to comport with the documentary requirements of participating in the proceedings, they can participate as a potential witness, and vest the appropriate party (Defence or Prosecution) with the responsibility for executing disclosure obligations and producing corroborating documents.
13. In this connection, the OPCD notes that domestic systems for victim claims also provide for a 'discovery procedure'. In the United States of America, plaintiffs filing a claim under the Alien Torts Act can request that their identity and documentation be withheld from the public (John Doe

[7] Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101 at para 16.
[8] Victims Before the International Criminal Court: A Guide for the Participation of victims in the Proceedings of the Court, at page 21. http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf

procedure). Nonetheless, if the defendant chooses to contest the claim, the "the defendant's lawyers would still have the right to ask [..] questions (in a proceeding known as a "deposition") and to ask [the plaintiff] to provide documents in [the plaintiff's] possession that relate to the case."[9]

14. In France, "Les parties peuvent, au cours de l'information, saisir le juge d'instruction d'une demande écrite et motivée tendant à ce qu'il soit procédé à leur audition ou à leur interrogatoire, à l'audition d'un témoin, à une confrontation ou à un transport sur les lieux, à ce qu'il soit ordonné la production par l'une d'entre elles d'une pièce utile à l'information, ou à ce qu'il soit procédé à tous autres actes qui leur paraissent nécessaires à la manifestation de la vérité."[10]
15. In terms of the documentary requirements of the respective regional human rights mechanisms, the Inter-American Court of Human Rights has concluded that documents submitted in the proceedings will not be taken into consideration if "they lack authentication, present defects and do not comply with the minimum formal requirements for admissibility as it is impossible to precisely establish their source, and also the procedure by which they were obtained."[11]
16. Moreover, such procedural requirements are not waived, even if the consequence of non-compliance would be the dismissal of the actual application. In this connection, the Court has stated that it "must preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism. In the instant case, to continue with a proceeding aimed at ensuring the protection of the interests of alleged victims in the face of manifest violations of the procedural norms established by the Convention itself would result in a loss of authority and credibility that are indispensable to organs charged with administering the system for the protection of human rights".[12]

[9] 'Becoming a Plaintiff Without Revealing Your Identity', prepared by the Center for Justice and Accountability, http://www.cja.org/cases/BeingaDoe.pdf
[10] Article 82-1 alinea 1 du Code de procédure pénale (Loi nº 2000-516 du 15 juin 2000 art. 21 Journal Officiel du 16 juin 2000 en vigueur le 1er janvier 2001)(Loi nº 2000-1354 du 30 décembre 2000 art. 24 Journal Officiel du 31 décembre 2000 en vigueur le 1er janvier 2001)
[11] Bámaca Velásquez Case, Judgment of November 25, 2000, Inter-Am Ct. H.R. (Ser. C) No. 70 (2000) at para. 105. http://www1.umn.edu/humanrts/iachr/C/70-ing.html
[12] Cayara Case v. Peru, Preliminary Objections, Judgment of 3 February 1993 Series C No. 14 at para 63.

17. With respect to the European Court of Human Rights, Rule 44A of the Rules of the Court stipulates that "the parties to a case before the Court have a duty to cooperate fully in the conduct of the proceedings, and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice". [13]
18. Notably, Rule 44C further states that "where a party fails to adduce evidence or provide information requested by the Court or to divulge relevant important information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate".
19. Finally, as regards international criminal law, the OPCD observes that the ICTY Appeals Chamber has held that in light of the complexity and multi-faceted nature of international criminal proceedings, the right to equality of arms and fair trial implies that "the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case."[14]
20. The application form, as currently drafted, does not require the applicants to specify the time and address where the application form was signed, or to provide an exhaustive list of all persons who were present during the application process.[15] The application process is not videotaped, transcribed, or conducted in the presence of judicial officers. Neither the applicant, the person assisting the applicant, the witness, or the interpreter are officers of the Court, and as such, are not bound by the Staff Rules or the Code of Professional Conduct for Counsel. Indeed, the status of such persons is so amorphous, that is not clear as to whether they would fall under the relevant categories of persons who are subject to article 70 of the Rome Statute (offences against the administration of justice).
21. In any case, the application form does not caution the applicants that there may be legal consequences should they intentionally falsify their application form. The only reference to false or fraudulent applications is page 26 of the ICC guide for victim participation, which states that "[m]any safeguards are in place to prevent false or fraudulent application [sic] from being submitted.

[13] Rules of Court, as amended July 2006, http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf
[14] Prosecutor v. Tadic, Judgment of 15 July 1999, at para 52 http://www.un.org/icty/tadic/appeal/judgement/index.htm
[15] http://www.icc-cpi.int/library/victims/Form-Participation-1_en.pdf

In order to avoid false applications the ICC requires from the applicant a certain form of proof of identity, signature and other information"(emphasis added).[16]

22. It is for this reason that, in the absence of any express financial or punitive sanctions for false or fraudulent applications, the power of the Chamber to request the applicants to submit all relevant supporting documentation is of paramount importance.
23. The OPCD further submits that a need for strict procedural safeguards further stems from the fact that the Court is relying on a written application procedure, as opposed to in-court testimony, in contravention of the principle of orality.
24. In this regard, whilst international criminal tribunals and regional human rights courts have generally adopted a relatively unrestricted approach to their assessment of evidence, they have nonetheless cautioned against the use of written, out-of-court statements,[17] or, in light of the unreliability of such statements, implemented procedural safeguards or promulgated strict criteria as to when out of court testimony can be accepted,[18] and the format to which such testimony must adhere.[19]
25. As stated by the ICTY Appeals Chamber, the need for such safeguards derives from article 21 of the Statute "which grants to every accused person appearing before the Tribunal as one of the "minimum guarantees, in full

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[16] Victims Before the International Criminal Court: A Guide for the Participation of victims in the Proceedings of the Court http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf

[17] In the case of Bámaca Velásquez, Judgment, 25 November 2000, Inter-Am Ct. H.R. (Ser. C) No. 70 (2000), the Court held at para. 103: "*In this respect, the Court considers that the videotape with the testimony of Nery Angel Urizar Garcia, contributed by the Commission as documentary evidence, lacks autonomous value, and the testimony that it contains cannot be admitted as it has not complied with the requirements for validity, such as the appearance of the witness before Court, his identification, swearing in, monitoring by the State and the possibility of questioning by the judge."* http://www1.umn.edu/humanrts/iachr/C/70-ing.html

[18] See ICTY Prosecutor v. Tadic, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link 25 June 1996, at para 19. *" It cannot be stressed too strongly that the general rule is that a witness must physically be present at the seat of the International Tribunal. The Trial Chamber will, therefore, only allow video-link testimony if certain criteria are met, namely that the testimony of a witness is shown to be sufficiently important to make it unfair to proceed without it and that the witness is unable or unwilling to come to the International Tribunal."*

[19] See for example, the ICTY Practice Directive for the Implementation of Rule 92*bis*(B) of the Rules of Procedure and Evidence, IT/192, 20 July 2001, http://www.un.org/icty/legaldoc-e/index.htm, which provides that in order to tendered into court pursuant to Rule 92*bis,* written statements must be (inter alia):

- accompanied by a declaration by the witness that the contents are true to the best of their belief (which can only be signed after the witness has been cautioned about the consequences of false testimony);
- in a language which the witness understands;
- certified by a Presiding Officer of the Court or relevant national authority, who has verified the ID of the witness and noted the time, date, and venue of the procedure, and listed all persons who are present and the reason for their presence.

equality", the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[20] The rights set out in Article 21 of the ICTY Statute are mirrored in article 67(1) of the ICC Statute.

26. In light of the above, the OPCD respectfully submits that if the information in question is within the possession of the applicants or the applicants are in a position to obtain it, they are put on notice that it is relevant, and they refuse nonetheless to disclose it, the Chamber should draw adverse inferences regarding the *bona fides* of the applicants, and the credibility of their allegations.

27. Moreover, if failure to obtain the information in question impedes the ability of the parties to properly assess the assertions contained within a particular document, or the application as a whole, then the Chamber should exclude either that particular document, or pursuant to Rule 89(2), dismiss the application *in limine*.

2.2 Relevance of the Materials requested

28. The OPCD submits that for the purposes of establishing that a category of documents is relevant, and hence, pursuant to regulation 86(2)(3) of the Regulations of the Court, should have been filed as supporting material for an application to participate as a victim, it is sufficient for a party "to describe the documents sought by their general nature as clearly as possible even though it cannot describe them in detail, and […] show that such access is likely to assist his case materially".[21]

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[20] ICTY Appeals Decision On Appeal By Dragan Papic Against Ruling To Proceed By Deposition**,** Prosecutor v. Kupreskic, 15 July 1999, at para. 18:
"In considering the issues raised by this ground of the appeal, the Appeals Chamber deems it necessary to recall one of the fundamental principles governing the giving of evidence before the Trial Chambers, namely the principle that witnesses shall as a general rule be heard directly by the Judges of the Trial Chambers. This principle is laid down in Article 21(4) of the Statute which grants to every accused person appearing before the Tribunal as one of the "minimum guarantees, in full equality", the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. Sub-rule 90(A) embodies that same principle and specifically prescribes that witnesses shall in principle be heard directly by the Chambers. Furthermore, this principle is a predominant feature in the criminal procedure of national legal systems, underpinned as it is by the compelling reason of facilitating the determination of the charges against an accused person. One of the consequences of this principle is the advantage that all three Judges of a Trial Chamber shall have of observing the demeanour of the witness in person while he or she is being examined by the parties, apart from their ability to put questions to the witness under solemn circumstances in order to best ascertain the truth in respect of the crimes with which an accused is being charged."

[21] Decision On Appeal From Refusal To Grant Access To Confidential Material In Another Case, Prosecutor v. Hadzihasanovic et al, 23 April 2002, page 3.

2.2.1 Information concerning a possible pre-existing medical condition

29. The OPCD submits that in order to verify whether there is a causal nexus between the harm alleged by the applicants, and the alleged commission of offences under the Rome Statute, it is necessary to verify whether the applicants suffered from the harm or symptoms in question before the offence in question took place.

30. The Chamber has previously stated that rule 85(a) of the Rules sets out four criteria which must be satisfied for victim status to be granted. Notably, there must be a causal link between the alleged offence and the harm.[22] In this regard, the description of the harm suffered as a result of the commission of a crime within the jurisdiction of the Court is a precondition for the admissibility of the application.[23]

31. The OPCD respectfully submits that a pre-existing medical condition is a relevant consideration which must be taken into account by the Court in determining whether a victim can claim for harm which could stem from this pre-existing condition, rather than the alleged offence.[24]

32. [Redacted]

33. [Redacted]

34. [Redacted]

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[22] ICC-01/04-101-tEN para. 79; see also ICC-02/04-100-Conf, para. 12

[23] ICC-01/04-374 para.12

[24] See Cour de Cassation, Chambre criminelle 24 October 1973 (Cour de Cassation, Chambre criminelle, 1973-10-24, numéro de pourvoi 72-93598, Publié au bulletin): The French Court de Cassation confirmed the judgment of the Appellate Chamber to the effect that although an accident suffered by the victim might have triggered or exacerbated a pre-existing condition, this condition could not serve as the basis for a claim in the absence of proof, given by the applicants, corroborating this hypothesis.
http://www.legifrance.gouv.fr/WAspad/Visu?cid=127901&indice=3&table=CASS&ligneDeb=1

Similarly, the European Court of Human Rights has held that if a person's death could have been caused by a pre-existing medical condition rather than the circumstances of detention *per se,* the detaining authority will not be responsible for that person's death in the absence of clear proof that the cause of death can be attributed to the detaining authorities: of. Keenan v. United Kingdom, Judgment of 3 April 2001 Application no. 27229/95, at para 101.

See also Alberta (Canada) Victims of Crime Regulation, Alta. Reg. 63/2004,

> 5 If, in the opinion of the Director, a portion or all of the suffering by a victim arising from the injuries of the victim is attributable to a pre-existing medical condition of the victim and the victim was suffering due to that pre-existing medical condition prior to the injury occurring, the Director may, based on the amount of suffering attributable to the pre-existing medical condition,
>
> (a) reduce the financial benefits payable in respect of that victim by 25%, 50% or 75% as the Director considers reasonable, or
>
> (b) deny financial benefits in total payable in respect of that.

35. Consequently, it's necessary to know if the applicants have pre-existing medical condition to determine if they suffer of harm as a result from the alleged incident.

2.2.2 Information that the applicants may have been investigated or convicted in national proceedings

36. The OPCD submits that a necessary criterion of victim participation should be that the alleged victim has not themselves committed, contributed to, or benefited from the criminal acts.[25]

37. In addition, the possible criminal background of an applicant is highly relevant to the credibility of the applicant's assertions, particularly if the crime in question was a crime involving dishonesty or moral turpitude.[26]

2.2.3 Whether the applicants have a relationship with other persons who have previously filed applications before the court, and if so, the pseudonym of these related applicants and the link between them.

38. The OPCD was first tasked in May 2007 with the mandate of filing observations on victim applications in the DRC situation.

39. It therefore has not been granted access to all unredacted applications filed previously before the ICC, and as such, is unable to cross-reference the names and allegations of the applicants with applications which had been previously filed before the Court. Accordingly, unlike the Prosecution, the OPCD does not benefit from a holistic overview of all applications filed thus far in the DRC situation.

40. In addition, in the absence of detailed information concerning the family history of the applicants, even if the OPCD has been provided with the

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[25] Law of the Republic of Lithuania on compensation for damage caused by violent crimes (Official Gazette No 85-3140 of 14 July 2005) < http://www.tm.lt/default.aspx?item=smurt&lang=3>. See See also RD Pedro 'Measures to protect victims of crime and the abuse of power in the criminal justice Process' < http://www.unafei.or.jp/english/pdf/PDF_rms/no70/p092-105.pdf> (accessed 19 June 2007)

[26] See the Trial judgement in Prosecutor v. Kordic and Cerkez, in which the Chamber observed that in common law jurisdictions "the evidence of witness AT would be treated as that of an accomplice and would be treated with great caution" (26 February 2001 at para 628) http://www.un.org/icty/kordic/appeal/judgement/index.htm; and Prosecutor v. Halilovic, 'Decision on Addendum to Further Defence Report *re* Access to *Foss* Material and Additional Motions *re* Criminal Record of Prosecution Witnesses filed on 5 January 2005 and 11 February 2005, Decision of 18 March 2005, http://www.un.org/icty/halilovic/trialc/decision-e/050318.htm. The Chamber referred to the "general principle of law that judgements of domestic courts are public, wherefore the right to privacy of a witness is not violated in any way by allowing access to the Defence to these judgements", and that " a file containing the supporting material of a criminal case ("criminal file") which has led to a conviction, whether or not the witness was later pardoned or whether amnesty was granted to that witness, may contain information which could affect the credibility of a witness, or information as to the "criminal character" of those witnesses who allegedly were involved […], wherefore the Trial Chamber considers that access to those criminal files may be necessary or relevant for a fair determination of a matter in issue before the Trial Chamber".

relevant unredacted applications, it is not always possible to verify the familial relationships between different applicants.

41. For this reason, the OPCD submits that it is necessary to request the legal representative to state, on behalf of their clients, whether the present applicants have a familial/marital relationship with other persons who have previously filed applications before the Court.

42. This is relevant to the consistency of their allegations, and the possibility that the account of younger family members may have been influenced by the recollection of other family members. In this connection, the ICTY Appeals Chamber acquitted three accused, because the testimony of a young girl, which was used to convict them at first instance, was fundamentally unreliable.[27] The Chamber observed that whereas Witness H was able to confidently place the accused at the scene of the crime in her testimony before the Chamber, she had failed to do so in earlier statements. In conjunction with this inconsistence, the Chamber examined the progressive development of the witness statements of various family members and noted that they changed from vague uncertainty to positive identification of the accused. The Chamber therefore concluded that the "likelihood that Witness H could have been dramatically influenced by speculation amongst her surviving family members as to who was responsible for the atrocities that had torn apart their lives is strengthened by the fact that she was only 13 years old at the time of these events. She was therefore more susceptible to influence, particularly by close family members".[28]

43. This phenomenon, whereby the recollection of a person may be heavily influenced by others, was also described by Professor Casssese, in the following terms in his amicus curiae brief in the Sudan situation: "[i]t should be stressed that in Darfur, because of the widespread illiteracy in the population, the victims' evidence potentially available almost exclusively consists of *testimonies*. These however not only undergo the usual fading or blurring process just mentioned, but also tend to become fuzzy and consequently unreliable because of a specific factor: persons in IDP camps repeatedly talk to one another about their personal experiences, with the

[27] Prosecutor v. Kupreskic, Appeals Judgement of 23 October 2002, http://www.un.org/icty/kupreskic/appeal/judgement/index.htm
[28] At para. 201.

result that in the end accounts of different persons tend to merge or to change or to blur, thereby becoming subject to deformation."[29]

44. Finally, the OPCD observes that the requested information is necessary tp verify whether different family members have sought to act on behalf of the same victim.

2.2.4 Information concerning domestic proceedings or complaints filed before other human rights mechanisms

45. The OPCD respectfully submits that it is highly relevant to its preparation of observations as to whether it is appropriate for the applicants to participate as victims in the DRC situation at this stage of the proceedings to know firstly, whether the applicants have attempted to communicate their complaints to relevant authorities in DRC; and secondly, whether the applicants (or persons on their behalf) have filed complaints before other jurisdictions seeking remedies for the events in question.

46. In terms of its query as to whether the applicants have seised domestic authorities of the issues at hand, the OPCD submits that in order for the ICC to fulfil its role as a "Court of last resort", which encourages the development of national rule of law mechanisms, it is incumbent on the Court to either stipulate that applicants must attempt to exhaust domestic remedies, or, require applicants to explain why they were not in a position to utilise such remedies.

47. The rule concerning exhaustion of domestic remedies is predicated on the following: firstly, before seising an international body with a complaint, the State concerned should first be provided with the opportunity to remedy matters through its own judicial mechanisms;[30] and secondly, the primary responsibility for rectifying human rights violations lies with the State concerned.

48. The OPCD submits that this underlying rationale of exhaustion of domestic remedies finds resonance in the Rome Statute. As stated by the preamble to the Rome Statute, "it is the duty of every State to exercise its criminal

[29] Observations on issues concerning the protection of victims and the preservation of evidence in the proceedings on Darfur pending before the ICC, 30 August 2006, at page 9**,** ICC-02/05-14

[30] Dawda Jawara v. The Gambia, African Commission on Human and Peoples' Rights, Comm. Nos. 147/95 and 149/96 (2000) < http://www1.umn.edu/humanrts/africa/comcases/147-95.html> (13 June 2007); IACHR, 1996 Annual Report, Report Nº 39/96 (Case 11.673 – Santiago Marzioni), Argentina, October 15, 1996, para. 49, p. 85.

jurisdiction over those responsible for international crimes". To that end, the jurisdiction of the ICC is complementary to national criminal jurisdictions.[31]

49. In the particular context of victim applications, if applicants were permitted to file complaints directly before the ICC, the relevant national authorities would not be informed of the alleged violation, and would thus be deprived of the opportunity of investigating the complaint, and providing the victims with an appropriate remedy. Rather than operating as a self-described "court of last resort",[32] the ICC would obtain *de facto* primacy by virtue of the fact that the national authorities would not have had the necessary means (the information contained within the applications) to commence domestic investigations.

50. The principle of complementarity would thus be frustrated if the Court did not require applicants to establish that they have genuinely attempted to exhaust all appropriate domestic remedies, or in the alternative, demonstrate why they are not in a position to do so.[33]

51. Alternatively, if the applicants have filed complaints before national authorities, then it may be necessary for the Court to be apprised of this fact in order to notify the State in question for the purposes of an article 17(1) admissibility evaluation and to assess potential *ne bis in idem* claims. The latter question clearly raises issues concerning the rights of the defence, and is thus of material relevance to the OPCD's preparation of its observations.

52. In terms of the OPCD's inquiry as to whether the applicants (or persons on their behalf) had filed complaints before regional or international human rights mechanisms, the OPCD observes that international and regional human rights mechanisms stipulate as a condition of admissibility that the applicants must not have submitted the same claim to another treaty body or regional mechanism, "the aim being to avoid unnecessary duplication at the international level."[34] Applicants are therefore required to describe any

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[31] Article 1 of the Rome Statute.

[32] 'ICC at a Glance' http://www.icc-cpi.int/about.html

[33] "The initial burden is with the complainant to prove that he or she has exhausted or genuinely attempted to exhaust all appropriate domestic remedies. The complainant must substantiate any claim that certain remedies are unavailable, ineffective, futile or unreasonably long. Subsequently, the burden shifts to the State party". http://www.omct.org/pdf/UNTB/2006/handbook_series/vol4/eng/handbook4_eng_02_part2.pdf At page 71. See also See *R.T. v. France* (262/87) and *Kaaber v. Iceland* (674/95).

[34] Fact Sheet No.7/Rev.1, Complaints Procedure, Office of the Human Commissioner of Human Rights, http://www.ohchr.org/english/about/publications/docs/fs7.htm#_ftn6#_ftn6. See also article 33 of the Rules of Procedure of the Inter-American Commission on Human Rights

claims they have made, the body to which they have applied, and the outcome of the complaint.

53. The OPCD respectfully submits that the ICC should both respect and uphold this principle concerning duplication of procedures - to hold otherwise would be contrary to the Relationship Agreement between the ICC and the United Nations,[35] would generally frustrate the procedures of other regional organisations, would risk inconsistent factual findings, and could result in the accused being penalised twice if awards for damages for the same acts are issued by different courts. The same logic applies to complaints filed before domestic courts, based on the same facts, which have not been dismissed by domestic authorities for lack of jurisdiction.

54. Apart from the issue of double damages, it would be necessary for the OPCD be apprised of such proceedings in order to attempt to obtain copies of prior statements or any other information which could be exculpatory for the defence, or impact on the credibility of the applicants themselves or their allegations.

55. In this connection, the OPCD notes that in the Uganda situation, the Honourable Single Judge found that in the absence of direct evidence, it would be necessary to evaluate the application "first and foremost on the merits of its intrinsic coherence".[36] The intrinsic coherence of the assertions contained therein is highly dependent on the consistency with which the application has adhered to these assertions, and could be impugned by the existence of inconsistent statements.

56. Even if the applicants did not file the complaint themselves, it is possible that the complaint may have been filed by relatives of the applicants, on whose behalf the applicants are now seeking reparations, and could contain contrary allegations or factual details.

57. For example, in the case of Toğcu v. Turkey, the European Court of Human Rights dismissed a complaint because of the fact that the applicant and his family had provided inconsistent statements.[37]

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http://www.cidh.oas.org/Basicos/English/Basic18.Rules%20of%20Procedure%20of%20the%20Commission.htm, and article 56(7) of the African Charter of Human and Peoples' Rights.

[35] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1, Entry into Force 4 October 2004, Article 2(3) *inter alia*.

[36] Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-01/05-252 at para 15.

[37] The Court observed that various members of the applicants family had provided conflicting versions of the event at different times, including in statements given to human rights organisations, and furthermore, noted "

2.2.5 If the interpreters or witnesses have any kind of relationship with the applicant, or if they have submitted an application to participate as a victim before the ICC.

58. The OPCD submits that both interpreters and witnesses are obliged to maintain absolute impartiality, and to disclose the existence of any potential conflicts of interest.

59. With respect to interpreters, the OPCD notes that persons providing interpretative services for the purposes of judicial proceedings are generally regulated by a code of professional conduct,[38] which imposes strictly obligations of confidentiality[39] and impartiality,[40]and require interpreters to disclose the existence of any potential conflicts of interest.[41]

60. In defining what constitutes a potential conflict of interest and the attendant obligations of an interpreter, the Canadian Code for Interpreters provides that:

> "As soon as an interpreter becomes aware, for example, of any ties, whether personal, professional, or other, that the interpreter has or may have with the person with respect to whom he or she is providing interpretation, the interpreter is required to disclose this fact, without

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that the applicant – who was legally represented in the present proceedings – has not provided any explanation for these serious discrepancies"(at para 93). The Court found that such inconsistencies "*detract from the credibility of his account to the extent that, on the basis of his submissions, the Court is unable to draw a clear picture of the events of 29 November 1994 and it cannot, therefore, find it established that Ender was taken into custody by security forces*" (at para 94).
Although the Court "*the difficulties for an applicant to obtain the necessary evidence in support of his or her allegations which is in the hands of the respondent Government in cases where that Government fail to submit relevant documentation*", it nonetheless emphasised that "*to shift the burden of proof onto the Government in such circumstances requires, by implication, that the applicant has already made out a prima facie case*" (at para 95). The Court therefore held that "[*i]n the light of the contradictory versions of events put forward by the applicant in the present case, the Court cannot but conclude that he has failed to make out his case to the extent necessary for the burden to shift onto the Government to explain that the custody records withheld by them contained no relevant information concerning Ende*r" (at para 96). Case of Toğcu v. Turkey (Application No. 27601/95) Judgment 31 May 2005.

[38] See for example, the Code of Ethics for Interpreters and Translators Employed by the International Criminal Tribunal for the former Yugoslavia (IT/144) (ICTY Code)http://www.un.org/icty/legaldoc-e/basic/codeinter/IT144.htm; Code of Ethics for Interpreters and Translators Employed by the Special Court for Sierra Leone, Adopted on 25 May 2004 (SCSL Code) http://www.sc-sl.org/interpreters-codeofethics.html; Canadian Code of Conduct for Interpreters (providing services to the Immigration and Refugee Board) (Canadian Code) http://www.irbcisr.gc.ca/en/references/procedures/code_interpret_e.htm; United States Code of Ethics and Professional Responsibilities, United States National Association of Judiciary Interpreters and Translators (US NAJIT Code) http://www.najit.org/ethics.html#Preamble; French Code of Ethics for Interpreters (French Code) http://www.injs-paris.fr/cpsas/rubrique_interprete/deontologie.html

[39] See for example, rule 5 Canadian Code, article 7 ICTY Code, article 6 SCSL Code, Canon 3 US NAJIT Code, article 1 French Code.

[40] See for example, articles 5(1) and 8 of the ICTY Code, article 5(A) of the SCSL Code, Canon 2 of the US NAJIT Code, Canadian Code Rule 4(a), article 4 French Code.

[41] See for example, article 8(3) ICTY Code, article 5(C) SCSL Code, Canon 2 US NAJIT Code, Rule 4(b) Canadian Code.

delay, to the case management officer or clerk or presiding decision-maker, as the case may be.

An interpreter is likewise required to disclose, in the same manner and to the same person, for example, any employment or other activity, association, or private interest, (such as membership in an organization that is critical of or in favour of the government of the country of origin of the person concerned), that may be incompatible with his or her duties as an interpreter."[42]

61. The OPCD therefore submits that the existence of familial, professional or financial ties between the interpreter and the applicant constitute potential conflicts of interest which should be disclosed to the Chamber and the parties.
62. In addition, the OPCD submits that an interpreter, who has previously applied to participate as a victim would not be impartial, since the interpreter would have a vested interest in ensuring that applicant's allegations are consistent with those proffered by the interpreter in their application form.
63. Similarly, if an interpreter were to file an application to participate as a victim after providing interpretive services to other applicants, their account of the events could easily be influenced by confidential information which they were privy to during the application process of other applicants.
64. These are therefore factors which should be disclosed as potential conflicts of interest.
65. [Redacted]
66. The OPCD submits that the interpreter's [redacted] activities are incompatible with the obligation of an interpreter to maintain the strictest impartiality, and not to exert any influence over the persons being interpreted.[43] As such the OPCD requests that these application forms should be completed again, with the services of a more impartial and qualified interpreter.
67. With respect to witnesses, the OPCD observes that the application forms were witnessed by various individuals, who have not provided any identifying documentation which would enable the OPCD to verify whether

[42] Commentary to Rule 4 Canadian Code.
[43] Articles 5(3) and (4) of ICTY Code.

the witness's signature on the application form corresponds to the named person.

68. In addition, the application forms do not provide any information as to the capacity in which the named persons witnessed the application procedure, for example, whether, in that particular jurisdiction, they have any authority to act as a witness to court documents as a court official, magistrate, notary, or justice of the peace.

69. In this connection, the OPCD submits that for a witness to have any legal credibility and to avoid conflicts of interest, there are certain conditions to which the witness must comport: they may not have a financial and familial ties with the applicant, and they must not derive a possible financial benefit from the outcome of the application procedure.

70. The OPCD therefore submits that in order to verify potential conflicts of interest, it is necessary to be informed as to whether the witnesses have financial, professional, or familial links with the applicants, and whether the witnesses have at any stage submitted an application to participate as a victim before the ICC.

71. Finally, there is no information concerning the nature of the witnessing act. In contradistinction to the ICTR and ICTY Rule 92 *bis* procedure, the application form does not require the witness to sign a declaration that the application process was conducted in accordance with any particular procedure. For example, there is no requirement that the 'witness' lists all the persons present (which is particularly important if other prospective applicants are present), or certifies that there was no undue influence or coercion during the application process.

2.2.6. The qualification of the persons who provided interpretation services during the application process

72. The OPCD respectfully submits that in order to ensure a modicum of reliability and credibility for the application process, at the very least, it is necessary to evaluate the identity, background, and qualifications of all persons involved in the application process.

73. In this regard, the OPCD has noted that whilst the applications have been filed in French, several applicants stated in their application form that they either do not understand French, or that they only have a minimal command of French.

74. Whilst the application forms state that an interpreter was present, the forms do not require the applicant to state whether the contents were read to them in a language which they understood.
75. In addition, neither VPRS nor the legal representative had provided any information to the OPCD concerning the qualifications of these interpreters.
76. The OPCD submits that the fact that the applicants have signed their statements has no evidentiary value if it cannot be reliably ascertained that they understood and approved the contents of the statement. The OPCD therefore submits that it is necessary to verify the accuracy of the translation and the qualifications of the interpreters.
77. Regarding the qualifications of the interpreters, the aforementioned Codes of Conduct require interpreters to disclose their qualifications, and prohibits interpreters from accepting any engagements for which they are not adequately qualified. [44]
78. The OPCD further submits that the credentials of the interpreters should lie in the field of interpretation: "it is a popular misconception that any bilingual person would make an adequate interpreter".[45]
79. The OPCD would also like to express a general concern regarding the utility and accuracy of submitting applications in a language not understood by the applicant. In terms of the experience of the ad hoc Tribunals, during many early investigative interviews at the ICTY, a language assistant would translate what the witness was stating from Bosnian/Croatian/Serbian (B/C/S) into English, the investigator contemporaneously transcribed what the witness said in English, and the witness eventually signed the English version. It was a common occurrence for a witness to subsequently deny the accuracy of these statements when confronted with a B/C/S interpretation of the statement in court, or B/C/S translation during the Rule 92 bis (use of written statements in lieu of oral testimony) process.[46]
80. The OPCD understands that it might be costly for applicants to procure qualified interpretation services. Nonetheless, in such a scenario, the Victims Guide Book advises prospective applicants, who are unable to submit the form in one of the working languages, that they may contact the Court or its

[44] Canon 7 US NAJIT Code, article 3 SCSL Code, rule 2 Canadian code, article 9 ICTY Code.
[45] J. Karton, Lost in Translation: International Criminal Courts and the Legal Implications of Interpreted Testimony 40 Vand. J. Transnat'l L.at page 19 http://works.bepress.com/joshua_karton/1/
[46] See Transcripts of Status Conference on this issue in Prosecutor v. Brdjanin and Talic, 18 May 2001, in particular at page 281, http://www.un.org/icty/transe36/010518SC.htm

field offices.[47] Accordingly, the OPCD respectfully submits that in light of the effect that mistranslation or undue influence could have on the fairness of the proceedings, it would be preferable for the applicants to resubmit their applications, signed in a language which they are able to understand, and for the Court to subsequently prepare translations into one of the working languages.

3. Relief Sought

81. For the reasons set out above, the OPCD respectfully requests the Honourable Single Judge to order that the legal representatives or by default the VPRS section, to disclose to the Chamber and the parties:
    i. any information concerning a possible pre-existing medical condition;
    ii. whether the applicants may have been investigated or convicted in national proceedings;
    iii. whether the applicants have a relationship with other persons who have previously filed applications before the court, and if so, the pseudonym of these related applicants and the link between them;
    iv. whether the interpreters or witnesses have any kind of relationship with the applicant, or if they have submitted an application to participate as a victim before the ICC;
    v. the interpretation qualifications of the persons identified as interpreters in the application forms.
82. If the persons listed as interpreters do not possess any relevant qualifications in this field, the OPCD respectfully requests the Honourable Single Judge to order the applicants to resubmit their applications to the Court in a language which the applicants understand, and, if the applicants are illiterate, to order that the applicants resubmit their applications with a declaration that the contents of the application have been read to them in a language which they understand.

[47] ICC Guidebook at page 26.

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Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this 31st day of August, 2007

At Cotonou, Benin