Cour Pénale Internationale

International Criminal Court

Original : **French**

No.: **ICC-01/04-01/06**
Date: **4 September 2006**

PRE-TRIAL CHAMBER I

Before: **Judge Claude Jorda, Presiding Judge**
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: **Mr Bruno Cathala**

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

Public Document

Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr EkkehardWithopf
Legal Representative of the Applicants
Mr Luc Walleyn
Mr Franck Mulenda

Counsel for the Defence
Mr Jean Flamme
Legal Assistant
Ms Véronique Pandanzyla

1. Background

1. The applicants filed their applications for participation "in proceedings" on 9 May 2006 and on an "ex parte" basis.

2. By decision of 18 May 2006, the single judge ordered that the Registrar, as soon as practicable, provide:

   i. the Prosecution with an unredacted copy of the applications;

   ii. Counsel for the Defence with a redacted copy of the applications after having expunged any information which could lead to identification of the applicants.

3. The Defence filed its submissions on the application of applicant a/0001/06 for participation in the proceedings. In these submissions, the Defence raised – *inter alia* and for the first time – the issue of the **absence** of forms, and of explanatory and supporting documentation pertaining to two of the applicants.

4. Pre-Trial Chamber I issued its decision on 28 July 2006, granting applicants a/0001/06 to a/0003/06 the status of victims in the case *The Prosecutor v. Thomas Lubanga Dyilo* in the situation in the DRC, in view of the harm linked to the crimes as described in the arrest warrant for the latter, whilst requesting that they formulate their observations on the proceedings and manner of their participation in the confirmation hearing.

5. On 7 August 2006, the Defence filed its request for leave to appeal this decision.

6. By order of 10 August 2006, the single judge invited the Prosecutor and Defence Counsel to respond to the observations made by the victims' legal representatives

on the proceedings and manner of their participation during the confirmation hearing. The observations were formulated on 8 August 2006.

7. In its decision of 18 August 2006, Pre-Trial Chamber I rejected the Defence request for leave to appeal.

2. Merits

2.1 Preliminary observations – invalidity of proceedings as of the decision of 18 May 2006

8. The decision of 18 August 2006 erroneously states:

"Considering that, according to the notification records kept by the registry, the defence received a copy of the redacted version of all three applications well before the expiration of the time-limit set by the single judge for the defence to reply."

The Chamber refers here to the electronic notification on 2 and 5 June 2006 and to notification by DHL delivery, sent on 2 June 2006.

9. However, Mr Flamme has **not** received the aforementioned electronic notification. He draws attention to failures in the electronic system for disclosure between the Registry and the Counsel for the Defence, which have already been experienced on a number of occasions. This is unacceptable in view of the deadlines which are always extremely short.

He received electronic notification comprising the sole application made by the (first?) victim, in redacted form on 31 May 2006, as well as by DHL delivery.

The Defence makes these notifications available to the Chamber. Only one application is attached and not "all three" applications as claimed in the decision of 18 August 2006.

As a result, the Defence is forced – yet again – to formulate its observations on the participation of victims whose applications, nor explanatory and supporting documents it has never seen and about whom it therefore knows nothing, not even their gender, their place of origin or nationality, not to speak of their statements of the facts.

10. The Defence therefore considers that the decision of 18 August 2006 is based on an error of fact, with serious implications since the Defence based its submissions of 8 June 2006 on grounds which were not successful for this reason. The Defence is also forced to submit a response to applications of which it knows nothing and therefore considers that the decision should be reviewed. In the alternative, the Defence considers that the position it was in and the rights it would have benefited from immediately after the decision of 18 May 2006, should be restored as soon as it receives full notification as ordered by this decision. For as long as this notification has not taken place, the status of the proceedings should revert to its previous state since the Court order has not been executed.

Since this order has not been carried out, all subsequent proceedings must be considered null and void.

2.2. **In the alternative: proceedings and manner of participation**

11. The Defence refers to the arguments repeated in its submissions of 8 June 2006 and in its request of 7 August 2006, which it reiterates here in that it specifically pertained to proceedings and manner of participation.

2.2.1 The redacted nature of the procedural documents filed by the applicants

12. The decision of 18 August 2006 reasons as follows:

"Considering further that the issue of non-disclosure of the identity of the applicants after issuance of the decision and prior to the confirmation hearing was not dealt with in the decision; and that, therefore, the applicants are in error when they allege that the Chamber has already endorsed the principle of non-disclosure of identity prior to the confirmation hearing of those granted the procedural status of victim in the case against Thomas Lubanga Dyilo."[1]

13. Any application for participation is a formal procedural document by which the applicant requests to be admitted to proceedings as a **party**, even if this party is not allowed to participate in the hearings in the same way as the Prosecutor and the accused.[2]

The application for participation, which seeks compensation, therefore constitutes a claim against the accused.

[1] Decision of 18 August 2006, p. 9/11.
[2] Rule 89 (1)

One cannot accept the anonymous submission of such a document. Any claim (by way of a instrument served by a bailiff or otherwise) must mention the applicant's identity, place of residence and the object of the application.[3]

The first precondition for the Defence to be able to fully exercise its rights, consists of knowing **who** is bringing legal proceedings against the person in question.[4]

In reckless and vexatious proceedings, how else, for example could damages be claimed from the applicant?

How else could an application be verified if essential information such as the identity, age, place of residence, applicant's place of origin, the places and facts and dates remain concealed?[5]

14. The rights of the Defence, and more specifically the right to equality of arms and to a fair trial, are also violated by the sole fact that, unlike the Defence, **the Prosecutor** was notified of unredacted copies of those very applications and their annexes.

[3] In this respect, the Defence refers to article 24 of the European Convention on Human Rights. http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/englishAnglais.pdf Under article 33 of the Rules of the European Court of Human Rights, applications must be filed publicly and mention the applicant's identity. Nevertheless, in exceptional circumstances, confidentiality measures can be taken in respect of the public. http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf Similarly, under article 33 of the Rules of Procedure of the Inter-American Court, applications must mention "the name and address of the original petitioner, and also the name and address of the alleged victims"

[4] See for example Second Report on the Situation of Human Rights in Peru, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, Doc. 59 rev. (2000).(Chapter II)<http://www1.umn.edu/humanrts/iachr/countryreports/peru2000-chap2.html#696#66>

[5] http://www.icrc.org/Web/Fre/sitefre0.nsf/htmlall/5FZJE8/$File/irrc_845_001_Walleyn.pdf Some rights and guarantees granted to victims and witnesses may seem a cause for concern, because they infringe the rights of the defence and the accused. This applies not only to anonymous tesimony. L. Walleyn, RICR March 2002, vol. 84 no 845 http://www.ICRC.org/web

The Prosecution is therefore in a more advantageous position than the Defence when assessing the merits of the applications as well as providing an appropriate response to them.

The Defence considers that such discrimination between the Prosecution and the Defence violates the principle of equality of arms.

Furthermore, this sends a message that the interests of the victims and those of the Prosecutor are the same.

It is obvious that the Prosecutor, can, as a result, be assisted in his work, since parts of his case-file can thus be confirmed, even revealed in such a way that the victims' applications can have a direct impact on knowledge of the facts and therefore the case (article 67 (1)).

The Defence is unable to verify whether or not the relevant applicants have been heard as witnesses by the Prosecutor.

Moreover, from a recent decision of 18 August 2006 (ICC-01/04-01/06-337), it would appear that the Prosecutor requested leave to contact victims. Since this request will be heard "ex parte", the Defence will not be able to make known its observations as to whether the application is appropriate. Furthermore, some parts of the applicants' statements could contain materials which are exculpatory or of use to the Defence. However, since the Defence does not have full access to these statements, it considers that it is being denied access to potential sources of exculpatory materials.

15. Nor could protective measures include victims wishing **to become parties** to the proceedings.

Nothing in the Statute and/or the Rules allows an exception to be made to this basic rule of procedural law, as set out in paragraph 13.

A victim wishing to participate in hearings therefore agrees to reveal his or her identity as party to the case and to the withdrawal of possible security measures put in place for him or her.

This is all the more so, as once the victim is admitted as a party, he or she would no longer be allowed to testify.[6]

16. In the alternative, it is necessary to observe that rule 87 (3) in no way mentions "measures" which would consist of preventing a victim's identity from being revealed to the Defence. The relevant rule mentions only the "public", the "press" and "information agencies".

This is confirmed – *a contrario* – by the same rule, under which the Prosecutor, the Defence or any other **participant in the proceedings** can be prohibited from revealing such information to a third party.

Additionally, under Rule 87 (3) (a), the Chambers can order that the name of the victim, witness or other person at risk on account of either the filing or any information which could lead to his or her identification, be expunged from the **public records** of the Chamber.

[6] "The Statute and role of the victim, p. 1409 dans "The Rome Statute of the International Criminal Court: a commentary" Vol. II ed. Cassese, Graeta &Jones 2002 – Jorda and Hemptinne.

It can be deduced – *a contrario* – that the Defence must know the identities of those covered by protective measures, and, all the more so, the identities of victims asking to participate in proceedings. Protective measures relate only to the public, and not to the Defence upon whom a specific confidentiality obligation can be imposed in addition to the general confidentiality obligation which the profession requires.

This is understandable because security measures will always be subordinate to the rights of the Defence[7] and because these rights essentially include being informed of **all** the materials in the case file and the trial, including the identity of its adversaries.[8]

The application of measures to redact the victims' identities and addresses prevents the Defence from verifying whether the relevant persons fulfil the requisite criteria for victim status and renders the right to ask for leave to appeal subsequent decisions ineffective, because the Defence is given no control.

17. The rights of the Defence are violated not only by the protective measures themselves.

The importance of the redacted parts is so great that the Defence is unable to verify whether the facts invoked have a causal link to the crimes listed in the arrest warrant, or even to simply know what the facts are.

[7] Article 68 of the Statute in fine.

[8] - Eur. Ct. H.Rts, « Bonisch v Austria (1985), Series A, N° 92, Kostovski v. Netherlands (1989), Series A, N° 166; and Uterpertinger v Austria (1986), Series A, n° 110
- Case n° ICTY-IT-95-14-T, The Prosecutor v/ Tihomir BLASKIC, Protection of witnesses, 5 November 1996, § 41

In addition, the Defence is forced to spend much more time in attempting to analyse the accounts and facts mentioned which compromises the right of the accused to be tried without undue delay.

Furthermore, the Defence is consequently relegated to the position of **a second class participant**, with the same standing as the public.

Moreover, Pre-Trial Chamber I has already considered that decisions pertaining to the scope of protective measures are "directly related to the fairness of the proceedings insofar as non-disclosure could affect the ability of the Defence to fully challenge the evidence of the relevant Prosecution witnesses and ha[ve] an impact on the rights of the Defence pursuant to articles 61 (3) and (6) (b) and 67 (1) of the Statute."[9]

18. Under article 67 (1) of the Statute, the accused has, *inter alia,* the right to be informed **promptly** and **in detail** of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.

This applies *mutatis mutandis* to the victims' applications.

Although their role differs from that of the Prosecutor, their applications ascribe crimes to the accused falling within the Court's jurisdiction. They go even further than the Prosecutor because they are asking for compensation.

[9] Decision on the prosecution motion for reconsideration and, in the alternative, leave to appeal of 23 june 2006, ICC-01/04-01/06-166 au par. 32

As noted by the Prosecutor in his application for leave to appeal of 23 January 2006 (para. 5), the Chamber does not have its own means of investigation and therefore cannot verify the credibility of information submitted by the victims. It is therefore essential that the Defence be put in a position from which it could verify their credibility.

This is a right in the current stage in proceedings pursuant to article 61 (6) of the Statute.

19. The Defence considers that applicable case-law on witnesses must hold - even more so - for victims requesting to participate in proceedings.

In the case the Prosecutor v. Brdjanin and Talic (Decision on motion for protective measures of 3.7.2000), the Prosecutor argued that it was necessary to resolve the conflict between the obligation to disclose evidence to the accused within 30 days of his first appearance and protective measures granted to the witnesses and victims.

The Chamber has not held that such a conflict is at issue. Rule 69 (a) does not provide for the full protection advocated by the Prosecutor. The Prosecutor would have to at least establish the existence of exceptional circumstances on a case-by-case basis, consistent with article 20 (1).

The **primary concern** is the rights of the Defence. The need to protect witnesses and/or victims comes in the alternative. This was also Judge Stephen's reasoning in his dissenting opinion in the Tadic case.[10] This reasoning was later adopted in the Blaskic case. [11]

[10] Decision on the Prosecutor's request for protective measures for victims and witnesses (ICTY-94-1-T) of 10

20. This is the only line of argument compatible with rule 81 (5) of the Rules of Procedure and Evidence at the ICC.

Indeed, under this rule when documents or information have not been disclosed in accordance with article 68 (5), such documents or information can not subsequently be produced as evidence at the confirmation hearing or at the trial without the accused having had prior knowledge of them.

This obviously applies even more so to victims **seeking to be parties** to proceedings.

This argument is in addition confirmed by the fact that, under the Statute, an express stipulation is required if the rights of the accused are to be subordinated to another right.

21. Also in the alternative, reference must also be made to Pre-Trial Chamber I's decision of 19 May 2006.

The Defence also submits that the absence of an obligation to mention the identities could encourage fraudulent applications. In this context, reference must be made to the experiences of the ad hoc tribunals where anonymity regularly gave rise to false testimony.[12]

August 1995

[11] Decision on the Application of the Prosecutor requesting protective measures for victims and witnesses of 5 November 1996.

[12] Decision of 19/5/06, p. 14/24 par. 31 : *"Hence, in the view of the single judge, non-disclosure of the identity of witnesses on whom the Prosecution intends to rely at the confirmation hearing can be authorised exceptionally when, due to the particular circumstances surrounding a given witness, non-disclosure of identity is still warranted because less restrictive protective measures have been sought from the victims and witness unit but are considered infeasible or insufficient."*

This could also delay proceedings because belated revelation of identities would delay the Defence's ability to reveal essential information to the Chamber about the victims' credibility and confirm that they were erroneously granted victim status.

2.2.2 Participation in the pre-trial stage as such

22. Under article 68 (3) of the Statute: "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and **in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial**. Such views and concerns may be presented by the legal representatives of the victims **where the Court considers it appropriate**, in accordance with the Rules of Procedure and Evidence".

Neither the Statute, nor the rules provide for victims' participation **at the pre-trial stage** of the proceedings.

The Statute provides for this participation at a stage "determined to be appropriate" by the Chamber.

23. Regulation 86 (3) specifies that:

"Victims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the

start of the stage of the proceedings in which they want to participate".

It must be deduced from this, that *a contrario*, that there is no opportunity for victim **participation** during the pre-trial phase.

This is understandable in view of the principle of the presumption of innocence set out in article 66 of the Statute.

This fundamental principle would be contravened if victims were to be heard and admitted to the hearings before the charges brought by the Prosecutor against an accused were confirmed.

24. This is all the more so considering that the role of Pre-Trial Chamber I is to determine whether there is enough evidence to establish sufficient grounds to believe that a person has committed the crimes of which he or she is accused. The Pre-Trial Chamber need not seek the truth about the guilt or innocence of the person who has been served with an arrest warrant or a summons to appear.[13]

It is therefore premature to agree to victims' participation since this "participation" depends precisely on the guilt of the accused and since victim participation at a stage where this guilt cannot yet be established would contravene the presumption of innocence.[14]

[13] Decision of Pre-Trial Chamber I of 15.5.2006 in the current case.
[14] The definition of victims, as presently set out in the ICC RPE is problematic, - "it may pose problems for the presumption of innocence, as it appears to presuppose that a crime has been committed – where that remains to be proved at trial"
"The Statute and Role of the Victim", page 1403 in "The Rome Statute of the International Criminal Court: A commentary" Volume II edited by Cassese, Gaeta and Jones 2002

25. Furthermore, admitting victims at the pre-trial stage infringes the right to a fair and impartial trial, and more particularly the right to be tried expeditiously since such victim participation would delay hearings which are already extremely complicated and long.

On this matter, and in the alternative, the Defence considers that the Pre-Trial Chamber should not conduct a purely theoretical and "in abstracto" examination of the issue of whether, generally speaking, it is appropriate to participate in the pre-trial stage.

In the opinion of the Defence, the Chamber should examine the possibility of participation both "in concreto" and in the light of this case's particularities, especially the fact that the confirmation hearing has been scheduled in the immediate future, due to the fact that the Defence is already overburdened with: pending litigation on the Prosecutor's and Defence's disclosure obligations; the draft "E-Court" protocol; the temporary disclosure method and its resulting problems; very serious problems pertaining to investigations it is to conduct in the DRC and the obligation to reply to 43 new requests for victim participation within an extremely short deadline etc. All this is required, even though Defence human resources are absolutely minimal.

To this end, it should also be taken into account that Mr Thomas Lubanga Dyilo is currently in detention and, if this detention is legal, he has the right to be tried by the Chamber expeditiously, regardless of the confirmation hearing.[15]

The victims are not part of this hearing, which they could not slow down

[15] European Convention on Rights and Fundamental Freedoms, 4 November 1950, article 5 (4).

without violating the rights of the Defence.

Under article 67 (1) (b), the Defence must have adequate time and facilities for the preparation of the defence.

Article 67 (1) (c) specifies that he must be tried without undue delay. This right evidently extends to the right to a verification of the legality of the detention.

The admission of additional participants at the current stage of proceedings will result (and is already resulting) in the obligation to file very significant additional submissions.

26. The confirmation hearing has already been postponed and put back by three months because the Prosecutor (and/or some of the Court services) were not ready.

The admission of additional parties at the current stage in proceedings will inevitably delay them further and therefore violate Mr Thomas Lubanga Dyilo's basic rights since the Defence will simply not have the means and resources at its disposal to ensure the accused's right to a defence as guaranteed by the Statute.

The articles and rules which govern the victims' application for participation confer a discretionary power on the Pre-Trial Chamber.

Failure to consider the concrete circumstances of a case and the situation of the rights of the Defence in that case would open the door to countless applications from victims making it impossible for the Defence to focus its

efforts on the essentials of the confirmation, or non-confirmation, of the charges.

Moreover, this approach is consistent with the spirit of the Statute which even limits the Prosecutor's ability to further disclose evidence after a certain date prior to the confirmation hearing.

This would not adversely further affect the interests of the victims who can still exercise their rights at a later stage in accordance with rule 89 (2).

The Defence therefore considers that victims do not have a "right" to "participation" at the pre-trial stage, for the very least because there is no concrete case-file at issue.

2.2.3 Subsidiarily: proceedings and manner of participation at the confirmation hearing

27. In their observations of 8 August 2006, the victims request access to the record of the case. They also ask to participate in the confirmation hearing pursuant to rules 89 and 91, at which they wish to make oral interventions, particularly opening and closing statements as provided for by rule 89 (1). They also envisage the filing of written submissions.

Finally, they request the opportunity to put questions to the accused during the hearing pursuant to rule 91 (3) (a). The victims' requests pertaining to the form of their participation fail to include any grounds.

2.2.3.1 Access to the case record

28. The applicants merely refer to regulation 16 of the Regulations of the Registry to support their request for access.

However, this regulation does not mention "victims" as such, but refers to participants.

Furthermore, article 61 only refers to the Prosecutor and "the person charged" and that person's counsel as "participants". This is confirmed by rule 122 which governs the proceedings at the confirmation hearing and provides for the participation of the Prosecutor and the accused **only**.

The applicants' request for access is therefore not provided for by the texts which govern this matter, and certainly not at the current stage of the proceedings.

Moreover, rule 121 (10) contradicts article 61 (1) of the Statute, which must therefore take precedence.

29. The Defence observes, in the alternative, that rule 121 (10) only mentions the "record of all proceedings" such that it should be concluded that victims and their legal representatives do not have access to the evidence files disclosed and filed by the Prosecutor and the Defence who have no legal disclosure obligation towards them.

Rules 76 and the subsequent rules on disclosure pertain to the Prosecutor and the Defence to the exclusion of the victims.

This is confirmed by rules 92 (5) and (6).[16]

These rules concern only the procedural documents as such.

30. In any case, rule 92 (5) would preclude the victims from participating in proceedings themselves because they are only **informed** of proceedings and the dates of the hearings. From this, it should be deduced *a contario*, that they do not participate as a parties.

This confirms the provisions relating to disclosure.

31. The Defence shares the Prosecutor's views on confidentiality and the victims' safety.[17]

However the Defence strongly disagrees with the Prosecutor's opinion on information in the record which is "not of a confidential character". No provision gives victims the right to access this evidence in the record. Their intervention on the subject of "compensation" only as such does not, for that matter, necessitate equal access at the current stage in any case.

32. The victims erroneously base their argument on regulation 16 of the Regulations of the Registry. This regulation does not confer on victims a

[16] Rule 92 (5): "In a manner consistent with the ruling made under rules 89 to 91, victims or their legal representatives participating in proceedings shall, in respect of those proceedings, be notified by the Registrar in a timely manner of:
(a) Proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision;
(b) Requests, submissions, motions and other documents relating to such requests, submissions or motions"
Rule 92 (6): "Where victims or their legal representatives have participated in a certain stage of the proceedings, the Registrar shall notify them as soon as possible of the decisions of the Court in those proceedings."
[17] Prosecution's response to "Observations concernant les modalités de la participation des victimes" du 25.08.2006 para.26

specific right to access. Nor can it confer on parties more rights than those established by the Statute and the Rules, the implementation of which it only regulates.

2.2.3.2 Participation at the confirmation hearing

A. Participation sensu stricto

33. The victims erroneously consider that under rules 89 and 91 they have a right to full and active participation in the confirmation hearing.

Rule 89 indeed specifies that the Chamber will set the proceedings and manner of participation. As already argued, this must be done "in concreto". This rule, however, does not mention the confirmation hearing. Furthermore, rule 122 does not mention victims.

34. The Defence refers to what was stated in its submissions on applicant's a/0001/06 application for participation dated 8 June 2006 (paras. 18-21) pertaining to "participation" at the pre-trial stage, as well as that person's application for leave to appeal dated 7 August 2006 (paras. 48 to 62). These arguments are expressly reiterated here and are an integral part of the present submissions.

The Defence considers not only that there is no right to "participation" at the pre-trial stage as such, flowing from the "de jure" victim status, but also asserts, in the alternative, that granting a right to "active" participation to the many victims in the case at its current stage will further delay the confirmation or non-confirmation of the charges which has already been put back once.

In the second document referred to, an extensive explanation has been provided as to why "participation" will adversely affect the rights of the Defence, more particularly the right to be tried without undue delay and the right to a fair trial.

The Defence voices the most express reservations on this matter. It should not be forgotten that a person in detention and presumed innocent has the right to an expeditious review of the legality of his or her detention, not only as such but also at the confirmation or non-confirmation of charges.

35. The maximum level of participation which the Chamber can grant victims is determined by rule 89 (1) *in fine* : ".. manner in which participation is considered appropriate, which may include making opening and closing statements."

This implies, *a contrario*, that victims could not intervene during the hearings without hopelessly slowing them down to the extent of even doubling or tripling their duration.

36. The wording of rule 89 confirms that in no case could they consist of "pleadings", but **only** "views" and "concerns" in the form of opening and closing "statements".

The Chamber's discretionary power regarding the proceedings and manner of victims' participation is set out in article 68 (3) of the Statute and not article "68 (14)" (non-existent) of the Statute as set out in rule 89 (1).

Moreover, article 68 (3) states that these views and concerns shall be presented at stages of the proceedings determined to be **appropriate** by the Court and in a manner which is **not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.**

B. Scope of the statements

37. The Defence requests that any statement made by victims not be admitted as evidence against the accused.

Nevertheless, once admitted as a victim and a party, that person cannot be authorised to testify.[18] This is also consistent with the rules of procedure in legal cultures where the victims may become parties to the proceedings. No party would be able to become a witness in his own case, in view of the interest he has in that case.

Moreover, in the Defence's opinion, the "victims' views and concerns" could not relate to the presence or otherwise of charges against the accused, but only to issues regarding the course of the proceedings.

C. Examination of the accused

38. The victims are not making an application to examine or cross-examine the witnesses. Moreover, this right does not exist at the pre-trial stage.

[18] "The Statute and Role of the Victim, p. 1409 in "The Rome Statute of the International Criminal Court: a commentary" Vol. II, edit. Cassese, Gaeta & Jones 2002

39. The victims are wrong in asking that they be allowed to "put questions to the accused during the hearing" in accordance with rule 91 (3) (a).

This rule actually applies to **testimony**.

The Defence is of the opinion that the legal representatives of the victims do not have an automatic right to examine or cross-examine the witnesses, because they must make an application to the Chamber to grant it on a case by case basis, inasmuch as rule 91 would be recognised as applicable in the pre-trial stage, quod non.

It is therefore only in the exceptional case of the accused being heard as a witness that they could request the Chamber for permission to examine him.

Moreover, granting the victims a right to examine the accused would constitute a flagrant violation of his fundamental right to **silence** confirmed by article 67 (1) (g).

D. **Presentation of evidence**

40. The victims have not made an application to present evidence. Article 67 (1) gives the Defence the right to be informed promptly and in detail of the nature, cause and content of the charge and to have adequate time and facilities for the preparation of the defence.

Regarding the information to be disclosed by the Prosecutor, the Chamber has already ruled that 30 days before the confirmation hearing is the minimum time limit to permit the accused to exercise his rights.

The Defence notes that it does not even have two of the three requests submitted by the victims, and that for the only request disclosed, it does not have the names, addresses, dates and places of the facts.

Any disclosure of documents at this stage, less than 30 days before the confirmation hearing, would therefore violate the provisions of article 67 (1).

FOR THESE REASONS

MAY IT PLEASE THE COURT

To review its decision of 18 August 2006; to order the Registry to notify the Defence of all of the applications for participation of victims a/0001/06 to a/0003/06. To return the Defence to the position and the rights it would have had immediately after the decision of 18 May 2006.

In the alternative, to find that the applicants will have only a right to participate passively at the pre-trial stage, meaning that they will be kept informed of developments in the proceedings. In the absolute alternative, to assess the manner of the applicants' participation in the confirmation hearing as described in the present submissions, in paragraphs 33 to 40.

Defence Counsel

Jean Flamme

[signed]

Done on Monday 4 September 2006

At Ghent