

VICTIMS RIGHTS WORKING GROUP

ADVOCATING FOR THE RIGHTS OF VICTIMS AT THE INTERNATIONAL CRIMINAL COURT

ICC Victim's Rights Legal Update

11 September 2006

Note: this is not a comprehensive summary; it only relates to the most key developments impacting on victims within the ICC's jurisdiction since mid July 2006.

SITUATION IN DARFUR

11 Sept 2006: The Prosecutor responds to Prof. Antonio Cassese's observations on victim protection and the preservation of evidence [[English only](#)]. The Prosecutor respectfully submits that Professor Cassese's observations are premised on a mistakenly broad interpretation of Article 68(1), and a belief that OTP and Chambers have a responsibility to enhance security for victims in Darfur. He submits that Cassese's wider observations on his investigative strategy and policy, modes of liability and means of proof are beyond the scope of the Pre-Trial Chamber's decision. The Prosecutor explains that as it is successfully carrying out investigations outside Darfur, which remains extremely volatile. For the purpose of transparency, he details a) the security situation in Darfur, b) the Prosecutor's current investigation strategy, c) his reasons to continue with his investigative approach after careful consideration of Prof Cassese's observations and d) current witness protection measures being implemented by the prosecutor.

Chronology: On 31 March 2005 the Security Council, acting under Chapter VII referred the situation in Darfur since 1 July 2002 to the ICC Prosecutor, *inter alia* inviting the Prosecutor to report to the Security Council every six months [[English](#), [French](#)]. The Prosecutor has subsequently submitted three reports to the Prosecutor.

On 24 July 2006, [Pre-trial Chamber I invited observations](#) on victim protection and preservation of evidence from UN High Commissioner for Human Rights, Louise Arbour; former Chairman of the UN Commission of Inquiry on Darfur, Antonio Cassese; the Prosecutor and Defence. In this decision, the Pre-Trial Chamber cited the [Prosecutor's third Report to the Security Council](#), in particular, that "the continuing insecurity in Darfur is prohibitive of effective investigations inside Darfur, particularly in light of the absence of a functioning and sustainable system for the protection of victims and witnesses". [[Arabic version of "third Report"](#)].

On 25 August, [Prof. Antonio Cassese submitted his observations to the Chamber](#). **A most important aspect of his submission is the number of specific and practical suggestions on how the Prosecutor can move investigations forward while also taking into account the challenging security situation, victims' rights to physical and psychological protection and the need to preserve evidence.**

Prof. Cassese notes that (i) investigations into alleged crimes may not be undertaken in Darfur, without putting victims at risk and (ii) victims may not be protected from ongoing attacks. He submits that consequently, the only way forward is to expeditiously establish the criminal command responsibility of those who have created and continue to create instability, in other words, to collect evidence about the possible criminal responsibility attributable to military forces of Sudan (as well as to armed militias) on the one side, and to rebels, on the other.

He suggests that the Prosecutor could make a number of specific requests to the Chamber relating to the protection of victims (that the Sudanese Government guarantee protection, report on protection measures taken, etc). Such measures are important in that non-compliance with an order to Sudanese authorities to protect victims, etc. could lead to separate contempt proceedings, and additionally, a request to the UN Security Council to take remedial action.

Prof Cassesse specifically refers to the need for the ICC to set up programmes for psychological protection and for victims' associations to be invited to take part in the pre-trial proceedings, and for a legal representative to be appointed to take up the case of victims.

With respect to the protection of victims of rape, he notes that the best way to prevent further instances of rape is to "hold accountable under the notion of command responsibility those who would be in a position to prevent or punish its authors". In addition, to protect victims from re-traumatization given that they might only be called to testify in two or more years from now, one could explore the possibility in the ICC Statute to hear them at this stage and preserve their testimony ready for trial. [\[English only\]](#).

DRC - LUBANGA CASE

The Arrest Warrant of Thomas Lubanga Dyilo, allegedly the founder and leader of the *Union des Patriotes Congolais* (UPC), was issued under seal on 10 February 2006. [\[English, French original\]](#). The Arrest Warrant includes charges for the crimes of enlisting, conscripting and / or use of children under the age of fifteen in hostilities. Lubanga was arrested and transferred to The Hague on 17 March 2006, at which point the charges became public. The charges are due to be confirmed at a hearing on 28 September 2006.

• REQUEST TO FILE AMICUS BY WOMEN'S INITIATIVE

7 Sept 2006: Women's Initiative for Gender Justice requests leave to file an amicus brief in relation to the Lubanga confirmation hearing. The interveners highlight the fact that Lubanga's confirmation hearing scheduled for 28 September will be the ICC's first confirmation hearing, and that no jurisprudence exists on the powers and duties of the Pre-Trial Chamber in such an "article 61 confirmation hearing". Under article 61(7)(c)(i), the Pre-Trial Chamber has the power to request the Prosecutor to consider conducting further investigation with respect to a particular charge, and under article 61(7)(c)(ii), the Pre-Trial Chamber has the power to request the Prosecutor to consider amending a charge.

If granted leave, the Women's Initiative will submit that, whether or not the Prosecutor seeks to present additional charges, the Pre-Trial Chamber has the power, and the duty, to satisfy itself that the Prosecutor's decision on the charges is an appropriate exercise of his discretion in all relevant circumstances, which include, *inter alia*, the fact that there is information publicly available to the effect that other crimes such as murder and sexual violence were committed specifically by the UPC/FPLC. Such information includes a letter from the Secretary-General of the United Nations to the President of the Security Council dated 16 July 2004, United States Department of State country reports for the DRC for the years 2003 and 2004; and reports by Amnesty International, Human Rights Watch and the Women's Initiatives for Gender Justice. [\(English only\)](#)

• APPLICATIONS TO PARTICIPATE FILED BY A FURTHER 41 VICTIMS **NB: Decision on right to participate for victims a/004 to a/052 still pending.**

Chronology. On 31 July 2006 and on 3 and 4 August 2006, forty-one applicants filed confidentially and forty-three applicants filed *ex parte* requests to participate in the Lubanga case. The Prosecutor was given full copies of the applications and the defence redacted versions. The Prosecutor and defence were given until 18th August to present any views [\[only in French\]](#).

4 August 2006: The Pre-Trial Chamber authorized the Prosecutor and Defence to file observations on the victim applications. [Documents unavailable]

22 August 2006: The Prosecutor filed its observations to applicants a/004 to a/009 and a/0016 to a/0046. The Prosecution submitted that the applicants did not meet the criteria for participation as "victims" in the LUBANGA case. The facts depicted in Application a/0004/06 relate to crimes committed after the time frame specified in LUBANGA's Arrest Warrant. Application a/0005/06 relates to crimes committed by "Lendu militia" and not the UPC. Applications a/0006/06 to a/0009/06 describe crimes that are not covered by the Arrest Warrant. Application a/0016/06 and Applications a/0018/06-a/0046/06 describe crimes that are not covered by the Arrest Warrant. Furthermore, Application a/0030/06 relates to crimes that occurred after the time frame specified in the Arrest Warrant, while Applications a/0018/06, a/0026/06, a/0027/06 and a/0038/06 do not refer to any time period during

which the crimes described allegedly occurred. Applications a/0030/06, a/0033/06 and a/0044/06 describe crimes committed by FNI militiamen and not by the UPC.

Finally, if Application a/0017/06 depicts the attempted forced enlisting of the victim into the UPC, the Prosecutor alleged that this victim was not a child soldier as defined by Article 8(2) of the Statute *at the time of the events*. ([English only](#)).

25 August 2006: The Prosecutor filed its observations on applications a/0047 to a/0052 ([English only](#)). The Prosecution submits that the applicants, who are all minors, and include both girls and boys meet the criteria for participation as "victims" in the LUBANGA case, and that these victims are in fact also prosecution witnesses. **The prosecutor submits that it is not incompatible for victims to hold dual status as both prosecution witnesses and participants under article 68(3)**, and goes on to examine UN and Council of Europe texts in this regard.

4 Sept 2006: Defence conclusions on applications a/004 to a/052. The Defence has objected, *inter alia*, to the redacted nature of the applications ([French only](#)).

- **MODALITIES OF PARTICIPATION FOR VICTIMS A/001, A/002 and A/003 STILL PENDING**

4 Sept. 2006: The Pre-Trial Chamber decides not to allow the participation of victims a/001/06, a/002/06 and a/003/06 (hereinafter "a/001, a/002 and a/003") in the 5 September Status Conference because the issue of the modalities of their participation is still pending. ([French only](#))

Chronology. On 24 July 2006 (public version 28 July & 31 July), the Pre-Trial Chamber grants victims a/001, a/002 and a/003 the right to participate in the Lubanga Case. The public version of the Decision was filed in the Lubanga Case file on 28 July 2006 ([English](#), original in [French](#)), with a mirror Decision filed in the DRC Situation Case file on 31 July 2006, available in [French](#). The Decision invites the applicants to file their observations on the modalities of their participation at the confirmation hearing, then scheduled for 28 September 2006. In the interim, the Defence sought to appeal this decision [see below].

8 August 2006: Victims a/001, a/002 and a/003 file their observations on the modalities of participation in the Lubanga confirmation hearing. *Inter alia*, the victims expressed their **wish to make oral submissions, including opening and closing statements, and written submissions in response to any filings by the Prosecution and Defence, as well as put questions to the accused**. [Documents as yet unavailable].

14 August 2006: Defence requests access to unredacted applications of victims a/001, a/002 and a/003. The Defence also requests that, if its application for leave to appeal the 28 July Decision is granted [see 7 August below], then its requests for access to the unredacted statements pertaining to the appeal, for unredacted statements of the later victim/applicants as well as the issue of timing, should be postponed until after the appeal is decided. ([English only](#)).

17 August 2006: Decision not to allow victims a/001, a/002 and a/003 to participate in the 24 August status conference because the issue of the modalities of their participation is still pending. ([French only](#))

25 August 2006: The Prosecutor's response to observations regarding the modality of participation of a/001, a/002 and a/003. ([English only](#))

4 Sept. 2006: Defence response to observations regarding the modality of victim participation in the Lubanga confirmation hearing. ([French only](#))

- **PRE-TRIAL CHAMBER DISMISSES DEFENSE APPLICATION TO APPEAL VICTIM PARTICIPATION**

18 August 2006: Pre-Trial Chamber rejects the Defence application for leave to appeal the Pre-Trial Chamber's decision granting victims a/001, a/002 and a/003 the right to participate in the Lubanga case and DRC situation. [[English original](#), [French translation](#)].

Chronology. On 24 July 2006 (public version 28 July & 31 July), the Pre-Trial Chamber grants victims a/001, a/002 and a/003 the right to participate in the Lubanga Case. The public version of the Decision was filed in the Lubanga Case file on 28 July 2006 ([English](#), original in [French](#), with a mirror Decision filed in the DRC Situation Case file on 31 July 2006, available in [French](#)), but is sometimes referred to as the 24 July Decision by the parties.

24 July 2006: the Pre-Trial Chamber invites the government of the DRC and “victims in the case” to comment on proceedings. The Pre-Trial Chamber orders the Registrar to notify the DRC and the victims in the case of Lubanga's application for release, etc. and invites the DRC and victims in the case to make their submissions by 25 August on the challenge to the jurisdiction of the Court submitted by the defence, in particular regarding the alleged illegal detention of Lubanga by DRC authorities before 16 March, the alleged irregularities in his subsequent arrest and transfer to the Court in execution of the arrest warrant. ([French original](#), [English translation](#)).

7 August: The defence lodges an application to appeal the decision of the Pre-Trial Chamber relating to the application of a/001, a/002 and a/003 to participate in the Lubanga case and the DRC situation (of the decision of 28 July, below). The defence argues that it was not provided with an opportunity to be heard on whether to grant the protected measures (redaction) and that its ability to respond to the applications was hampered by the redactions. The defence argues that because the applicants are seeking to be a party to the proceedings, it is essential that the defence is provided with their identity. The defence also disputes the ability of the applicants to participate at this stage of the proceedings (In advance of the confirmation hearing) on the basis that it infringes upon the presumption of innocence and would delay and complicate proceedings. [[only in English](#)] The Prosecution and legal representatives were provided until 18 August to file any observations.

10 August: Pre-Trial Chamber Decision authorising the Prosecutor and the Defence to respond to the observations of the legal representatives of victims regarding the manner in which the victims are able to participate in the confirmation hearing. They must respond at the latest at the confirmation hearing on 25 August. [[English only](#)].

11 August: The victims' legal representative requests the Chamber to reject the Defence application to appeal its decision granting victims a/001, a/002 and a/003 the right to participate in the Lubanga case and the DRC situation. [[French only](#)].

14 August 2006: **The Prosecutor supports the defence's application to appeal the Pre-Trial Chamber's 28 July Decision** on the basis that: i) the defence has met its burden of identifying appealable issues (regarding defence rights), and ii) The Prosecutor agrees that the Chamber's use of the “grounds to believe” test to determine eligibility to participate appears to pre-judge issues, something which the Prosecutor had previously sought to appeal (and was denied the ability to appeal). [[English only](#)].

18 August: Pre-Trial Chamber denies the Defence's request for leave to Appeal its decision 28 July (public redacted version) granting victims a/001, a/002 and a/003 the right to participate in the Lubanga case / DRC situation. [[English original](#), [French translation](#)].

24 August: In response to the Pre-Trial Chamber's invitation of 24 July, the victim's legal representative files its observations in relation to Lubanga's challenge to the Court's jurisdiction pursuant to Article 19(2)(a). The observations address *inter alia* the alleged illegal detention of Lubanga by DRC authorities before 16 March, the alleged irregularities in his subsequent arrest and transfer to the Court in execution of the arrest warrant. [[French only](#)].

The Victims' Rights Working Group (VRWG) is a network of over 200 civil society groups and individual experts created in 1997 under the auspices of the NGO Coalition for an International Criminal Court. Affiliated organisations include NGOs from Uganda, DRC and Sudan as well as international NGOs. The VRWG works to ensure that victims' rights are effectively protected and respected, and that their needs and concerns are met throughout the judicial process of the ICC. Particular attention is paid to the need to ensure that the Court will render not only retributive, but also restorative justice, that will aim, *inter alia*, to prevent re-victimization, to break cycles of violence and war, and to provide reparations and rehabilitation for victims. The VRWG advocates for fair and effective structures and procedures at the Court to facilitate victims' full and active participation. For a list of affiliated organisations see our website See <http://www.vrwg.org>