

VICTIMS RIGHTS WORKING GROUP

ADVOCATING FOR THE RIGHTS OF VICTIMS AT THE INTERNATIONAL CRIMINAL COURT

ICC Victim's Rights Legal Update

26 October 2006

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

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SITUATION IN DARFUR

Maitre Shalluf, the "Ad hoc counsel for the Defence" challenges the ICC's jurisdiction instead of responding to the Chamber's request for observations on victims' protection

- On 25 August, the ICC appointed Maitre Haddi Shalluf, a Paris based lawyer to act as the *ad hoc* counsel for the Defence as there is no accused yet in the Darfur Situation to provide his observations on victim protection in Darfur.

[Background: The Pre-Trial Chamber had made a request on 24 July 2006 inviting Louise Arbour, UN High Commissioner for Human Rights, as well as Prof. Antonio Cassese, former Chairman of the UN Commission of Inquiry on Darfur and also the Prosecutor and Defence **to provide their observations on victim protection and preservation of evidence in Darfur.** (http://www.icc-cpi.int/library/cases/ICC-02-05-10_English.pdf)

The Chamber made this request in an interesting move to get expert information that might challenge the Prosecutor's position 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*". Prosecutor's 3rd Report to the Security Council: http://www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur_English.pdf Arabic Version of Prosecutor's 3rd Report: http://www.icc-cpi.int/library/cases/OTP_ReportUNSC3-Darfur_Arabic.pdf

Prof. Cassese was the first to submit his observations on 25 August: http://www.icc-cpi.int/library/cases/ICC-02-05-14_English.pdf He provided detailed and specific suggestions on how the Prosecutor might 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. [See [September 2006 Update](#) for more detail]. The Prosecutor also responded to Cassese's observations saying that his input was beyond the scope of the request put by the Chamber

- On 9 October 2006 Maitre Shalluf, having been appointed to provide observations on victim protection, instead challenged the Court's jurisdiction in the Darfur situation. http://www.icc-cpi.int/library/cases/ICC-02-05-20_French.pdf

Louise Arbour , High Commissioner for Human Rights, gives her input on victims' protection in Darfur

On 10 October, Louise Arbour filed her response to the Pre-Trial Chamber's request for observations on victim protection and preservation of evidence in Darfur.

The response provides substantial detail about how the Office of the High Commissioner for Human Rights monitors and investigates serious violations of human rights violations in numerous conflict zones. Essentially Arbour is saying that more presence in the field the greater the protection for victims and deterrence of further atrocities. She analyses the risk of retaliation against those who interact with the international community, saying that in general retaliation has taken the form of arbitrary arrest and detention and to a lesser extent also certain forms of physical ill-treatment but as yet it has not resulted in any loss of life.

Louise Arbour has called for *"an increased visible presence of the International Criminal Court in Sudan, as she believes that carefully tailored strategies can operate effectively to conduct investigations"* She also has said that *"the Court's presence on the ground would also importantly contribute, among other international deployments in the country, to a proactive presence increasing the level of protection perceived and enjoyed by the affected population"* http://www.icc-cpi.int/library/cases/ICC-02-05-19_English.pdf

Prosecutor responds to Louise Arbour's observations on victims' protection

On 19 October the Prosecutor responded to Louise Arbour's observations. He essentially claimed that much of Louise Arbour's submissions go beyond the scope of victims' protection provided in article 68(1) of the Rome Statute. He claims that because the Prosecutor is not taking statements in Darfur, there are no witnesses for him to protect there.

The prosecutor differentiates the risk that ICC witnesses might face as oppose to persons interacting with UN human rights monitors, and points out that Arbour herself has indicated that those who have interacted with the international community have sometimes been subjected to death threats, arbitrary arrest or extreme violence. He reiterates the volatile situation in Darfur making investigations impractical but also goes on to agree with the High Commissioner in that increased presence may enhance a deterrent effect. However, he states that it is not the duty of the Prosecutor to provide this kind of protective effect in areas he has chosen not to investigate.

http://www.icc-cpi.int/library/cases/ICC-02-05-21_English.pdf

First applications are made on behalf of victims in Darfur

On 15 October the first applications on behalf of victims from Darfur were filed before the ICC.

<http://darfurrehab.org/home.html>

DRC – SITUATION

The number of applicants in the DRC "Situation" has reached 105. Applicant 105 is granted the right to participate in the confirmation hearing, others are rejected or will have to wait

On 29 September 2006 the Pre-Trial chamber invited the Prosecution and Defence to provide its observations on the requests to participate of victims a/0072 to a/0105. The Prosecution was provided with full copies of the applications, while the Defence was provided with redacted versions. http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-494_French.pdf

On 18 October, the defence submitted that applicants a/0072 to 80 concern crimes other than the ones stipulated in the arrest warrant, and that application 105 concerns crimes of recruitment but by the UPDF and not the UPC, that Lubanga was in charge of. The defence requested that these applications be rejected. http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-585_French.pdf

On 19 October the Prosecution submitted that applicant a/0150, who has filed the application on behalf of her son, born in 1992 meets the criteria to participate as a victim, as the crimes suffered have a causal link with the charges against Lubanga. Applicant a/0078 was 15 at the time of the commission of the crimes, and further evidence is required about the date of birth. The prosecutor submits that a/0072 to 77 and 78 to 80 do not fall within the definition of victims linked to the charges against Lubanga and should be rejected. http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-589_English.pdf

On 20 October the Pre-Trial Chamber granted the status of victim to applicant a/0105, who indeed had indicated an association with the UPC and not the UPDF as suggested by the defence. The modalities of participation applicable to a/001-3 also apply to a/0105. The chamber ordered that the Registry take all necessary measures to ensure that the legal representative of a/0105, Maitre Carine Bapita be present at the confirmation hearing.

Not granted at this stage: The chamber stated that applicants a/0047 to 52 cannot be granted the status of victims at this particular phase of the proceedings although their applications provided sufficient links to the Lubanga charges. They have nonetheless been granted protective measures.

Not granted: The Chamber could not grant victim status to applicants a/004 to a/007, a/0016 to a/0046, a/0054 to a/0061, a/0063, a/0071 to a/0080 because they did not establish a sufficient link to Lubanga's charges. The Chamber will subsequently consider their participation in the DRC situation.

In this decision, the Chamber also made an interesting statement about contact between legal representatives of victims. It said that repeated contact, while perhaps necessary for ensuring effective representation, and even if organised by the Victims and Witnesses Unit, may in fact increase risks for victims. (page 11)

Finally, in this decision, the Chamber stated that given the fast approaching confirmation hearing on 9 November, it will not be able to consider further applications until after the hearing. http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-601_French.pdf

DRC - LUBANGA CASE

- **The amicus filed by the Women's Initiative for Gender Justice**

On 26 September, the Women's Initiative for Gender Justice were asked to re-file their request to file an amicus regarding Lubanga's confirmation hearing in the "DRC situation case" instead of Lubanga's case. The Chamber specified that the case against Lubanga was confined to recruitment and use of children under fifteen in armed conflict, and that as such, the amicus request had no link to the case as such. It stated that the subject matter of the amicus request concerned gender based crimes committed in the DRC. The Chamber was mindful of the rights of the accused, who has a right to defend himself in relation to the crimes for which he is charged. As such, new elements of fact, as suggested in the amicus request, and particularly in its letter submitted as Annex I, would according to this reasoning, need to be argued as part of the ongoing investigation in the DRC situation.

http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-480_English.pdf

- **Chamber rejects Lubanga's challenge against the Court's jurisdiction**

On 3 October 2006: The Pre-Trial Chamber rejected Lubanga's application of 23 May 2006, for his release on the basis of lack of jurisdiction and abuse of power - a doctrine borrowed from domestic law under Article 21(3). The Decision was handed down after some confusion as to the legal basis upon which the defence was arguing lack of jurisdiction. The Court had ordered the defence on two occasions to clarify its arguments (29 May and 13 July) before the Defence re-characterised the challenge under Article 19(2)(b), namely that the DRC had jurisdiction over Lubanga and was investigating or prosecuting the case already. However it also claimed to be making the challenge on the basis of *abuse of power* alleging arbitrary arrest and irregularities of detention.

http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-512_English.pdf

http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-512_tFrench.pdf

On 25 August Victims a/0001, 2 and 3, who are participating in the Lubanga case, submitted their views on Lubanga's challenge, claiming that the Court had jurisdiction. On the same day the DRC also submitted its observations (filed by the Auditor General of the Armed Forces) asserting that the Court had jurisdiction. The Chamber ruled that it did not need to review the lawfulness of arrest and detention prior to 14 March, and that the execution of the arrest warrant, set in motion on 14 March had been done in accordance with the Statute and Rules.

http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-349_French.pdf

- **Lubanga's demand for bail (provisional release) goes on appeal**

On 20 October 2006, Lubanga appealed against the Pre-Trial Chambers' decision of 18 October that refused him interim release. Lubanga had requested interim release (bail) on 20 September 2006, at a time when the date for the confirmation of his charges was uncertain and he had already been in custody for six months. http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-585_French.pdf

On 9 October victims filed their observations, saying *inter alia*, that he could not be realised into the Netherlands or any other country without the DRC's consent, given that he was detained by the DRC beforehand. Furthermore, that his release would be dangerous as he could continue to direct the UPC which still exists on the ground, notably in Bunia District, where victims are located.

http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-530_French.pdf

- **Modalities of participation for victims a/001, a/002 and a/003**

On 22 September 2006 the Pre Trial Chamber defined the modalities for victim participation in the Lubanga case that were “compatible with anonymity”. Here the Chamber tries to balance the interest of victims in remaining anonymous from Lubanga, with his right to a fair trial. The Chamber assessed the implications of the worsened security situation in certain regions on available (or potentially available) protective measures for victims.

The chamber admitted that for now, the non-communication of victims’ identity to the defence constituted the only protective measure available to protect victims as required. The chamber has noted the importance of participation but warned against anonymous accusations. Thus, victims a/0001 to a/0003 may participate without adding any elements of fact to the case.

Anonymous participation at this stage of the proceedings is limited to:

- i) Access to public documents in the case file only, and
- ii) Presence at public hearings only (starting with the status conference of 26 Sept);

However, the Chamber reserves the right to make exceptions to this basic principle in exceptional circumstances, given that victims under rule 89(1) are able to make declarations at the beginning and end of hearings to which they are invited, and that victims’ legal representatives may request permission to intervene in public sessions of the confirmation of charges. The Chamber added that it would decide each case individually on the basis of the principles established in this decision.

French: http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-462_French.pdf

English : http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-462_tEnglish.pdf

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>