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Fédération internationale des ligues des droits de l'Homme

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الفدرالية الدولية لحقوق الانسان

Report of the FIDH Legal Action Group

Supporting the participation of victims from DRC

before the International Criminal Court

The historic decision of 17 January 2006

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1. Context – International crimes in the east of the Democratic Republic of Congo (DRC)

a) Since 2002, conflicts have raged in Ituri

In 2002 and 2003, when diplomacy was being used in Sun City (South Africa) to put an end to five years of war¹ in DRC, by laying down the basis of a peace agreement calling for the establishment of a democratic transition regime, the country was still the theatre of bloody confrontations, particularly in its eastern province and the district of Ituri.

This land became a target for predators, both economic - as it is rich in natural resources - and military - as it could provide a territorial base for the rebel forces and their allies giving them some influence in the negotiations for the establishment of the transitional government.

Although they had agreed to the withdrawal of their troops from Congolese soil², the intervention of Uganda and Rwanda, particularly in the district of Ituri, intensified the fighting between rebel groups, who were themselves instrumental in the tensions between ethnic groups, especially between the Lendu and the Hema. According to the many alliances and divisions, offensives and counter-offensives, Ituri has passed successively from the hands of the *Rassemblement Congolais pour la Démocratie-Goma* (RCD) to the *Rassemblement Congolais pour la Démocratie-Kisangani/Mouvement de libération* (RCD-ML later RCD-KML), to the *Front de libération du Congo* (FLC), the *Union des Patriotes Congolais* (UPC) and to the *Front pour l'Intégration et la Paix en Ituri* (FIPI)³.

b) Serious international crimes have been perpetrated against the civilian population

¹ Between 1998 and 2001, an armed conflict known as the “third world war” was raging between the government of the Democratic Republic of Congo, backed by Angola, Zimbabwe and Namibia, and several rebel movements, backed by Uganda, Rwanda and Burundi. According to UN sources, this war has caused the deaths of more than three million people.

² Agreement between Rwanda and DRC (July 2002) and Agreement between DRC and Uganda (September 2002)

³ For the various rebel attacks between 2002 and 2003 and a description of the armed groups, see:

- FIDH report: Ethnic hatred and widespread and systematic human rights violations persist in Bunia, 5 May 2003, available in French: http://www.fidh.org/article.php3?id_article=472

- Special MONUC Report on the events in Ituri (January 2002-December 2003) S/2004/573, 16 July 2004:

http://www.monuc.org/downloads/S_2004_573_2004_Engl.pdf

- Report of the Special Investigation Team of MONUC on the events in Mambasa (31 December 2002-10 January 2003), S/2003/674, 02 July 2003: http://www.un.org/Docs/sc/unscc_presandsg_letters03.html

- Thirteenth Report of the UN Secretary General on the UN Organisation Mission in the Democratic Republic of the Congo (MONUC), 21 February 2003, S/2003/211: <http://www.un.org/Docs/sc/sgrep03.html>

- Second Special Report of the UN Secretary General on the MONUC, 27 May 2003, S/2003/566: <http://www.un.org/Docs/sc/sgrep03.html>

- Report on the situation of human rights in DRC by the Special Rapporteur, Mme Iulia Motoc, E/CN.4/2003/43, 15 April 2003:

<http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/efaf61a23bdd455ec1256d420053889f?Opendocument>

- Report by Human Rights Watch: Ituri: “Covered in Blood” - Ethnically targeted violence in north-eastern DRC, July 2003: <http://hrw.org/reports/2003/ituri0703/>

- Report by Minority Rights Group, “Erasing the Board”, 6 July 2004_

<http://www.minorityrights.org/OnlineReports/OnlineReport.asp?ID=37>

As the United Nations Mission in DRC stressed in a report in 2003 “[A]ll of the armed groups have committed war crimes, crimes against humanity and violations of human rights law on a massive scale in Ituri. Unarmed civilians have been deliberately killed, contrary to article 3 common to the Geneva Conventions, often solely on the basis of their ethnicity. Attacks on villages have been accompanied by the killing of several thousands of civilians, widespread looting and destruction of housing and social structures, abduction of civilians, including women for sexual slavery, rape and torture.”⁴

These crimes have been perpetrated with complete impunity.

2. The situation in DRC has been referred to the Prosecutor of the International Criminal Court (ICC) who has opened an investigation

The ICC, whose Statute was adopted in 1998, has a mandate to judge individuals responsible for the most serious crimes which “threaten the peace, security and well-being of the world” and “are of concern to the international community as a whole”⁵. The crimes within its jurisdictions are the crimes of genocide, crimes against humanity, war crimes and the crime of aggression⁶. Unlike the *ad hoc* International Criminal Tribunals for former Yugoslavia and for Rwanda, the ICC is a permanent institution⁷ (its mandate is not limited in time) with universal authority (its mandate is not restricted to one specific country or region)⁸.

As the DRC ratified the Statute of the ICC on 11 April 2002, the most serious crimes committed since 1 July 2002⁹ (the date when the ICC Statute came into force) on its territory or by one of its nationals¹⁰ fall under the jurisdiction of the Court¹¹, insofar as the Congolese courts are neither willing nor able to prosecute or judge their perpetrators¹².

In 2003, with the consent of its member organisations in DRC – *Association africaine des droits de l'Homme* (ASADHO), *Groupe Lotus* and *Ligue des Electeurs* – FIDH informed the Prosecutor of the ICC, Mr Luis Moreno Ocampo, of the international crimes perpetrated in Ituri which fall under the jurisdiction of the Court, in particular by submitting reports to the Prosecutor pursuant to article 15 (1) of the Statute of the

⁴ See Special MONUC Report on the events in Ituri (January 2002-December 2003) S/2004/573, 16 July 2004, para. 35: http://www.monuc.org/downloads/S_2004_573_2004_Engl.pdf

⁵ Statute of the ICC, preamble.

⁶ Statute of the ICC, article 5. The Court shall have jurisdiction over the crime of aggression when its definition is adopted, in principle by the conference to revise the Statute planned for 2009.

⁷ Statute of the ICC, article 1

⁸ 104 States have now ratified the Statute of the ICC

⁹ Statute of the ICC, article 11

¹⁰ Statute of the ICC, article 12

¹¹ The crimes specified in article 5 of the Statute of the ICC, i.e. war crimes, genocide and crimes against humanity

¹² See the principle of complementarity specified in article 17 of the Statute of the ICC

ICC. Although he could initiate an investigation on his own initiative¹³ into the situation, the Prosecutor has not pursued this.

On 19 April 2004¹⁴, the Congolese State itself referred the situation which has developed throughout the DRC since 1 July 2002 to the Prosecutor of the ICC.

Following this referral, the Prosecutor decided, on 23 June 2004, to open an investigation into “*the crimes allegedly committed on the territory of the DRC since 1 July 2002*”¹⁵.

3. The status of victims before the ICC

a) The Rome Statute allows victims to participate in proceedings before the ICC

Unlike the International Military Tribunals of Nuremberg and Tokyo, as well as the International Criminal Tribunals for Rwanda and former Yugoslavia, before which victims could only appear as witnesses of crimes, the Statute of the ICC grants victims the chance to participate in proceedings brought before it. In fact, where the personal interests of 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*”¹⁶.

Pursuant to the ICC Rules of Procedure and Evidence, “a victim” is defined as “*any natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the Court; The term “victim” may include organisations or institutions that have sustained harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes*”¹⁷.

In order to present their views and concerns, victims who wish to participate in the proceedings shall make written application to the relevant Chamber¹⁸.

To assist them in this, victims are free to choose a lawyer, known as a legal representative, or they may leave

¹³ Article 15 (1) of the Statute of the ICC: “*The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court*”.

¹⁴ Press release, *Prosecutor receives referral of the situation in the Democratic Republic of Congo*, 19 April 2004, <http://www.icc-cpi.int/press/pressreleases/19.html>

¹⁵ Press release, *The Office of Prosecutor of the International Criminal Court opens its first investigation*, 23 June 2004, <http://www.icc-cpi.int/press/pressreleases/26.html>

¹⁶ Statute of the ICC, article 68 (3)

¹⁷ Rule 85 of the Rules of Procedure and Evidence (RPE)

¹⁸ Rule 89 (1), RPE

it to the Registry of the ICC to appoint a legal representative¹⁹.

On the other hand, the Statute of the ICC allows the Chambers to grant, on their own initiative or at the request of the victims, reparation measures to victims who have suffered harm as a result of the commission of a crime within the jurisdiction of the Court or to other interested parties²⁰. The procedure for reparation is distinct from the procedure for victims' participation.

b) Victims' interest in participating in proceedings before the ICC

Apart from a victim's evident interest in exercising his/her right to justice and reparation guaranteed by the international body of human rights law, victim participation in proceedings before the Court has other positive aspects:

- It enables victims to ask the Court for specific protection measures;
- It allows victims to present their views and concerns as to the preservation of evidence, the scope of the investigation by the Prosecutor, the charges brought against an individual who is the subject of an arrest warrant, etc.

4. Difficulties for victims acting alone

There are several impediments to victims effectively participating before the ICC:

- There is a lack of information concerning the jurisdiction of the ICC and the possibility of victims participating in proceedings brought before it;
- Participating in proceedings may give rise to problems of security for the victims;
- Completing the standard form of the Registry of the ICC when making an application to the Court to participate may be difficult for anyone not accustomed to judicial practices;
- Finding a legal representative well-versed in international criminal law and the rules of international criminal procedure can be difficult.

5. Intervention of the FIDH Legal Action Group

The FIDH Legal Action Group (*Groupe d'action judiciaire* – GAJ) is a network of magistrates, legal experts and lawyers, both members of national human rights organisations that are affiliates or correspondents of FIDH and elected representatives of FIDH. The GAJ mandate is to:

- Provide direct legal assistance for victims of serious human rights violations by accompanying them,

¹⁹ Rules 90 to 93 of the RPE

²⁰ Statute of the ICC, article 75

advising them, representing them and supporting them in any legal action initiated against the alleged perpetrators of the crimes of which they are victims. The GAJ shall endeavour to ensure that victims have the right and access to a just, independent and fair trial, that their rights are restored and that they may be entitled to reparation;

- Combine legal and factual evidence so that legal proceedings may be initiated to bring those responsible for human rights violations to justice;
- Initiate legal actions before national and international courts with a view to supporting the work of the national legal systems in the pursuit of those responsible of human rights violations.

The GAJ has long been noted for initiating complaints before national courts on the principle of extraterritorial or universal jurisdiction (a principle provided for in certain international conventions which allows any national court to try foreign individuals who have perpetrated abroad the most serious crimes against foreign victims), mainly in the cases of the “Disappeared of the Beach”, the Mauritania torturer Captain Ely Ould Dah, the Chadian dictator Hissène Habré, the Rwandan genocides, etc.²¹.

Since its Congress in Quito in 2004, FIDH has officially authorised the GAJ to support and accompany victims before the International Criminal Court. Lawyers of the GAJ have been asked to enter their names on the ICC list of legal representatives.

6. FIDH collects evidence from victims in DRC

In 2004, FIDH carried out an investigative mission in DRC, in particular in Ituri, to collect testimonies from victims of crimes committed since 1 July 2002 falling under the jurisdiction of the ICC.

Evidence was collected in accordance with the following precautions and special criteria:

Precautions:

- the mission was carried out under a blanket of confidentiality in view of the presence of rebel groups and the lack of security in the region;
- the criteria for selecting victims took account primarily of the issue of protection (place of residence, type of person, etc.);
- the victims were met on neutral ground, under full protection;
- at the start of any meeting, the mission delegate gave a presentation of FIDH, as well as of the ICC and the possibilities available to victims to participate in proceedings;
- the victims wishing to participate in proceedings before the ICC were all advised of the difficulties in

²¹ See the last activity report by the FIDH GAJ , <www.fidh.org> - more exactly under: http://www.fidh.org/rubrique.php?id_rubrique=367

guaranteeing their safety, and of the length and complexity of the proceedings;

- testimonies were collected with the help of a translator.

Criteria:

- FIDH wished the testimonies of victims, particularly of those victims who indicated their will to participate in proceedings before the ICC, to be representative of the various crimes committed in Ituri by the rebel groups against the civilian population, namely murder, rape and sexual violence, enslavement, looting, etc. This was in order that the Prosecutor of the ICC could investigate the whole of the crimes perpetrated in the region;
- FIDH wished to collect testimonies from victims of the various rebel groups rife in Ituri, to demonstrate the multiplicity of responsibilities in the most serious crimes perpetrated against the civilian population. To do so, the FIDH mission had to travel to several villages in Ituri. This was in order that the Prosecutor of the ICC could issue arrest warrants for the leaders of the various rebel groups, charged with the most serious crimes in the region.

Procedure for collecting evidence:

- every testimony has been signed by the victim and the FIDH mission delegate; as, at the time, there were no standard application forms for participation before the ICC, FIDH used its own form, based on regulation 86 of the Regulations of the Court and the forms drawn up by the UN organs for the protection of human rights, in particular by the Committee Against Torture. The victim should provide the following: Identity of the victim / place of residence / details of the crimes (places, dates, etc.) / physical or psychological harm and/or property damage suffered / identity of the person(s) responsible / identity of possible witnesses;
- This document stipulated that the victim was to be assisted by a legal representative, a member of the GAJ. The document was signed by the victim and the mission delegate.

7. FIDH transmits the victims' applications for participation to Pre-Trial Chamber I (the Chamber) of the ICC

a) Six victims apply for participation

In May 2005, FIDH sent to the Registry of the ICC the applications for participation of six Congolese victims. This selection was once again dictated by the principle of precaution given in particular that the protection regime for victims stipulated in the Statute of the ICC had not yet been fully outlined. In addition, FIDH was hoping for assurance that the Court would give a positive decision on a number of points of law before it lodged other applications, those of the most vulnerable victims.

The selection of the applying victims also reflected the wish of FIDH to present to the ICC a general framework of crimes committed in DRC by covering different types of crimes perpetrated in different parts of Ituri by different armed groups.

FIDH decided that the six victims should be legally represented by Maître Emmanuel Daoud, Counsel at the Paris Bar, and a member of the GAJ.

b) The memorandum of the legal representative

On 6 May 2005, FIDH sent, in accordance with rule 89 (3) of the Regulations of Procedure and Evidence, to the Registrar²² of the ICC, Bruno Cathala, with a letter signed by its President, Sidiki Kaba, the six applications for participation with a note of the legal representative, along with a legal memorandum in support of the applications by the legal representative. The Registrar then transmitted these applications to Pre-Trial Chamber I (“the Chamber”) which was handling the situation in DRC.

The first point of law raised by this transmission was in defence of the legal right of FIDH to transmit to the Court the applications for participation on behalf of the victims. FIDH based its memorandum on Rule 89 (3) of the RPE which provides that *“applications referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child, or, when necessary, a victim who is disabled”*.

In his memorandum, the legal representative stipulated that the applicants complied with the definition of victims given in Rule 85 of the RPE: 1/ they are natural persons; 2/ in each case, a crime within the jurisdiction of the Court and falling within the scope of the “situation in DRC” has been perpetrated; 3/ in each case, the Applicants have suffered harm; 4/ in each case, there is a causal link between the crime committed and the harm.

The legal representative also asserted that the right of the victims to participate should be acknowledged at the stage of the investigation into the situation in DRC, in other words before the arrest warrants have been issued. In this connection, he was founding on article 68 (3) of the Statute of the ICC: *“Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented at stages of the proceedings determined to be appropriate by the Court”*. The legal representative of the victims also made reference to international human rights law, in particular to article 2 (3) of the International Covenant on Civil and Political Rights, to the observations of the UN Human Rights Committee and to the decisions of the Inter-American Court of Human Rights to justify the victims’ involvement at the investigation stage. The

²² Rule 89 (1) of the RPE: *“Victims wishing to present their views and concerns shall make written application to the Registrar who shall transmit the application to the relevant Chamber”*

legal representative ended by asserting that the acceptance of a victim's application to participate at the investigation stage is neither prejudicial nor contrary to the rights of the accused and to the requirements for a fair trial²³.

On behalf of the victims identified in the forms annexed to the memorandum, the legal representative asked the Court to recognise their procedural status as victims and to permit them to present their views and concerns about the "situation in the Democratic Republic of Congo".

Moreover, in view of the major risks to which the applicants are exposed, the widespread insecurity in DRC, and the danger involved in divulging the information in the applications for participation, the legal representative asked Pre-Trial Chamber I to order appropriate measures to guarantee the safety and protection of all parties concerned²⁴.

In this connection, as a protective measure, the legal representative asked the Registry not to divulge the identity of the applicants to the public, the accused nor to the Prosecutor of the ICC.

Summary - Points of law raised in the memorandum:

- Can the Court allow victim participation at the investigation stage?
- Do the applicants comply with the definition of victims given in the Statute of the ICC?
- What measure of protection can the ICC grant the victims at the investigation stage?

8. The Chamber questions FIDH on the modalities of collecting evidence and on the requests for protection

Once it had received the applications for participation, Pre-Trial Chamber I requested additional information from the representatives of the victims and from FIDH about the modalities of collecting evidence and the requests for protection.

The legal representative and FIDH answered on 10 June 2005 and 21 June 2005 respectively the questions put to them by the Chamber in confidential documents, *ex parte*.

On 12 July 2005, the Chamber held a hearing *in camera* with the legal representative and representatives of

²³ In accordance with article 68 (3), the Chambers permit the participation of victims "in a manner which is not prejudicial to nor inconsistent with the rights of the accused and a fair and impartial trial"

²⁴ The legal representative founded on article 68 of the Statute of the ICC; rule 87 of the RPE and regulation 102 of the draft Regulations of the Registry.

FIDH, to ask them further questions about the modalities of collecting evidence and the protective measures.

Following the hearing, the Chamber also asked for additional information concerning the mandates and activities of the Victims and Witnesses Unit on the protection of witnesses and victims in DRC and of the Victims Participation and Reparation Section.

On 22 July 2005, the Chamber ordered that the applications for participation be sent to the Prosecutor and the Defence to enable them to reply²⁵. However, in order to protect the victims, the Chamber ordered that the defence be provided with redacted copies of the applications expunged of any information that could lead to identification of the victims. On the other hand, the Prosecutor was provided with unredacted copies of the applications, as the Chamber considered that the internal obligation of confidentiality binding the Office of Prosecutor was sufficient guarantee of protection for the Applicants. In addition, the Chamber gave each victim a pseudonym.²⁶ In implementation of a first protective measure at the stage of considering applications for participation, the Chamber ordered all organs of the Court to abstain from any direct contact with the Applicants and only to contact them through their legal representative²⁷.

These decisions, therefore, relating to the protection of victims, satisfy the request made by the legal representative of the victims in his memorandum in support of the victims' applications for participation.

9. Replies by the Office of the Prosecutor and the Defence to the applications for participation

In its reply to the memorandum of the legal representative, the Office of the Prosecutor refuted the possibility of the victims to express their views and concerns at the investigation stage by submitting the following arguments²⁸:

- In accordance with article 68 (3) of the Statute of the ICC, the Court shall permit victims to present their views and concerns *at stages in the proceedings* which it determines to be appropriate. The Prosecutor states that strictly speaking there are no *proceedings* during the investigation phase;
- the participation of victims at this stage is inappropriate as it is inconsistent with the need to conduct impartial, objective and efficient investigations;

²⁵ In accordance with rule 89 (1) of the Rules of Procedure and Evidence, a copy of the applications for participation must be sent to the Prosecutor and the defence who have the right to reply within the time-limit set by the Chamber.

²⁶ The use of pseudonyms for victims is stipulated in rule 87 (3) (d) of the Rules of Procedure and Evidence.

²⁷ *Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp*, of 21 July 2005, http://www.icc-cpi.int/library/cases/ICC-01-04-73_English.pdf

²⁸ *Prosecutor's Reply on the Applications for Participation 01/04-1/dp to 01/04-2/dp*, of 15 August 2005, confidential document reclassified as public pursuant to decision ICC-01/04-140, http://www.icc-cpi.int/library/cases/ICC-01-04-84_English.pdf.

- the applying victims have not demonstrated that their personal interests are affected at the investigation stage.

The Defence, however, did not challenge the possibility of the victims to participate at this stage of the proceedings, i.e. at the investigation phase. On the other hand, the Defence brought into question the possibility of FIDH to transmit the applications for participation on behalf of the applicants and the qualification of some of them as “victim”.

10. The Chamber grants the applying victims the right to participate – the historic decision of 17 January 2006

In its historic decision issued on 17 January 2006²⁹, Pre-Trial Chamber I granted, for the first time, the status of victims to the six Applicants whose applications for participation had been transmitted by FIDH. In fact, the Chamber accepted and confirmed the arguments of FIDH and the legal representative of the victims, thus rejecting the arguments of the Prosecutor and the Defence who were opposed to the participation of the victims at this stage of the proceedings.

The most important points of this decision are as follows:

a) The Chamber accepted the role of FIDH as a channel for transmitting the applications for participation

Rejecting the arguments of the Defence according to which FIDH had not the quality “*to file any document on behalf of the victims*”, the Chamber thus interpreted article 89 (3) according to which “*applications [for participation] may also be made by a person acting with the consent of the victim (...)*”. The Chamber considered that the term “person” applied in fact to both natural and legal persons and noted that the six Applicants had expressly consented to their applications for participation being made to the ICC by FIDH.

b) The Chamber confirmed the validity of FIDH forms as applications for participation

In its decision, the Chamber noted that the application forms for participation used by the six victims were FIDH forms. In this connection, it stated that rule 86 (1) of the Regulations of the Court which stipulates that “[t]hese standard forms shall, to the extent possible, be used by victims”, implied that “*the use of such forms is not compulsory and that the Applicants are entitled to use FIDH forms*”. It added that “*the applications for participation transmitted by FIDH contain the information required by regulation 86, sub-regulation 2,*

²⁹ *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6*, of 17 January 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-101_English.pdf

of the Regulations of the Court”³⁰.

c) The victims are entitled to participate in the proceedings before the Court at the investigation stage

- Following a terminological and contextual analysis of the use of the terms “proceedings” and “investigation” in the Statute and the Rules of Procedure and Evidence, the Court dismissed the Prosecutor’s first argument and concluded that *“the Statute grants victims an independent voice and role in proceedings before the Court”* including at the investigation stage. It also stated that this interpretation was consistent with the growing emphasis placed on the role of victims by the international body of human rights law and by international humanitarian law.
- The Chamber also rejected the second of the Prosecutor’s arguments, considering that the participation of victims at this stage does not affect the Prosecutor’s capacity to conduct the investigation in conformity with the requirements of efficiency and security. The Chamber believed that *“the core consideration, when it comes to determining the adverse impact on the investigation alleged by the Office of the Prosecutor, is the extent of the victim’s participation and not his or her participation as such. In this regard, the Chamber considers that giving persons with the status of victims the right to present in general terms their views and concerns regarding the investigation of a situation and to submit evidence to the Pre-Trial Chamber cannot have an adverse impact on the investigation”*
- Lastly, the Chamber concluded that the personal interests of the victims are affected in general at the investigation stage *“since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparation for the harm suffered”*.

The Chamber thus asserted that the victims, who meet the definition in rule 85 of the RPE, may participate in proceedings before the ICC including at the investigation stage. The victims are then qualified as “victims of the situation”. The Court indicated that once a case is opened (for example *The Prosecutor v. Thomas Lubanga Dyilo* case initiated by the issue of an arrest warrant on 17 March 2006), it would automatically examine whether the victims of the situation can be considered as *“victims of the case”*, giving them the right to present their views and concerns during the preliminary phases of the trial and during the trial itself.

d) Each of the six applicants has been qualified as a “victim of the situation” in DRC

The Chamber then analysed the applications for participation in question. It decided that each of the Applicants met the definition of victim as set out in the Rules of Procedure and Evidence. It thus established:

- 1) that the case in question involved natural persons;
- 2) that they had suffered harm;
- 3) that the alleged

³⁰ Regulation 86 (2) of the Regulations of the Court stipulates that the applications for participation must contain: the identity and address of the victim, evidence of the consent of the victim, a description of the harm suffered resulting from the commission of any crime within the jurisdiction of the Court, a description of the incident, any relevant supporting documentation, any information as to why the personal interests of the victims are affected, any information on the stage of the proceedings in which the victim wishes to participate, any information on the legal representation envisaged by the victim.

crimes fell under the jurisdiction of the court; and 4) that there was a causal link between the crimes and the harm suffered³¹. The six Applicants were therefore considered to be victims of the situation entitled to participate in the proceedings.

e) The Chamber specified the modalities of participation of victims at the investigation stage

The Chamber then specified the modalities of participation of victims at the investigation stage. The victims shall have the right to participate in public proceedings, and in certain cases in proceedings conducted confidentially where such proceedings may have an impact on their personal interests. They are authorised to present their views and concerns, to file documents and to request the Chamber to order specific m.

11. The Prosecution's application for leave to appeal and its rejection by the Chamber

Dissatisfied by this decision, the Prosecutor asked Pre-Trial Chamber 1 for leave to appeal³². In fact, in accordance with the Rules of Procedure and Evidence, certain decisions issued by the Chambers of the ICC may only be appealed with the leave of the Court³³.

The Prosecutor's main arguments challenging the right granted to the victims to participate in the proceedings at the investigation stage were:

- ◆ *The Court might risk being inundated with applications for participation.* The Prosecutor believed that, given the massive scale of alleged criminality in DRC, allowing the participation of victims at the investigation stage could result in “*tens of thousands, or hundreds of thousands*” of applications which would have a grave impact on the expeditious conduct of the investigation and the proceedings. The Prosecutor stressed that the various organs of the Court did not work with unlimited resources whilst such an enormous participation by victims would require considerable resources to deal with the applications for participation as well as other requests filed by the victim participants.
- ◆ *The risk of obstructing or impeding investigations and proceedings.* According to the Office of the Prosecutor, a mischievous interpretation of the decision of 17 January 2006 could lead to an abuse of

³¹ Rule 85 (a) of the RPE. It should be noted that the status of victim can also be granted to a legal person where it is an “[organisation] or [institution] that [has] sustained direct harm to any of [its] property which is dedicated to religion, education, art or science or charitable purposes, and to [its] historic monuments, hospitals or other places or objects for humanitarian purposes”.

³² *Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, of 23 January 2006: http://www.icc-cpi.int/library/cases/ICC-01-04-103_English.pdf

³³ Article 82 (1) (d) of the Rome Statute and Rule 155 of the Rules of Procedure and Evidence.

applications for participation intended at obstructing or impeding investigations and proceedings. The victims could, according to the Prosecutor, interfere with the investigation thus compromising its objectivity and integrity.

- ◆ *The risk of imbalance between the victim participants and the Defence.* The Prosecutor believed that the procedural rights granted by the Chamber to the victims of a situation were broader than those enjoyed by a person under investigation. In this sense, the decision would create an imbalance between the victim participants and the Defence.
- ◆ *The risk to the security of victims and witnesses.* Lastly, the Prosecutor affirmed that the participation of victims in the proceedings could also endanger the security of victims and witnesses.

The legal representative for the victims, a member of the FIDH Legal Action Group, replied to the Prosecutor's request for leave to appeal with the following arguments³⁴:

- The risk of an increased number of applications for participation is not appreciable at this stage;
- It falls to the Pre-Trial Chamber to decide the modalities for participation of victims taking due account of the fair and expeditious conduct of the proceedings;
- Taking into consideration the fact that the Prosecution and the Defence are entitled to reply to any presentation of the views and concerns of the victims, their participation cannot violate the principle of fairness of those proceedings;
- The Office of the Prosecutor has not established that the participation of victims in the proceedings might endanger their security and protection;
- There are organs and procedures within the Registry for receiving and dealing with applications for participation, even many.

On 31 March 2006, the Pre-Trial Chamber issued a decision on the Prosecutor's application for leave to appeal³⁵. In its decision, the Chamber once again rejected the Prosecutor's arguments and upheld the position and the arguments of the victims' legal representative. As a result, it concluded that the Prosecutor had not managed to prove that the criteria necessary for leave to appeal had been met in the present case³⁶.

³⁴ *Observations of the Legal Representative of VPRS 1 to 6 following the Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's decision on the Applications for Participation in the Proceedings of VPRS 1 to 6*, of 27 January 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-105_English.pdf

³⁵ *Decision on the Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, of 31 March 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-135_tEnglish.pdf

³⁶ For the Chamber to grant leave to appeal, the Prosecutor had to demonstrate that the decision raised an issue that could significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber might materially advance the proceedings. See Statute of the ICC, article 82.1.d

12. The Prosecution's application for extraordinary review and its dismissal by the Appeals Chamber

Although no appeal was available, the Office of Prosecutor decided to lodge an “application for extraordinary review” before the Appeals Chamber³⁷. As such a remedy does not exist in the system of the ICC Statute, the Prosecutor had to develop arguments that this was a *lacuna* and that the Appeals Chamber would need to apply general principles of comparative law to accept this extraordinary application. He went on to criticise the appeal system conceived by the Statute of the ICC as well as the decision of the Pre-Trial Chamber I to reject his application to lodge an appeal and repeated the arguments he had presented in that application.

In a decision issued on 13 July 2006³⁸, the Appeals Chamber explained that it was not appropriate to apply remedies existing in comparative law to the system of the ICC and it rejected the Prosecutor's argument, demonstrating that, contrary to his submissions, there was no *lacuna* in the Statute of the ICC in this respect. The application of the Prosecutor for extraordinary review was therefore rejected by the Appeals Chamber.

As a result, the six Congolese victims who applied for participation before the ICC are definitely entitled to present their views and concerns regarding the proceedings on the situation in DRC.

³⁷ *Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, of 24 April 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-143_English.pdf

³⁸ *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, of 13 July 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-168_English.pdf

Conclusions and prospects

The system established by FIDH for supporting Congolese victims in their right to fair and independent justice has been proved effective.

Firstly, the FIDH intervention with the support of its member organisations in DRC – *Association Africaine des droits de l'Homme* (ASADHO), Groupe Lotus and Ligue des Electeurs -, has allowed victims in DRC to enjoy their rights pursuant to the Statute of the International Criminal Court and thus to assert their interest in contributing to the fight against impunity for the most serious crimes. As far as these victims are concerned, the right to justice is inextricably linked with the objective of peace and security in DRC.

FIDH has also facilitated the fairly complex procedure of collecting evidence and of making the victims' application for participation in accordance with the requirements of the Rome Statute, even before the Court's organs had drawn up a standard form for this.

Moreover, FIDH asked the lawyer members of its Legal Action Group (*Groupe d'action judiciaire* – GAJ), conversant with the rights of victims and international criminal law, to represent the victims who have applied for participation before the ICC. The representatives of the GAJ were thus able to plead in favour of the participation of victims at the investigation stage and ask the organs of the Court for confidentiality measures to guarantee the protection of the victims concerned.

After making the first six applications for participation of victims ever received by the ICC, FIDH has contributed to the development of the case law of the Court which is favourable to victims. The ICC has acknowledged the rights of victims to present their views and concerns as soon as an investigation is opened by the Prosecutor into a situation. If the victims meet the definition given in the ICC Statute, they are then considered as “victims of the situation” and entitled to participate in the proceedings, file evidence and ask for specific measures, in particular concerning their protection.

These modalities of participation of victims at the investigation stage will be very useful in the fight against impunity of perpetrators of the most serious crimes brought before the ICC.

In the case in question, on 17 March 2006, Pre-Trial Chamber I issued an arrest warrant for Thomas Lubanga Dyilo, one of the war-lords allegedly responsible for the most serious crimes committed in DRC since 1 July 2002. To date, the charges made against him are the enlistment, conscription and use of child soldiers, acts which constitute war crimes in pursuant to the ICC Statute³⁹.

Victims whose participation has been agreed by the Court at the investigation stage will be able to argue that

³⁹ Statute of the ICC, article 8 (2) (e) (vii)

they are now victims of the case *The Prosecutor v. Thomas Lubanga Dyilo*⁴⁰, allowing them, in the event of a positive response, to participate in the preliminary stages of the trial and in the trial itself.

Other victims of the situation shall be able to present, before Pre-Trial Chamber I, their views as to the extremely restricted scope of the charges brought against Thomas Lubanga Dyilo, and ask that they be extended to other crimes.

In addition, other victims of the situation as well as of the above mentioned case shall be able to present their concerns before Pre-Trial Chamber I about the Prosecutor's decision to suspend temporarily the investigation in relation to other possible charges against Thomas Lubanga Dyilo⁴¹.

Lastly, given FIDH's decision to present applications for participation by victims of different crimes committed by different rebel groups in different localities, the victims of the situation shall be able to express their concerns about the scope of the Prosecutor's investigation.

This confirms that the participation of victims in the proceedings concerning the situation in DRC is actively contributing to the objectives of the ICC, in other words to the fight against impunity of perpetrators of the most serious crimes and the prevention of further crimes.

⁴⁰ For this, they have to show that they were victims of the charges brought against him, i.e. enlistment, conscription and use of child soldiers during hostilities.

⁴¹ *Prosecutor's Information on Further Investigation*, of 28 June 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-170_English.pdf