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Date: **4 February 2008**

THE APPEALS CHAMBER

Before: **Judge Philippe Kirsch**
Judge Georghios M. Pikis
Judge Navi Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: **Mr Bruno Cathala**

SITUATION IN DARFUR, SUDAN

Public Document

OPCD appeal brief on the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor"

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1. Introduction

1. The framework for victim participation, as enshrined in the Rome Statute, constitutes a legal landmark in international criminal law in terms of its emphasis on restorative, as opposed to purely retributive justice, founded on proceedings which recognise the right of victims to be treated with respect and dignity. The Office of Public Counsel for the Defence ("OPCD") thus fully subscribes to the principle that victim participation is a right and not a privilege.
2. Nonetheless, as set out in article 68(3*) inter alia*, this right has an overriding purposive element: to facilitate the ability of persons affected by the judicial process to present their views and concerns as regards those proceedings which directly impact upon their personal interests. The OPCD therefore submits that the judicial designation of the right to participate should be contingent upon the satisfaction of all criteria set out in article 68(3). If the application procedure is divorced from an express consideration of these criteria, the right to participate itself becomes denuded of meaning.
3. The OPCD further submits that the procedures for victim participation, as set out in article 68(3) and rule 89, should not be construed or applied in a legal vacuum, but in accordance with the overarching objectives (and limitations) of the ICC itself. In establishing a criminal court, the State parties explicitly recognised that the ICC's mandate to eliminate impunity and provide victims with a remedy should be served through the criminal process itself, in the culmination of a judgement adjudicated fairly and impartially in accordance with the standard of beyond reasonable doubt.
4. At the same time, the Rome Statute is founded on the notion of complementarity: in particular, the notion that the primary responsibility for rectifying human rights violations lies with the State concerned.[1] In addition, it was intended that the ICC should only exercise jurisdiction over "the most serious crimes of concern to the international community as a whole". As such, the ICC was not intended to constitute a broad based forum for litigating all alleged violations of international criminal law which may have occurred in the territory of a State party or situation referred by the Security Council.

[1]"The complementarity principle was the motivating force behind a court built around a limited and defined authority to take jurisdiction that operates when needed to supplement domestic court systems" (at p. 67); to circumvent the principle "would minimize the ability of states to exercise their courts as proper forums for prosecuting violations of international humanitarian law"(at p.68); Michael A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court' (2001) 167 Mil. L. Rev. 20, at 65.

5. The OPCD respectfully submits that any procedure for victim participation at the ICC should therefore give effect to, rather than frustrate these jurisdictional purposes. The OPCD is thus concerned that the creation of a separate and independent procedural status of victims, risks transforming the situation phase into a quasi-truth and reconciliation forum, whereby the Pre-Trial Chamber would be rendering factual determinations as to whether persons are victims, for alleged incidents which might not meet the stringent jurisdictional thresholds for eventual prosecution, and most importantly, impartial adjudication before the Court.

2. Procedural history

6. On 23 July 2007, the Honourable Single Judge issued a Decision authorising the filing of observations on applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for participation in the proceedings,[2] in which the Single Judge ordered the Registry to transmit the applications to participate as victims to the OPCD, and granted the OPCD the right to file observations.
7. On 21 August 2007, the OPCD filed a confidential request for the Single Judge to order the applicants through their representatives to produce relevant supporting documentation, pursuant to regulation 86(2)(e).
8. On 24 August 2007, the OPCD filed a request that the Chamber order the Prosecutor to disclose any information which would affect the credibility or contradict the assertions (including dates and location of alleged events) contained within the applications. In the alternative, the OPCD argued that if the Chamber rejected this request, the application to participate in the situation phase should be dismissed *in limine*, in light of the prejudice to the rights of the Defence and the principle of equality of arms.
9. On 3 December 2007, the Honourable Single Judge issued the 'Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor' ("the Decision"), which dismissed the requests of the OPCD.
10. The Honourable Single Judge concluded that the application process was a distinct proceeding, unrelated to the criminal proceedings before the Court, which is not *per se* prejudicial to the Defence. The Chamber therefore limited the scope of applicable law to rule 89 of the Rules, regulation 86 of the Regulations of the Court, and prior

[2] ICC-02/05-85.

decisions of the Chamber concerning the application process;[3] thus, by inference, excluding articles 21 and 67 of the Statute *inter alia*.

11. The Honourable Single Judge therefore held that whilst the principle of complementarity applied to the proceedings in the situation phase, in the absence of an express provision to that effect in either rule 89 or regulation 86, it was not applicable to the application process.[4] Similarly, the requirement of exhaustion of domestic remedies, as set out in human right jurisprudence, was also dismissed by the Single Judge in the absence of an express condition to that effect under rule 89 and regulation 86.[5]

12. Secondly, as regards the OPCD's request under regulation 86(2)(e) for supporting documentation, the Single Judge held that in light of the limited purpose of the application process, rule 89(1) only required the Chamber to provide the Prosecution and the Defence with copies of the applications, and did not require the Chamber to provide, or order the applicants to provide, information extrinsic to the applications themselves.[6]

13. Thirdly, the Honourable Single Judge noted that the Chamber had the power, pursuant to regulation 86(7), to request additional information. Nonetheless, the Single Judge referred to the decision of 17 August 2007, issued in the DRC situation, which delineated the information which the Chamber deemed necessary for a complete application form, and held that the information requested by the OPCD did not fall within the categories of information which is necessary to complete an application form.[7]

14. Finally, the Single Judge held that neither article 67(2) nor rule 77 applied to the application process for victims. The Single Judge did not address the alternative submission of the OPCD; namely, whether, in light of the fact that the Defence did not have investigative resources or the facility to request relevant documentation from the OTP, it was appropriate for the applicants to participate in the situation phase in light of the prejudice to the rights of the Defence and the principle of equality of arms.

15. On 10 December 2007, the OPCD filed a request for leave to appeal the Decision in relation to firstly, the issue as to whether the application process is a distinct procedure, unrelated to the modalities of participation or the criminal proceedings

[3] Para. 7 of the Decision.
[4] At para. 11 of the Decision.
[5] Para. 12 of the Decision.
[6] Paras. 14 and 15 of the Decision.
[7] Paras. 16 and 17 of the Decision.

before the Court, and thus, not *per se* prejudicial to the Defence; and secondly, the issue as to whether the Chamber is only obliged to provide the Prosecution and the Defence with copies of the applications, and is thus not obliged to provide or order the applicants to provide information extrinsic to the applications themselves.[8]

16. On 23 January 2008, the Honourable Single Judge issued a decision in relation to the OPCD's request,[9] in which the Single Judge observed that "the two issues identified by the OPCD are inextricably linked because, according to the Decision, the specific procedural features of the application process provided for in rule 89 of the Rules and regulation 86 of the Regulations - including the fact that the Chamber is only obliged to provide the Prosecution and the Defence with copies of the applications - are the result of its distinct and specific nature, object and purpose".[10]

17. The Honourable Single Judge therefore granted the OPCD leave to appeal the decision in relation to the following issues:[11]

> *"whether article 68(3) of the Statute can be interpreted as providing for a 'procedural status of victim' at the investigation stage of a situation and the pre-trial stage of a case; and (i) if so, whether rule 89 of the Rules and regulation 86 of the Regulations provide for an application process which only aims to grant the procedural status of victim and is thus distinct and separate from the determination of the procedural rights attached to such status; and what are the specific procedural features of the application process? Or (ii) if not, how applications for participation at the investigation stage of a situation and the pre-trial stage of a case must be dealt with."*

3. Appellate Submissions

3.1 Whether article 68(3) of the Statute can be interpreted as providing for a 'procedural status of victim' at the investigation stage of a situation and the pre-trial stage of a case

18. The OPCD submits that the purpose of determining whether an applicant meets the criteria to be considered a victim, under article 68(3), is to assess whether their personal interests are affected by a specific proceeding, and whether this therefore triggers a right to submit views and concerns regarding that proceeding.

19. Article 68(3) thus requires the Chamber to render firstly, a specific determination as to whether the personal interests of the individual applicants are affected by an actual (as opposed to hypothetical) procedural step in the situation or pre-trial phase,

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[8] Request for leave to appeal the "Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", ICC-02/05-112

[9] Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", ICC-02/05-118

[10] At p. 4.

[11] Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor , 23 January 2008, ICC-02/05-118

and secondly, whether in light of the specific characteristics of this procedural step (including the position of the parties at this point in time), it would be appropriate to permit applicants (whose personal interests are affected), to submit their views and concerns in relation to this procedural step.

20. As such, the creation of a 'procedural status of victim' is legally incorrect since it fetters the discretion of the Chamber to render a specific determination as to whether these criteria are met, rather than relying on generic presumptions concerning all applicants, and all situation and pre-trial phases at the ICC.

21. The OPCD further submits that granting applicants the procedural status of victims during the situation phase would be contrary to the interests of judicial economy if there are no viable proceedings at this stage in which the applicants either could participate, or require such a designation in order to participate.

22. Finally, the OPCD respectfully submits that the Pre-trial Chamber does not have the competence to render a factual finding that a person can be considered to have the status of a victim of a crime within the jurisdiction of the ICC, outside of the context of a decision issued in accordance with an application for an arrest warrant, or a decision on the confirmation of charges. Such a factual finding could inadvertently extend the jurisdiction of the ICC by judicial fiat, and would be prejudicial to the rights of the Defence, and the fairness and impartiality of the proceedings.

3.1.1 Granting applicants the procedural status of 'victim' is incompatible with the obligation of the Chamber to render a specific determination as to whether the personal interests of the applicant are affected, and whether it would be appropriate for them to participate in the proceeding in question

23. The OPCD respectfully submits that the Honourable Single Judge's finding that article 68(3) permits the Chamber to grant applicants the procedural status of victim is inconsistent with the clear terms of article 68(3), and the drafting history of this provision.

24. The limited scope of the application process is founded in the Single Judge's findings that the personal interests of victims are *per se* affected at the investigation stage of a situation and the pre-trial stage of a case, and that these are appropriate stages of the proceedings for victims' participation.[12] Accordingly, in determining whether applicants should be granted the right to participate at the investigations and pre-trial stage of the case, the Single Judge held that it is only necessary to assess whether the applicants meet the definition of 'victim' under rule 85.

[12] At p. 5.

25. Thus, in light of this generic assumption that the criteria of personal interests and appropriateness were automatically fulfilled at these stages, the Single Judge did not consider it necessary to adjudicate upon the parties' submissions as to whether the respective personal interests of the applicants were affected, or whether it was appropriate to grant a right of participation at this stage of the proceedings in the Sudan situation.

26. The OPCD submits that in so doing, the criteria of personal interests and appropriateness have been denuded of any effective meaning. This limited interpretation also fetters the power of the Chamber, under rule 89(2), to reject an application if "the criteria set forth in article 68 paragraph 3 are not otherwise fulfilled".[13]

27. In this regard, the OPCD submits that since the Rome Statute is, in effect, a treaty, its provisions should be interpreted in accordance with the principle of effective interpretation: as the parties must have intended that each provision have a certain effect, a provision should not be given an interpretation that leaves it meaningless or without effect.[14] This principle is of particular importance regarding the construction of provisions in criminal statutes, which give effect to rights or regulate the fairness of the proceedings.[15]

28. The OPCD further submits that if the phrase 'personal interest' is given its plain meaning - that is, it must be an interest which is personal (and thus particular) to each independent applicant - it is clear that article 68(3) requires the Chamber to render a determination which is tailored to the specific circumstances of each applicant. For this reason, it has been commented that the 'personal interests' criterion refers to an individual interest in the proceedings concerning the criminal conduct which caused harm to the victim: "Thus, without prejudice to the collective

[13]The OPCD refers to the findings of the ICC Appeals Chamber, to the effect that where a provision of the Rome Statute or Rules requires a Judge to exercise his or her discretion, then there is an obligation to apply the provision in accordance with the particular circumstances before the Judge - the Judge cannot fetter their discretion by invoking a rigid principle: Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568 at para 67.

[14] See The Corfu Channel Case (merits) ICJ Reports (1949) at p. 24 (and cases cited therein); Jennings and Watts (ed), Oppenheim 's International Law (9th ed) (1992), Vol I at para 633(9).

[15] See dissenting opinion of Judge Hunt in 21 October 2003, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, at paras 18 and 19: http://www.un.org/icty/milosevic/appeal/decision-e/031021diss.htm
See also Liversidge v Anderson [1942] AC 206 at 245, http://uniset.ca/other/cs5/1942AC206.html

interest of identifiable groups and of human-kind, this provision is specifically addressed to individual victims of a given crime".[16]

29. The OPCD further submits that the right of victims to be treated with dignity and respect also militates against generic presumptions concerning their interests. Whilst it is possible that there may be a degree of commonality between the interests of the respective applicants, there are also several possible instances in which a proceeding during the situation phase might impact on the interests of only a limited category of applicants. For example, a request under article 56 in relation to a unique investigative opportunity concerning an incident in one village, will not impact on the personal interests of applicants who suffered harm as the result of an incident in a completely different area, or time period.

30. The interpretation of the Honourable Single Judge thus leaves no room to manoeuvre between the different interests of applicants, nor does it provide for a mechanism for differentiating between *which* proceeding the victims would be entitled to participate in (which is a separate question from the modalities of participation in this proceeding). Indeed, in the Decision granting leave to appeal, the Honourable Single Judge clearly states that although the Chamber still retains the discretion to tailor the modalities of participation, "once, in exercising its discretion, the Chamber decides on the set of procedural rights that are attached to the procedural status of victim, such rights belong to all applicants for whom the procedural status of victim has been granted".[17]

31. The OPCD further submits that the term 'appropriate', if given its plain meaning requires a situation and stage specific assessment as to whether it would be right, in the sense of fair,[18] to permit their participation in light of the particular

[16] D Donat Cattin, 'Article 68 Protection of the Victims and their participation in the proceedings' Commentary on the Rome Statute of the International Criminal Court (Triffterer ed. Nomos Verlagsgesellschaft 1999) at p. 879 The OPCD further observes that the Human Rights Committee has held that '[a] person can only claim to be a victim if he … is actually affected. It is a matter of degree how concretely this requirement should be taken. No individual can in the abstract, by way of *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant': Aumeeruddy-Cziffra v Mauritius (35/78) 9/4/81, at para. 9.2

[17] At page 5.

[18] In a separate, concurring appellate opinion, Judge Pikis stated that the rights of the accused and the need to ensure a fair an impartial trial, are also elements to be considered in connection with the Chamber's determination as to whether participation would be appropriate: "The manner of presentation of victims' views and concerns is subject to an important proviso. It must not be inconsistent with a) the rights of the accused and b) a fair and impartial trial. This is also a consideration relevant to the determination of the appropriateness of the stage at which such views and concerns may be presented." (at para 17)

"The stage at which the views and concerns of victims may be presented must be at an interval of the proceedings that would be appropriate, regard being had to the norms of a fair and impartial trial and the rights of the accused evaluated within the context of the Statute." (at para 20)

Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo" ICC-01/04-01/06-824, 13 February 2007 circumstances at hand. This is exemplified by rule 50(1), which provides that the right of victims to participate in proceedings concerning a request for authorisation from the Pre-Trial Chamber to commence an investigation can be subordinated to the particular security concerns of the investigation in question or the safety of the victims themselves.

32. In this regard, the OPCD further observes that inquietude of certain State parties as to whether article 68(3) should provide for an entitlement to participate (shall) was quelled by the inclusion of the additional criteria, which would require the Chamber to analyse the impact of potential participation in a proceeding on the effectiveness or fairness of the proceeding,[19] as a condition precedent to the recognition of the right to participate.[20]

3.1.2 It is premature, and potentially unnecessary to grant applicants the procedural status of victim during the situation phase of the Sudan situation

33. In light of the fact that the evidential threshold for participation at the situation phase differs from the pre-trial stage, the OPCD respectfully submits that in determining whether it is appropriate to grant a right to participate at the situation phase, the Chamber should take into consideration whether it is fair to either the parties or the applicants themselves to subject them to the rigours of the application process,[21] if there are no viable proceedings during the situation phase in which the applicants could participate.[22]

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[19] "Whatever the perspective and particular views, it was recognised by all that the access of victims to ICC proceedings would necessarily entail logistic constraints. Due to the nature of the crimes under its jurisdiction, very large numbers of victims might be expected and the Court could be overwhelmed by their full participation and request for reparation. It was considered absolutely necessary to devise a realistic system that would give satisfaction to those who had suffered harm without jeapordising the ability of the Court to proceed against those who had committed the crimes." S. Gurmendi 'Victims and Witnesses' ICC: Elements of Crimes and Rules of Procedure and Evidence (Lee et al. eds. Transnational Publishers 2001) p 429.

[20] "If appropriateness of the stage of the proceedings is a criteria of judgement that may only justify a postponement of the intervention of the victim […] the requisites of the rights of the accused and a fair trial constitute pre-conditions for the exercise of the victims' right to intervention. As affirmed above, respect for the rights of the accused is an essential component of a fair trial, which is implemented when the rights of victims and society as such (represented by the Prosecutor) are implemented to." D Donat-Cattin, 'Article 68 Protection of the Victims and their participation in the proceedings' at p. 886.

[21] The OPCD refers to its submissions at para 36 and fn 29 of its request for leave to appeal, and further observes that in accordance with the Trial Chamber's recent finding in the Thomas Lubanga Dyilo case, the commencement of the application process during the situation phase potentially triggers the protective responsibilities of the Court vis-à-vis the applicants: Decision on victim's participation ,ICC-01/04-01/06-1119, 18 January 2007, at para. 37.

[22] In this regard, de Hemptinne, and Rindi have commented: that "allowing the victims to be involved in the investigation stage may have a number of drawbacks for the activity of the Prosecutor and the rights of the accused. In the long run, it may also jeopardize the efficiency and expeditiousness of the proceedings as well as the interests of victims themselves. […] Finally, the victims themselves might be frustrated. Indeed, what would happen if the Prosecutor concludes that, in accordance with the criteria provided by Article 53(2) of the ICC Statute there is not a sufficient basis for prosecution (for instance, because the case is inadmissible, or prosecution is not in the interest of justice)? […] The Pre-Trial Chamber, after having recognised that one or more individuals have suffered from one or several crimes within the jurisdiction of the ICC, would not be able

34. This determination will necessarily differ between the different situations before the Court, since the legal framework applicable to a situation referred by a State differs from a situation referred by the Security Council pursuant to article 13(b) of the Statute. For example, as submitted in the OPCD's observations of 24 September 2007, a consequence of the fact that the ICC's jurisdiction is triggered by a Security Council resolution (as opposed to State consent) is that the ability of the State to challenge admissibility appears to be non-existent at the situation phase.[23] As such, there is no possibility for victims to present their views and concerns in relation to a possible challenge to the admissibility of the situation.

35. The OPCD further submits that the application procedure set out in article 68(3) should also be considered to be the *lex generalis*, which is inapplicable to proceedings which expressly set out a specific methodology for facilitating victim participation.[24]

36. In this connection, the OPCD respectfully submits that the right of victims to an effective remedy, and to participate in any proceedings which impact on this right, can be secured during the situation phase by specific mechanisms which do not require a formal adjudication of the applicants' status under article 68(3).

37. The Rome Statute permits victims to submit complaints directly to the Prosecution, which triggers an automatic obligation to investigate the complaint, subject to the criteria set out in article 53(1). If the Prosecutor requires the authorisation of the Chamber to commence an investigation, then the Prosecutor is also obliged – to the extent which is consistent with their safety or the integrity of the investigation – to notify any victims who are known to the Prosecutor or the Victims and Witnesses unit, for the purpose of enabling them to submit representations to the Pre-Trial Chamber.[25] If the Prosecutor decides not to proceed with a prosecution, the

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to guarantee their participation at further stages of the trial." 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings' (2006) 4 J. Int'l Crim. Just. 342 at 347 to 349

[23] Article 18 of the Statute (challenges to the admissibility of an investigation) appears to be limited to situations falling under either article 13(a) or (c) of the Statute. (para 7 of OPCD Observations of 24 September 2007), The OPCD further refers to its submissions concerning whether it is appropriate to render a judicial determination which could impact on the rights of a non-State party, which has not consented to be bound by the provisions concerning victim participation, during a phase in which that State does not have the opportunity to defend itself from such findings (24 Sept 2007 OPCD Observations at para 7 and fn10).

[24] See for example, B Timm 'The Legal Position of Victims in the Rules of Procedure and Evidence' <u>International and National Prosecution of Crimes under Domestic International Law</u> (Fischer and Kress eds 2004) pp 289-308, at p. 294

[25] See rules 50(1) and (3), which provide that any person who is known to the Prosecution or the VWU as a victim, and who has been notified of the proceeding, may make representations in writing to the Chamber. As such, it is not necessary for the victims to apply to be recognised as such in order to submit such observations.

Prosecutor is obliged to take into consideration the interests of victims under article 53(2)(c).[26]

38. The OPCD therefore submits that the legal framework applicable to the situation phase implies that potential victims do not need to be accorded the status of 'victim' in order to be notified of key procedural developments, nor are they required to submit a formal application to be accorded this right.[27]

3.1.3 Granting applicants the procedural status of victims during the situation phase unduly impacts on the fairness and impartiality of the proceedings

39. Whilst the participation of victims at the situation phase is not, *in abstracto,* inappropriate, the OPCD nonetheless submits that granting applicants the procedural status of victims, based solely on the information provided by the applicants themselves, is unfair (and thus inappropriate) in light of the limited procedural protections which apply to the situation phase.[28]

40. In term of the identification of a person as a victim, whereas a future defendant has the ability to challenge the factual allegations of the Prosecution set out in an arrest warrant or the charging document, the Rome Statute does not provide any recourse to challenge or dispel factual determinations issued outside of this framework during the situation phase.

41. Whilst the Statute permits the Pre-Trial Chamber to issue preliminary factual findings concerning the alleged existence of crimes falling under the jurisdiction of the ICC, the OPCD submits that the requirement that proceedings before the ICC be conducted with the utmost fairness and impartiality manifests itself in certain attendant procedural protections. For example, the Pre-Trial Chamber's finding under article 58 that there are reasonable grounds to believe that a person has committed crimes within the jurisdiction of the Court is predicated on evidential submissions from the Prosecutor, who as a Minister of Justice, is strictly obliged to

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[26] Whilst rule 92 refers to the fact that victims, who wish to participate in a decision of the Prosecutor not to investigate or prosecute, should apply in accordance with the procedure set out in rule 89, the OPCD respectfully submits that if the Chamber were to adjudicate whether the applicant could be considered to have suffered harm, as the result of a crime within the jurisdiction of the Court, it could predetermine their ultimate inquiry as to whether the Prosecutor correctly assessed that the case was inadmissible, or that there was not a reasonable basis to believe that a crime within the jurisdiction of the Court had been committed.

[27] In this regard, the OPCD refers to the finding of Pre-Trial Chamber II in the Uganda situation to the effect that "in respect of crucial stages such as challenges to the jurisdiction or the admissibility of a case, the confirmation of the charges, conditional release and proceedings under article 53, a decision pursuant to rule 89 of the Rules and ensuing participation is not a pre-condition for victims being granted a procedural right as significant as notification, a right to be formally informed of procedural developments which is typically granted to individuals or entities entitled to some role in the proceedings." Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, 10 August 2007, at para 94.

[28] The OPCD refers to its submissions at paragraphs 31-35 of its Request for Leave to Appeal dated 10 December 2007.

search for the truth, and in so doing, to search for information which is both incriminating and exculpatory. Moreover, the arrested person also has the statutory right to investigate the evidential basis of this finding, to seek relevant or exculpatory information from the Prosecution, and to contest it before the Pre-Trial Chamber in accordance with article 60(3) of the Statute.

42. The ICC statutory framework also provides that factual allegations concerning the existence of crimes under the jurisdiction of the ICC should ultimately (and expeditiously) be adjudicated by an impartial Chamber, which was insulated from the pre-confirmation process, and either upheld in accordance with the standard of beyond reasonable doubt, or dismissed if this threshold has not been met.

43. These protections do not apply to factual findings in the situation phase which are issued outside of the context of a specific case. The OPCD has referred in its filings to the fact that the Defence does not have the possibility at the situation phase to challenge jurisdiction, conduct investigations, or (as concluded by the Honourable Single Judge) request disclosure from either the Prosecution or the applicants. As such, its ability to contest the submissions of the applicants concerning the existence of alleged crimes falling under the jurisdiction of the ICC is extremely circumscribed.

44. In the absence of any evidence adduced from the Prosecutor at this stage, the decision of the Chamber is based solely on the written assertions of applicants, who are not bound by a Code of Conduct or testimonial oath. In addition, the application form does not caution the applicants as to the possible consequences (if indeed, any exist) of falsifying the information contained within it.

45. Factual findings to the effect that persons can be considered to be victims of a particular incident are particularly problematic if it is possible to attribute the crime referred to in the decision to a particular individual[29] or group of persons.[30] Since the

[29] For this reason, it has been stated that "[t]o name culprits who had not defended themselves and were not obliged to do so would have been the moral equivalent to convicting someone without due process. This would have been in contradiction with the spirit, if not the letter, of the rule of law and human rights principles': Jose Zalaquett, Commissioner for the Chilean Truth Commission, Introduction to the Report of the Chilean National Commission in Truth and Reconciliation, at xxxii; see also Priscilla Hayner 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study' 16 *HRQ* 597, p648: 'The publication of a person's name […] is popularly understood to indicate their guilt'; and Ariel Meyerstein, 'Transitional Justice and Post-Conflict Israel/Palestine: Assessing the Applicability of the Truth Commission Paradigm' (2006-07) 38 Case W. Res. J. Int'l L. 281 at 344.

[30] The decision of 6 December 2007 expressly attributed the alleged crimes to the Janjaweed and/or the Sudanese military. The OPCD refers to its submissions at paragraphs 31-33 of its request for leave to appeal, and further refers to the Decision on Defence Motion seeking the disqualification of Justice Robertson from the Appeals Chamber, Decision 13 March 2004, Prosecutor v. Issa Hassan Sesay, Case no. SCSL-2004-15-AR15**,** in which the President of the Special Court was disqualified from sitting on cases involving members of the RUF due to comments he had made concerning crimes committed by the RUF.

application process, as defined by the Single Judge, permits applicants to be granted the procedural status of victim even if their allegations do not relate to a 'live' investigation or prosecution, it is highly possible that these allegations will never be properly adjudicated, in accordance with the standard of beyond reasonable doubt. In this connection, the OPCD observes that international tribunals have expressly terminated criminal proceedings against persons who have died, in light of the fact that it would be impossible for the accused to properly instruct a counsel to defend himself against the allegations, and to subsequently appeal a conviction.[31] In this regard, the ICC Appeals Chamber has recognised that "[a] fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped."[32]

46. Even if the allegations are related to an existing investigation or prosecution, it is also arguable that the issuance of factual determinations concerning the existence of crimes, in a context which is outside of the due process protections which apply to the criminal process,[33] and at a stage prior to the commencement of case-related proceedings, could impact on the integrity of subsequent case-related proceedings,[34] and the perception of impartiality of the Chamber.[35] For this reason, many national

[31] Special Court for Sierra Leone, Prosecutor v Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa (Case No. SCSL-04-14-T), 'Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues', 21st May 2007, at paras 16-17: 'A judgement in criminal proceedings […] is indeed the exclusive legal privilege and prerogative attached to the persona or the individual who was the subject matter of the Prosecution that stands abated following his death. The Chamber notes that this legal position is quite consistent with the fundamental principle of individual criminal responsibility, the right of the Accused to a fair trial and the right to an appeal, if convicted. It is, therefore, the Chamber's view that […] if the deceased […] were convicted of the crimes alleged against him, he would by reason of death, be unable to exercise effectively his right of appeal against conviction and would be unable to properly instruct counsel as to the conduct of his trial or appeal.'

[32] ICC Appeals Chamber, Judgement No. ICC-01/04-01/06, 14 December 2006, para. 37.

[33] In its decision of 3 December 2007, the Honourable Single Judge emphasized that the application process was distinct from the criminal proceedings before the Court, and as such, outside of the attendant fair trial protections.

[34] For this reason, it has been commented in the context of East Timor that "it is vitally important to ensure that this new truth and reconciliation mechanism does not damage ongoing investigations and prosecutions. The two are now to operate simultaneously with mandates covering the same time period and there is likely to be overlap and focus on the same incidents. This carries with it dangers for fair trial, including trial by media, prejudice to the presumption of innocence, the tainting of evidence and the risk of inconsistent testimony." S. Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' 2001, Criminal Law Forum 12: 185–246, at 225.

[35] The OPCD submits that in requesting information, and formulating the potential offence to which the information relates, the Single Judge is performing a role which is more analogous to an investigating judge. This may impact on the perception of impartiality of the Pre-Trial Chamber for the purposes of any subsequent proceedings during a confirmation phase: See for example, Piersack v. Belgium (Application no. 8692/79), ECtHR Judgement, 1 October 1982, at para. 30, and ICTY Order of the President, dated 9 January 2008 in Prosecutor v. Seselj, in which the President constituted a panel to examine whether the fact that one of the judges, in his capacity as a member of an NGO, had previously interviewed a person whom the Prosecution intended to call as a witness, impacted on the perception of his impartiality: www.un.org/icty/seselj/president/080109.pdf

jurisdictions do not permit victim complainants to file civil claims related to criminal acts, prior to the commencement of criminal proceedings.[36]

47. The OPCD therefore submits that the propriety of granting applicants the procedural status of victims during the situation phase must be considered in light of impact that such factual determinations would have on the integrity of the proceedings and the mandate of the ICC to promote reconciliation and the rule of law through a rigorous judicial assessment of such allegations.

3.1.4 Granting applicants the procedural status of victim during the situation phase could potentially exceed the competence of the Pre-Trial Chamber, and the ICC

48. The OPCD submits that the issuance of decisions concerning the alleged existence of crimes during the situation phase thus risks extending, by judicial fiat, the jurisdiction of the Court over ordinary crimes which normally fall purely within the competence of domestic authorities.

49. Whereas the existence of many domestic crimes can be established through an incontrovertible fact (medical statements concerning the death of a person), the question as to whether a crime under the jurisdiction of the ICC occurred will depend on several complex factors, such as the nexus of the offence to a conflict, the gravity of the offence, the existence of widespread or systematic attack, the combatant status of the alleged victim *inter alia*.

50. The existence of these elements is relevant not only to the ultimate responsibility of an accused, but also the underlying jurisdiction of the ICC, since under article 5 of

[36] The rule *« electa una via, non datur recursus ad alteram »* prevents a civil claimant, who has triggered reparation before a civil judge, to go as a civil party before the criminal judge when the decision has the same request of reparation, the same object and the same cause as before the civil judge. If there is not yet a civil judgment and the prosecutor issues a case before a criminal judge, the claimant by exception can join the criminal proceedings. However, the civil proceeding has to be stayed until the criminal judgment, in accordance with the adage of "le criminel tient le civil en l'état" (to avoid any conflict between two decisions), then the civil judge has to follow the decision of the criminal judge ("le criminel emporte le civil"). See, articles 4 (2) and 5 of Criminal proceedings code of France (Loi du 31 décembre1957 et Ordonnance du 23 décembre 1958)(Last update: 5 January 2008), article 3 of Code d'instruction criminelle, en vigueur dans le Grand-Duché de Luxembourg, du 17 novembre 1808; 4 Bull. 214bis; Promulgué le 9 décembre 1808. (Last update: 1st september 2007) ; article 114 (1) of Ley de Enjuiciamiento Criminal (14/09/1882)(last update : 22 january 2004)

This rule is applicable even if the criminal proceedings are against an unknown person (French Court de Cassation Cass.2e civ. 22 juin 1988). The OPCD further observes that in jurisdictions which do not provide for a distinct regime for victim participation, any judicial findings or documentation which is derived from a prior civil suit can not generally be utilized in subsequent criminal proceedings relating to the same alleged offence: For the United States position see 'Concurrent Civil and Criminal Proceedings', (1967) 67 *Columbia Law Rev.* 1277, at 1283: 'Whenever discovery sought in a civil action may prejudice a pending criminal case, the court in the civil action should, absent special circumstances, stay discovery pending the disposition of the criminal action. This is what courts have usually done'. The cases of *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), in which the Court stated that '[a] litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit', and *United States v. Tison*, 780 F.2d 1569, 1572 (11th Cir. 1986) (civil proceeding stayed for three years in order to prevent circumvention of criminal discovery provisions in parallel proceeding) are illustrative in this respect.

the Statute, the jurisdiction of the Court is strictly limited to "the most serious crimes of concern to the international community as a whole": namely, genocide, crimes against humanity, war crimes, and the crime of aggression.[37]

51. Although it is possible to ascertain grounds to believe the existence of these threshold elements by cross-referencing the incidents in the applications to the incidents set out in an arrest warrant or charging document, it is not possible to ascertain the existence of these threshold elements during the situation phase.[38]

52. The OPCD further observes that in accordance with the principle of complementarity, the ICC does not exercise sole or even primary jurisdiction over violations of international criminal law which occur in the territory of State parties.[39] The Court therefore has neither the obligation nor the power to give effect to the right to a remedy for every potential victim within that territory.[40]

53. Indeed, if the ICC were to become prematurely seised of a complaint, judicial activity before the ICC could frustrate or impede domestic investigations and prosecutions, notwithstanding the fact that the ICC Prosecutor might have no intention of pursuing these complaints before the ICC;[41] for example, if ICC factual

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[37] In this regard, the ICTR Appeals Chamber has recently confirmed that a strict interpretation of jurisdictional elements is necessary to ensure the principle of legality and foreseeability, which are key elements of the fairness of the proceedings: Prosecutor v. Nahimana et al, Appeal Judgment of 28 November 2007, paras 309- 313, pp.117-118.

[38] The OPCD refers to its submissions set out in its Observations dated 8 June 2007, at paras 55-58; its Request for the Single Judge to order the production of relevant supporting material, dated 21 August 2007 at paras 10-17, and its Observations dated 24 September 2007 at paras 53-62 concerning, *inter alia,* the fact that human rights courts and UN complaint mechanisms require applicants to adduce information concerning the existence of threshold elements for international crimes.

[39]The OPCD fully subscribes to the following observations of Professor Cassese: "To have provided for this sort of complementarity is in many respects a positive step. Plainly, it falls primarily to national prosecutors and courts to investigate, prosecute and try the numerous international crimes being perpetrated in many parts of the world. First of all, those national institutions are in the best position to do justice, for they normally constitute the forum conveniens, where both the evidence and the alleged culprit are to be found. Secondly, under international law, national or territorial states have the right to prosecute and try international crimes, and often even a duty to do so. Thirdly, national jurisdiction over those crimes is normally very broad, and embraces even lesser international crimes, such as sporadic and isolated crimes, which do not make up, nor are part of, a pattern of criminal behaviour. Were the ICC also to deal with all sorts of international crimes, including those of lesser gravity, it would soon be flooded with cases and become ineffective as a result of an excessive and disproportionate workload. To a certain extent, this has already occurred at the ICTY and has necessitated the withdrawal of indictments of minor individuals in the political-military hierarchy." 'The Statute of the International Criminal Court: Some Preliminary Reflections' 158 EJIL 10 (1999), 144–171

[40] "The Rome Statute emphasizes the need for national courts to prosecute international crimes. This is similar to the requirement in human rights courts that victims must all of their domestic remedies before they can bring their complaint before an international court of Human Rights. Where national courts are willing and able to take measures to punish the perpetrators of these most serious crimes, this is the correct position." S. Ryan, 'From The Furies of Nanking to the Eumenides of the International Criminal Court; the Evolution of Sexual Assaults as International Crimes' (1999) 11 Pace Int'l L. Rev. 447 at 449.

[41] In this connection, the OPCD observes that under the Rome Statute, State parties have no recourse to challenge the admissibility of ICC decisions concerning the existence of crimes, which are issued in connection with victim participation decisions during the situation phase, rather than in connection with the investigation or prosecution of a case. Indeed, whereas the Prosecutor is obliged under article 18(1) to notify the Prosecutor's intention to commence an investigation to any State party which would normally exercise jurisdiction over the

findings, issued in accordance with a lower standard of proof, were contrary to domestic judicial findings issued in accordance with the standard of beyond reasonable doubt, it would thereby undermine both the credibility of these findings, and the mandate of the ICC to assist in establishing the truth.

54. Finally, the OPCD notes that the Statute does not vest the Pre-Trial Chamber with the power to render factual findings affirming the existence of crimes, on the basis of evidence which has not been submitted by the Prosecutor, and which has been submitted to the Chamber outside of the context of a specific prosecution investigation or case.[42]

3.2 How applications for participation at the investigation stage of a situation and the pre-trial stage of a case must be dealt with.

55. The OPCD firstly refers to its above submissions that rights of victims during the situation phase can generally be secured by mechanisms other than the time and resource intensive application procedure under article 68(3) and rule 89: for example, victims can submit complaints directly to the Prosecutor, and both the Prosecutor and the Registry can notify victims of any key procedural developments at the Court.

56. Indeed, the OPCD respectfully submits that the establishment of a comprehensive system of notification to all potential victims who have communicated with the Court would also ensure that a greater class of persons would have the capacity to apply to participate, should a proceeding arise which is linked to their respective personal interests.

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crimes concerned, there is no legal mechanism requiring the applicants or the Pre-Trial Chamber to notify the State party which would normally exercise jurisdiction over the crimes referred to in the applications.

[42] For example, a decision of the Pre-Trial Chamber to authorise an investigation must be predicated on the Prosecution's request in conjunction with the supporting material tendered by the Prosecutor. Under article 53(3), the Pre-Trial Chamber can only compel the Prosecutor to reconsider its decision: the Chamber does not have the power to oblige the Prosecutor to investigate or prosecute a specific case. Under article 58(1), the Chamber can only issue an arrest warrant on the basis of information submitted by the Prosecutor. Article 61(7) provides that the Pre-Trial Chamber can only request the Prosecutor to consider amending the charges: the Chamber cannot *proprio motu* add additional factual allegations to the charges. Article 74(2) also precludes the Trial Chamber from modifying the facts set out in the Prosecutor's charging document, as confirmed by the Pre-Trial Chamber. The OPCD further refers to the partially dissenting opinion of Judge Blattman: "Assessments of this type that overstep the mandate of the charges are an attempt against the principle of legality embodied in those charges, which sets limits on the accusations that may be brought and to the actors that may intervene in the proceedings. Any other determination would bring about, in my opinion, the inappropriate scenario in which the Trial Chamber could be forced to make determinations based on evidence which is outside of the scope the charges against the Accused. As well, the possibility would be present that another chamber of the Court which is competent to review the application would, having seen the evidence relevant to the situation or case before it, make a different determination with regard to the victims applicant. This situation would cause great confusion, lead to legal uncertainty, and would be extremely unfair to potential victim applicants." Decision on victim's participation ICC-01/04-01/06-1119, 18 January 2007,at para.11.

57. In such an event, the OPCD respectfully submits that the application process for victim participation should have a strictly purposive element: to verify which persons are entitled to present their views and concerns by virtue of the fact that the proceedings impacts on their personal interests.[43] The clarity of the application process and the ability of the applicants to frame their personal interests and to insert relevant information into the application form would also benefit from taking place in connection with an actual proceeding as opposed to abstract or hypothetical proceedings.

58. In terms of the Chamber's ability to assess whether the applicants meet the definition of victim under rule 85, the integrity if the proceedings, in particular, the jurisdictional limitations of the ICC, require the Chamber to verify (albeit it to a lower standard of proof) that the jurisdictional elements of the crime have been met. In this connection, the OPCD respectfully submits that the mere undocumented assertion of the applicants themselves that a crime occurred is plainly unsatisfactory, particularly since they are not in a position to comment whether key threshold elements (such as the existence of a policy) have been met.[44]

59. The most appropriate method of assessing whether an applicant appears to have suffered harm as the result of a crime under the jurisdiction of the Court would therefore be to base this assessment on prior judicial findings, which have been issued in connection with an explicit provision in the Rome Statute and Rules of Procedure and Evidence: for example, the Chamber's determination under article 58(1)(a) that there are reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court, or the Chamber's assessment under article 61 that there are sufficient grounds to believe that the crimes referred to in the charging document were committed.[45]

[43] As observed in its request for leave to appeal, the phrase "in order to present their views and concerns, victims shall make written application to the Registrar" at the beginning of rule 89(1) underscores that the raison d'être of the application process is to facilitate the ability of applicants to present their views and concerns in a proceeding which impacts on their personal interests.

[44] The OPCD refers to its submissions at paragraphs 43-50 in its Observations dated 8 June 2007, and its submissions at paragraph 46 of its Request for Leave to Appeal dated 10 December 2007.

[45] The OPCD is aware that the only factual finding provided for at the situation phase is a decision under article 15(4) that the case investigated by the Prosecution appears to fall within the jurisdiction of the Court. The OPCD nonetheless submits that the dearth of explicit judicial mechanisms (and attendant safeguards) during the situation phase in itself strongly militates against the Chamber rendering abstract factual determinations as to whether a person has suffered harm as the result of a crime under the jurisdiction of the Court during the situation phase, particularly if such an adjudication is not necessary to protect the rights of putative victims.

60. By so doing, the Chamber would be acting clearly within its powers, and in a manner which is protected by pre-existing procedural safeguards.[46] It would also ensure that a future defendant is not burdened with the task of challenging an array of victim-related prejudicial factual allegations, in addition to those levied by the Prosecutor, and would have the capacity to request disclosure materials from the Prosecution in relation to these factual allegations under rule 77 and article 67(2).[47]

61. Moreover, victim-applicants have the ability – via article 53 – to bring specific incidents to the attention of the Prosecution. The Prosecution can therefore be presumed to have these reviewed the reliability of these allegations, and taken them into consideration when framing the alleged incidents in an arrest warrant or charging document. Although it is possible that the Prosecution will not refer to isolated incidents in its arrest warrants, it should also be borne in mind that isolated incidents would be unlikely to meet the strict jurisdictional threshold of crimes within the ICC Statute.

62. The OPCD further respectfully submits that in assessing whether the applicants suffered harm as the result of crimes set out in the arrest warrant or charging document, neither article 68(3) nor rule 85 require that the applicant identify the arrested person or charged person as the perpetrator of these crimes. In this regard, whilst there should be a correlation between the events referred to by the applicants and the alleged crimes set out in the arrest warrant or charging document, there is no

[46] The factual finding would be predicated on evidence tendered by the Prosecutor, who is under a duty to establish the truth. In addition, since State parties have the possibility to challenge the admissibility of a case, this mechanism would ensure that the ICC would not inadvertently render findings concerning victim complaints, which are the subject of an active domestic investigation or prosecution.

[47]The OPCD further submits that it would not be advisable to vest the task of establishing the existence of the alleged offence with the applicants, since any investigative activities carried out by them could impact on the integrity of evidence or witness testimony, and result in key evidence falling outside the control of either the Prosecution or future defendants, whilst being exempt from reciprocal disclosure obligations. The OPCD further notes that both the ECHR and the Inter-American Court have emphasised that in order to implement victims' right to a remedy in an effective manner, the actual act of investigating the complaints should be done by national authorities, and not by the relatives of the deceased: See for example, Kilic v. Turkey (application no. 22492/93 28 March 2000) at para 93: "The authorities thus had an obligation to carry out an effective investigation into the circumstances of the killing of the applicant's brother" . Blake v. Guatemala, Judgment of 24 January 1998, Inter-American Court of Human Rights at para 92. "The Commission argued that, as had been decided in the Velásquez Rodríguez Case,it is the responsibility of the State to conduct serious judicial investigations into human rights violations committed on its territory and not the responsibility of private persons" and at para 97: "Consequently, Article 8(1) of the American Convention recognises the right of Mr. Nicholas Blake's relatives to have his disappearance and death to effectively investigated by the Guatemalan authorities to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained."
At the same time, the OPCD submits that it would be highly inappropriate to entrust the task of compiling information concerning the possible existence of offences falling under the jurisdiction of the Court to a component of the Registry, which is tasked with providing neutral administrative support to witnesses, victim-applicants, and the defence. If the VPRS were to undertake such a task, a conflict of interest could arise between the VPRS's duty to assist applicants whilst at the same time, impartially verifying the credibility of their claims.

requirement that there be a correlation between the view and concerns of the applicants and the Prosecution case theory.[48]

63. In verifying whether victim-applicants have suffered harm as the result of an alleged crime-based incident, the OPCD submits that the decision of the Chamber should be premised on factual allegations or findings which have been provided to both the Prosecution and the Defence, and not *ex parte* evidence or redacted components of an arrest warrant. By requiring that the applications be disclosed to both the Prosecution and the Defence, and according them a right to respond, rule 89 clearly envisages that the application process should be of an adversarial nature.[49] It would therefore fundamentally violate the right of the parties to be heard if the Chamber were to base its decision on extrinsic information or documents which have been communicated on an *ex parte* basis by the VPRS, or *ex parte* components of an arrest warrant or charging document which have not been disclosed to the Defence at that point.[50]

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[48] Such a requirement would frustrate the underlying objective of victim participation – to enable victims to present their personal views and concerns in a manner which is independent of the parties.

[49] In this regard, the Honourable Single Judge held that since rule 89(1) only requires the Registry to transmit 'the application' to the parties, there is no legal obligation to provide any extrinsic documents (Decision of 3 December 2007 at para. 14). Nonetheless, the OPCD further observes that rule 89(1) also states that the Registry shall only transmit the 'application' to the Chamber, and rule 89(3) provides that that it is upon this 'application' which the Chamber should base its decision. As such it is illogical and inconsistent to widen the definition of the term 'application' for the benefit of the Chamber, in order to permit them to receive Reports of the Registry and additional information under regulation 86, whilst at the same time, applying the narrower definition of 'application' to the parties. The OPCD further submits that this interpretation is inconsistent with article 21(3) of the Statute - which stipulates that <u>all</u> provisions of the Rome Statute and the Rules must be interpreted in a manner which is consistent with internationally recognised human rights, such as equality of arms, and the right to a fair, impartial, and transparent judicial process (see above-cited ICC Appeals Judgement of 13 October 2006 at para 67). Finally, the following decision of the ICTY, in which the confirming judge of the Milosevic indictment granted the defence access to the Registry minutes of the *ex parte* indictment confirmation hearing, notwithstanding the absence of an article or rule which expressly entitled the defence to have access to this material: " The issue here, of course, is *not* whether there is a specific provision in either the Statute or the Rules which permits the disclosure of the material before me as the confirming judge other than the supporting material which accompanied the indictment. The Tribunal's powers are not limited to those which are specifically provided in the Statute and the Rules. The Tribunal also has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done" Prosecutor v. Milutinovic et al., Decision on Application by Dragoljub Ojdanic for Disclosure of *Ex Parte* Submissions, Case No. IT-99-37-I (Confirming Judge), 8 November 2002 at para 13.

[50] The OPCD refers to its submissions set out at paras 47-52 of its request for leave to appeal. The OPCD further submits that in the above-cited Decision of 13 October 2006, the Appeals Chamber upheld the principle that proceedings before the ICC should - to the extent possible - be convened on an *inter partes* basis. The Appeals Chamber further ruled that an assessment as to whether proceedings should be *ex parte* or not should not be rendered in the abstract, but should be decided on a case by case basis (at para 67). In this regard, in light of the fact that the names of all persons referred to in the Report of the Registry have been disclosed to the Prosecutor and the OPCD, and thus, disclosure of the report would occasion no prejudice to these persons, there is no factual justification for filing the Report on an *ex parte* basis: see Prosecutor v. Milutinovic et al., Decision on Application by Dragoljub Ojdanic for Disclosure of Ex Parte Submissions, Case No. IT-99-37-I (Confirming Judge), 8 November 2002.

Finally, the OPCD observes that if a Judge renders factual findings on an *ex parte* basis, he or she could be contaminated from participating in later stages of the case, particularly if the Defence isn't provided with a subsequent opportunity to access or contest this information: see Prosecutor v. Krnojelac: 20 May 1999, Decision on Prosecutor's Response to Decision of 24 February 1999 at paras. 11-12.

64. In terms of the procedural safeguards for the application process, the OPCD submits that the information which may be required to constitute a 'complete' application form cannot be fixed in a generic manner for all situations, and for all proceedings. In light of the fact that regulation 86(2)(e) provides that applicants shall, to the extent possible, provide relevant supporting material, the Chamber is required to exercise its discretion to assess whether the applicant was in a position to provide further relevant information or documents. In this regard, the ability of the applicants to adduce identification and supporting documents will necessarily differ from country to country, as will the reliability of such documentation. The parties should also be provided with a right to be heard in advance, since they may be able to provide vital assistance to the Chamber on relevant factual or legal considerations.[51]

65. Finally, the OPCD respectfully requests that prior to the issuance of a final judgement, in order to retain the impartiality of the proceedings, it would be highly preferable for the Court to utilise a nomenclature other than 'victim' for the purpose of referring to applicants who meet the criteria set out in article 68(3).[52]

4. Relief Sought

66. The OPCD respectfully requests the Honourable Appeals Chamber to:

   i. reverse the finding of the Honourable Single Judge that article 68(3) of the Statute can be interpreted as providing for a 'procedural status of victim' at the investigation stage of a situation and the pre-trial stage of a case; and

   ii. Order that the application procedures should be implemented in accordance with the principles set out at paragraphs 55-65.

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http://www.un.org/icty/krnojelac/trialc2/decision-e/90520FI27429.htm

[51] The OPCD refers to its submissions in its Request for Leave to Appeal at para. 49-52.

[52] The OPCD refers to its submissions in its Request for Leave to Appeal at para. 34. The OPCD further refers to the following case law: the Connecticut Supreme Court after referring to a number of other decisions, concluded: "[W]e agree with those courts that have deemed references to the complainant as the "victim" inappropriate where the very commission of a crime is at issue." 276 Conn. 241, State of Connecticut v. Christopher Cortes, No. 17255, Decided Nov. 22, 2005, at page 249 ft 4. See also State v. R.B., 183 N.J. 308, 873 A.2d 511 (2005) dealing with violation of presumption of innocence for court to refer to complainant as 'the victim': "The court's identification of C.R. as the victim in the jury charge had the obvious potential to diminish the presumption of innocence accorded to defendant" (at p. 342-43).

M. Xavier-Jean Keïta
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Dated this Monday, the 4th of February 2008

At The Hague, The Netherlands