

**Cour
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**International
Criminal
Court**

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No.: **ICC-02/05**
Date: **15 February 2008**

THE APPEALS CHAMBER

Before: Judge Navanethem Pillay, Presiding Judge
Judge Georgios M. Pikis
Judge Philippe Kirsch
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: Mr Bruno Cathala

SITUATION IN DARFUR, SUDAN

Public

Prosecution's Response to OPCD's Appeal Brief on the "Decision on the Requests of the OPCD on the Prosecution of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the and Disclosure of Potentially Exculpatory Material"

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Introduction

This appeal by the Office of Public Counsel for the Defence (“the Appellant”) concerns the manner in which applications by victims to participate are to be addressed and victim participation is to be realised during the early stages of the Court’s proceedings; and specifically whether Article 68(3) can be interpreted as providing a “procedural status of victim” in the manner determined by the Single Judge.

The framework established in the Rome Statute regarding victim participation represents a key innovative feature of this Court and is, in the Prosecution’s consistent view, a milestone in international criminal justice.¹ It is part of a consistent pattern of evolution of international law, including but not limited to international criminal law, which recognizes victims as actors and not only passive subjects of the law and grants them specific rights. The challenge for the Court is to apply this innovative framework in a consistent manner, avoiding such varying criteria as to create a general uncertainty for the victims and other participants and respecting the rights of all the participants.

The Appellant makes a series of arguments which it considers demonstrate that the Single Judge erred assessing the victims’ applications in the manner that she did and in assigning victims a “procedural status” on the basis of the findings made. The Appellant goes on, within the terms of the issue certified for appeal, to set out how it considers that applications for participation by victims at this phase of proceedings should be assessed.

All decisions granting victims rights of participation or formal status at any stage, including in the situation, must comply with all requirements established by the Statute, the Rules and the existing jurisprudence. The Appeals Chamber has previously held that determinations of whether an applicant’s personal interests are affected “require careful consideration on a case-by-case basis” and that “an assessment will need to be made in each case as to whether the interests asserted by victims, do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.”² It is also required that participation be

¹ See e.g. *Situation in the DRC*, ICC-01/04-103, 23 January 2006, para. 6; *Situation in the DRC*, ICC-01/04-143, 24 April 2006, para. 7; *Situation in Uganda*, ICC-02/04-85, 28 February 2007, para. 8; *Situation in Darfur*, ICC-02/05-81, 8 June 2007, para. 8.

² *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28, going on to state that “Clear examples of where the personal interests of victims are affected are when their protection is in issue and in relation to proceedings for reparations.”

Further, Judge Pikis has stated that “The first constituent [of article 68(3)] requires that “the personal interests of the victim must be affected”. The status or identity of a person as a victim does not legitimize as such participation in any proceedings before the Court.” “To qualify for participation in proceedings before the Court, the personal interests of a victim as such must be affected. The word “affect” denotes something having a bearing on, impact or

consistent with a fair trial, and that the Chamber specifies the particular proceedings and the modalities of participation.³

Procedural History

1. On 23 July 2007, the Single Judge authorised the Prosecution and OPCD to file observations on applications by victims to participate in the situation.⁴
2. On 21 and 24 August 2007, OPCD applied to the Single Judge to order the production of supporting information by the applicants, and the disclosure of potentially exculpatory information by the Prosecution.⁵ The Prosecution objected to both requests.⁶
3. On 3 December 2007, the Single Judge issued a Decision rejecting both requests by OPCD.⁷ In so doing, the Single Judge, *inter alia*:
 - recalled that “the stage of investigation of a situation ... are appropriate stages of the proceedings for victim participation as provided for in article 68 (3)” (para. 2)
 - held “therefore, there is a procedural status of victim in relation to situation and case proceedings before the Pre-Trial Chamber” (para. 2)
 - recalled that “the personal interests of victims are generally affected by the outcome of the investigation of a situation” (para. 3)
4. OPCD sought leave to appeal the Decision on 10 December 2007.⁸
5. On 6 December 2007, the Single Judge issued the “Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07,

repercussions upon the victims' personal interests. To the question "affected" by what, the self-evident answer is by the proceedings before the Court, in which participation is sought.” - *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, para. 13.

³ The proper modalities of participation which can be encompassed by victims expressing their views and concerns is an important issue, and one which may merit appellate review in due course. However the issue in the Decision, and on this appeal, is not which modalities of participation are appropriate, but whether those modalities must be specified as part of any grant of participant status. The Prosecution submits that they must, and that it is in the interests of all parties and participants to have certainty in this regard from the outset.

⁴ ICC-02/05-85.

⁵ ICC-02/05-94-Conf; ICC-02/05-97.

⁶ ICC-02/05-99-Conf.

⁷ ICC-02/05-110 (hereinafter “the Decision”).

⁸ ICC-02/05-112.

a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07”.⁹ Both the Prosecution and OPCD also sought leave to appeal this substantive decision on victim participation.¹⁰

6. On 23 January 2008, the Single Judge granted leave to appeal a single, overarching issue in the Decision.¹¹ In so doing, after recalling the findings that the personal interest of victims are affected by the investigation and that investigations are an appropriate stage for participation which grants them procedural status, the Single Judge *inter alia* clarified that:

- “the granting of the procedural status of victim in situation or case proceedings automatically gives the applicants the right to participate in such proceedings” (p. 5)
- “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” (p. 5)

7. On 6 February 2008, the Single Judge granted leave to appeal a similar issue in the substantive decision on victim participation,¹² in which the Single Judge further clarified *inter alia* that:

- “the analysis of whether victims' personal interests are affected under article 68(3) ... is to be conducted in relation to "stages of the proceedings", and not in relation to each specific procedural activity ...; and that the investigation of a situation ... are stages of the proceedings in relation to which the analysis of whether victims' personal interests are affected under article 68(3) ... is to be conducted” (p. 6)
- “the Single Judge has found that the personal interests of victims are generally affected at [the investigation of a situation]; that consequently these are appropriate stages of the proceedings for victim participation in all situations and cases before the Court; that the Single Judge does not need to review her findings on this matter each time a new investigation of a situation is opened or a new case is initiated” (p. 8)
- “when determining the set of procedural rights attached to the procedural status of victim, the Single Judge: (i) need not make a second assessment of the victims' personal interests” (p. 9)
- “such rights belong to all natural and legal persons for whom the procedural status of victim has been granted in relation to those stages of the proceedings” (p. 9)

8. On 4 February 2008, OPCD filed its document in support of this appeal.¹³ The Prosecution hereby files its response pursuant to Regulation 65(5).

⁹ ICC-02/05-111, 6 December 2007 (hereinafter the “substantive decision on victim participation”). On 14 December 2007, the Single Judge issued a “Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07” (ICC-02/05-111-Corr).

¹⁰ ICC-02/05-113, 12 December 2007; ICC-02/05-114, 12 December 2007.

¹¹ ICC-02/05-118 (hereinafter “Decision Granting Leave”)

¹² ICC-02/05-121.

¹³ ICC-02/05-119, 4 February 2008 (hereinafter “the Appeal Brief”)

Scope of Response and the existence of parallel appeals with overlapping issues

9. In responding to the appeal brief, Regulation 64(4)(a) allows the Prosecution to state whether it opposes each ground of appeal raised by the Appellant and the relief sought. In this case, the Prosecution does not, in general, oppose either the grounds of appeal or the relief.
10. The issue certified for appeal in this proceeding¹⁴ was whether Article 68(3) can be interpreted as providing for a “procedural status of victim”, and:
 - if so, whether Rule 89 and Regulation 86 provide for an application process which only aims to grant the procedural status of victim and is thus distinct from determinations of the procedural rights attached to such status, and the specific procedural features of that process; or
 - if not, how applications for participation are to be dealt with at this stage.
11. The Prosecution notes that the issue was defined to cover both the investigation stage of a situation and pre-trial phase of the case, however the Appeal Brief largely addresses the determinations of victim participation in the situation.¹⁵ The Prosecution, as respondent, cannot go beyond the boundaries of the grounds of appeal raised by the Appellant, and will thus limit its arguments to determinations of victim participation in the situation.¹⁶

¹⁴ Decision Granting Leave, p. 8.

¹⁵ See in particular Appeal Brief, paras. 5, 33-54. The reasoning of the Appellant relating to the need for factual determinations only to be made after a decision on an application for an arrest warrant (e.g. Appeal Brief paras. 57-59) also appears to refer only to proceedings during the investigation phase of a situation. The Decision against which this appeal was lodged, and all predicate proceedings, further took place solely in the situation rather than in any associated case – see Appeal Brief, paras. 6-16.

¹⁶ The Prosecution notes that victim participation in the pre-trial phase of a case and the sequencing of the necessary determinations may be quite different from such participation in a situation. The essential requirements of a meaningful determination that a victim’s personal interests are affected by specific proceedings, that participation is appropriate, and prescription of the modalities of participation remain. Thus while the Prosecution would still submit that a grant of “procedural status of victim” in the terms of this Decision would not be supported by the Statute, it may well be possible to make a meaningful determination whether a person fulfils the criteria for “victim” in Rule 85 and whether their personal interests are affected by upcoming proceedings, and also prescribe at least provisional modalities of participation (which can be varied if required under Rule 91(1)) once a case has commenced.

The Prosecution also notes that both it and the Defence have sought leave to appeal a separate decision of the Trial Chamber relating to victim participation in the *Lubanga* case (ICC-01/04-01/06-1135 and ICC-01/04-01/06-1136, 28 January 2008), and the Trial Chamber has indicated that it is likely to grant leave to appeal in respect of at least some aspects of the decision (ICC-01/04-01/06-T-75-ENG, 13 February 2008, pp. 2-3). Given the impact that any determination of the principles governing participation in the pre-trial phase of the case will have on any appeal against that decision, should leave be granted, the Prosecution submits that issues of participation of victims in the pre-trial phase of the case should not be independently considered by the Appeals Chamber in this appeal.

12. The Single Judge recently granted both the Prosecution and the Appellant leave to appeal against the substantive decision on victim participation in the situation.¹⁷ The Prosecution also respectfully requests that the Appeals Chamber consider treating the appeals jointly, and entering a consolidated and comprehensive judgement, as this would assist all parties and participants by providing clarity and certainty regarding how the different elements of the system are intended to operate together.

Arguments in Response to Appeal Brief

13. The issue in this appeal, in essence, concerns the system for assessing and potentially granting applications by victims to participate during the situation, including whether a procedural status can be granted without any findings relating to specific proceedings or procedural rights.
14. The Appellant raises four sets of arguments in support of its claim that the Single Judge erred in her interpretation of the relevant provisions and the system established. The Prosecution will discuss each of the Appellant's sets of arguments in turn, and will then respond to the Appellant's submissions regarding how applications for participation should be dealt with at this stage.

The Appellant's submissions regarding whether Article 68(3) can be interpreted as providing for a procedural status of victim at the investigation phase of a situation¹⁸

Granting applicants the status of "victim" is incompatible with the obligation to render a specific determination as to whether the personal interests are affected, and whether it would be appropriate for them to participate in the proceeding in question (paras. 23-32)

15. The Appellant submits that granting victim applicants an undefined "victim" status without any other findings is in breach of the duty to determine whether personal interests are affected, the proceedings in which victims may participate and whether their participation is

¹⁷ In granting leave to appeal that decision, the Single Judge noted that the first issue for which leave was granted to each of the Prosecution and the Appellant was part of the same "overarching issue" in this appeal (see *Situation in Darfur*, ICC-02/05-121, pp. 5, 10). The Prosecution will develop its position on the underlying issue in its document in support of the appeal.

¹⁸ As discussed above (see para. 11 and footnote 15), three of the four grounds brought by the Appellant relate exclusively to participation in the situation, and while the initial ground regarding personal interests and appropriateness formally extend to pre-trial stage of the case, the Prosecution considers that most of these arguments relate primarily to participation during the situation

appropriate.¹⁹ The Appellant notes that this status (and the limited nature of the process) is founded on the generic assumption that the personal interests of every victim are *per se* affected by the investigation of the situation and that their participation in these stages is necessarily appropriate,²⁰ and that therefore victims are granted this procedural status merely by virtue of being victims.²¹ In contrast, the Appellant stresses that the notion of “personal interests” must not be construed in an overly expansive or generic manner, but must refer to tangible and personal interests.²²

16. The Prosecution does not oppose this ground of appeal. The Prosecution has repeatedly stated that the determination of “personal interests” is the cornerstone of victim participation under Article 68(3).²³ Whether an individual’s personal interests are affected is independent of, and must require more than merely, that person’s status as a victim.²⁴
17. The Prosecution submits that relevant personal interests for the purposes of Article 68(3) must be tangible – a “judicially recognisable personal interest”²⁵ – and must be affected by the specific proceedings in which the victims seek to participate; and further notes that the Appeals Chamber has held that “an assessment will need to be made in each case as to whether the interests asserted by victims, do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.”²⁶

¹⁹ Appeal Brief, para. 20, 23.

²⁰ Appeal Brief, para. 24.

²¹ Appeal Brief, para. 24.

²² Appeal Brief, para. 28.

²³ See, e.g., *Situation in the DRC*, ICC-01/04-428, 7 January 2008, para. 4; *Situation in Darfur*, ICC-02/05-114, 12 December 2007, para. 12.

²⁴ The fact that victims can only participate when their personal interests are affected has been recognized from the earliest decisions on victim participation, see e.g. *Situation in the DRC*, ICC-01/04-101-Corr, 23 January 2006, para. 61. According to the Appeals Chamber, any determination of whether the personal interests of victims are affected will require careful consideration on a case-by-case basis; and the personal interest must not be of a general nature and must be affected by the specific proceedings in which the victims seek to participate - see *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, paras. 26-28.

²⁵ See E. Haslam, “Victim Participation at the ICC”, in McGoldrick, Rowe and Donnelly (eds.): *The Permanent International Criminal Court* (2004) at p. 326; see also *Situation in the DRC*, ICC-01/04-84, para. 28; *Situation in the DRC*, ICC-01/04-151, page 6.

²⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28, going on to state that “Clear examples of where the personal interests of victims are affected are when their protection is in issue and in relation to proceedings for reparations.”

Further, Judge Pikis has stated that “The first constituent [of article 68(3)] requires that “the personal interests of the victim must be affected”. The status or identity of a person as a victim does not legitimize as such participation in any proceedings before the Court.” “To qualify for participation in proceedings before the Court, the personal interests of a victim as such must be affected. The word “affect” denotes something having a bearing on, impact or repercussions upon the victims’ personal interests. To the question “affected” by what, the self-evident answer is by the proceedings before the Court, in which participation is sought.” - ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, para. 13.

18. Participation thus cannot be granted on a general and/or abstract basis, nor in a general and/or abstract form. Not only should personal interests be assessed in relation to specific proceedings, but Rule 89(1) explicitly mandates that the Chamber in granting an application shall specify the proceedings in which participation is granted. The Rule goes on to also oblige the Chamber to determine the appropriate manner of participation (i.e. modalities).²⁷ The Decision's approach to participation does neither, and the grant of procedural status of victim thus falls outside the boundaries of the Rule which implements the participation of victims under Article 68(3).²⁸

It is premature and potentially unnecessary to grant applicants the procedural status of victims during the situation phase (paras. 33-38)

19. The Appellant submits that the Court should not subject the applicants and the parties to a rigorous (and resource intensive) application process where there are no concrete proceedings in which any victims could participate. Rather, it argues that the Single Judge should reserve the use of Article 68(3) for later phases and instead let other forms of participation take place, such as victims petitioning directly to Prosecution, which will then examine the submissions and will consider interests of victims in any determination under Article 53(2)(c).

20. The Prosecution does not oppose this ground of appeal, to the extent that it means that Chambers of the Court should only grant participant status in relation to specific proceedings.

Granting applicants the procedural status of victims during the situation phase unduly impacts on the fairness and impartiality of the proceedings (paras. 39-47)

²⁷ These determinations specifying the particular proceedings in which the victims may participate, and the modalities of that participation, must also not be made in the abstract but rather in concrete terms: identifying specific proceedings and granting specific rights; not merely indicating classes of proceedings or rights which might arise in the future and therefore granting contingent or hypothetical rights of participation which would require further rulings to confirm.

²⁸ Rule 89 requires that "In order to present their views and concerns" the victims shall make an application under it; which the Chamber shall rule on and specify how that participation is to take place. The Rules were drafted "as an instrument for the application of the Rome Statute", and "constitute the indispensable procedural legal basis for the functioning of the Court" - Fernandez de Gurmendi, "Elaboration of the Rules of Procedure and Evidence," in Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), 235-235.

21. In this ground of appeal, the Appellant raises concerns about the dangers in a Pre-Trial Chamber entering factual findings relating to the commission of crimes on the basis of either submissions by the applicants and/or material external to the Prosecution's investigative and collection processes. The Appellant compares this process with the normal process of issuance of a warrant of arrest under Article 58, where any finding of "reasonable grounds to believe" (similar in itself to the "grounds to believe" standard created by the Pre-Trial Chamber for making determinations based on victim applications²⁹) is based on evidential submissions from the Prosecutor. The Appellant submits that the duties of the Prosecutor to search for the truth are not shared by victim applicants.³⁰
22. The Prosecution does not oppose this ground of appeal. The fairness of the proceedings and the perception of impartiality of the Pre-Trial Chamber must be safeguarded during the investigation.³¹

Granting applications at the situation phase can potentially exceed the competence of the PTC and of the ICC (paras. 48-54)

23. The Appellant argues that by engaging in an inquiry into the crimes alleged by the applicants, and entering findings pertaining to those events, the court may end up dealing with incidents that fall outside the scope of the Court's jurisdiction (e.g. a set of crimes that actually does not form part of a widespread or systematic attack against the civilian population, and consequently cannot constitute a crime against humanity).³² The Appellant also argues that the Pre-Trial Chambers do not enjoy the power to "render factual findings on 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 the context of a specific prosecution investigation or case".³³
24. While not opposing this ground of appeal, the Prosecution does not agree with all of the Appellant's arguments or share the Appellant's positions in their entirety. The Prosecution

²⁹ See e.g. Decision, para. 8; see also Substantive decision on victim participation, ICC-02/05-111, 6 December 2007, paras. 49-50. This test originated in *Situation in the DRC*, ICC-01/04-101-Corr, 23 January 2006, paras. 97-101.

³⁰ Appeal Brief, para. 41.

³¹ See e.g. *Situation in the DRC*, ICC-01/04-103, 23 January 2006, paras. 23-28; *Situation in Uganda*, ICC-02/04-85, 28 February 2007, paras. 34-37.

³² Appeal Brief, para. 49.

³³ Appeal Brief, para. 53.

concur that Pre-Trial Chambers should refrain from entering findings on the existence of crimes other than on the basis of evidence submitted by the Prosecution; and that, as a general matter, no judicial inquiry into crimes other than those pleaded by the Prosecution should be undertaken by Chambers of the Court. The Prosecution also agrees that “the Court has neither the power nor the obligation to give effect to the right to a remedy for every potential victim” of all crimes within the jurisdiction of the Court.³⁴

25. However, the Prosecution notes that the Statute itself requires the Court to make determinations of whether someone qualifies as a victim at the situation level at least for the purposes of any intervention within the context of Articles 15 (*proprio motu* powers of the Prosecutor) or 53(2) (decision not to investigate), potentially³⁵ before the Prosecution has led any specific evidence before any Chamber. In these cases, it is unavoidable that the intervening Chamber will be required to examine the submissions and supporting materials, if any, from the applicants to determine whether the requirements of Rule 85 have been met.

The Appellant’s submissions regarding how applications for participation at the investigation phase of a situation should be dealt with (paras. 55-65)³⁶

26. The issue certified for appeal by the Single Judge was not limited to the correctness of the granting of a procedural status of victim, but explicitly extended to the question of (if such a status could not be granted in the manner contemplated in the Decision) how applications

³⁴ Appeal Brief, para. 52. Pursuant to article 21(3), the Statute and the Rules must be interpreted in a manner that is “consistent with internationally recognised human rights”. However, the right of victims to have the perpetrators of human rights violations prosecuted, as declared by the IACtHR, is founded upon the specific duty on *States* to provide an effective remedy for human rights violations (*El Caracazo v. Venezuela*, para. 115 and authorities cited therein.). The Court works in a different context, with different objectives: it is not a body to ensure that each individual has redress against national authorities that fail to investigate abuses against them; rather, the ICC may exercise its jurisdiction only in cases of sufficient gravity and is complementary to domestic courts (Statute, articles 17(1)(d) and 53(1) and (2)). There is not an individual right to an effective remedy before the ICC in the same way as there is before national courts. Furthermore, the recognition by the IACtHR of a right to participate in criminal proceedings for violations of human rights makes sense where the respondents are States accused of being responsible for human rights violations. In contrast, the Court is an independent judicial organ, and is obliged to consider the interests of victims at critical moments and to observe victims’ rights as provided by the Statute.” See further *Situation in the DRC*, ICC-01/04-84, 15 August 2005, para. 37.

³⁵ In the context of a hearing under Article 53(2), the Prosecution may have previously led supporting material under Article 15(3).

³⁶ As noted above, the Prosecution is limiting its submissions to the issue of how applications should be addressed in the situation, and not in the pre-trial phase of the case – see further para. 11 and footnote 18, above.

for victim participation were to be dealt with at the situation phase.³⁷ In this regard, the Appellant proposes, *inter alia*, the following:

- (a) At the situation phase, proper use should be made of vehicles other than Article 68(3) and Rule 89, including direct submission of complaints to the Prosecution;
- (b) Registry should develop a comprehensive system of notification to all potential victims that have communicated with the court, whereby the key procedural developments are properly notified; which will in turn facilitate broader participation when there is a proceeding arising that truly affects certain victims' personal interests;
- (c) The application process should only aim at determining which persons are entitled to present their views and concerns on the basis of their personal interests being affected;
- (d) Because of the evidentiary implications, such determination should normally happen after a determination has already been made under Articles 58(1)(a) or 61 (and based on that determination), i.e. where a case has been formed;
- (e) In verifying the existence of harm, the Chamber should only make its determination on the basis of *inter partes* materials and submissions (and not *ex parte* evidence).

27. In relation to (a) the Prosecution stresses that victim participation under Article 68 (3) is independent of, and distinct from the possibility of victims interacting directly with the Prosecution at the investigation phase. The Prosecution agrees in general with points (b)-(c). The Prosecution also notes that the Pre-Trial Chambers' and Single Judges' decisions to date which granted general participation in entire situations led to the dilution or abandonment of critical requirements enshrined in the Court's basic documents for any decision allowing for participation:³⁸ namely identifying the personal interests and how they were affected by the relevant proceedings, and specifying the proceedings in which

³⁷ The Prosecution submits that this issue is properly before the Appeals Chamber. The Single Judge, in framing the issue certified for appeal, expressly asked the parties to address the manner in which applications should be dealt with if not under the existing approach. The Single Judge was thus seeking either the endorsement of the existing process from the Appeals Chamber, or definitive guidance on how the Statute and the Rules require that such applications be considered.

It is within the powers of the Appeals Chamber to provide this guidance. Rule 158(1) gives the Appeals Chamber the power to *inter alia* amend the decision under appeal. As a commentator has noted, "In other words, [the Appeals Chamber] can substitute its own findings and verdict for those of the Trial Chamber" (Brady, "Appeal and Revision", in Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Ardsley 2001) p. 577), which in this case means substituting its findings on how applications for participation are to be dealt with. Furthermore, precedent exists in international criminal jurisprudence for an appeals chamber to set out the proper approach, including the applicable procedures, for a given issue where it rules that the existing approach was not supported by the Statute. For example, the ICTY Appeals Chamber prescribed the proper modalities for the issuance of binding orders in *Prosecutor v Blaskic*, (IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II, 29 October 1997, paras. 67-69 - <http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html>). These procedures in turn led to the adoption of a specific rule of procedure, namely Rule 54 *bis* on Orders Directed to States for the Production of Documents, which was adopted on 17 November 1999.

³⁸ Article 68(3) and Rule 89(1).

participation was authorized and the modalities of participation. Any procedure for assessing victims' applications and a meaningful regime of victim participation at all phases, it is submitted, must incorporate and be built upon these fundamental requirements.

28. Emphasis should be placed on developing a proper system of notification of the main developments taking place at the situation level, allowing for those victims who have communicated with the Court to request participation in specific proceedings.
29. Once an application for participation is made or properly considered in relation to specific proceedings, the Chamber shall, after hearing the parties, make a determination as to whether the applicants' personal interests are affected by those proceedings, whether participation is appropriate, and rule on the permissible modalities of participation.³⁹ All this, plus a description of the relevant proceedings, must be specified in any decision granting participation, as mandated by Rule 89(1).⁴⁰
30. Contrary to a recent decision,⁴¹ there is no need to re-argue and re-decide the status of a person as victim. Once this status has been determined for a given specific set of proceedings, there is no need to re-address this status as the initial determination can be used in subsequent proceedings – therefore only personal interests, appropriateness and modalities of participation need to be revisited. The Prosecution submits that this is consistent with the jurisprudence of the Appeals Chamber,⁴² and also with Regulation 86(8).⁴³

³⁹ Rulings on the modalities of participation may be varied (Rule 91(1)). However as noted above (see footnote 27), the determination of the modalities of participation must be a concrete grant of procedural rights in the particular proceedings at hand, and not a speculative or abstract ruling that certain rights might be exercised at some point in the future.

⁴⁰ In this sense, the Prosecution notes that so far none of the decisions granting participation at the situation level appear to be compatible with a strict reading of the requirements of Rule 89, to the extent that neither the specific proceedings in which participation is allowed, nor the modalities of such participation are specified.

⁴¹ Decision Granting Leave, p. 6; see also Decision granting leave to appeal the substantive decision on victim participation, ICC-02/05-121, 6 February 2008, pp. 6-7.

⁴² The Appeals Chamber has previously ruled that once a person has been considered a victim within the meaning of Rule 85 by the Pre-Trial (or presumably a Trial) Chamber, it does not need to re-address that issue in considering an application for participation (*Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 45). Rather, the Appeals Chamber recognised the need to make a fresh determination of personal interests and appropriateness for each interlocutory appeal, as it would not have been possible for the original Chamber to rule on these initially as the subject matter of the specific proceedings at hand were unknown (*Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 43, 45; and even assess personal interests separately for different proceedings within an interlocutory appeal, *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, paras. 26-27).

⁴³ A decision on participation in particular proceedings can continue to apply, but in a situation the different sets of specific proceedings that may arise will often be entirely unrelated. Thus while the assessment of whether a person qualifies as a victim under Rule 85 remains in effect, new specific proceedings generally will necessarily require a separate determination of whether the personal interests of any given victim are affected and whether participation is appropriate. In contrast, during a case the specific proceedings will have a common thread of

31. Rather than approaching the requirements of Article 68(3), and Rules 85 and 89 in a piecemeal fashion, all elements underpinning victim participation should be jointly determined by Pre-Trial Chambers. A comprehensive determination must be entered before any procedural status or participatory rights can be afforded, and always in relation to specific proceedings within a situation.
32. Finally, the Prosecution submits that the determination of whether a given applicant qualifies as a “victim” within the terms of Rule 85 should be “of a summary and preliminary nature”,⁴⁴ and made in a manner that does not compromise the integrity of the proceedings or entail any premature fact-finding activities by the Pre-Trial Chamber.

Relief Sought

33. For the reasons referred to above, the Prosecution respectfully requests that the Appeals Chamber grant the appeal and order that victim applicants should be granted participation in the proceedings based on:
- (a) finding that their personal interests are affected by specific proceedings at hand, which shall be clearly delineated by the Chamber;
 - (b) finding that their participation in those specific proceedings is appropriate; and
 - (c) clearly prescribing in concrete terms the modalities of that participation.



Luis Moreno-Ocampo
Prosecutor

Dated this 15th day of February 2008
 At The Hague, The Netherlands

particular charges running through them, which could reasonably be seen to warrant, in most cases, the continued application of a finding of participation (including personal interests and appropriateness) unless varied.

⁴⁴ The language is borrowed from Friman and Bitti, “Participation of Victims in the Proceedings”, in Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 461.