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**International
Criminal
Court**

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THE APPEALS CHAMBER

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

Registrar: **Mr Bruno Cathala**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public

**Prosecution's Document in Support of Appeal against the 24 December 2007
Decision on the Victims' Applications for Participation in the Proceedings**

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Introduction

This appeal concerns the manner in which applications by victims to participate are to be addressed and victim participation is to be realised under Article 68(3).

The Rome Statute contains defining new provisions concerning victims of war crimes, crimes against humanity and genocide, “victims of unimaginable atrocities that deeply shock the conscience of humanity”. The crimes they suffer are so serious that they are of concern to the international community as a whole. On this basis, the Rome Statute provides for two landmark evolutions: (1) a commitment of the international community to take responsibility for the protection of victims of such serious crimes, should national States fail to do so, to end impunity and to contribute to the prevention of such crimes. To achieve those goals, the Statute gives a mandate to an independent prosecutor to investigate and prosecute the crimes: protecting the rights of the victims, respecting their interest and respecting the rights of the accused; and 2) it empowers victims as an actor in the international criminal justice system, with a right to express their views and concerns independently in proceedings where their personal interests are affected

The framework established in the Rome Statute regarding victim participation represents a key innovative feature of this Court and is, in the Prosecution’s 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 recognises victims as actors and not only passive subjects of the law, and grants them specific rights² It is a main feature of the Statute and the Rules, which seek to define with as much precision as possible the nature of those rights (right to protection, right to participate, expressing views and concerns at all stages of the proceedings where their personal interests are affected) and the procedures to implement them.

The challenge of the Court is to apply this innovative framework in each situation and case in a consistent manner, avoiding such varying criteria as to create a general uncertainty for the victims – and other participants. While implementation might vary according to the specific circumstances, as provided in the Statute and the Rules, the Prosecution considers that it is crucial to build upon the experience of the last three years of activities of the Court in this

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; *Situation in Darfur*, ICC-02/05-123 OA, 15 February 2008, p. 1.

² Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985; the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly resolution 60/147 of 16 December 2005.

regard and address all issues of relevance to victims' participation in a clear, consistent and certain manner. As Judge Blattmann said, victim participation "is ... a right accorded to victims by the Statute".³ The Prosecution submits that victims' rights to participate should not be dependant on case by case decisions with no agreed criteria.

The Prosecution respectfully submits that the impugned Decision does not provide for the certainty required by the participants. The Statute and Rules themselves mandate a degree of certainty for the participation of victims at any phase – fundamentally by requiring that any victim's personal interests be affected by the proceedings in which they express their views and concerns; and by making a determination of the modalities mandatory for any grant of a right to participate.

The Appeals Chamber has already provided some guidance on these criteria, holding 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."⁴

The definition of personal interests under Article 68 and the related issue of the modalities of victims' participation form the basis of a new, autonomous role of victims in proceedings, expressing their own views and concerns. Such a role is distinct and should not affect the exercise by the Prosecutor of its own exclusive duties and responsibilities.

The question in this appeal is essentially how to interpret and apply these concepts: how to implement the defined role of victims; and specifically whether a Chamber may properly grant participation based only on those findings made in the Decision, without personalised findings including a meaningful assessment of personal interests.

All decisions granting victims rights of participation or formal status at any phase, including in the situation, must comply with all requirements established by the Statute, the Rules and the existing jurisprudence: in particular by requiring that victims' personal interests are affected in a way distinct from the Prosecutor's role by specific proceedings, findings by the relevant Chamber that their participation is appropriate and consistent with a fair trial, and details from the Chamber specifying the particular proceedings and the modalities of participation.⁵

³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1119, 18 January 2008, Separate and Dissenting Opinion of Judge Blattmann,, para. 13.

⁴ *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28.

⁵ 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,

Procedural History

1. The Prosecution recalls and refers to the procedural history set out in its Response to the OPCD's Appeal, filed on 15 February 2008.⁶
2. On 17 July 2007, the Single Judge authorised the Prosecution and the OPCD to file observations on applications by victims to participate in the situation.⁷
3. On 24 December 2007, the Single Judge issued the "Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 à a/0241/06 à a/0250/06",⁸ which recalled and followed earlier jurisprudence of Pre-Trial Chamber I,⁹ and held *inter alia*:
 - "à ce stade de la procédure, il lui suffit de demander si les demandeurs qui souhaitent se voir reconnaître la qualité de victimes autorisées à participer à la procédure au stade de l'enquête sur la situation en question ont démontré qu'il y a des motifs de croire que le préjudice qu'ils ont subi résulte d'un crime relevant de la compétence de la Cour, et que ce crime a été commis dans les paramètres temporels, géographiques et le cas échéant, personnels définissant la situation concernée" (para. 4); and
 - "le stade de l'enquête concernant une situation et le stade préliminaire d'une affaire sont des stades de la procédure appropriés pour la participation des victimes, telle que prévue à l'article 68-3 du Statut ; et b) qu'il est donc possible d'avoir la qualité de victime autorisée à participer aux procédures liées aux situations et affaires portées devant la Chambre préliminaire" (para. 4).
4. Both the Prosecution and the OPCD sought leave to appeal the Decision,¹⁰ which on 6 February 2008 the Single Judge granted in part,¹¹ further clarifying *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

and on this appeal, is not which modalities of participation are appropriate. Rather it is whether those modalities must be specified as part of any grant of participant status (see First Ground).

⁶ ICC-01/04-452 OA4, 15 February 2008, paras. 1-8 ("Prosecution's Response to the OPCD Appeal").

⁷ ICC-01/04-358.

⁸ ICC-01/04-523, 24 December 2007 (the "Decision"). On 31 January 2008, the Single Judge issued a corrigendum to this decision (ICC-01/04-423-Corr).

⁹ Decision, para. 2.

¹⁰ ICC-01/04-428, 7 January 2008; ICC-01/04-429, 7 January 2008.

¹¹ ICC-01/04-444, 6 February 2008 (the "Decision Granting Leave").

the proceedings in relation to which the analysis of whether victims' personal interests are affected under article 68(3) ... is to be conducted" (p. 8);

- "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. 10);
 - "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. 11);
 - "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. 11); and
 - "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. 11).
5. The Prosecution hereby files its Document in Support of Appeal pursuant to Regulation 65(4).

The Issue on Appeal, Scope of Appeal Brief, and Existence of Overlapping Appeals

6. The Prosecution sought, and was granted, leave to appeal the issue of "whether a 'procedural status of victim', within the terms of the Decision, can be granted independent of any finding by the Chamber that the requirements of Article 68(3) and Rule 89 are satisfied, and without addressing and providing for a definition of the personal interests, or following the steps required by the Appeals Chamber's jurisprudence".¹²
7. The OPCD has previously been granted leave to appeal a broader issue relating to the manner of assessing victims' applications, which led to the grant of a "procedural status of victim".¹³ The Prosecution has already requested in its response to the OPCD's first appeal that, as the issues are similar in scope and intrinsically linked, the Appeals Chamber consider treating the appeals jointly, and entering a consolidated and comprehensive judgement.¹⁴ The Prosecution submits that 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, and repeats its request in the present proceedings.

¹² Decision Granting Leave, pp. 6 and 15.

¹³ In the Decision Granting Leave, the Single Judge noted that the first issue raised by the Prosecution and for which leave was granted (and the first issue for the OPCD) was part of the same "overarching issue" as the OPCD had been granted leave to appeal against the prior decision – Decision Granting Leave, pp. 7 and 12.

¹⁴ Prosecution's Response to the OPCD Appeal, paras. 9-12.

8. The Prosecution also notes that while the issue in the OPCD's first appeal was defined to cover both the investigation of a situation and the pre-trial phase of a case,¹⁵ the Decision under appeal was entered solely in relation to the situation, and the issue on this appeal was only defined in relation to determinations in the situation.¹⁶

Arguments on Appeal

9. The issue in this appeal, in essence, concerns the system for assessing and potentially granting applications by victims to participate in proceedings. The key element is whether the requirements of Article 68(3) and Rule 89(1) are met by granting participation without determination that the personal interests of victims are specifically affected by proceedings at hand; whether there can be a process in which a procedural status of victim is granted after fulfilling only some of the criteria and other requirements are deferred to a later stage; and even if this is found to be correct, whether the criteria at the different stages have been correctly interpreted and applied.
10. The Prosecution submits that the decisions involve a series of interlocking errors of law, interpreting Article 68(3) and Rule 89(1) in such a way that they permit the granting of a "procedural status of victim" in the terms of, and based on the findings in, the Decision. This interpretation of Article 68(3) and Rule 89(1) and the system created by the interaction of those two provisions, which is at the core of this appeal, is found not only in the Decision, but also in the decision granting leave to appeal.¹⁷
11. The Prosecution has identified three errors of law in the Decision, as clarified by the subsequent decisions granting leave to appeal:

¹⁵ In that prior appeal, the Prosecution noted that the OPCD's Appeal Brief largely addressed determinations of victim participation in the situation, that the Prosecution as respondent could not go beyond the boundaries of the grounds of appeal raised by the Appellant, and therefore limited its arguments on that appeal likewise to determinations of victim participation in the situation – see Prosecution's Response to the OPCD Appeal, para. 11.

¹⁶ The Prosecution notes that victim participation in the pre-trial phase of a case and the sequencing of the necessary determinations may be different from such participation in a situation. The essential requirements of a meaningful determination that a victims' personal interests are affected by specific proceedings, that participation is appropriate, and prescription of the modalities of participation remain. However the range of proceedings leading up to (and including) the confirmation hearing in a case are more predictable than during the investigation of a situation; and under the jurisprudence of Pre-Trial Chambers I and II, the range of victims permitted to participate is more focused and their personal interests, while not the same, are more likely to be aligned in similar terms. 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 of Rule 85 and whether their personal interests are affected by upcoming proceedings, and also prescribe modalities of participation (which can be varied if required under Rule 91(1)) once a case has commenced).

¹⁷ See Prosecution's Response to the OPCD Appeal, paras. 3, 6 and 7.

- a. First, the Decision erred by interpreting Article 68(3) and Rule 89 as allowing formal procedural status to be granted to victims in an investigation¹⁸ solely on the basis of the findings made in the Decision, and in particular without fulfilling the criteria and complying with the requirements of Rule 89(1). This allowed the victims to be granted this status in the absence of, and without any connection with, specific proceedings in which victims could exercise meaningful rights, and without specifying the nature of those rights (i.e. modalities through which those rights could be exercised).
- b. Second, the Decision erred in the interpretation and application of the requirement in Article 68(3) that a victim's personal interests be affected, by making this finding in general terms: without any case-by-case consideration; and with no connection to particular proceedings and therefore no consideration of the impact of those proceedings on the interests of the victims.
- c. Third, the Decision similarly erred in holding that the requirement of appropriateness was to be assessed in relation to the entire phase of proceedings.¹⁹

First Error – Article 68(3) and Rule 89(1) do not establish a process in which formal status in the proceedings can be granted in the absence of specified proceedings and a finding on the modalities of participation

12. The Decision grants formal procedural status to victims in an investigation solely on the basis of the finding that a person qualifies as a victim pursuant to Rule 85.²⁰ The Decision Granting Leave states that the personal interests of victims are affected in general at the investigation state,²¹ and 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 or piece of evidence”.²²

¹⁸ This in turn automatically grants the right to participation – see Decision Granting Leave, p. 11.

¹⁹ As will be explained in detail below, the investigation of a situation is not a “stage of the proceedings” as that term is used in the Statute or within the meaning of Article 68(3); rather, such broad aspects of the progression of an investigation or case such as the investigation, pre-trial, trial, and appeal are referred to in the Statute, Rules and Regulations as “phases”. Stages of the proceedings, by contrast, are times within a proceeding or phase of proceedings. See further paras. 42-45, below.

²⁰ Decision, paras. 4 and 35-38. See also paras. 40-133 of the Decision analysing the elements under Rule 85 in relation to the individual applicants whose applications have been considered to be complete.

²¹ Decision Granting Leave, p. 10.

²² Decision Granting Leave, p. 8. See also p. 11 of the Decision Granting Leave: “the granting of the procedural status of victim ... automatically gives the applicants the right to participate in such proceedings”, and “when

13. The Decision and the Decision Granting Leave do not provide further details as to the mechanics of the model adopted, or its degree of support in the Statute or the Rules.
14. The Decision effectively creates a two-step process, whereby once furnished with an application for participation at the situation phase, a Pre-Trial Chamber firstly examines the requirements of Rule 85. If the Chamber is satisfied that such requirements are met, the Decision effectively grants an undefined (and unsupported in the Statute and the Rules) “procedural status of victim”, on the basis of an approach to personal interests which is not consistent with the terms of the statute and existing jurisprudence from the Appeal Chamber, and with no consideration of whether participation was appropriate.²³ Also, it is done without any specification of the concrete stages of the proceedings in which such participation is possible and appropriate or the manner in which such participation must materialize is made. Rather, all these elements are deferred for later consideration.²⁴
15. The Prosecution submits that participation cannot be granted on such a general and/or abstract basis, or in such 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 relevant 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).²⁵ The Decision’s flawed 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).²⁶
16. The Prosecution contends that, contrary to a finding made in the Decision Granting Leave,²⁷ the approach taken whereby the personal interests of victims could be and only needed to be assessed in relation to the entire phase of an investigation is not consistent

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; and [...] once the Chamber makes a decision on the set of procedural rights that are attached to the procedural status of victim at the investigation stage of a situation [...], 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”.

²³ Discussed separately below, see paras. 22-45.

²⁴ Decision, p. 4.

²⁵ 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.

²⁶ 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.

²⁷ Decision Granting Leave, p. 8: “[T]his interpretation is consistent with the Decision of the Appeals Chamber of 13 June 2007 because [inter alia] the Appeals Chamber focused its assessment on whether the personal interests of the victims were affected by the overall interlocutory appeal”.

with the jurisprudence of the Appeals Chamber and in particular the Appeals Chamber's judgement of 13 June 2007.²⁸ In that decision, the Appeals Chamber denied the application for victim participation, on the basis that the particular determination at hand in the interlocutory appeal (i.e. the specific stage of the proceeding, namely a determination of whether that appeal was admissible) could not itself lead to the termination of proceedings (which might affect the interests of victims). The Appeals Chamber went on to hold that if it determined that the appeal could be heard, it would then consider whether the victims' personal interests were affected by the appeal and whether it was appropriate for them to participate.²⁹ The Prosecution submits that this decision demonstrates that within the proceedings of an interlocutory appeal (and even within proceedings as narrow as that), there were different "stages" or specific proceedings (the "preliminary issue" of admissibility, and the substantive consideration of the appeal if so) against which the personal interests of the victims had to be analysed separately.

17. Thus, the duty of any Chamber granting participation at any phase – including an interlocutory appeal and the situation phase – is, as mandated by Rule 89(1), to specify the concrete proceedings within the situation in which participation is possible, and not merely refer to the situation as a whole. Similarly, under the clear terms of Rule 89(1), a Chamber granting participatory rights to victims must also specify "the manner in which participation is considered appropriate", something that the impugned Decision also fails to do.
18. The Prosecution respectfully submits that neither Article 68(3) nor Rules 85 and 89(1) vest Pre-Trial Chambers with the authority to make determinations on, and grant participation to, victim applicants in a sequential or piecemeal fashion, i.e. determining first some of the critical elements, such as the requirements for the status of "victim" under Rule 85, and effectively deferring the determinations on the remaining ones for later stages. Rather, the plain language of the provisions, in particular that of Rule 89(1), mandates that all elements underpinning victim participation be jointly determined by Pre-Trial Chambers. It is submitted that making a single comprehensive determination at an appropriate juncture, in addition to complying with the relevant legal requirements, will also ensure that the decisions are cohesive and focussed on the key elements, and enhance procedural economy. In contrast, the bifurcated procedure created by the Single Judges and the undefined status that results from it have no basis in the Statute and the Rules. Thus, a comprehensive

²⁸ *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007.

²⁹ *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, paras. 26-27.

determination must be entered before any procedural status or participation can be afforded, and always in relation to specific proceedings.

19. Contrary to the Decision Granting Leave,³⁰ there is no need to re-argue and re-decide the status of a person as victim by connecting, as required by law, the determination of victim participation to concrete proceedings within a situation: once this status has been determined for a given and specific set of proceedings, there is no need to re-address this status as the initial determination can be used in subsequent proceedings; only personal interests, appropriateness and modalities of participation need to be revisited. The Prosecution submits that this approach is consistent with the jurisprudence of the Appeals Chamber,³¹ and also with Regulation 86(8).³² The Prosecution further stresses that it is the current system which entails an unnecessary amount of litigation and judicial activity, in the sense that it forces the parties to submit observations, and the Chamber to decide, on a participation that may never materialize in practice, for want of specific proceedings affecting the victims' personal interests and allowing for victim participation.³³

Second Error – the Single Judge misinterpreted and misapplied the requirement that a victims' personal interests must be affected

20. The Prosecution submits that the Single Judge erred in holding that the personal interests of victims are affected in general at the investigation stage.³⁴ Such an interpretation, and the ineffectual role that this requirement is relegated to, is at odds with the principles of statutory interpretation, and the jurisprudence of the Appeals Chamber.

³⁰ Decision Granting Leave, p. 9.

³¹ 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).

³² 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 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.

³³ The Prosecution has provided certain considerations on how the system should work in its response to the appealed brief by OPCD: *Situation in the DRC*, ICC-01/04-452 OA4, 15 February 2008, paras. 26-32.

³⁴ Decision Granting Leave, p. 10.

21. There are two interlinked aspects of this error, namely (a) the failure to make a concrete and meaningful determination of whether a victim's personal interests are affected; and (b) the failure to determine the impact on personal interests in light of concrete proceedings.
22. The Appeals Chamber (as well as Pre-Trial Chambers I and II) have recognised that the requirement that a victims' personal interests be affected is an additional criterion which must be met in order for them to be able to express their views and concerns under Article 68(3). Pre-Trial Chamber I, in its initial decision on victim participation, correctly identified:

“that the ‘personal interests’ criterion expressly set out in article 68(3) constitutes an additional criterion to be met by victims, over and above the victim status accorded to them”.³⁵

The Appeals Chamber has also stated that any determination:

“of whether the personal interests of victims are affected ... will 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.”³⁶

23. In this light, the requirement that the personal interests of victims be affected by the proceedings in which they are applying to participate is a cornerstone of the regime of victim participation established by the Statute and the Rules.³⁷ The statement that “the personal interests of victims are affected in general” – merely recalling an earlier generic ruling, without any consideration of the position of individual victims, and without analysing the impact on their interests of any particular proceedings – cannot be reconciled

³⁵ *Situation in the DRC*, ICC-01/04-101-Corr, 23 January 2006, para. 62. This is the decision on which the Single Judge relied in the impugned Decision for her determination of personal interests (see Decision, para. 2). A similar approach can be seen by Pre-Trial Chamber II: *Situation in Uganda*, ICC-02/04-101, 13 August 2007, para. 89.

³⁶ *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.” - *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, para. 13.

³⁷ 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.

with the Appeals Chamber's requirement for "careful consideration on a case-by-case basis".³⁸

24. The Statute empowers victims to participate in proceedings where their personal interests are affected. It also mandates an international Prosecutor to investigate and prosecute the crimes which affected thousands, potentially millions, of victims and which therefore are of concern to the international community as a whole. Under Article 54, the Prosecutor shall establish the truth, investigating both incriminating and exonerating circumstances. The Prosecutor does not purport to represent and express all the views and concerns of victims; the Statute acknowledges this through the key innovation of granting victims a separate and independent voice. However establishing the guilt or innocence of the accused should not be confused with the interest of the victims under article 68.³⁹ That crimes should be effectively investigated and prosecuted is the core of the Prosecutor's mandate. While it is also an overriding interest of the international community as a whole, and of the victims specifically, it is not one that should be the basis for victims' participation in specific proceedings under Article 68(3).
25. The Statute and Rules are to be interpreted in accordance with the ordinary principles of treaty interpretation: "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".⁴⁰ As terms of a treaty are the expression of the intention of the parties, and as the parties must have intended that each provision has a certain effect, the "principle of effectiveness" or "*effet utile*" requires that a provision ought not be given an interpretation that leaves it meaningless or without effect.⁴¹
26. In recalling and following earlier jurisprudence of Pre-Trial Chamber I, the Decision ruled that the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the

³⁸ *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28.

³⁹ As Judge Pikis has noted, victims may not express their views and concerns "in relation to the proof of the case or the advancement of the defence", and the proof of guilt lies squarely within the mandate of the Prosecution (*Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, para. 16).

⁴⁰ *Vienna Convention on the Law of Treaties*, Article 31(1); see e.g. *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 33. In addition, Article 31 stipulates that courts shall also take into account any subsequent agreement between the parties regarding the interpretation or application of the treaty, which would include the Rules of Procedure and Evidence.

⁴¹ *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). This principle is based on or related to interpretation in light of the treaty's object and purpose.

perpetrators of crimes and to request reparations for the harm suffered.⁴² This interpretation and application of this criterion is erroneous in law.

27. Under the interpretation and application of this requirement in the Decision, every victim's personal interests would necessarily be affected. Their interests would be affected by the fact that they fulfil the criteria to be considered a victim pursuant to Rule 85(a) – no further showing would be necessary. The Prosecution notes that the Decision expressly provides that granting the procedural status of a victim, authorised to participate in the proceedings at the stage of the investigation of the situation, only required a finding that the victim had suffered harm from a crime within the jurisdiction of the Court.⁴³
28. Under Article 68(3), it is not every victim who may participate in a given proceeding, but only those whose personal interests have been specifically affected. The requirement that a victim's personal interests be affected must be independent of, and additional to, the finding that they are a victim. The independence of the two determinations – whether a person is a victim, and whether their personal interests are affected – is reinforced by the relationship between Article 68(3) and Rule 89(2).⁴⁴
29. The Prosecution submits that the Decision thus erred by interpreting and applying the criteria of “personal interests” in such a broad manner that it is rendered meaningless, in contradiction of the principles of treaty interpretation⁴⁵ and the existing jurisprudence of this Court.⁴⁶
30. Making this finding was an error in itself, and underpinned the erroneous grant of a procedural status without complying with the requirements of Rule 89(1) and outside of the context of any concrete or impending proceedings.⁴⁷ The system elaborated in the Decision

⁴² Decision, para. 2 recalling and following *Situation in the DRC*, ICC-01/04-101-Corr, 23 January 2006, para. 63). This decision has never been the subject of appellate review.

⁴³ Decision, para. 4: “La juge unique considère en outre qu'à ce stade de la procédure, il lui suffit de demander si les demandeurs qui souhaitent se voir reconnaître la qualité de victimes autorisées à participer à la procédure au stade de l'enquête sur la situation en question ont démontré qu'il y a des motifs de croire que le préjudice qu'ils ont subi résulte d'un crime relevant de la compétence de la Cour, et que ce crime a été commis dans les paramètres temporels, géographiques et le cas échéant, personnels définissant la situation concernée.”

⁴⁴ Rule 89(2) provides two different reasons to reject an application for participation: that a person is not a victim, or that the person does not otherwise fulfil the criteria in Article 68(3), i.e. the personal interests of the victim are not affected. In addition, Rule 89(2) specifies that a victim whose application has been rejected may file a new application later in proceedings. A person's status as a victim is unlikely to change, only the question of whether their personal interests are affected, and there is thus little scope for such a change under the overly expansive interpretation taken in the Decision. See *Situation in the DRC*, ICC-01/04-84, 15 August 2005, paras. 25-27 for a more detailed exposition of these arguments.

⁴⁵ See above, para. 25..

⁴⁶ See e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28; *Situation in the DRC*, ICC-01/04-101-Corr, 23 January 2006, para 62. See further para. 22. above.

⁴⁷ See the First Ground of Appeal, paras. 12-19, above.

Granting Leave compounds the error and its deleterious effects on the system of victim participation as the investigation of a situation progresses. In contrast with prior rulings,⁴⁸ the Decision Granting Leave states that:

“according to the Single Judge's interpretation of article 68(3) of the Statute, 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”.⁴⁹

Thus this fundamental element of the system of victim participation has not only been interpreted in such a way as to make it redundant in the grant of procedural status during the investigation of a situation; it has also been removed entirely from any role in governing subsequent specific aspects of participation.⁵⁰

31. In contrast to the approach adopted in the Decision the Prosecution submits that the relevant personal interest of a victim and the impact of the proceeding upon it cannot be purely speculative. The interest must be a “judicially recognisable personal interest”,⁵¹ and it must be affected in a concrete or tangible manner.

32. Furthermore, for this requirement to have meaning the personal interests of the victim must be affected by and assessed in relation to the particular proceedings, i.e. the specific subject matter of the proceedings, in which the victim wishes to present their views and concerns.⁵² In this regard, the Prosecution submits that the Single Judge further erred in the

⁴⁸ The Prosecution notes that this appears to be in conflict with:

- the approach of Pre-Trial Chamber II (*Situation in Uganda*, ICC-01/04-101, 10 August 2007, paras. 89, 97, 100),
- the original decision on victim participation from Pre-Trial Chamber I (*Situation in the DRC*, ICC-01/04-101-Corr, 23 January 2006, paras. 64, 73 and 75); and
- the previous ruling of the Single Judge in the Darfur situation, in which the Single Judge recently held that “the assessment of the personal interests of the victims in specific proceedings taking place during the investigation of a situation and the pre-trial stage of a case is only to be conducted for the determination of the specific set of procedural rights attached to the procedural status of victim” (*Situation in Darfur*, ICC-02/05-111, 14 December 2007, para. 13).

⁴⁹ Decision Granting Leave, p. 11. See also *Situation in Darfur*, ICC-02/05-121, 6 February 2008, p. 9.

⁵⁰ Thus there would be no determination at all of whether any particular specific proceedings in which a victim would be allowed to exercise procedural rights affect that victim's personal interests – rather, the only determination is a generalised one which is fulfilled solely by the person's status as a victim (as according to the Single Judge, every victim's personal interests are affected in general by the investigation of the situation – see e.g. Decision Granting Leave, p. 10. See also *Situation in Darfur*, ICC-02/05-121, 6 February 2008, p. 8; see further paras.15-17, above).

⁵¹ 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, 15 August 2005, para. 28; *Situation in the DRC*, ICC-01/04-151, page 6; Prosecution's Response to the OPCD Appeal, para 17.

⁵² See further e.g. *Situation in the DRC*, ICC-01/04-84, 15 August 2005, para. 27-28; *Situation in the DRC*, ICC-01/04-141, 6 June 2006, para. 7; *Situation in the DRC*, ICC-01/04-346, 25 June 2007, para. 10; Prosecution's Response to OPCD Appeal, para. 17. Indeed, Pre-Trial Chambers appears to acknowledge that the personal interests of the victims must be affected by the relevant proceedings (see e.g. the authorities cited in footnote 48, above), yet this is not reflected in their approach to personal interests where the investigation as a whole is concerned.

interpretation and application of this requirement by assessing the personal interests of victims not in relation to any specific proceedings, but attempting to make this assessment in relation to the broad investigation of a situation.

33. The Prosecution submits that the relevant impact on the personal interests of the victims *can only be meaningfully assessed in relation to particular proceedings*. It is the particular nature of the proceedings and their relationship with the interests of the victims that allows the case-by-case determination referred to by the Appeals Chamber to be made.⁵³ As Judge Pikis has stated, “To the question ‘affected’ by what, the self-evident answer is by the proceedings before the Court, in which participation is sought.”⁵⁴
34. The Prosecution submits, in this regard, that the Single Judge misinterpreted the jurisprudence of the Appeals Chamber.⁵⁵ In the relevant decision, the Appeals Chamber denied the application for victim participation, as the particular determination at hand in the interlocutory appeal *could not itself lead to the termination of proceedings* (which might affect the interests of victims).⁵⁶ This decision demonstrates that within a particular phase of proceedings (even as confined as an interlocutory appeal), there were different proceedings or stages of proceedings⁵⁷ against which the personal interests of the victims were to be analysed separately.⁵⁸
35. The divorce of the assessment of personal interests from any tangible proceedings rendered the meaningless finding in the Decision inevitable. At that point and in the absence of any

⁵³ *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28. See for example the recent order of the Appeals Chamber regarding participation of victims in the appeal by the OPCD, requiring a statement of how the victims’ personal interests were affected by the particular appeal: *Situation in the DRC*, ICC-01/04-450 OA4, 14 February 2008.

⁵⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, para. 13. See also *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, paras. 23-24 and 28.

⁵⁵ In the Decision Granting Leave to Appeal, the Single Judge stated the determination that a victim’s personal interests are affected “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 and the pre-trial phase of a case are stages of the proceedings in relation to which the analysis of whether victims’ personal interests are affected”, and argued that “this interpretation is consistent with the Decision of the Appeals Chamber of 13 June 2007 because [inter alia] the Appeals Chamber focused its assessment on whether the personal interests of the victims were affected by the overall interlocutory appeal” (Decision Granting Leave, p. 8).

⁵⁶ *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, paras. 26-27. The Appeals Chamber went on to hold that if it determined that the appeal could be heard, then it would consider whether their personal interests are affected by the appeal and whether it is appropriate for them to participate.

⁵⁷ “At this stage of the proceedings, the Appeals Chamber is determining whether, by way of preliminary issue, whether the appeal can be heard at all.” *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 26. For full discussion of the proper interpretation of “stages of the proceedings”, see the Third Ground of Appeal (paras. 36-45, below).

⁵⁸ See para. 16, above.

specific proceedings, only such a general finding could be made; the erroneous ensuing interpretation further demonstrates the underlying error in the Decision.⁵⁹

Third Error – the Single Judge misinterpreted and failed to make a proper determination of whether the participation of victims in the proceedings was appropriate

36. In similar terms to the generic finding of personal interests, the Decision found that the participation of victims in the investigation of the situation (and the pre-trial stage of a case) was, in general and necessarily, appropriate.⁶⁰ In granting leave to appeal, the Single Judge clarified that: “the Single Judge has found that the personal interests of victims are generally affected at these two stages of the proceedings; 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”⁶¹
37. Thus it appears that the Single Judge considers that (a) the determination that participation is appropriate in the investigation of a situation is *per se* appropriate simply because that investigation generally affects the personal interests of victims; (b) the investigation of a situation is, in itself, a “stage of the proceedings” in which victim participation can be considered as appropriate; and (c) after this finding has been made in relation to one situation, it need not be revisited based on the characteristics of other investigations but can simply be applied *pro forma*.
38. While the Prosecution considers that during the investigation of a situation, there are stages of proceedings in relation to which a Chamber could analyse whether victims’ personal interests could be affected for the purposes of Article 68(3), the Prosecution submits that the Decision has misinterpreted and misapplied the requirement in Article 68(3) that the participation of victims occur at appropriate stages. In large part, the reasons demonstrating this error mirror those made above in relation to the erroneous finding that the personal interests of victims were generally affected by the investigation, in conjunction with which the blanket finding of appropriateness was made.

⁵⁹ As clarified by the Decision Granting Leave. See the First Ground, paras. 12-19, above.

⁶⁰ The Decision recalled a finding that “the stage of investigation of a situation and the pre-trial stage of a case are appropriate stages of the proceedings for victim participation as provided for in article 68 (3) of the Statute” (para. 5). As noted above, leave to appeal was granted only in the situation, and therefore this Appeal Brief deals only with these errors as they relate to victim participation in the investigation of a situation.

⁶¹ Decision Granting Leave, p. 10 (citations omitted; emphasis added).

39. First, the decisions appear to have considered that the phase of the investigation of a situation was an appropriate stage for the participation of victims by virtue of the fact that their personal interests are affected (“consequently”).⁶² The Prosecution submits that this is an incorrect interpretation of the requirements in Article 68(3). The requirements that the proceedings affect the personal interests of the victims, and that they participate during stages considered to be appropriate, are individual and cumulative requirements: the fulfilment of one cannot be taken to automatically satisfy the other without independent analysis and evaluation.⁶³
40. The Prosecution further submits that appropriateness (like personal interests) cannot be presumed or determined in the abstract. Which stages of a proceeding will be appropriate for the participation of victims would have to take into account both the characteristics and projected course of the proceedings at hand.
41. The decisions⁶⁴ further stated that there would not even be a consideration of whether participation in subsequent investigations of situations would be appropriate, on the basis that it was appropriate in the investigation of a past situation.⁶⁵ In this regard, the Prosecution notes that not only has the Single Judge misinterpreted and misapplied the criterion of appropriateness in this instance, but also appears to have further erred by prejudging all future situations as necessarily appropriate for all future victims to participate in.
42. Finally, the Prosecution submits that the decisions misinterpreted or misconceived the nature of the “stages of the proceedings” against which the appropriateness of participation is to be determined. The “stages of the proceedings” in which participation must be determined to be appropriate (or not) is not the entire investigation of a situation; rather it relates to points in that phase of the proceedings, during which it is appropriate for victims to present their views and concerns. For example, a proper finding that participation is appropriate in relation to a trial would not be that the trial itself is a stage of the proceedings

⁶² Decision Granting Leave, p. 10. This is further reinforced when the Decision Granting Leave states that “article 68(3) of the Statute requires the Chamber: (i) first, to assess whether the victims’ personal interests are affected at a given stage of the proceedings so as to determine whether that stage is an appropriate stage of the proceedings for them to present their views and concerns (i.e., to participate)” (p. 7, emphasis added).

⁶³ Furthermore, as outlined above the manner in which the Decision approached the requirement of personal interests limited that finding to effectively a question of whether the individual fulfilled the definition of a victim in Rule 85(a) (see paras. 26-29, above). If the requirement of appropriateness is solely dependent on the finding of personal interests, this means that all of the requirements of Article 68(3) have been reduced to the mere question of whether a person is a victim. As noted above (footnote 43), this appears to have been the approach taken by the Decision (para. 4).

⁶⁴ The impugned Decision and Decision Granting Leave, read together.

⁶⁵ Decision Granting Leave, p. 10.

throughout the entirety of which the expression of views and concerns is appropriate; rather it would require determinations of the stages of the trial at which those expressions of views and concerns by victims would be appropriate.⁶⁶

43. In this context, the Appeals Chamber has distinguished within a single interlocutory appeal the existence of different “stages” (one referred to admissibility and the other to the substantive issues) for the purposes of determining victim participation at the appellate phase.⁶⁷

44. Rule 89(1) provides guidance in support of this approach in this specific context, in contradistinction to the approach in the Decision, linking the “appropriate” nature of participation, and thus the identification of “stages of the proceedings” to the specific proceedings (within, for example, an investigation or a trial) and the modalities of participation. Indeed, the rule provides an example of where participation may be appropriate – “making opening and closing statements” – which the Prosecution submits is further indicative of the proper interpretation of “stages of the proceedings” in this context.

45. The Prosecution thus submits that the Single Judge erred in law by considering the investigation of a situation in its entirety to constitute a “stage” of the proceedings in which the participation of victims could be determined to be appropriate or not. As with the

⁶⁶ As Judge Blattmann observed in his Separate and Dissenting Opinion in the recent decision on victim participation at trial in *Prosecutor v Lubanga*: “the Trial Chamber who must determine at what stage during the trial proceedings it is appropriate for victims to present any views or concerns. In its determination of appropriateness, the Trial Chamber should consider, *inter alia*, such factors as the significance of any victims’ participation to the proceedings, the constructiveness of the participation, the legal protected interest affected, judicial economy and whether not allowing an intervention at a particular time during the proceedings would affect the interests of the victims” (ICC-01/04-01/06-1119, 18 January 2008, Separate and Dissenting Opinion of Judge René Blattmann, para. 25). Commentators have similarly noted that victims have a right to intervene “at all crucial stages of the proceedings” but do “not become a true party to the trial” – i.e. there are multiple “crucial stages” of the proceedings within the phase of the trial (Jorda and de Hemptinne, “The Status and Role of the Victim”, in Cassese, Gaeta and Jones (ed) *The Rome Statute of the International Criminal Court* (2002) p. 1405).

⁶⁷ “At this stage of the proceedings, the Appeals Chamber is determining, by way of a preliminary issue, whether the appeal can be heard at all. ... should the Appeals Chamber decide, following its consideration of the preliminary issue, that the appeal can proceed to be heard, it would then consider, on the basis of the application made by the Victims, whether or not their personal interests are affected by the appeal itself and whether it is appropriate for them to participate at that stage.” (*Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, paras. 26-27). In their separate opinions to the same judgement, Judges Pikis and Song also set out clearly that “stage” referred to points within a proceeding, not an entire phase of proceedings:

- “The ‘stage’ relates to the point or interval of the proceedings at which views and concerns may be put forward” (Separate Opinion of Judge Pikis, 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” (Separate Opinion of Judge Pikis, para. 20);
- “In appeals proceedings under article 82 (1) (b) of the Statute, the appropriate stage for participating victims to present their views generally will be after the submission of the document in support of the appeal, once the arguments of the appellant have been fully expressed.” (Separate Opinion of Judge Song, para. 21).

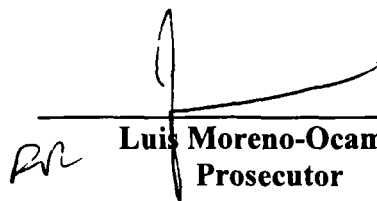
In contrast, the Appeals Chamber has reserved the term “phase” to refer to the broader phases such as pre-trial and trial - “the Pre-Trial Chamber must provide reasoning to support its findings on these aspects irrespective of the phase of the proceedings” (*Prosecutor v Lubanga*, ICC-01/04-01/06-773, 14 December 2006, para. 23).

erroneous assessment of personal interests, this error was rendered inevitable by the Decision's attempt to make the findings required by Article 68(3) in the absence of any concrete or pending actual proceedings before the Court, and underscores the error in attempting to grant participation in the absence of specific proceedings.

Relief Sought

46. For the reasons referred to above, the Prosecution respectfully requests that the Appeals Chamber

- (a) grant this appeal;
- (b) overturn the Decision; and
- (c) direct the Pre-Trial Chamber to only grant a victim-applicant participation on the basis that their personal interest are specifically affected, in connection with identified proceedings before the Chamber, and specifying the modalities of their participation in those proceedings.


Luis Moreno-Ocampo
Prosecutor

Dated this 18th day of February 2008
At The Hague, The Netherlands