

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04
Date: 4 March 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 THE DEMOCRATIC REPUBLIC OF THE CONGO

Public

**Prosecution's Consolidated Response to Applications by Victims to Participate in
OPCD's Appeal on the Production of Supporting Documentation Pursuant to
Regulation 86(2)(e) and Disclosure of Potentially Exculpatory Material**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia, Senior Appeals Counsel
Mr Ekkehard Withopf, Senior Trial Attorney

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta

**Legal Representatives of Victims and
Victim applicants**

Ms Carine Bapita Buyangandu
Mr Patrick Baudoin
Mr Sylvestre Bisimwa
Mr Emmanuel Daoud
Mr Joseph Keta
Mr Michel Shebele
Mr Michael Verhaeghe

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

Introduction

This appeal by the Office of Public Counsel for the Defence (“OPCD”) 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.

A number of victims who have been granted this procedural status by the Single Judge in the situation have applied to the Appeals Chamber to participate in this appeal, as have a number of applicants who have not been granted any procedural status or participatory rights.

The Prosecution does not oppose the participation in this appeal of those victims who the Single Judge has determined to fulfil the criteria of being a “victim” under Rule 85(a), and has granted participatory status: this appeal does affect their personal interests; and their participation is appropriate. On the other hand, the Prosecution submits that those applicants who the Single Judge has not granted the procedural status of victim cannot be permitted to participate in this appeal, in particular as in most cases no finding has been made that they fulfil the criteria set out in Rule 85.

Procedural History

1. The Prosecution refers to the procedural history set out in its Response to the Appeal Brief.¹
2. On 28 and 31 August 2007, the 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.²
3. On 7 December 2007, the Single Judge issued a Decision rejecting the two requests by OPCD to order the production of supporting information by the applicants, and the disclosure of potentially exculpatory information by the Prosecution.³
4. OPCD sought leave to appeal the Decision on 13 December 2007,⁴ and on 23 January 2008 the Single Judge granted leave to appeal a single, overarching issue.⁵

¹ ICC-01/04-452 OA4, 15 February 2008, paras. 1-8.

² ICC-01/04-378 and ICC-01/04-381-Conf. On 18 September 2007, the Prosecution objected to both requests (ICC-01/04-396-Conf).

³ ICC-01/04-417 (hereinafter “the Decision”).

⁴ ICC-01/04-419.

5. On 24 December 2007, the Single Judge issued a decision on victim participation in the situation.⁶
6. On 4 February 2008, OPCD filed its document in support of this appeal.⁷ The Prosecution filed its response on 15 February 2008.⁸
7. On 6 February 2008, the Office of Public Counsel for Victims (“OPCV”) filed a request for clarification regarding the participation of victims in this appeal.⁹
8. Two legal representatives of victims filed applications to participate in the appeal on 8 February 2008¹⁰ and 11 February 2008.¹¹
9. On 14 February 2008, the Appeals Chamber issued a decision on OPCV’s application for clarification and order on the filing of applications for participation in this appeal.¹² The order specified that any applications for participation were to be filed by 21 February 2008, and were to:

“include a statement in relation to whether and how the personal interests of the victims concerned are affected by this appeal, indicating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings and why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence.”

The order further granted the Prosecution and OPCD until 4 March 2008 to respond to any applications, “which may include submissions with regard to the right of victims to participate in this appeal, and the modalities for such participation.”

10. On 14 February 2008, the legal representative of victims VPRS1 to 6 and a/0071/06 filed a substantive response to OPCD’s Appeal Brief.¹³
11. On 21 February 2008, OPCV filed two applications to participate in the appeal, one on behalf of victims who have been granted procedural status and the other on behalf of

⁵ ICC-01/04-438 (hereinafter “Decision Granting Leave”). On 6 February 2008, the Single Judge granted leave to appeal a similar issue in the substantive decision on victim participation (ICC-01/04-444).

⁶ ICC-01/04-523, 24 December 2007 (hereinafter the “substantive decision on victim participation”). On 31 January 2008, the Single Judge issued a corrigendum to this decision (ICC-01/04-423-Corr). Both the Prosecution and OPCD also sought leave to appeal this substantive decision on victim participation (ICC-01/04-428, 7 January 2008; ICC-01/04-429, 7 January 2008)

⁷ ICC-01/04-440 OA4 (hereinafter “the Appeal Brief”)

⁸ ICC-01/04-452-OA4.

⁹ ICC-01/04-442-tENG OA4.

¹⁰ ICC-01/04-446-tENG OA4 (legal representative of victims VPRS1 to 6 and a/0071/06).

¹¹ ICC-01/04-448-tENG OA4 (legal representative of victim a/0105/06).

¹² ICC-01/04-450 OA4 (“Appeals Chamber’s Order”).

¹³ ICC-01/04-451 OA4.

applicants who have not been admitted to participate.¹⁴ A further legal representative also filed an application to participate in the same appeal on that date.¹⁵

12. The Prosecution hereby files its consolidated response pursuant to the Appeals Chamber's order.

Nature of Victim Participation in Interlocutory Appeals

13. As the Appeals Chamber's order confirmed, victims must file an application to participate in interlocutory appeals under Article 82(1)(d). The Prosecution submits that this principle, along with the other principles set out in the prior decisions of the Appeals Chamber relating to interlocutory appeals under Article 82(1)(b),¹⁶ apply equally to all interlocutory appeals. Thus, as set out in the Appeals Chamber's order, victims must demonstrate how their personal interests are affected by the particular appeal; that their participation is appropriate at this stage of the proceedings; and that the presentation of their views and concerns is not prejudicial to or inconsistent with the rights of the defence or a fair trial.¹⁷ These showings, combined with the Pre-Trial (or Trial) Chamber's finding that a person has the status of a victim under Rule 85,¹⁸ will form the basis for any participation in the appeal.¹⁹
14. The Appeals Chamber has also previously ruled that "An application to participate should in principle be made as soon as possible after appeal is filed."²⁰ In the context of an interlocutory appeal under Article 82(1)(d), the Prosecution submits that applications should be made as soon as possible after the decision granting leave to appeal, which commences the appellate process.²¹ The Prosecution notes that interlocutory appeals are in

¹⁴ ICC-01/04-466 OA4; ICC-01/04-467 OA4.

¹⁵ ICC-01/04-468 OA4 (legal representative of victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 and Applicants a/0163/06 to a/0183/06, and a/0185/06 to a/0187/06).

¹⁶ *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 37-55 (recognizing also that the "precise application of the principles ... is likely to be guided by practice and experience"); *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, paras. 21-28.

¹⁷ Appeals Chamber's Order, p. 3.

¹⁸ *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 45.

¹⁹ This was explicitly recognized by some applicants in the present proceedings – see e.g. ICC-01/04-446-tENG OA4, 12 February 2008, paras. 13-14.

²⁰ *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 46.

²¹ While the views and concerns of victims may be most appropriately presented after the document in support of appeal has been filed (*Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Song, para. 21), the Prosecution submits that once the decision granting leave to appeal has been issued (or, in the case of appeals under Article 82(1)(a), (b) or (c), the appeal notice has been filed), the issue or issues are sufficiently defined to allow victims to assess whether the appeal affects their personal interests and file an application to participate.

principle to be determined expeditiously.²² Thus, depending on the nature of the appeal, if victims did not apply to participate promptly, and as a result their participation would delay the resolution of the issue, the Prosecution submits that this may be a factor to be considered by the Appeals Chamber in determining whether the expression of views and concerns by the victims was appropriate at that stage in the appeal, and whether it was consistent with the rights of the defence.²³

15. In relation to the manner of participation, the Appeals Chamber has held that "Observations to be received by the victims were therefore limited and had to be specifically relevant to the issues arising in the appeal rather than more generally."²⁴ Further, the Appeals Chamber has clarified that "Should the Appeals Chamber permit the victims to participate in the appeal, the Prosecutor and the Defence shall be allowed to reply to any filing of the victims, in accordance with the provisions of rule 91 (2)."²⁵

Response to Applications

16. 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.
17. The Prosecution acknowledges that the subject matter of this appeal may have significant repercussions on the victims who have been granted "procedural status of victim" in the situation to date, their standing and the manner in which they are able to exercise their rights under the Statute and the Rules. The Prosecution therefore submits that the personal interests of victims who have been admitted to participate so far are affected by this appeal.

²² See e.g. Article 82(3) (presumption of no suspensive effect unless otherwise ordered); Rule 156(3) and (4) (appeal to be determined on the papers unless decided otherwise by the Chamber, and any hearing to be held as expeditiously as possible); and Regulations 64 and 65 (setting short deadlines for the filing of documents in interlocutory appeals).

²³ See further *Prosecutor v Lubanga*, ICC-01/04-01/06-757 OA7, 6 December 2006, para. 17. The Prosecution notes that in some cases, the expeditious assessment of applications by victims to participate in the appeal, so as to avoid delays and maintain the appropriate nature of that participation, may require proactive management by the Appeals Chamber in setting deadlines for applications and responses. One mechanism which might assist with the management of victim participation in interlocutory appeals, and ensuring that all participants have proper notice of the need for prompt applications, could be to consider a regulation prescribing default deadlines for applications to participate in the various categories of appeals under Article 82 (as the Regulations do for the other filings in such appeals), which could be varied by order of the Appeals Chamber if the circumstances so required.

²⁴ *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 55.

²⁵ *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 49.

18. The Prosecution notes that there is no particular urgency attached to the resolution of this appeal.²⁶ In light of this lack of urgency, the nature of the issue under appeal, and additional considerations identified by applicants, the Prosecution submits that the expression of views and concerns by victims who have been previously admitted to participate or granted procedural status of victim by the Pre-Trial Chamber, in accordance with the modalities proposed below, is appropriate at this stage.
19. The Prosecution also submits that the participation of such victims in this appeal through those proposed modalities is not inconsistent with the rights of the defence or a fair and impartial trial.
20. The Prosecution thus does not oppose, in general, the participation of victims who have been granted the procedural status of victim in this appeal. However the Prosecution submits that mere applicants who have not yet been granted procedural status by the Pre-Trial Chamber, or whose applications have been found to be incomplete, cannot be permitted to participate in this appeal.
21. The Prosecution will respond to the various applications and other documents filed by each of the four legal representatives separately below.

*Legal Representative of victim a/0105/06*²⁷

22. The Prosecution does not oppose victim a/0105/06 being permitted to present his or her views and concerns in this appeal. Victim a/0105/06 was accorded the status of victim authorised to participate in the situation on 24 December 2007.²⁸ The application sets out the basis on which the issue in this appeal affects the personal interests of the victim, as it “essentially concern the rights and privileges accorded to victims”, including this applicant.²⁹ As noted above, the Prosecution submits that participation in accordance with

²⁶ For example, resolution of this issue at the situation stage has no influence on trial proceedings; nor are their proceedings pending in the situation which are awaiting the resolution of this issue to continue.

²⁷ The Prosecution notes that in addition to the application dated 11 February 2008 (ICC-01/04-448), the legal representative of a/0105/06 filed a further application on 22 February 2008 (ICC-01/04-469-Conf-Exp). This application was filed after the expiration of the deadline set in the Appeals Chamber’s order, and did not contain any application for a variation or extension of that deadline. Given that the Prosecution does not oppose the participation of victim a/0105/06 on the basis of the 11 February 2008 application, then pursuant to the Appeals Chamber’s order which directed the Prosecution to file “a consolidated response to all applications received to date and those received by 21 February 2008”, the Prosecution will not respond to the 22 February 2008 application.

²⁸ ICC-01/04-423, 24 December 2007, p. 58.

²⁹ ICC-01/04-448-tENG OA4, 14 February 2008, para. 15. The Prosecution submits, however, that contrary to the application the purpose of participation in an appeal is not to discover whether a victim’s personal interests are affected (contrast p. 5). Rather, a showing of impact on the personal interests of the victim is a precondition to

modalities proposed below is appropriate and is not inconsistent with the rights of the defence or a fair trial.

Legal Representative of victims VPRS 1 to 6 and a/0071/06

23. The Prosecution does not oppose victims VPRS 1 to 6 and a/0071/06 being permitted to present their views and concerns in this appeal. Victims VPRS 1 to 6 were granted the status of victim and allowed to participate in the stage of the investigation of the situation on 17 January 2006;³⁰ and victim a/0071/06 was admitted on 24 December 2007.³¹ This application properly recalls that, in accordance with the jurisprudence and order of the Appeals Chamber, there is no need to revisit the question of whether the person qualifies as a “victim” under Rule 85.³² This issue does affect the victims’ personal interests³³ and is appropriate.
24. The victims recognize that the Prosecution and OPCD will have the right to respond to their views and concerns if they are allowed to participate,³⁴ therefore the Prosecution submits that participation in accordance with modalities proposed below is not inconsistent with rights of defence or fair trial.
25. The Prosecution notes that these victims also filed, on the same day as the Appeals Chamber’s Order, substantive observations on the appeal.³⁵ As this filing was made without the authorisation of the Appeals Chamber or any other procedural basis in this appeal, the Prosecution submits that the Appeals Chamber should disregard the filing at this stage. If the Appeals Chamber grants these victims permission to present their views and concerns on this appeal, then the Chamber could either order them to refile their substantive observations or order that the existing document be taken to be validly filed, and the Prosecution will then respond to the substance of the document within the time limit prescribed by the Chamber.

any participation. If participation could be allowed in order to discover personal interests, the definition would become circular, and participation could be founded on the most speculative of grounds.

³⁰ ICC-01/04-101-Corr, 23 January 2006.

³¹ ICC-01/04-423, 24 December 2007, p. 58.

³² ICC-01/04-446-tENG OA4, 12 February 2008, para. 13.

³³ As the application notes, the appeal will “impact on their status and the rights conferred upon them at the situation stage” - ICC-01/04-446-tENG OA4, 12 February 2008, para. 18. The application also argues that this appeal will also affect their status and rights at the pre-trial phase of the case. The Prosecution recalls its prior submissions in relation to the scope of this appeal being properly focussed on participation in the situation (ICC-01/04-452 OA4, 15 February 2008, para. 11); and further notes that most of the victims who have been granted procedural status in the situation have not been admitted to participate in any of the cases formed to date.

³⁴ ICC-01/04-446-tENG OA4, 12 February 2008, para. 24.

³⁵ ICC-01/04-451 OA4, 14 February 2008.

Office of Public Counsel for Victims

26. The OPCV filed two separate applications to participate in the appeal: one as legal representative of victims admitted to participate in the situation;³⁶ and the other as legal representative of applicants who have not yet been admitted to participate.³⁷

The participation of Victims who have been granted procedural status

27. In relation to those victims who have been granted the status of victim authorised to participate in the situation,³⁸ the Prosecution does not oppose their participation in the appeal.³⁹

28. While the Prosecution submits that the issue in this appeal does affect the personal interests of those victims, it does not agree with each of the arguments raised by OPCV in support of its application.⁴⁰ In particular, the Prosecution disputes the argument that because Pre-Trial Chambers I and II have held that the interests of victims are affected in general by the investigation, the personal interests of all victims are therefore necessarily affected by every interlocutory appeal arising out of an investigation.⁴¹ The Appeals Chamber has previously ruled that the mere fact that a victim participated in, and that their personal interests were therefore affected by, proceedings before a Pre-Trial or Trial Chamber does not mean that their personal interests are necessarily affected by the issue in the appeal.⁴² Furthermore,

³⁶ ICC-01/04-466 OA4, 21 February 2008 ("OPCV Victim Submissions").

³⁷ ICC-01/04-467 OA4, 21 February 2008 ("OPCV Applicant Submissions").

³⁸ Contrary to the submissions of OPCV (OPCV Victim Submissions, para. 11), the Prosecution submits that a/0047/06 to a/0051/06 cannot be considered as victims who have been granted procedural status in the situation. The Single Judge decided that as the applications were pending before the Trial Chamber (in relation to the case of *Prosecutor v Lubanga*), she would not rule on their status in the situation. The Prosecution submits that for the Appeals Chamber to consider these individuals as victims with the right to participate in the context of this appeal could be seen as prejudicing this determination by the Single Judge.

In addition, the Prosecution notes that OPCV raises the power of the Single Judge to expand the issue on appeal beyond the situation (in which the Decision was issued) and to encompass the pre-trial stage of cases (OPCV Victim Submissions, paras. 16-17). The Prosecution recalls its prior submissions regarding the scope of the Appeals and its Response (ICC-01/04-452-OA4, 15 February 2008, para. 11).

³⁹ The Prosecution has not addressed each and every argument raised by OPCV in support of their application, and does not concede any of the arguments made.

⁴⁰ For example, upholding OPCD's appeal would not necessarily deny these victims the right to participate in future specific proceedings – contrast ICC-01/04-466 OA4, 21 February 2008, para. 15. The Prosecution also does not agree with OPCV's interpretation and application of human rights principles to the question of victim participation in appeals before this Court (para. 24), which would again appear to lead to victims being permitted to participate in every interlocutory appeal contrary to the established jurisprudence of this Chamber.

⁴¹ ICC-01/04-466 OA4, 21 February 2008, para. 18.

⁴² See e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 43-44; *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 29 (see more generally paras. 23-28).

this argument is based on a ruling which is at the heart of the dispute in this appeal⁴³ and the Prosecution's appeal against the substantive decision on victim participation.⁴⁴ Indeed, the Prosecution submits that the contrast between OPCV's arguments based on this ruling (i.e. that every victim's personal interests are necessarily affected by every interlocutory appeal in the situation) and the Appeals Chamber's rulings⁴⁵ (i.e. that victims must show how their personal interests are affected by the specific issues in this appeal) reinforces the need for appellate review of the impugned ruling.

29. The Prosecution has also recognised that the participation of victims in this appeal is appropriate,⁴⁶ but again does not agree with some of the reasons put forward by OPCV to support this position.⁴⁷ In particular, for similar reasons to those set out above, the mere fact that a Pre-Trial Chamber has ruled that a victim's participation in the investigation of a situation is appropriate does not in itself make that victim's participation in every appeal arising out of the investigation of that situation also necessarily appropriate.⁴⁸ Once again, this proposition contradicts existing jurisprudence of the Appeals Chamber⁴⁹ and the Appeals Chamber's order;⁵⁰ and is based on another disputed aspect of the ruling which is at the heart of the Prosecution's related appeal.⁵¹

30. The Prosecution has further recognised that participation in accordance with modalities proposed below is not inconsistent with rights of defence or fair trial.

The participation of Applicants who have not been held to be victims or granted procedural status

31. In relation to those applicants who have not been granted the procedural status of victim in relation to the situation, and in respect of whom the Pre-Trial Chamber has generally made

⁴³ ICC-01/04-440 OA4, 4 February 2008, paras. 25-30; see also ICC-01/04-452 OA4, 15 February 2008, paras. 15-18.

⁴⁴ ICC-01/04-454 OA6, 18 February 2008, paras. 20-35.

⁴⁵ See Appeals Chamber's Order, and jurisprudence referred to in footnote 16, above.

⁴⁶ See e.g. OPCV Victim Submissions, para. 22.

⁴⁷ In particular, the Prosecution notes that whether participation of victims at a particular stage of the proceedings is appropriate is not simply a derivation of whether their personal interests are affected, as OPCV asserts (OPCV Victim Submissions, para. 19). This assertion repeats one of the very errors against which the Prosecution is appealing in its related appeal – see ICC-01/04-454 OA6, 18 February 2008, paras. 36-45.

⁴⁸ OPCV Victim Submissions, para. 20.

⁴⁹ See jurisprudence referred to in footnote 16, above.

⁵⁰ If this argument is correct, then the requirement in the Appeals Chamber's Order that victims include in their application a statement "indicating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage in the proceedings" would have been redundant.

⁵¹ ICC-01/04-454 OA6, 18 February 2008, paras. 36-45.

no finding that they qualify as “victims” for the purposes of Rule 85(a),⁵² the Prosecution opposes their participation in this appeal. The Prosecution submits that the arguments raised by OPCV to the effect that victims who have not been granted the right to participate may still express views and concerns under Article 68(3) are circular and undermine the entire system for managing and facilitating victim participation. Furthermore, the system created by this Chamber for the efficient determination of victim participation in interlocutory appeals is predicated on an existing ruling from a Pre-Trial (or Trial) Chamber that an applicant fulfils the criteria of “victim” pursuant to Rule 85(a).

32. Only victims may present their views and concerns to the Court. Many of those applicants represented by OPCV were denied the procedural status of victim in the situation on the basis that their applications were incomplete,⁵³ and there has been no ruling that the applicants in question fulfil the criteria of “victim” pursuant to Rule 85(a). The scheme for the participation of victims in interlocutory appeals developed by the Appeals Chamber requires a prior ruling that a person is a victim in relation to the underlying proceedings.⁵⁴ This is the basis for the briefing requested in the Appeals Chamber’s order, which only requested submissions on the additional requirements of personal interests, appropriateness, and prejudice.⁵⁵ The applicants in question cannot be permitted to present their views and concerns, based on OPCV’s application, because there has been, and can be, no finding that they are victims.⁵⁶

⁵² An exception is victims a/0047/06 to a/0051/06, in respect of whom OPCV notes that the Pre-Trial Chamber has previously found that they have provided sufficient evidence that they suffered harm as a result of crimes within the jurisdiction of the Court (OPCV Victim Submissions, para. 11, referring to *Prosecutor v Lubanga*, ICC-01/04-01/06-601, 20 October 2007).

⁵³ See for example ICC-01/04-423, 24 December 2007, paras. 17 (applicants a/0005/06, a/0019/06, a/0027/06, a/0153/06, a/0155/06, a/0156/06, a/0157/06, a/0159/06, a/0203/06, a/0220/06, a/0222/06, a/0224/06, a/0227/06, a/0229/06, a/0230/06, a/0234/06, a/0236/06, a/0240/06); 18 (applicant a/0036/06); 20 (applicant a/0004/06); 21 (applicant a/0035/06); 22 (applicants a/0073/06 to a/0080/06 and a/0110/06); and 26 (applicants a/0006/06, a/0020/06, a/0039/06, a/0043/06, a/0144/06, a/0154/06, a/0160/06).

⁵⁴ *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 45; as recognized in ICC-01/04-446-tENG OA4, 12 February 2008, paras. 13-14.

⁵⁵ The Prosecution notes that the Appeals Chamber’s order requests submissions on “whether and how the personal interests of the victims concerned are affected by this appeal” (emphasis added).

⁵⁶ The Prosecution submits that the Appeals Chamber is not in a position to make the finding of whether or not the individuals are victims itself. The situation is before the Pre-Trial Chamber, and it is that Chamber which has the jurisdiction to properly consider whether an individual is a victim for the purposes of participation during this phase of the proceedings. An interlocutory appeal during the investigative, pre-trial or trial phases is a stage of the proceedings is a specific and corrective mandate (*Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 71). The role for the Appeals Chamber during such an interlocutory appeal is to determine whether, and which of, the victims who have been permitted to participate in the underlying proceedings by the first-instance Chamber may participate during the interlocutory appeal (in contrast, during a final appeal which constitutes a separate phase, the Appeals Chamber may properly consider whether a person is a victim).

In addition, the information required to determine whether the applicants are victims is not (to the Prosecution’s knowledge) before the Appeals Chamber. In most cases, the applicants have not been granted victim status

33. The Prosecution also strongly disputes OPCV's submissions that Article 68(3) allows alleged victims to present their views and concerns prior to a ruling on their application to participate.⁵⁷ The arguments raised by OPCV are entirely circular – the participation referred to by OPCV is the expression of views and concerns; thus OPCV is effectively arguing that victims may present their views and concerns regardless of whether or not they are authorised to present their views and concerns. Rule 89 governs the procedure by which victims may be authorised to present their views and concerns (“In order to present their views and concerns”).⁵⁸ A formal application is required, which must be adjudicated by the Chamber, including whether the person is a victim pursuant to Rule 85. It is this process which results in a victim being authorised to present their views and concerns, and defines the parameters within which they can be presented.⁵⁹ To allow victims to present their views and concerns before that application is granted would pre-empt and defeat the very purpose of that application.
34. OPCV also refers to Rule 93.⁶⁰ The Prosecution submits that this, and not Article 68(3), is the only provision which could allow for victims to present submissions in the absence of a Chamber considering and accepting an application for participation under Article 68(3) and Rule 89. However the Prosecution submits that this rule grants a Chamber the prerogative to seek the views of victims, and is not a question on which the representative of an applicant may petition the Chamber – amongst other reasons because a person who has been granted no procedural status or participatory rights has no standing to lodge a request with a Chamber. In the present proceedings, the Prosecution further submits that there is no reason for the Chamber to avail itself of this exceptional power, especially in light of the

because their applications were held to be incomplete. Even if complete applications for participation were before the Appeals Chamber, the Prosecution submits that the Appeals Chamber should not make such determinations and permit participation. The determination of victim status, in addition to the other requirements, is a fact, time and resource intensive exercise that it would cause significant and unwarranted delays to the resolution of this appeal. The participation of such applicants would not be appropriate at this stage of the proceedings: given the likely delays involved, and especially in light of the range of victims' perspectives which will already be presented by those victims who may participate.

⁵⁷ OPCV Applicant Submissions, para. 15.

⁵⁸ Rule 89 is the mechanism by which the presentation of views and concerns in Article 68(3) is implemented and realized – it is not separate from or superfluous to it. 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.

⁵⁹ i.e. specifying the proceedings and the manner in which participation is considered appropriate (Rule 89(1)), which is subject to modification (Rule 91(1)).

⁶⁰ OPCV Applicant Submissions, para. 24.

range of victims who have made proper applications and will likely present their views and concerns.

Legal Representative of victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 and applicants a/0163/06 to a/0183/06, and a/0185/06 to a/0187/06

35. This application, like the dual applications of OPCV, seeks the right to present views and concerns both of victims who have been granted procedural status by the Pre-Trial Chamber, and of applicants who have not been granted procedural status.
36. As with the previous applications to participate in this appeal by victims who have been given the status of victim and admitted to participate in the situation, the Prosecution does not object to such persons being granted the right to present their views and concerns, based on the modalities of participation proposed below. As the legal representative notes, the outcome of this appeal will impact on their procedural status and the manner in which they can express their views and concerns.⁶¹ The participation of victims at this stage of this interlocutory appeal and in accordance with the proposed modalities set out below is further appropriate, especially as it will “facilitat[e] the presentation of contradicting views to ensure a binding and considered ruling on the issues under examination”,⁶² and is not prejudicial to the defence or a fair trial.⁶³
37. In relation to the application to participate in the appeal by applicants who have not yet been recognised as victims by the Pre-Trial Chamber or granted procedural status, the Prosecution opposes the requests.⁶⁴ As the Prosecution has set out above, there is no procedural basis which allows applicants who have not been determined to be victims, or

⁶¹ ICC-01/04-468, 21 February 2008, para. 15; see also para. 16 (“To the extent that the appealable issue relates to an interpretation of rule 89 of the Rules and regulation 86 of the Regulations, the determination of same, insofar as it could potentially require the Victims to present new applications to participate in any specific procedural activity in a situation or case proceedings, will directly impact upon the capacity of the Victims to present in a timely manner their views and concerns in those instances when their personal interests are affected.”)

⁶² ICC-01/04-468, 21 February 2008, para. 25.

⁶³ The Prosecution notes that the legal representative has submitted, in the context of arguing that participation would not prejudice the defence, that “Provided that submissions do not expressly or impliedly point to the particular guilt of an accused in respect of actual charges, it is difficult to see how any prejudice might arise” (ICC-01/04-468, 21 February 2008, para. 24). The Prosecution does not agree with this submission. The Prosecution considers that the views and concerns which victims may properly express under Article 68(3) generally will not go the proof of the guilt or innocence of the accused (see further *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, paras. 16, 18-19), and that the participation of victims in some circumstances may nevertheless be prejudicial to the rights of the defence or a fair trial.

⁶⁴ See paras. 31-34, above.

granted any procedural status or participatory rights, by a Pre-Trial Chamber to present their views and concerns in this appeal.⁶⁵

Modalities of Participation

38. As the Appeals Chamber has previously ruled, “the Prosecutor and the Defence shall be allowed to reply to any filing of the victims, in accordance with the provisions of rule 91 (2).”⁶⁶ This point has been repeated and relied upon by some applicants to participate in this appeal in arguing that their participation is appropriate and is not inconsistent with the fairness of the proceedings.⁶⁷
39. The Prosecution submits that the appropriate modality for the presentation of victims’ views and concerns in this appeal is for those views and concerns to be submitted in writing.⁶⁸ The views and concerns should be limited to the specific issue arising in this appeal.⁶⁹ In this regard, the purpose is to present the views and concerns of the victims relating to this issue: the filing is not a legal response to the brief filed by the Appellant;⁷⁰ their role is to provide the Appeals Chamber with the views of the victims on the issue under appeal, not to refute particular legal arguments.⁷¹
40. The Prosecution submits that in this instance, a modest timeframe should be prescribed by the Appeals Chamber for the submission of these views and concerns. A number of victims’ applications which are pending will be affected by the resolution of this appeal. Further, the legal representatives have had an opportunity to consider the issues, and their impact on the victims represented by them, and should be in a position to present those views and concerns promptly.

⁶⁵ This is not to deny that the appeal may relate to the personal interests of such applicants (see e.g. ICC-01/04-468, 21 February 2008, para. 21), however this does not in itself grant them standing to participate. The Prosecution further submits that the prior (unspecified) rulings of a Pre-Trial Chamber regarding participation of applicants in proceedings relating to their protection are of no relevance to the issue at hand (para. 20).

⁶⁶ *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 49.

⁶⁷ See e.g. ICC-01/04-446-tENG OA4, 12 February 2008, para. 24; ICC-01/04-448-tENG OA4, 14 February 2008, p. 5.

⁶⁸ The Prosecution submits that written observations will be sufficient to convey the views and concerns of the victims in relation to this appeal. The practice of the Appeals Chamber to date has not been to hold hearings for interlocutory appeals, consistent with Rule 156(3).

⁶⁹ The Appeals Chamber has held that “Observations to be received by the victims were therefore limited and had to be specifically relevant to the issues arising in the appeal rather than more generally” - *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 55.

⁷⁰ In this regard, the Prosecution disagrees with OPCV’s request that the Appeals Chamber set a time limit for them to file a response to OPCD’s Appeal Brief (OPCV Victim Submissions, pp. 14-15 (dispositif); OPCV Applicant Submissions, p. 16 (dispositif)).

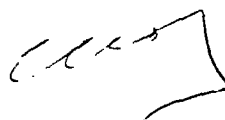
⁷¹ See e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, paras. 15-16.

41. The Prosecution finally submits that the Appeals Chamber should allow it and OPCD to respond to the various views and concerns of the victims. The Prosecution submits that the period prescribed by the Appeals Chamber for the filing of such a response should reflect the number of filings to which it will be responding.⁷²

Conclusion

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

- (a) grant the applications to participate in this appeal of those victims who have been granted “procedural status of victim” by the Pre-Trial Chamber;
- (b) deny the applications to participate in this appeal of those applicants who have not yet been granted “procedural status of victim” by the Pre-Trial Chamber;
- (c) order those victims who are permitted to participate in this appeal to file their views and concerns in writing with a defined period; and
- (d) permit the Prosecution and OPCD to respond to the various submissions of views and concerns within a deadline prescribed by the Appeals Chamber.



Luis Moreno-Ocampo
Prosecutor

Dated this 4th day of March 2008
At The Hague, The Netherlands

⁷² Depending on the number and extent of observations filed by victims, adjustments to the page limit for the responses by the Prosecution and OPCD may be required.