

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04

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THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Observations of the Legal Representative of VPRS 1, VPRS 2, VPRS 3, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and a/0071/06 on the “OPCD appeal brief on the Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the *Regulations of the Court* and on the Disclosure of Exculpatory Materials by the Prosecutor”

Counsel for the Victims
Emmanuel DAOUD

1. Introduction

1. Noting Pre-Trial Chamber I's *Decision authorising the filing of observations on applications for participation in the proceedings*, dated 17 July 2007;¹
2. Noting the OPCD's "Request for Single Judge to order the Prosecutor to disclose exculpatory materials", dated 28 August 2007;²
3. Noting the OPCD's "Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e)", dated 31 August 2007;³
4. Noting Pre-Trial Chamber I's *Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor*, dated 7 December 2007;⁴
5. Noting the OPCD's "Request for leave to appeal the 'Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor'", dated 13 December 2007;⁵
6. Noting Pre-Trial Chamber I's *Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor"*, dated 23 January 2008;⁶
7. Noting the "Application from the Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and a/0071/06 for Leave to Participate in the Appeal filed by

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¹ ICC-01/04-358-tENG.

² ICC-01/04-378.

³ ICC-01/04-382.

⁴ ICC-01/04-417.

⁵ ICC-01/04-419.

⁶ ICC-01/04-438.

the OPCD on 13 December 2007 and Authorised by Pre-Trial Chamber I on 23 January 2008”, dated 8 February 2008;⁷

8. Considering regulation 65(5) of the *Regulations of the Court*, under which participants may file a response within ten days of notification of the document in support of the appeal;
9. Noting the “OPCD appeal brief on the ‘Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor’”, dated 4 February 2008;⁸
9. Noting the “Application for Extension of Time for the Legal Representatives of Victims VPRS 1 to 6 and a/0071/06 to file a Brief in Response to the Observations submitted by the OPCD on the ‘Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Incriminating Materials by the Prosecutor’”, dated 8 February 2008;⁹
10. Noting the *Decision of the Appeals Chamber on the OPCV’s request for clarification and the legal representatives’ request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor*, dated 13 February 2008,¹⁰ which rejects the request for extension of time for filing the brief of the Legal Representatives of Victims VPRS 1 to 6 in response to the observations submitted by the OPCD;
11. **CONSIDERING that the time limit to respond to the OPCD’s appeal brief expires today at 4 p.m. exactly.**
12. **Accordingly, the Legal Representative of Victims a/0071/06, VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 hereby provisionally submits their**

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⁷ ICC-01/04-446-tENG.

⁸ ICC-01/04-440.

⁹ ICC-01/04-447-tENG-Corr.

¹⁰ ICC-01/04 OA4.

observations on the OPCD's claims, despite the Chamber having not yet been able to render its decision on the said Victims' application for participation in the appellate proceedings.

2. Granting a specific procedural status to victims at the situation and pre-trial stages of the case under article 68(3) of the Rome Statute

a) Main submission: inadmissibility of the issue raised by the Pre-Trial Chamber on this point

13. In its request for leave to appeal,¹¹ the OPCD did not raise the issue of the status of victims at the situation stage. In fact, the issue was not dealt with in the decision impugned by the OPCD.¹²

14. Accordingly, the overall issue raised by Pre-Trial Chamber I concerning the existence of a victim status at the investigation stage and the pre-trial stage cannot be admissible, because it goes beyond the subject matter of the appeal.¹³

15. Thus, the arguments raised by the OPCD on this point in its appeal brief are equally inadmissible.

b) In the alternative: justification of the existence of the status

i) Establishment of a general procedural right of victims

16. Under article 68(3) of the *Rome Statute*, judges have full discretion to decide on the modalities of victims' participation in the proceedings:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁴

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¹¹ ICC-01/04-419.

¹² ICC-01/04-358.

¹³ ICC-01/04-438, p. 8.

¹⁴ A/CONF.183/9, *Rome Statute*, article 68(3).

17. The OPCD submits that while the Statute grants discretion to the Court, such discretion may only be exercised on a case-by-case basis, without establishing general rules;¹⁵ however, the OPCD does not advance any valid legal argument in support of its assertion.
18. In fact, the OPCD refers to a previous judgment of the Appeals Chamber which held that the Pre-Trial Chamber should not have set a general rule preventing any flexibility in the future; however, that judgment was issued in relation to a specific context, namely the sensitive subject of redactions in applications for participation.
19. On the contrary, on 6 February 2008, Pre-Trial Chamber I recalled that the judges of the Court would not review the established criteria when faced with each new situation:

[T]he Single Judge has found that the personal interests of victims are generally affected at [the investigation stage of a situation and the pre-trial phase of a case]; that, consequently, these are appropriate stages of the proceedings for victims' 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; and that, accordingly, victims have procedural status at the investigation stage of a situation and a pre-trial phase of a case.¹⁶

20. Accordingly, the OPCD could not generalise the Chamber's answer to a particular case, since no general principle was set out in the decision of the judges of the Appeals Chamber.¹⁷
21. On the contrary, in its decision of 6 February 2008,¹⁸ Pre-Trial Chamber I itself acknowledged the existence of the Chamber's discretion in connection with the procedural status of victims:

Considering that, in exercising its discretion, 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 and the pre-trial stage of a case, 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.

22. Furthermore, as Pre-Trial Chamber I recalled when ruling on the same question of law, but in relation to the situation in Darfur:¹⁹

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¹⁵ ICC-01/04-440, para. 27, referring to ICC-01/04-01/06-568, para. 67.

¹⁶ ICC-01/04-444, referring to ICC-01/04-101-tEN and ICC-01/04-438, p. 5.

¹⁷ ICC-01/04-01/06-568, para. 67.

¹⁸ ICC-01/04-444.

[T]he application process is prior to, distinct and separate from the determination and exercise of the modalities of participation by those to whom the procedural status of victims has been granted.

23. In other words, according to the Pre-Trial Chamber, a distinction should be made between the very existence of a procedural status for the “participants” and the content of the rights attached to that status, which may include the right to participate in an appeal lodged against particular decisions or to receive notification of certain documents, for instance.
24. Indeed, the principle set out in article 68(3) of the Statute and recalled above – that is, the Court’s discretion to assess on a case-by-case basis whether the victims’ views and concerns may be presented and considered – relates specifically to the issue of the scope of the applicants’ procedural rights, not the very principle of the existence of those rights.
25. The OPCD’s argument that granting a “general” procedural status to the victims in connection with the application process would be contrary to the case-by-case review that the Court must undertake is therefore unsound and results from confusion between the granting of procedural status – which is a general issue likely to be raised in relation to many victims at the situation stage – and the content of that status – which can only be determined on a case-by-case basis, taking into account the criteria set by the Court’s now well-established case law.²⁰
26. In any event, it should be noted that the requirement for expeditiousness and effectiveness in international justice means, on the contrary, that procedural frameworks and methodologies for reviewing the various problems the Court may face must be developed so that the Court should not have to continually rehash the same rules with each response it issues, leaving moreover the door open for multiple repetitive observations and appeals preventing it from carrying out its work efficiently.

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¹⁹ *Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor* dated 7 December 2007, ICC-02/05-110, para. 5.

²⁰ See for example Pre-Trial Chamber I’s *Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6* (ICC-01/04-101-tEN) or the judgment issued by the Appeals Chamber on 13 February 2007 on the conditions for participation of victims in particular interlocutory appeals (ICC-01/04-01/06-824).

ii) Use of the nomenclature “victim” prior to the issuance of a judgment

27. The OPCD remarks that the nomenclature “victim” should not be used prior to the issuance of a judgment, since proof of the crime is a prerequisite to the existence of any such “victim”.²¹
28. How can such remarks be accepted when the crime has already been committed? While it is true that the crime has not yet been punished at the situation stage, the crime existed before the investigation phase itself.
29. It should be noted that national legal systems employ the term “victim” as of the investigation stage. How then can it be acceptable for the International Criminal Court, itself a product of the Member States, to fail to observe fundamental rights by suspecting victims of crimes, upon applying to participate, by refusing them *a priori* the very nomenclature of victim?
30. The fact that a person is considered a victim as soon as it has been established that he or she has suffered harm, regardless of whether the perpetrator of the violation has been identified, arrested, prosecuted or found guilty, is also a recognised principle established in international law, in particular by the United Nations General Assembly in its resolution 40/34²² and in its *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 in December 2005.
31. Under article 21(1)(b) of the Statute, the Court is required to apply the principles and rules of international law, including the established principles of the international law of armed conflicts.

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²¹ ICC-01/04-440, para. 66.

²² *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29 November 1985.

32. Moreover, the definition of “victim” under article 85 of the *Rules of Procedure and Evidence* of the Court embodies exactly this interpretation.²³

iii) Appropriateness of the existence of the status of victim at the situation stage

33. The OPCD submits that granting victim status at the situation stage is contrary to the principles set out in article 68(3) of the *Rome Statute*, as neither the criterion of personal interest nor that of common interest is met.²⁴

* *locus standi*: should the interest required be personal or generic?

34. Regarding the criterion of the personal interests of victims, the Office submits that the victims cannot justify a particular interest in participating in the proceedings at this stage since they can already submit complaints to the Prosecutor. The Office further adds that if there were no victim status at the situation stage, their interests would be adequately protected by pre-existing mechanisms since the Prosecutor, in deciding to prosecute, must transmit to the Chamber the identity of the victims who have submitted complaints and are concerned by the prosecution, and should he decide not to prosecute, he is obliged to properly take into consideration the interests of the victims.

The Statute permits victims to submit complaints directly to the Prosecution, which triggers an automatic obligation to investigate the complaint, subject to the criteria set out in article 53(1). If the Prosecutor requires the authorisation of the Chamber to commence an investigation, then the Prosecutor is also obliged – to the extent which is consistent with their safety or the integrity of the investigation – to notify any victims who are known to the Prosecutor or the Victims and Witnesses unit, for the purpose of enabling them to submit representations to the Pre-Trial Chamber. If the Prosecutor decides not to proceed with a prosecution, the Prosecutor is obliged to take into consideration the interests of victims under article 53(2)(c).²⁵

35. However, such reasoning cannot succeed. The victims must be able to make observations during the pre-trial proceedings in order to possibly steer the Prosecutor’s

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²³ **Rule 85 – Definition of victims**

For the purposes of the Statute and the *Rules of Procedure and Evidence*:

(a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

²⁴ ICC-01/04-440, paras. 20-23.

²⁵ ICC-01/04-440, paras 29-31; 34-39.

investigation, and influence the decisions taken by the Pre-Trial Chamber. The acknowledgement and the punishment of the crimes they have suffered depend on the choices made by these two organs and the victims cannot be disregarded in their decisions.

36. Indeed, the President of the Inter-American Court of Human Rights emphatically recalled that the existence and broadening of the procedural rights of victims is fundamental in international justice:

The broader legitimization of the victim or alleged victim in the inter-American judicial proceedings has produced excellent results, from the perspective of both justice and procedural practice. It constitutes, in our understanding, progress in the protection of human rights; the victim cannot be a ‘third party’ in his own case.²⁶

37. The jurisprudence of Pre-Trial Chamber I²⁷ also recalls that:

[T]he Statute [of the ICC] grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests. As the European Court has affirmed on numerous occasions, victims participating in criminal proceedings cannot be regarded as “either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different”.

38. The fact that, in connection with the instant case, the Prosecutor has on numerous occasions expressed views at odds with those defended by the victims further illustrates the fact that the victims’ interests cannot be equated with or reduced to those advanced by the Prosecutor.
39. For example, at the confirmation hearing, the Prosecutor pressed charges in the context of an armed conflict not of an international character; this was challenged by the victims, who considered that the conflict was an armed conflict of an international character. The Pre-Trial Chamber ultimately sided with the Legal Representatives of the victims, at least for part of the period in question.

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²⁶ *Report of the President of the Inter-American Court of Human Rights to the OAS General Assembly*, Mr Sergio Garcia-Ramirez, 5 June 2007.

²⁷ *Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, supra*, ICC-01/04-101-tEN, para. 51.

40. In any event, the victim's personal interest in being involved must not be sought in connection with each act of participation, but only at the various stages in the proceedings, such as the situation or pre-trial stage, the situation being an actual "stage" in the proceedings, since documents pertaining thereto are separately listed on the Court's website and the application for participation forms request an indication of the stage of the proceedings (situation, pre-trial, trial) for which participation is sought.

Hence, the Appeals Chamber has stated that it needed to consider whether the interest of the victims was affected by the appeal phase generally and not by each of the acts affected by this proceeding.²⁸

* General procedural interest and action of the victims

41. Regarding the general interest criterion, the Office submits that victim status cannot be ascertained at this stage because it is based solely on the assertions of the applicant, and that since the characterisation of the alleged crimes is as yet uncertain, the Court may well devote time and effort to facts that, in the final analysis, will be considered as falling outside its jurisdiction. The Office thus maintains that granting procedural rights to a victim prior to the selection of incidents by the Prosecutor impedes the expeditious conduct of the trial.²⁹
42. However, these arguments cannot succeed, as one of the conditions for the participation of a victim at the situation stage (as set out below) is the causal link between the harm alleged and a crime within the jurisdiction of the Court. Accordingly, upon undertaking this examination, the Court conducts a review and a selection of the victims in order to avoid overstepping its jurisdiction.
43. The Chamber's review is in fact a *prima facie* [or at the level of "reasonable grounds to believe"] review in order to comply with the requirement for expeditiousness of the trial.
44. Whilst the Prosecutor's selection of the alleged crime for trial before the Court is uncertain at this stage, the very existence of the situation phase is designed to enable the

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²⁸ ICC-01/04-01/06-925, decision of 13 June 2007.

²⁹ ICC-01/04-440, paras. 32-33, 40-49, 60.

victims to make known what was inflicted upon them and the investigation of these events by the Office of the Prosecutor. Victim participation at this stage of the proceedings cannot therefore be construed as impeding the expeditiousness of the trial, but must assuredly be understood as being indispensable to the missions of the Prosecutor and the Pre-Trial Chamber, which is supposed to exercise its reviewing power over the actions of the Prosecutor at the investigation stage, particularly his prosecutorial choices.

45. In any event, Pre-Trial Chamber I has noted that granting the status of victim at the situation stage was not, *per se*, prejudicial to the rights of the Defence,³⁰ as the Defence would have the right to respond to all observations which will be made by the victims during the proceedings.

iv) The jurisdiction of the Pre-Trial Chamber and the Court

46. In the view of the OPCD, in granting the procedural status of “victim” to the applicants at the situation stage, the Pre-Trial Chamber and the Court might exceed their jurisdiction.
47. The OPCD bases this representation on the premise that granting victim status necessarily requires the Pre-Trial Chamber to rule on the actuality of the crimes alleged by the victims, which could lead it to exceed its jurisdiction if, in due course, the said crimes were to be found not to fall within the jurisdiction of the Court, but within the jurisdiction of national courts.
48. However, it should be recalled that the Pre-Trial Chamber is not making a determination as to the actuality of the crimes since it restricts itself to “grounds to believe” that the said crime was committed.³¹
49. Accordingly, the Pre-Trial Chamber has clearly stated that:

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³⁰ ICC-02/05-110: Pre-Trial Chamber I’s *Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor*, 3 December 2007.

³¹ ICC-01/04-101-tEN, para. 98.

(...)[T]he complementarity principle is applicable to the ongoing proceedings relating to the investigation in the Situation (...). However, it is inapplicable to the application process because the object and purpose of the application process is confined to the determination of whether the procedural status of victim can be granted to applicants in such ongoing proceedings.³²

50. Furthermore, it should be pointed out that the statutory mechanisms for ensuring respect of the principle of complementarity, such as the warning mechanism in article 15(2) mentioned by the OPCD, pertain in the main to the investigation stage, which is the natural stage at which the issue of competition may arise between the two legal systems and two modes of prosecution. Conversely, the effect of the application process, whose purpose is to grant victim status to applicants, is not to determine whether the charged person is responsible for the crimes alleged by the victims as this issue falls within the case and trial stages.
51. This is, in fact, the reading evident in article 15(4) of the Statute, which states that if the Pre-Trial Chamber authorises the Prosecutor to commence an investigation, which implies an examination of the admissibility of the crimes alleged and, by extension, the jurisdiction of the Court. This is only a provisional assessment, conducted as it is “without prejudice to subsequent determinations by the Court with regard to jurisdiction and admissibility of a case”.
52. Accordingly, the arguments advanced by the OPCD can only be rejected.

v) The status defined by the Court

53. Pre-Trial Chamber I defined the status of victim before the Court at the various stages of the proceedings in its decision of 17 January 2006.³³
54. Considering that situations and cases entail the conduct of discrete proceedings, the Chamber holds that the status of victim must be assessed at each stage in light of the specific rules and criteria governing that stage of the proceedings.

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³² ICC-02/05-110.

³³ ICC-01/04-101-tEN: *Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6.*

55. Accordingly, at the situation stage, “the status of victim will be accorded to applicants who seem to meet the definition of victims set out in rule 85 of the Rules of Procedure and Evidence in relation to the situation in question.”³⁴
56. Hence, recalling that the criterion of the nomenclature of the *Rome Statute* used at the situation stage to grant procedural rights in the context of an investigation is that of “grounds to believe” that a crime within the jurisdiction of the Court has been committed, and not that of the “reasonable grounds to believe” criterion required for the case stage, or “substantial grounds to believe” for the confirmation of charges stage,³⁵ the Chamber establishes the principle that at the situation stage, “it is reasonable to set a relatively low threshold”.^{36 37}

3. The application process

a) Characteristics of this process

i) Its autonomous nature

57. Recalling that the application process is governed by rule 89 of the *Rules of Procedure and Evidence* and by regulation 86 of the *Regulations of the Court*, the Court established the principle of autonomy of the application process, its object being confined to the determination of whether to grant victim status to applicants:

[T]he application process is prior to, distinct and separate from, the determination and exercise of the modalities of participation by those to whom the procedural status of victim has been granted.³⁸

58. The Court further observed that the application process is also distinct from the general criminal proceedings before the Court, the aim of which is to bring to light and try the crimes committed:

[T]he application process is not related to questions pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witnesses as it only

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³⁴ ICC-01/04-101-tEN, para. 66.

³⁵ A/CONF/183/9, *Rome Statute*, articles 55(2), 58(1) and 61(7).

³⁶ ICC-01/04-101-tEN, para. 97.

³⁷ ICC-01/04-101-tEN, para. 99.

³⁸ ICC-02/05-110, para. 5.

aims at determining whether the procedural status of victim should be granted to applicants. Hence, it can be distinguished from criminal proceedings before the Court [...] which are governed by specific articles, rules and regulations.³⁹

59. Having set out these principles in the context of the situation in Darfur, Pre-Trial Chamber I merely recalled this normative position in the decision under appeal by the OPCD.⁴⁰

ii) Its non-prejudicial nature

60. Pre-Trial Chamber I stated that in the context of the application process, its analysis did not pertain to assessing the credibility of the applicants or engaging in a process of corroboration.⁴¹
61. Accordingly, granting victim status cannot be prejudicial to the defence since it has no direct bearing on the reinforcement of a potential charge.
62. Pre-Trial Chamber I was indeed able to specify that, as a result of the limited purpose of the application process, the checks and balances applicable in criminal proceedings before the Court were not applicable to the application process.⁴²

ii) Restriction of the information required

63. Reiterating rule 85(a) of the *Rules of Procedure and Evidence* according to which “[v]ictims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”,⁴³ Pre-Trial Chamber I formulated four criteria for considering applications for participation: the natural person criterion, the notion of harm, the context of a crime within the jurisdiction of the Court and the causal link between the crime committed and the harm suffered.⁴⁴
64. The information required for the purposes of the application process and necessary for a decision to be taken were listed: the applicant’s identity, the date of the crime, the

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³⁹ ICC-02/05-110, para. 6.

⁴⁰ ICC-01/04-417, paras. 5 and 6.

⁴¹ ICC-01/04-100-tEN, para. 101.

⁴² ICC-02/05-110, para. 8 and ICC-01/04-417, para. 8.

⁴³ ICC-ASP/1/3, *Rules of Procedure and Evidence*, article 85(a).

⁴⁴ ICC-01/04-101-tEN, paras. 77-94.

location of the crime, a description of the harm suffered in connection with the crime within the jurisdiction of the Court, proof of the applicant's identity, the express consent of the victim if he or she is being represented or the document proving any legal representation and the signature or thumb-print of the applicant on the last page of the form.⁴⁵

65. Regulation 86(2) of the *Regulations of the Court* enumerates the information which must be provided in the standard forms or applications for participation by victims:

- (a) The identity and address of the victim, or the address to which the victim requests all communications to be sent; in case the application is presented by someone other than the victim in accordance with rule 89, sub-rule 3, the identity and address of that person, or the address to which that person requests all communications to be sent;
- (b) If the application is presented in accordance with rule 89, sub-rule 3, evidence of the consent of the victim or evidence on the situation of the victim, being a child or a disabled person, shall be presented together with the application, either in writing or in accordance with rule 102;
- (c) A description of the harm suffered resulting from the commission of any crime within the jurisdiction of the Court, or, in case of a victim being an organization or institution, a description of any direct harm as described in rule 85 (b);
- (d) A description of the incident, including its location and date and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the harm as described in rule 85;
- (e) Any relevant supporting documentation, including names and addresses of witnesses;
- (f) Information as to why the personal interests of the victim are affected;
- (g) Information on the stage of the proceedings in which the victim wishes to participate, and, if applicable, on the relief sought;
- (h) Information on the extent of legal representation, if any, which is envisaged by the victim, including the names and addresses of potential legal representatives, and information on the victim's or victims' financial means to pay for a legal representative.

66. The OPCD maintains that the Chamber cannot draw up a generic list of information required for the purposes of the application process, as such information depends on the victim's nationality and the reliability of the official documents adduced. The OPCD

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⁴⁵ ICC-01/04-374, para. 12.

concludes that the Chamber cannot deny it the opportunity to submit information not falling within such a list.⁴⁶

67. The OPCD's interpretation is, however, erroneous. The Chamber neither draws up a list of the requisite documents, nor does it enumerate the requisite information on a discretionary basis: it merely repeats what is set out in regulation 86(2) of the *Regulations of the Court*.
68. Accordingly, despite the fact that, pursuant to the *Regulations of the Court*, "[b]efore deciding on an application, the Chamber may request, if necessary with the assistance of the Registrar, additional information from, inter alia, States, the Prosecutor, the victims or those acting on their behalf or with their consent",⁴⁷ these extrinsic documents are not part of the application *strictu sensu* and serve only to enlighten the judges prior to their decision, but will not form the basis thereof.

iv) The applications submitted by the indirect victims

b) Disclosure of the applications to the Defence

69. Rule 89(1) of the *Rules of Procedure and Evidence* states that "the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber".⁴⁸ In this respect, the Chamber's only obligation is to order the disclosure of documents requiring observations to be made thereon.⁴⁹ The Chamber is therefore under no obligation to disclose to the Defence extrinsic documents, which although attached to the application, do not form the basis for its decision.⁵⁰
70. In its request of 31 August 2007, the OPCD sought the disclosure of any information which may concern the applicants' possible pre-existing medical conditions, possible national criminal records, any relationship they might have with persons who have been granted victim status by the Court, any relationship they might have with the witnesses

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⁴⁶ ICC-01/04-440, para. 65.

⁴⁷ ICC-BD/01-01-04/Rev.01-05, *Regulations of the Court*, article 86(7).

⁴⁸ ICC-ASP/1/3, *Rules of Procedure and Evidence*, article 89(1).

⁴⁹ ICC-01/04-374, para. 35.

⁵⁰ ICC-02/05-110, para. 15.

or interpreters, if the interpreters or witnesses have submitted applications to participate in the proceedings, and the qualifications of the interpreters mentioned.⁵¹

71. The OPCD cannot argue that it is unable to effectively exercise its right to make observations on the application without this information,⁵² when such information is outside the scope of that required of the alleged victims in connection with their applications for participation. This information does not fall within the disclosure rules under rule 89(1) of the *Rules of Procedure and Evidence*, as the Chamber will not provide a copy of information which it did not require itself to take its decision.
72. In any event, the OPCD cannot rely on some deviation from the fair trial principle as a result of article 89(1) being inapplicable to documents which are extrinsic to the applications for participation. The very disclosure of the applications for participation to the parties is proof that basic procedural rules apply. Simply put: the disclosure of extrinsic documents is of no use to the Defence at this stage, since the applicant has not yet acquired victim status and cannot influence the charges.
73. Similarly, when the OPCD justifies its request by a desire to forestall frivolous applications for participation, it overlooks the fact that the founding texts of the Court and its jurisprudence have clearly circumscribed the notion of victim status and that it is after all only able to submit mere observations. It should be recalled that although the Court has established different requirements for granting victim status according to the stage in the case (investigation, pre-trial or confirmation of charges), the purpose of this gradation is precisely to ensure the efficiency and fairness of the trial by providing for stronger guarantees with respect to the reality of victim status as soon as such status has implications for the defence.
74. It should also be observed that the OPCD cannot link the “prima facie case” process of the International Criminal Tribunal for the former Yugoslavia with the requirement for a “prima facie” victim status at the situation stage before the Court when these processes are different. They do not relate to the same judicial stage: the former arises after the pre-trial phase at the time of the confirmation of the charges in the event that

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⁵¹ ICC-01/04-382.

⁵² ICC-01/04-440, para. 64.

the accused fails to appear, whereas the latter concerns the investigation stage, i.e. before the pre-trial phase of any case.

75. Thus, the OPCD application could not succeed and the decision of Pre-Trial Chamber I should be upheld in this respect.

c) *The Prosecution's disclosure of potentially exculpatory evidence*

76. In its request of 28 August 2007, the OPCD requested that the Prosecutor disclose to it any information in the applications for participation concerning the intensity of hostilities in the villages mentioned in the applications, the presence of persons affiliated with the armed groups in these villages, possible links between the applicants and the armed groups, possible acts of violence committed by the applicants and the applicants' overall credibility.⁵³
77. The OPCD argues that this information must be disclosed as it could be exculpatory to a potential future suspect or accused, pursuant to article 67(2) of the *Rome Statute* and rule 77 of the *Rules of Procedure and Evidence*.

i) *The scope of article 67(2) of the Statute*

78. Under article 67(2), "the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide [...]"⁵⁴
79. However, the Court has taken a decision in the instant case, Pre-Trial Chamber I having stated that the application process is not likely to affect issues pertaining to the guilt or innocence of a suspect or an accused or, further still, the credibility of Prosecution witnesses.⁵⁵

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⁵³ ICC-01/04-378.

⁵⁴ A/CONF.183/9, *Rome Statute*, article 67(2).

⁵⁵ ICC-01/04-100-tEN; ICC-01/04-170-tENG.

80. Accordingly, the provisions of article 67(2) are by no means applicable to the requested information.
81. Moreover, it must be emphasised that the Chamber did indicate that the alleged victim must not be equated with a witness whose credibility would be ascertained:

[T]he role of Applicants in the application process can by no means be confused with that of witnesses in criminal proceedings⁵⁶

ii) The scope of rule 77 of the Rules

82. Rule 77 requires the disclosure of three types of information: material which the Prosecution will rely on at the confirmation hearing or at trial, material to be used for the preparation of the defence for the confirmation hearing or trial and material obtained directly from or which belonged to the accused or the suspect.
83. As seen above, the application process does not affect issues pertaining to the guilt or innocence of a suspect or accused. Accordingly, the material on which this process depends cannot serve as a basis for the prosecution or the preparation of the defence. Since the application for participation process is distinct from the overall pre-trial process, the documents relating thereto are not part of the evidence which may be used by the Prosecutor in his prosecution.
84. Thus, since this material does not by its very nature come from a suspect or an accused person, but from alleged victims, the OPCD's request does not fall within the scope of rule 77.
85. Accordingly, this request could also not succeed and Pre-Trial Chamber I's decision in this respect should be upheld.

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⁵⁶ ICC-02/05-110, para. 20.

4. Conclusion

For these reasons, the Legal Representative of a/0071/06, VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 requests that the Appeals Chamber uphold the decision of Pre-Trial Chamber I dated 7 December 2007.

[signed]

Emmanuel DAOUD

Dated this 14 February 2008

At Paris, FRANCE