

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05 OA OA2 OA3

Date: 3 July 2008

THE APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

Public Document

**Prosecution's Response to Consolidated Statement of Views and Concerns of
Participating Victims pursuant to Appeals Chamber's Decision of 18 June 2008**

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Ms Wanda M. Akin

Mr Raymond M. Brown

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta, Principal Counsel

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

The Prosecution hereby responds to a Consolidated Statement of Views and Concerns, filed by the legal representatives of victims in the Darfur situation, on a series of three appeals pertaining to the scope of their participation at the situation phase.

The Prosecution stresses that in order for a victim to have any participatory rights or procedural status under Article 68(3), all of the criteria set out in that Article, and in Rule 89(1) which implements it, must be fulfilled.

Procedural History

1. On 4 February 2008, OPCD filed a document in support of its appeal against a decision of the Single Judge of Pre-Trial Chamber I denying access to additional information and disclosure of potential exculpatory information regarding applications by victims to participate in the situation.¹ The Prosecution filed its response on 15 February 2008.²
2. On 18 February 2008, the Prosecution³ and OPCD⁴ filed their respective documents in support of two appeals against a related decision of the Single Judge, the "Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07".⁵ The responses were filed on 29 February 2008.⁶
3. On 11 March 2008, the legal representative of a number of victims and applicants applied⁷ to participate in the three appeals by the Prosecution and OPCD relating to victim participation in the situation. On 20 March 2008, Prosecution filed a

¹ ICC-02/05-119 OA ("OPCD's First Appeal Brief").

² ICC-02/05-123 OA.

³ ICC-02/05-125 OA2 ("Prosecution's Appeal Brief").

⁴ ICC-02/05-126 OA3 ("OPCD's Second Appeal Brief").

⁵ ICC-02/05-111, 6 December 2007 (the "Decision"). On 14 December 2007, the Single Judge issued a "Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07" (ICC-02/05-111-Corr).

⁶ ICC-02/05-130 OA3; ICC-02/05-131 OA2.

⁷ ICC-02/05-134 OA2 OA3 ("Application to Participate").

response to that Application to Participate, and refers to the detailed procedural history set out therein.⁸

4. On 18 June 2008, the Appeals Chamber granted those victims who have been recognised as such in the situation the right to present their views and concerns regarding their personal interests in the issues raised in the appeals, by 25 June 2008. The Prosecution and OPCD were granted until 3 July 2008 to respond.⁹
5. On 24 June 2008, the Appeals Chamber granted the legal representatives, as well as the Prosecution and OPCD, an extension of 10 pages for their filings.¹⁰
6. On 25 June 2008, the legal representatives filed a Consolidated Statement of Views and Concerns.¹¹ The Prosecution hereby files its response to the Consolidated Statement of Views and Concerns.

Scope of the Consolidated Statement of Views and Concerns

7. The Appeals Chamber's Order "limit[ed] the victims to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal."¹² The Prosecution notes that aspects of the Consolidated Statement of Views and Concerns have gone beyond merely presenting the views and concerns of victims and instead present legal arguments refuting the substance of the parties' appeals or supporting the merits of the Decision.¹³
8. The Prosecution has previously submitted that:
 - "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;

⁸ ICC-02/05-135 OA OA2 OA3.

⁹ ICC-02/05-138 OA OA2 OA3 ("Appeals Chamber's Order").

¹⁰ ICC-02/05-143 OA OA2 OA3.

¹¹ ICC-02/05-144 OA OA2 OA3.

¹² Appeals Chamber's Order, para. 62.

¹³ See in particular Consolidated Statement of Views and Concerns, paras. 14-17; 19-22; 29-42.

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”;¹⁴ and

- as a result, and contrary to the position of the legal representatives, “challeng[ing] one by one” legal arguments raised by the parties is not the proper purpose nor role of victims’ observations.¹⁵

9. To the extent that the Appeals Chamber considers that the Consolidated Statement of Views and Concerns complies with its Order, the Prosecution will set out its response to the Consolidated Statement of Views and Concerns.

Submissions in Response to Consolidated Views and Concerns

The participation of victims must be linked with identifiable proceedings

10. In the first instance, the Prosecution submits that the legal representatives have misinterpreted the Prosecution’s submissions regarding the distinction between phases of proceedings and stages of the proceedings.¹⁶ ¹⁷ This distinction is firstly well founded in the Statute and the Rules.¹⁸ Further, the Prosecution did not

¹⁴ ICC-02/05-142-Corr OA OA2 OA3, 23 June 2008, para. 7; ICC-02/05-135 OA OA2 OA3, 20 March 2008, footnote 57; see also *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, paras. 15-16.

¹⁵ ICC-02/05-142-Corr OA OA2 OA3, 23 June 2008, para. 7; contrast victims’ Application for Extension of the Page Limit, ICC-02/05-139 OA OA2 OA3, 19 June 2008, para. 13.

¹⁶ Consolidated Statement of Views and Concerns, footnote 22.

¹⁷ “On behalf of the Participating Victims we respectfully submit that such artificial distinctions are nowhere supported by Article 68(3) or Rules 89 - 93.” - Consolidated Statement of Views and Concerns, footnote 22.

¹⁸ The Statute, Rules and Regulations of the Court each use “phase” when referring to the broad components of pre-trial or trial, referring respectively to “the pre-trial phase of a case” (Article 39(4)), “the pre-trial phase” (Title of Chapter 5, Section VI of the Rules), and “the pre-trial or trial phase of a case” (Regulation 12).

In contrast, the Statute and Regulations refer to stages as being points or periods within a given phase: Article 74(1) requires that all judges “shall be present at each stage of the trial”; Regulation 55(2) even more explicitly refers to the Chamber after “having heard the evidence” giving participants the opportunity to make submissions “at an appropriate stage of the proceedings”; and Regulation 77(4) also confirms that there are different stages within an investigation, rather than the investigation being a stage, including within the mandate of the Office of Public Counsel for the Defence “representing and protecting the rights of the defence during the initial stages of the investigation”.

This further appears consistent with the use of these terms by the Appeals Chamber regarding victim participation, in which the Appeals Chamber ruled that “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” (*Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 26), thus suggesting that this was one stage within the appeal, with later stages where participation might be appropriate (see para. 27).

The Prosecution submits that it would be contrary to the principles of interpretation of the Statute - considering the ordinary meaning of the words, in their context, and so as to give effect to the intention of the drafters - to take a word which is used in an unambiguously narrow sense at certain points in the Statute, Rules and Regulations (“stages”), and at a different point give that word a much broader interpretation, especially when the Statute, Rules and Regulations have used a different term to capture that broader meaning elsewhere (“phases”).

submit that because the investigation is a phase, rather than a stage, there can be no participation during the investigation.¹⁹ Rather, the Prosecution submits that within the investigation or pre-trial phases, it is only in relation to identifiable stages of those proceedings that the participation of victims can be meaningfully assessed and can be granted within the terms of the Statute and Rules.²⁰

11. The example provided by the legal representatives²¹ illustrates this point well. Proceedings under Article 53 constitute a particular stage of the proceedings during the investigation phase, and are a stage of the proceedings in which the Rules contemplate that the participation of victims may very well be appropriate, as the Prosecution has recognised.
12. Indeed the Rule highlighted in the Consolidated Statement of Views and Concerns demonstrates that the participation of victims is granted only in terms of defined events or “stages of the proceedings”. Rule 92 mandates notification to, *inter alia*, “victims or their legal representatives who have already participated in the proceedings”.²² Both the language and logic of this provision demonstrate that granting of procedural status must be limited to specific stages of proceedings within the investigation or pre-trial phase: “have already participated in” shows that the victims must have previously participated during the proceedings (i.e. earlier in the situation or the case), but that such procedural status had expired or ceased. The same intent is manifest in the other versions of Rule 91.²³

The participation of victims requires that all the criteria in Article 68(3) and Rule 89 be fulfilled

¹⁹ “These provisions of the rules would have no meaning if victim participation were excluded at the situation stage.” - Consolidated Statement of Views and Concerns, footnote 22.

²⁰ Prosecution Appeal Brief, paras. 34, 38, 42-45.

²¹ “Rule 92 requires notification to victims even of decisions of the Prosecutor not to initiate an investigation or not to prosecute pursuant to Article 53, ‘to allow victims to apply for participation in the proceedings’.” - Consolidated Statement of Views and Concerns, footnote 22.

²² Rule 92(2) and (3), as quoted in Consolidated Statement of Views and Concerns, footnote 22 (emphasis by legal representatives).

²³ For example, the French version of Rule 92(2) and (3) refers to victims “qui ont déjà participé”, as opposed to “qui participaient” - i.e. their participation is an event which has ended, not a continuing act or state. The Spanish version of the Rules (referring to “las víctimas o sus representantes legales que hayan participado ya en las actuaciones o”) conveys a similar effect.

13. The Prosecution submits that many of the legal representatives' submissions are founded on a key misconception: that the definition of victim in Rule 85 – a definition of general application – itself confers a procedural status, and thus the right to participate.²⁴ This is expressed in, for example, para. 30 of the Consolidated Statement of Views and Concerns,²⁵ which refers to “the requirements for victim participation” purely in terms of Rule 85(a) and without any reference to the elements in Article 68(3) or Rule 89.

14. The legal representatives consider that it is Rule 85(a) which grants a procedural status in the proceedings, with the other requirements being purely consequential. The Prosecution submits that rather, Article 68(3) and Rule 89 are the provisions which enable the participation of victims, and a victim cannot be granted any participatory rights or procedural status until all of the requirements of those provisions (of which the definition as a victim under Rule 85(a) is but one) have been fulfilled. The legal representatives are correct that the Statute:

“organiz[es] the respective criteria to be fulfilled in two distinct provisions, rule 85 of the Rules of Procedure and Evidence on the one hand, and Article 68(3) of the Rome Statute on the other hand.”²⁶

However it is the criteria in Article 68(3) that grant the right to participate, not Rule 85(a) alone.

15. The definition of “victim” in Rule 85(a) is a definition of general application, defined “[f]or the purposes of the Statue and the Rules of Procedure and Evidence”. This definition is not directly linked to, or limited to, victim participation.²⁷ Rather, this definition is provided in the context of the general

²⁴ In addition to para. 30, discussed below, see e.g. Consolidated Statement of Views and Concerns, paras. 15 (considering that the only two determinations that need to be made are “determination of the status of victims and the determination of the modalities of participation”)

²⁵ “Pre-trial Chamber I, interpreting rule 85(a), has established the requirements for victim participation at the situation stage as follows: (a) the victim be a natural person; (b) he or she must have suffered harm; (c) the crime from which the harm ensued must be within the jurisdiction of the Court; and (d) there must be a causal link between the crime and the harm suffered.”

²⁶ Consolidated Statement of Views and Concerns, para. 15.

²⁷ Throughout the Statute, while the term ‘victim’ is mentioned four times in reference to victim participation, it is mentioned eighteen times in other contexts. Similarly, in the Rules the term victim appears five times with respect to participation, and another forty times in other contexts; and in the Regulations, it appears six times in reference to participation, but twelve times in relation to other issues.

principle that the Court shall take into account the needs of all victims.²⁸ The definition further applies to a wide range of different issues and functions of the Court relating to victims, including protection of victims;²⁹ consideration of the interests of victims by the Court;³⁰ and reparations.³¹

16. It is not the case that every victim who meets the criteria in Article 85(a) is necessarily a participant; and that the requirements of personal interests and appropriateness are only to be assessed in relation to the modalities of such participation.³² Rather, the participation of victims is granted by Article 68(3),³³ and Rule 89(1) which implements such participation,³⁴ which also sets the parameters of such participation.

17. As noted by the legal representatives, provisions of the Statute, notably Articles 15(3) and 19(3), do provide specific roles for victims in proceedings without a showing of personal interests.³⁵ However these provisions are not the subject of this appeal; this appeal solely relates to the participation of victims under Article 68(3), which does expressly require findings of personal interests and appropriateness. The existence of other avenues for participation does not demonstrate any “contradiction” with requiring that the conditions of Article 68(3) be fulfilled before any participatory rights or status is granted under that provision.

18. The Prosecution further submits that the Statute and the Rules do not “specifically detach” the determination of whether a person is a victim from the

²⁸ Rule 86.

²⁹ See Articles 43(6), 57(3)(c), 57(3)(e), 67(6)(e), 68(1), 68(2), 68(4), 87(4) and 93(1)(j); and Regulations 21(8), 42 and 48(2).

³⁰ See Articles 53(1)(c), 53(2)(c), 54(1)(b), 64(2), 65(4), 90(6); and Rules 69, 101, 119, 145, 194, 223, 224.

³¹ See Articles 75, 79 and 82(4); Rules 94-99, 143; and Regulations 88, 116(1)(d), 117 and 118.

³² See e.g. Consolidated Statement of Views and Concerns, para. 15.

³³ In addition to the discrete instances of victim participation provided for in Articles 15(3) and 19(3).

³⁴ As previously submitted by the Prosecution, Rule 89 provides the exclusive procedure by which the right to participate under Article 68(3) is implemented: it commences “In order to present their views and concerns...”, indicating that such views and concerns may only be presented through the mechanism provided in this Rule; and paragraph (2) provides the bases for rejecting an application, including both that a person is not a victim pursuant to Rule 85 or that the other criteria in Article 68(3) are not fulfilled. See further Prosecution Appeal Brief, para. 18.

³⁵ Or an independent determination that their participation is appropriate - Consolidated Statement of Views and Concerns, para. 17. See also Rule 93.

other necessary findings,³⁶ including personal interests, appropriateness, and modalities of participation. Rule 89(2) requires the Chamber to consider both whether the person is a victim, and whether they fulfil the additional criteria of Article 68(3); and the language of Rule 89(1), “shall then specify”, suggests that determination of the specific proceedings and the modalities of participation should be done at that point.

19. However even if, *arguendo*, the Appeals Chamber finds that the determination of whether the requirements of Rule 85 are fulfilled can be made without also making at the same time the other determinations required under Rule 89 and Article 68(3), this does not support the propositions put forward by the legal representatives. In such a case, the deferral of the additional determinations means that those requirements have not yet been fulfilled: Rule 85 does not grant an independent “procedural status of victim”; and no such procedural status or participatory rights can be granted until all of the requirements of Rule 89 and Article 68(3) have been met.
20. Finally, there is no paradox in the Prosecution’s recognition that once an individual has been held to be a victim under Rule 85(a) in one set of proceedings, there is no need to re-address this status: only their personal interests, appropriateness and modalities of participation need to be revisited.³⁷ All of the requirements of Rule 89 and Article 68(3) must be fulfilled before any procedural status or participatory rights can be granted; however this does not mean that every element must be decided anew. If a relevant determination has previously been made, and there are no material changes of circumstances which would affect the application of that prior determination to the proceedings at hand, then the definition of victim in Rule 85 could be satisfied by reference to that prior determination which remains applicable to the instant proceedings.³⁸

³⁶ Contrast Consolidated Statement of Views and Concerns, para. 15.

³⁷ Consolidated Statement of Views and Concerns, para. 16; quoting Prosecution Appeal Brief, para. 19.

³⁸ This is consistent with both Regulation 86(8), and also the approach of the Appeals Chamber to determinations on victim participation in interlocutory appeals – see e.g. the Appeals Chamber’s Order in this

These requirements for the participation of victims are not unduly onerous

21. The manner in which the Statute and the Rules require that victims be permitted to participate in proceedings, and that their applications be considered and granted where appropriate, is not unduly onerous. This system establishes a proper balance between the interests of the victims, and the rights of the accused.
22. The legal representatives raise a series of concerns based on the misconception that the Prosecution consider the Statute and the Rules to require multiple full, personal applications to the Registrar for each procedural step or stage of proceedings in which they wish to participate.³⁹ The Prosecution does not consider that individual victims must separately make new full applications under Regulation 86(1) and (2) for each individual specific set of proceedings, or stage of proceedings. As the legal representatives note, an application can apply to multiple phases of the proceedings (investigation, pre-trial, trial, appeals),⁴⁰ and therefore can also apply to, and be considered in respect of, multiple stages within those phases. The question is not the nature or number of applications required of the victims; but rather at what point a Chamber may properly consider an application and grant participant status.⁴¹
23. As the Prosecution has previously submitted, applications by victims to participate may only be meaningfully assessed, and may only be granted, in respect of identifiable proceedings before the Court.⁴² In this regard, the Prosecution agrees with the legal representatives that

appeal, ICC-02/05-138 OA OA2 OA3, para. 53; *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 45.

³⁹ Consolidated Statement of Views and Concerns, para. 25, see also para. 23-24.

⁴⁰ Consolidated Statement of Views and Concerns, para 25.

⁴¹ For the same reason, it is not a question of the Chamber being forced to predict or forecast the specific activities in which the victims may participate

⁴² See e.g. Prosecution Appeal Brief, paras. 15, 17, 21, 30-35, 40; see also paras. 10-12, above. The Prosecution submits that the manner in which the Appeals Chamber determined the appropriateness of the participation of victims in the present appeals provides an example of this – the appropriate nature of participation was based on the subject-matter of the proceedings, which can only be assessed once those proceedings are identified (ICC-02/05-138, 18 June 2008, para. 59; see also *Situation in the DRC*, ICC-01/04-503, 30 June 2008, para. 98). Further, and as noted above, Rule 92 also supports this interpretation (see para. 12, above). Even prior to the consideration, and any grant, of participation status, the applicants would nonetheless be considered as “victims who have communicated with the Court”.

"The Chamber should not be burdened with the imposition of the needless and impossible task of both predicting the details of such procedural activities in advance and determining in a vacuum how victims and their representatives may participate in them."⁴³

However it is not the Prosecution's interpretation which imposes this "impossible task" on the Chamber, but the attempt to grant participation to victims in the absence of identifiable sets of proceedings.

24. When a concrete stage of proceedings arises in the context of the investigation, all pending applications for participation would be considered. This could include applications which had been considered in respect of a prior stage, but where the personal interest of the applicant was found not to have been affected by the prior stage of the proceedings or where their participation in that stage was otherwise not appropriate; and applications which had previously been found to be incomplete, and which have been supplemented since. In respect of those victims whose applications to participate in a previous stage of the proceedings had been granted, the determination that they are a victim would continue to be in effect,⁴⁴ and the Chamber could invite their legal representative to make submissions whether and how their personal interests are affected by the present stage of the proceedings and whether their participation is appropriate.⁴⁵

25. This approach is consistent with that taken by the Appeals Chamber.⁴⁶ Prior decisions of the Pre-Trial Chambers also foresee that victims who have previously been granted "participant status" will be required to provide additional details of how their personal interests are affected by subsequent stages of the proceedings.⁴⁷ In this regard, the Prosecution submits that the legal representatives endorse a scenario in which further applications are required of

⁴³ Consolidated Statement of Views and Concerns, para. 21 (emphasis added).

⁴⁴ See e.g. Regulation 86(8).

⁴⁵ To the extent that the Chamber considers that it need such specific submissions from other applicants who have not yet participated, it could request such submissions from "the victims or those acting on their behalf or with their consent" pursuant to Regulation 86(7).

⁴⁶ See e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, paras. 23-24, 28; see further footnote 38, above.

⁴⁷ See e.g. Consolidated Statement of Views and Concerns, paras. 22 (citing *Situation in the DRC*, ICC-01/04-101-tEN-Corr, 22 March 2006, para. 64) and 28; see also *Situation in Uganda*, ICC-02/04-101, 10 August 2007, paras. 89, 96-97.

victims, including more specific assessments of their personal interests;⁴⁸ yet protest analogous procedures in the following paragraphs without explanation.

26. The Prosecution submits that many of the practical consequences which the legal representatives raise concerns can be avoided or mitigated through proper and timely assistance and support to victims, and prompt appointment of legal assistance, including through OPCV.⁴⁹ Further, all those who have applied for participation would be considered as “victims who have communicated with the Court”, and as a result would be entitled to additional notification of key events, including under Rule 92.⁵⁰

27. Finally, certain concerns and implications asserted by the legal representatives are unsupported and do not reflect the conduct of proceedings before this Court:

- As described above, once an individual has been determined to be a victim, only the personal interests, appropriateness and modalities of participation must be reconsidered. In response, the legal representatives simply assert that “Inevitably, there would be arguments that one or more applicants are not ‘victims’ for purposes of a particular proceeding.”⁵¹ No support is provided for this assertion; and both jurisprudence of the Appeals Chamber⁵² and the practice of the Court to date, including in this very appeal,⁵³ demonstrate the opposite.
- Further, while the legal representatives suggest that “the Appeals Chamber might well face appeals from each and every determination”,⁵⁴ the Prosecution submits that Article 82(1)(d) operates to filter interlocutory appeals so that

⁴⁸ Consolidated Statement of Views and Concerns, para. 22; see also para. 24.

⁴⁹ See e.g. *Situation in the DRC*, ICC-01/04-374, 17 August 2007, paras. 43-44.

⁵⁰ See further ICC-02/05-123 OA, 15 February 2008, para. 28.

⁵¹ Consolidated Statement of Views and Concerns, footnote 47.

⁵² See footnotes 38 and 46, above; see also *Situation in the DRC*, ICC-01/04-503, 30 June 2008, para. 92 and 93(a).

⁵³ Once a person has been determined by a Chamber to fulfil the criteria of victim in relation to the relevant situation or case, it is unlikely that such status would be challenged, absent any substantial change in circumstances. If such a challenge was made, it would likely be promptly dispatched by the Chamber. The present proceedings demonstrate this: neither the Prosecution nor OPCD (whose position the legal representative were “particularly” concerned about) challenged the fact that victims who had been granted participant status in the impugned Decision were “victims” for the purposes of participation in this appeal. See also ICC-02/05-138, 18 June 2008, para 53.

⁵⁴ Consolidated Statement of Views and Concerns, para. 23.

only those decisions which may significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, are appealed at this early stage; and recalls that even those victims who are permitted to participate may not initiate appeals under Article 82(1).⁵⁵

The requirements for the participation of victims must be given meaningful effect

28. The legal representatives submit that the Decision:

“did not improperly collapse consideration and evaluation of the criteria of ‘affected personal interests’ and ‘stages of the proceedings determined to be appropriate’ into merely a determination of victim status at the situation stage. To the contrary, the Single Judge, following the jurisprudence of Pre-Trial Chamber I and the Appeals Chamber, considered each criterion separately and applied each one correctly to the applications for participation before her.”⁵⁶

29. It is not the Prosecution’s submission that the Single Judge failed to consider the criteria of personal interests and appropriateness at all.⁵⁷ Rather, it is the Prosecution’s submission that these criteria were interpreted and applied in such a generic manner that the inevitable result is that every person who is found to be a victim will necessarily satisfy the additional criteria,⁵⁸ rendering them useless in contravention of the principles of treaty interpretation.⁵⁹

⁵⁵ Article 82(1)(d) provides that “Either party may appeal any of the following decisions...” (emphasis added). The two parties referred to are the Prosecution and the Defence; the victims, on the other hand, while they may be participants pursuant to a grant by a Chamber under Article 68(3) and Rule 89, are not full parties to the proceedings. See submissions in *Prosecutor v Lubanga*, ICC-01/04-01/06-736, 29 November 2006, see in particular para. 12; *Situation in the DRC*, ICC-01/04-422, 21 December 2007, paras. 7-8; ICC-01/04-432 10 January 2008, paras. 6-7; further Jorda and de Hemptinne, “The Status and the Role of the Victim” in Cassese et al (eds), *The Rome Statue of the International Criminal Court: A Commentary, Vol. II*, p. 1406: the victim “has no right of appeal and cannot, on that basis, present his arguments against the accused to the Appeals Chamber”. See also Roth and Henzelin, “The Appeal Procedure of the ICC”, in Cassese et al (*op. cit.*), p. 1551 : “Victims, civil parties and third parties affected by a decision cannot normally be considered as parties, in the strictest sense of the word, to an appeal against an interim decision under Article 82, unless such decisions affect their civil rights as envisaged by Article 82(4)/Article 75.” See e.g. *Situation in the DRC*, ICC-01/04-437, 18 January 2008; ICC-01/04-444, 6 February 2008, p. 4.

⁵⁶ Consolidated Statement of Views and Concerns, para.19.

⁵⁷ In addition, the Prosecution has also submitted that the Single Judge further erred by failing to specify the concrete stages of the proceedings in which participation is possible and appropriate, and the manner of such participation – see Prosecution Appeal Brief, paras. 14-15.

⁵⁸ In this regard, the Prosecution notes the parallel argument raised that “pursuant to the methodology employed by the Honorable Single Judge, if applicants meet the definition of victim under Rule 85, then they are automatically granted a right to participate in the proceedings, since the elements of personal interest and propriety of participation are ipso facto fulfilled” (quoted in Consolidated Statement of Views and Concerns, para. 36). The Prosecution submits that nothing in this argument suggests that the Single Judge did not consider the personal interests or appropriateness; but rather that these criteria again were considered in such a way that they were rendered without independent meaning or effect.

⁵⁹ See Prosecution Appeal Brief, paras. 25, 29 and authorities cited therein.

30. As the Prosecution has previously demonstrated, Article 68(3) and Rule 89, in particular paragraph (2), establish that the personal interests of victims and the appropriate nature of participation are independent criteria, which must be satisfied in addition to the status of an individual as a “victim” under Rule 85(a).⁶⁰ However, the impugned Decision recalls that “the personal interests of victims are affected in general at the investigation stage”,⁶¹ and thus every individual who is a victim will necessarily satisfy this requirement.⁶² The Decision also held 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.⁶³ Thus once a person has fulfilled the definition of victim, under the terms of the Decision the other criteria will automatically be satisfied, and are deprived of any meaning or effect.

31. In substantiating their position, and supporting the Decision, the legal representatives rely primarily on an early decision from Pre-Trial Chamber I in the *Situation in the DRC*.⁶⁴ The Prosecution recalls that this decision was never subject to appellate review, and that some of the core principles in that decision (in particular relating to the interpretation and application of personal interests) were, and remain, contested.⁶⁵ Thus while the legal representatives refer to both a “general assessment” of personal interests, which is automatically granted in relation to the investigation as a whole, and “more specific assessment[s] of victims’ personal interests” which may be required in relation to specific

⁶⁰ The additional nature of the requirement that personal interests be affected is accepted, at least in principle, by both the legal representatives and the Pre-Trial Chamber – see Consolidated Statement of Views and Concerns, para. 22. See further Prosecution Appeal Brief, paras. 27-29; *Situation in the DRC*, ICC-01/04-84, 15 August 2005, paras. 25-27.

⁶¹ Decision, para. 11.

⁶² See further Prosecution Appeal Brief, paras. 20-35.

⁶³ 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. 14). See further Prosecution Appeal Brief, paras. 36-45.

⁶⁴ *Situation in the DRC*, ICC-01/04-101-tEN-Corr, 22 March 2006; see e.g. Consolidated Statement of Views and Concerns, paras 20-22, 36-37.

⁶⁵ See e.g. *Situation in the DRC*, ICC-01/04-103, 23 January 2006; ICC-01/04-141, 25 April 2006; *Situation in Uganda*, ICC-02/04-85, 28 February 2007, paras. 8-11. As a result, the Prosecution submits that such decisions do not necessarily represent the settled jurisprudence of the Court, and in any event cannot bind the Appeals Chamber.

procedures;⁶⁶ the Prosecution submits that a proper determination of personal interests can only be made, and participation can only be granted, in relation to such identifiable stages of the proceedings.

32. In relation to the legal representatives' arguments regarding the nature of the personal interests which may found participation, and in particular the Separate Opinion of Judge Pikis⁶⁷ and the Dissenting Opinion of Judge Song,⁶⁸ the Prosecution concurs that "Participating victims' views and concerns are referable to the cause which legitimizes their participation, the cause which distinguishes them from other victims, namely their personal interests to the extent they are affected by the proceedings."⁶⁹ The Prosecution recalls that the Appeals Chamber has held that "an assessment will need to be made in each case as to whether the interests asserted by victims, do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor."⁷⁰

33. Finally, the Prosecution disputes that the parties have a burden of proving that the personal interests of victims are not affected.⁷¹ The Prosecution submits that this proposal is without foundation in the Statute,⁷² and runs contrary to both the general principle that a participant who is asserting a proposition is expected to prove it, as well as the jurisprudence of the Appeals Chamber to the effect that victims must set out in their application to participate the manner in which their personal interests are affected by the relevant proceedings.⁷³

⁶⁶ Consolidated Statement of Views and Concerns, para. 22.

⁶⁷ Consolidated Statement of Views and Concerns, paras 26-28.

⁶⁸ Consolidated Statement of Views and Concerns, para. 44.

⁶⁹ *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, para. 16; quoted in Consolidated Statement of Views and Concerns, para. 26 (emphasis added).

⁷⁰ *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."

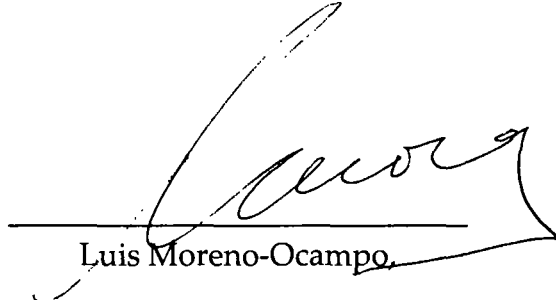
⁷¹ Or rebutting a presumption that their personal interests are affected - Consolidated Statement of Views and Concerns, para. 17.

⁷² No argument is made to substantiate the bare assertion that "Such an approach is not only coherent with the letters of the relevant texts of the Court relating to the rights of victims but is also the only logical one allowing these rights to be exercised efficiently and in the respect of the principle of fair and expeditious proceedings."

⁷³ See e.g. *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 2, 44 and 46; *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 23.

Conclusion

34. For the reasons referred to above, the Prosecution requests that the Appeals Chamber consider this Response in its determination of the appeals, and to grant the Prosecution's appeal and provide the relief requested in the Prosecution's Appeal Brief.



Luis Moreno-Ocampo

Prosecutor

Dated this 3rd day of July, 2008

At The Hague, the Netherlands