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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

SITUATION IN DARFUR, SUDAN

Public

**OPCD's Response to the 24 June 2008 Consolidated Statement of Views and
Concerns of the Legal Representatives
of the Participating Victims (a/0011/06 to a/0013/06, a/0015/06, a/0023/07, a/0024/07,
a/0026/07, a/0029/07, a/0036/07 to a/0038/07)**

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Procedural History

1. On 3 December 2007, the Honourable Single Judge issued 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’.¹
2. On 6 December 2007, the Single Judge of Pre-Trial Chamber I issued 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”,² granting the status of ‘victims’ in the situation of Darfur, Sudan, to applicants a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07 and a/0038/07.³
3. On 23 January 2008, the Single Judge of Pre-Trial Chamber I issued the “Decision on the 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”, granting the Office of Public Counsel for the Defence’s (the “OPCD”) request for leave to appeal.⁴
4. On 4 February 2008, the OPCD filed its document in support of the appeal 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”.⁵
5. On 6 February 2008, the Single Judge of Pre-Trial Chamber I issued the “Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation”, granting the Prosecution and the OPCD requests for leave to appeal.⁶

¹ ‘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’, ICC-02/05-110.

² ‘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, 6 December 2007. See the “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”, No. ICC-02/05-111-Corr, 14 December 2007.

³ At p. 23.

⁴ ICC-02/05-118.

⁵ See the OPCD’s Appeals 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”, No. ICC-02/05-119, 4 February 2008.

⁶ See ICC-02/05-121.

6. On 18 February 2008, the Prosecution⁷ and the OPCD⁸ filed their respective documents in support of their appeals on 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”.
7. On 29 February 2008, the Appeals Chamber issued two “Order[s] 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”.⁹
8. On 10 March 2008, the Legal Representatives of Victims (the “Legal Representatives”) filed a “Request of the Legal Representatives of Victims a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/071 to Participate in the Interlocutory Appeals of the Office of the Prosecutor and Office of Public Counsel for the Defence”.¹⁰
9. On 18 June 2008, the Appeals Chamber issued the “Decision on Victim Participation in the appeal of the Office of Public Counsel for Defense against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defense against the Pre-Trial Chamber I’s Decision of 6 December 2007”¹¹, granting victims a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07 and a/0038/07 to a/0033/07 and a/0035/07 to a/0038/07 the right to participate in the three appeals by filing their submissions by 25 June 2008,¹² and granting the Prosecutor and the OPCD to file their responses by 3 July 2008 to the submissions presented by the victims.¹³
10. On 24 June 2008, the Legal Representatives filed the “Consolidated Statement of Views and Concerns of the Legal Representatives of the Participating Victims

⁷ See the “Prosecution’s Document in Support of Appeal against the 6 December 2007 Decision on the Victims’ Applications for Participation in the Proceedings”, No. ICC - 02/05 - 125, 18 February 2008.

⁸ See the “OPCD Appeal Brief on the “Decision on the Application for Participation in the Proceedings of Applicant 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”, No. ICC - 02/05 - 126, 18 February 2008.

⁹ See the “Order[s] 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” (Appeals Chamber), No. ICC - 02/05 - 132, 29 February 2008 and No. ICC - 02/05 - 133, 29 February 2008.

¹⁰ See the “Request of the Legal Representatives of Victims a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/071 to Participate in the Interlocutory Appeals of the Office of the Prosecutor and Office of Public Counsel for the Defence”, No. ICC - 02/05 - 134, 10 March 2008.

¹¹ See the “Decision on Victim Participation in the appeal of the Office of Public Counsel for Defense against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defense against the Pre-Trial Chamber I’s Decision of 6 December 2007” (Appeals Chamber), No. ICC-02/05-138, 18 June 2008.

¹² At para. 63.

¹³ At para. 1.

(a/0011/06 to a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07 to a/0038/07) with Respect to the Appeal Chamber's 18 June 2008 Decision on Victim Participation in the Interlocutory Appeals of the Office of Public Counsel for the Defence and the Office of the Prosecutor",¹⁴ which requested the Appeals Chamber to deny the appeal of OPCD against the Decision of 3 December 2007 and deny the appeals of the Prosecutor and the OPCD against the Decision of 6 December 2007.¹⁵

11. The OPCD hereby submits its observations in response.

2. Observations which are irrelevant, or fall outside of the scope of the views and concerns of the alleged victims

12. The OPCD observes firstly, that notwithstanding the fact that the underlying rationale of granting the Legal Representatives the right to file observations is to ensure that the alleged victims are provided an opportunity to voice their views and concerns regarding the issue on appeal, the actual filing fails to reference these views and concerns. In light of the fact that the filing is drafted as pure legal argumentation of the representatives, it is not possible to assess whether the submissions are in fact derived from or indeed related to the personal interests of the alleged victims.

13. In this connection, several arguments appear premised on factual scenarios which do not correspond to the personal circumstances of the alleged victims. For example, at page 16, the Legal Representatives opine that in light of security risks and communication difficulties, requiring applicants to establish their interests in participating in different stages of the proceedings would create an insurmountable barrier. However, in support of this argument, rather than invoking the personal experiences and circumstances of the alleged victims, the Legal Representatives cite the views and concerns of the Prosecutor in relation to the plight of refugees in Chad, as set out in a Report to the Security Council.¹⁶ As the Appeals Chamber will be aware from the particular details of these applicants, the security environment

¹⁴ See the "Consolidated Statement of Views and Concerns of the Legal Representatives of the Participating Victims (a/0011/06 to a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07 to a/0038/07) With Respect to the Appeal Chamber's 18 June 2008 Decision on Victim Participation in the Interlocutory Appeals of the Office of Public Counsel for the Defence and the Office of the Prosecutor" (Appeals Chamber), No. ICC-02/05-144, 24 June 2008.

¹⁵ At para. 46.

¹⁶ At footnote 51.

conjured up by the Legal Representatives does not correspond to the actual circumstances of these particular alleged victims.¹⁷

14. The OPCD further observes that the following submissions refer to legal issues which fall outside of the scope of the three appeals, and moreover, seek to resurrect issues pertaining to past jurisprudence issued in the DRC situation rather than the Darfur situation.
15. For example, at footnote 22, the Legal Representatives engage in a debate concerning the definition of ‘proceedings’, and seek to refute *post facto* prosecutorial arguments on this point which were raised in a 2006 request for leave to appeal filed in the DRC situation. This issue was not germane to either the Prosecutor or OPCD appeals, and as such, is completely irrelevant.
16. At paragraphs 21, 36 and 37, the Legal Representatives seek to argue that the Single Judge did indeed render findings concerning the criteria of personal interests and appropriateness. However, in support of this assertion, they quote findings from the 17 January 2006 decision issued in the DRC situation, rather than any legal or factual conclusions of the Single Judge issued in the Darfur situation.
17. In this regard, findings of a Pre-Trial Chamber issued in one situation are not directly binding on a Chamber or Judge sitting in a different situation. The Honourable Single Judge was obliged to adjudicate the issues based on the factual and legal issues properly submitted before her in the Darfur situation. Accordingly, in determining whether the decision of the Honourable Single Judge concerning the personal interests of particular applicants and the appropriateness of their participation in the Darfur situation raised errors which warrant appellate review, the scope of enquiry should be limited to the impugned decisions issued in the Darfur situation.¹⁸
18. At paragraph 29 of their filing, the Legal Representatives invoke legal issues which were not directly raised on appeal, for example, whether the system of complementarity imposes a *de facto* obligation to either exhaust domestic remedies, or to provide an explanation as to why it was not feasible for the applicant to do so.

¹⁷ [Redacted]

¹⁸ The OPCD refers to the following findings of the Appeals Chamber, issued in the Katanga and Ngudjolo case: “What is missing is the evaluation of the relevant facts by the Single Judge in the present proceedings. In this case the Single Judge adopted the findings made by another Single Judge in other proceedings; this is impermissible. A judge, the Single Judge in this case, is duty-bound to appraise facts bearing on *sub judice* matters, determine their cogency and weight and come to his/her findings, as the Single Judge was bound to do in this case but failed to do.” Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release ICC-01/04-01/07-572, 9 June 2008, at para 26.

The Single Judge dismissed this argument in line with her findings concerning the limited scope of the application process. The OPCD appeal concerned the overarching issue as to whether the application process could indeed be adjudicated under such a limited legal framework. In the event that the appeal is granted, the OPCD submits that it would then fall to the Single judge to reconsider this issue (and all other arguments which were dismissed for the same reason) in line with the Appeals Chamber's directions concerning the application law for both the application process, and the scope of participation at this phase of the proceedings.

19. Finally, it appears that the Legal Representatives' submissions mistakenly confuse the question of the impact of judicial proceedings on the personal interests of an applicant, with the issue of the definition of a victim. The Legal Representatives quote the OPCD to the effect that "applicants cannot claim to be affected by violations of these rights in a general or indirect manner".¹⁹ This OPCD observation was directed to the issue as to whether an alleged victim could establish an indirect or general interest in participating in a specific proceedings – it was not addressing the definition of victim under rule 85. The issue of whether the definition of victim encompasses direct or indirect harms falls outside the scope of this appeal.
20. In light of the irrelevance of these aforementioned submissions, the OPCD respectfully requests that they be dismissed *in limine*.

3. Observations concerning issues raised on appeal

21. The observations of the legal representatives address the following four main issues:
 - the scope and applicable law governing the application process;
 - whether participation should be granted at a stage of the proceedings, or for the duration of a phase;
 - the extent of the Chamber's obligation to define the personal interests of an alleged victim and the appropriateness of their participation; and
 - the appropriateness of participation during the situation phase.

¹⁹ Cited at paragraph 39 of the Observations.

3. 1 Observations concerning the scope and applicable law governing the application process

22. In the decision of 3 December 2007, the Honourable Single Judge held that the application process was a confined process, which was independent of the actual criminal proceedings before the ICC. As such, the applicable legal framework governing this process was limited to rule 89, regulation 86, and prior decisions of Pre-Trial Chamber I governing victim participation.²⁰
23. The Legal Representatives seek to justify the approach of the Honourable Single Judge by arguing that since the application process is limited to the determination as to whether the applicants can be granted the status of victim, there is no need to invoke the due process protections of other sections of the Statute and Rules. The Legal Representatives further argue that there is no legal requirement to issue a decision concerning the status of an applicant as a 'victim' in conjunction with a decision pertaining to the modalities of participation.²¹
24. The OPCD firstly notes that the Honourable Single Judge erred by failing to stipulate that article 68(3) is the primary reference point for any decisions concerning victim participation. Rule 89 and regulation 86 exist for the purpose of facilitating decisions under article 68(3), are necessarily subordinate to article 68(3), in light of the fact that article 68(3) is contained within an hierarchically superior legal text.
25. The OPCD further notes that article 68(3) expressly requires the Chamber, before granting a right to participate, to consider the impact of such participation on the rights of the defence, and the requirements of a fair and impartial trial. It is therefore impossible for the Chamber to render such an assessment without taking into consideration the legal provisions which govern the rights of the defence (for example, article 67), and which regulate the fairness and impartiality of the criminal proceedings before the ICC. The reference to such general terms as fairness and impartiality within the text of article 68(3) automatically incorporates other provisions of the Statute and Rules by reference.
26. Moreover, the fact that article 68(3) makes the Chamber's determination as to whether a person may be granted the status of a participating victim contingent on a prior consideration of the rights of the defendant and the requirements of fair and

²⁰ Decision of 3 December 2007, at para 7.

²¹ At paragraph 15 of Observations of Legal Representatives.

impartial proceedings expressly recognizes the possibility that granting an applicant the right to participate as a victim can (if not properly regulated by the Chamber) impact or prejudice the rights of the defence.

27. In this regard, the Legal Representatives recognize that the judges possess the power to “control the conduct of the trial”,²² but argue that such a power should be exercised to control the manner of participation rather than the right to participate. However, if the Chamber were to limit its judicial oversight to the manner of participation, this would necessarily presume there will be some form of participation, whereas it is self-evidence that there are some types of proceedings in which it would be highly inappropriate for the alleged victims to participate (for example, *ex parte* hearing). The OPCD therefore respectfully submits that the Honourable Single Judge has committed an appealable error since in accordance with her findings, all applicants who have been accorded the status of victim are granted an automatic entitlement to participate, and the Judges and parties only have the ability to subsequently monitor or contest the extent of this participation.²³
28. In terms of the practical modalities of the application process, the legal representatives argue that the OPCD’s request for extrinsic materials is not supported by the applicable law, and would impose an undue burden on the applicants. In this regard, the Legal Representatives assert that a system which would require them to consult or obtain information from their clients would be resource intensive and could create security risks.²⁴
29. The OPCD observes firstly that such an argument as the latter appears to be fundamentally at odds with the underlying rationale for creating a legal forum for alleged victims to directly present their personal views and concerns, as opposed to being dependent on the parties to divine and represent their concerns. If, as asserted by the legal representatives, it is not feasible for them to liaise with their clients for the purposes of obtaining additional information in relation to the application process (or for the purpose of submitting multiple applications for different phases of the proceedings), then how would it be feasible for the Legal Representatives to consult with their clients (as required by article 14(2) of the Code of Professional Conduct for

²² At paragraph 24.

²³ “[O]nce 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 phase 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” ‘Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation’, 6 February 2008, ICC-02/05-121at p. 9.

²⁴ Page 16 of Observations.

Counsel) for the purpose of ascertaining their personal views and concerns? If it is not feasible for them to consult with their clients, than it is also not feasible for victim participation in such circumstances to have meaningful content. Rather than the applicant's views and concerns being presented, it would simply be the assumptions of their representative as to what the applicant should think and want— in effect, the legal representative would simply morph into a second prosecutor.

30. In any event, in terms of supporting documents which might be difficult for the applicants to adduce, the OPCD has submitted that the applicants should either adduce the document, or provide an explanation as to why they are not in a position to do so.²⁵ At no point have the legal representatives provided a cogent argument as to why the latter option would impose an undue burden on either the legal representatives or their clients.
31. In terms of the issue as to whether the Single Judge correctly found that there was no legal requirement to require applicants to submit any extrinsic materials, other than information falling within the categories set out in the Chamber's decision of 17 August 2007 issued in the DRC situation,²⁶ the OPCD submits firstly, that the Single Judge improperly fettered her adjudicative responsibilities by considering herself to be bound by a decision, which was issued in another situation,²⁷ and with respect to which the parties had not been provided a right to be heard.²⁸
32. Secondly, the Honourable Single Judge erred by imposing an arbitrary limit on what constitutes 'relevant' documentation for the purposes of regulation 86(2)(e).
33. In this regard, the Honourable Single Judge dismissed the OPCD requests for additional information on the basis that the information requested did not fall within

²⁵ See OPCD Appeal Brief of 4 February 2008, at para. 26. This is consistent with the wording of Regulation 86(2) of the Regulations of the Court: "The standard forms or other applications described in sub-regulation 1 shall contain, to the extent possible, the following information [...]".

²⁶ Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, 17 August 2007, ICC-01/04-374. At paras 16 and 17 of the 3 December 2007, the Honourable Single Judge dismisses the OPCD's request for additional information on the basis that the information requested did not fall within the categories of information set out in the 17 August 2007 DRC decision.

²⁷ The OPCD refers to submissions above in relation to the findings of the Appeals Chamber in the Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release ICC-01/04-01/07-572, 9 June 2008, at para 26.

²⁸ The OPCD refers to its submissions set out in its Appeal Brief of 4 February 2008, concerning the fact that the definition of relevant supporting documentation, and the possibility of adducing such documentation should be determined in light of the specificities of the situation, the information within the application form, and the country in which the applicants are residing. For example, whilst it might be unfeasible for an applicant residing in a refugee camp to obtain photocopies of certain documents, the same conclusion does not apply to an applicant residing in a well developed country, such as The Netherlands.

the categories of information set out in the 17 August 2007 DRC decision.²⁹ In this regard, regulation 86(2)(e) provides that an applicant shall submit “[a]ny relevant supporting documentation, including [...]”; the use of the words ‘any’, and ‘including’, clearly imply that this sub-regulation was not intended to be defined restrictively or exhaustively.

34. The OPCD further observes that regulation 86(7) further provides that “[b]efore deciding on an application, the Chamber may request [...], additional information [...]”. In terms of statutory construction, the word ‘may’ is utilised as an enabling provision; it connotes the power of the Chamber to order the production of additional information. This power is not limited to a specific phase, but applies with respect to any applications filed under rule 89. When construed in light of mandatory requirement of regulation 86(2) that the applications forms shall, to the extent possible, contain relevant supporting materials, this power of the Chamber translates to an obligation to assess firstly, whether such information would be relevant to its determination, and secondly, whether it would be possible to obtain such information through an order issued under regulation 86(7).³⁰

35. Finally, concerning the question as to whether the Chamber possess the power to render a determination that an applicant has the status of ‘victim’ under the definition of rule 85, independently of a decision concerning the modalities of their participation, the OPCD respectfully submits that Rule 85 simply provides a definitional framework for other provisions in the Statute and Rules, and does not itself create a free-standing power for the Chamber to issue decisions as to whether persons can be considered to fall within this definition. There is thus no judicial power under rule 85 to grant someone the status of victim, unless such a finding is necessary to exercise a judicial power, which is expressly recognized elsewhere in the Statute or Rules. For example, the Chamber may find that someone falls within the definition of rule 85 for the purpose of exercising their power to order protective measures, to grant participation under article 68(3), to issue a judgment, or to award reparations.³¹

²⁹ See paragraphs 16-17 of 3 December 2007 decision.

³⁰ The OPCD refers to the following conclusion of Judge Shahabuddeen “the word “may” in that sentence does not have its usual discretionary meaning: it attracts the standard jurisprudence which says that enabling words are construed as compulsory whenever the object of the power which they confer is to effectuate a legal right.”, Separate Opinion of Judge Shahabuddeen in ‘Decision on Interlocutory Appeal on Motion for Separate Funds’, Prosecutor v. Ojdanic, 13 November 2003, at para. 6.

³¹ This is clear from the wording of Rule 85: “[f]or the purposes of the Statute and Rules of Procedure and Evidence, victims means [...]”.

36. Accordingly, in determining that the applicants could be accorded the status of victim under rule 85, the Honourable Single Judge was obliged to issue this determination in conjunction with a defined statutory power, such as article 68(3). In this regard, both article 68(3) and rule 89 are aimed towards enabling applicants to present their views and concerns;³² they do not envisage either a preliminary or free-standing finding that the applicants meet the definition of rule 85.

3.2 Observations concerning whether participation should be granted at a stage of the proceedings, or for the duration of a phase

37. Both the Prosecution and the OPCD argued that in accordance with article 68(3) of the Statute, the right to participate must be adjudicated in light of the impact of specific proceedings on the personal interests of the applicants. In this regard, the reference to a ‘stage of the proceedings’ in article 68(3) refers to a defined procedural activity, which occurs during a particular phase of the proceedings. As such, granting alleged victims the right to participate in an entire phase of the proceedings would contravene the Chamber obligation to apply the criteria set out in article 68(3) in an effective manner.

38. In response, the legal representatives assert that it is ‘artificial’ to distinguish between a stage and a phase of the proceedings,³³ and further reference rule 92 in support of the proposition that the rules contemplate victim participation being granted for an entire phase of the proceedings.³⁴

39. In terms of whether the distinction between a stage and a phase is artificial, article 31 of the Vienna Convention on the Law of Treaties provides that the meaning of a term can be derived by reference to the context in which that term is employed in other components of the relevant text.³⁵ As observed by the OPCD in its Response to the Prosecution appeal, the Statute and Regulations employ the term phase to refer to

³² Article 68(3) grants the Chamber the power to authorize the applicants to submit their views and concerns. Rule 89(1) sets out the overarching chapeau of the power delineated within: “In order to present their views and concerns [...]”.

³³ At footnote 22.

³⁴ At footnote 22.

³⁵ 23 May 1969, Entry into force 27 January 1980, United Nations, *Treaty Series*, vol. 1155, p. 331. The Appeals Chamber has confirmed on several occasions the utility of the Vienna Convention of the Law on Treaties as a mechanism for interpreting the provisions of the Rome Statute and the Rules of Procedure and Evidence (see for example, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, 9 June 2008, ICC-01/04-01/07-573).

the entirety of the situation, pre-trial, or appeal proceedings, whereas the term stage is used to refer to a discrete procedural activity within a phase.³⁶

40. As regards the legal representatives' reliance on rule 92(2), the text provides that:
 "[i]n order to allow victims to participate in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53. Such a notification shall be given to victims or the legal representatives who have already participated in the proceedings, or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question.[...]"
41. It is thus clear from the text of rule 92(2) that the fact that an alleged victim may have participated at an earlier stage of the situation phase does not in itself trigger a right to participate in all future proceedings during that phase, such as review of a decision not to investigate or prosecute.
42. This follows from the fact that rule 92(2) is preceded by the general phrase, 'in order to allow victims to apply to participate in the proceedings in accordance with rule 89', which sets out the purposive intent of the rule. In terms of which persons fall under this category of 'victims', the rule further specifies that a victim would be considered to be persons who has either previously participated in the proceedings, or alleged victims who have communicated with the Court. The rule therefore does not distinguish between the rights and obligations of the two distinct categories; both categories are notified in order to facilitate their ability to apply to participate, and both categories are required to submit an application in accordance with rule 89.
43. Rule 92(7) further provides that "[w]here victims or their legal representatives have participated in a certain stage of the proceedings, the Registrar shall notify them as soon as possible of the decisions of the Court in those proceedings"; this text also implies that a stage of the proceeding should be equated to a discrete procedural activity, which is subject to judicial resolution, as opposed to the potentially infinite situation phase.
44. As such, the text of rule 92 clearly envisages a system whereby an alleged victim might in practice be required to submit multiple applications under rule 89 during a particular phase. This is consistent with the probability that a decision of the prosecutor not to investigate or prosecute a specific case will not affect the personal

³⁶ See paragraphs 31 to 36 of the 'OPCD Response to Prosecution's Document in Support of Appeal against the 6 December 2007 Decision on the Victims' Applications for Participation in the Proceedings', 29 February 2008, ICC-02/05-131

interests of all alleged victims who may have previously participated during that phase. This right to submit views and concerns in relation to the Chamber's review of the Prosecutor's decision not to investigate or investigate that specific case should thus be confined to those persons who have established through their rule 89 application that their personal interests are directly affected by the prosecutor's course of action.³⁷

45. Thus, rather than supporting the thesis of the Legal Representatives, rule 92(2) underscores the intention of the drafters that a decision on participation under article 68(3) should be issued in connection with a discrete procedural activity within a phase, rather than for the phase itself.
46. The Legal Representatives also invoke regulation 86(8) in support of their view that a decision on participation applies to an entire phase of the proceedings.³⁸ Regulation 86(8) provides that "[a] decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1."
47. Firstly, regulation 86(8) only governs case-related proceedings,³⁹ and not the situation phase. Secondly, regulation 86(8) refers to decisions issued in accordance with rule 89; it therefore creates no legal basis to modify or extend the Chamber's powers under article 68(3) and rule 89. The power of the Chamber to grant participation under these provisions is linked to a stage of the proceedings. The terms 'proceedings' in regulation 86(6) must therefore be understood to refer to this particular stage.
48. Finally, the Legal Representatives contend that the filing of multiple applications in relation to different stages of the proceedings would be cumbersome,⁴⁰ and likely to generate appeals, which would affect the resources for the legal representatives.⁴¹ The

³⁷ Such a limitation is indeed germane to the integrity of such proceedings. It would otherwise be possible to envisage persons, who could be considered as alleged victims of events which are not related to the prosecution's decision not to investigate or prosecute, filing views and concerns which are based solely on their ethnic, political or religious affiliation with either the potential defendants or alleged victims of the disbanded investigation/prosecution.

³⁸ Observations of the Legal Representatives at paragraph 25.

³⁹ The OPCD refers to the maxim *expressio unius est exclusio alterius*, which provides that the express mention of one thing, can exclude the applicability of others. The express reference to case proceedings thereby excludes the applicability of this provision to non-case specific proceedings, such as the situation phase.

This maxim has been applied within the field of international criminal law. See for example, Prosecutor v. Zejnir Delalic et al., Decision of 4 February 1998 "on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence" (<http://www.un.org/icty/celebici/trialc2/decision-e/90204WG25378.htm>), at para. 27, and the Judgement of the Trial Chamber in Prosecutor v. Zoran Kupreskic et al., 14 January 2000, (<http://www.un.org/icty/kupreskic/trialc2/judgement/kup-tj000114e-5.htm>), at para. 623.

⁴⁰ At paragraph 23.

⁴¹ At paragraph 25.

OPCD notes firstly that there is only a limited set of judicial activities during the situation phase which could conceivably impact on the personal interests of the applicants.⁴² Moreover, once the applicant's personal interests as regards a particular procedural activity have been addressed, there is likely to be greater expedition in processing future requests to participate in similar such activities.

49. In terms of the Legal Representatives' concerns regarding the possibility of delays generated by appeals, the OPCD observes that there is no automatic right to appeal decision concerning victim participation; the parties must seek leave to appeal under article 82(1)(d) of the Statute. Article 82(1)(d) appeals are subject to a finding that the issue in question impacts of the fairness and expeditiousness of the proceedings. As such, the Chamber has the duty to take in to consideration the impact of a possible appeal on the expeditiousness of the proceedings prior to granting leave to appeal. In any case, appellate decisions would provide greater clarity to the proceedings, which would expedite the processing of applications to participate in future proceedings. The OPCD also observes that the Legal Representatives have the ability to seek further resources from the Registry should the need arise.
50. Finally, the OPCD submits that the system delineated by the Single Judge is in fact potentially more resource intensive than the system advocated for by the parties, since the present system requires the applicants to undergo the rigors of the application process notwithstanding the fact that there may never be a concrete proceeding in which they can participate. In this regard, the Legal Representatives citation of the Separate Opinion of Judge Blattman is incongruous, since Judge Blattman is in effect, arguing the inutility of creating a two-step process, whereby the applicants are first granted a procedural status of 'victim', and the personal interests and modalities of participation are deferred to a separate decision.⁴³

3.3 Observations concerning the extent of the Chamber's obligation to define the personal interests of an alleged victim and the appropriateness of their participation

51. The Legal Representatives seek to establish a presumption that the personal interests of the applicants are automatically engaged by the situation phase, and that it

⁴² In this regard, there has no judicial activity in the Darfur situation for the first six months of 2008.

⁴³ Decision on victim's participation, 18 January 2008, ICC-01/04-01/06-1119, at paragraph 22.

is appropriate for them to participate at this phase, which would then fall to the defence to rebut.⁴⁴

52. In response, the OPCD submits that the establishment of such a presumption would be incompatible with the prior jurisprudence of the Appeals Chamber on victim participation, and would unacceptably reverse the onus onto the defence. In this regard, in its decision of 28 February 2008, in order to assess whether the applicants met the criteria to participate in the appeals of the Prosecution and the Defence, the Appeals Chamber ordered the Legal Representatives to file submissions concerning “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”;⁴⁵ if there was a presumption that victim participation is appropriate, then it would not have been necessary for the applicants to file an application in support of the appropriateness of their participation. The Appeals Chamber thus implicitly held that the burden of establish that the criteria under article 68(3) were met fell on the applicants, as opposed to the burden falling on the parties to disprove that the criteria were met.

53. The OPCD further submits that the imposition of any such legal or factual presumption is fundamentally incompatible with the rights of the defence,⁴⁶ and the role of the alleged victims in the proceedings.⁴⁷ In this regard, it should be borne in mind that defendants before the ICC face a heavy sanction if convicted, and are already faced with daunting task of responding to the Prosecution case. To add any such additional burdens through the establishment of extra-statutory legal or factual presumptions could thus threaten the fabric of fairness.

54. The Legal Representatives further assert that it is not practical to require the Chamber to verify the personal interests of the applicants in a vacuum: “the Chamber

⁴⁴ At paragraph 17.

⁴⁵ Decision of the Appeals Chamber on the OPCV's Request for Clarification 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, ICC-02/05-129, 28 February 2008.

⁴⁶ The OPCD refers to the following statement of Judge Hunt concerning the establishment of presumptions concerning factual assessments: “to identify an adjudicated fact as a rebuttable presumption necessarily (as the prosecution concedes) places some burden of proof (or more properly an onus of proof) upon the accused, and this is contrary to the presumption of innocence”. Dissenting opinion of Judge Hunt, Prosecutor v. Milosevic, ‘Decision on the Prosecution’s Interlocutory Appeal Against the Trial Chamber’s 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts’, 23 October 2003, at para 7 <http://www.un.org/icty/milosevic/appeal/decision-e/031028.htm>.

⁴⁷ The OPCD refers to its submissions at paragraphs 9-16 of its Request for the Production of Supporting Materials, dated 21 August 2007.

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”.⁴⁸ However if it is indeed an impossible task, then it is also being embarked upon for an impossible purpose. If the Chamber is unable to ascertain whether particular proceedings impact on the interests of the applicants, then this suggests that the personal interests of the applicants are not in fact affected, and as such, there is no legitimate right to participate in the proceedings. If the Chamber is also unable to devise the mechanics of participation, it also strongly suggests that being granted the right to participate is devoid of meaning, since it creates the appearance that the Chamber is unable to envisage an opportunity when the applicants can concretely exercise the right.

55. The Legal Representatives further assert on the one hand, that the personal interests of the applicants are affected in general by the investigation phase, but elsewhere acknowledge that the personal interests will be affected differently and that not every alleged victim will have a legitimate interest in participating in every proceeding.⁴⁹
56. The OPCD refers firstly to its appellate submissions concerning the principle of effective interpretation,⁵⁰ and note that in accordance with the proposition that the interests of alleged victims are generally affected by the investigation and prosecution phases, the criterion of personal interests in article 68(3) would in practice, become obsolete.
57. In terms of the prospect of differing personal interests between applicants, this simply underlines the legal errors of the Honourable Single Judge’s findings, since, in accordance with the clear terms of her decisions, once an applicant has been granted the status of a victim, he or she is automatically accorded the same subset of participatory rights as other alleged victims.⁵¹ In this regard, the Legal Representatives reference to the possibility that the Single Judge may, at a later stage, issue a more specific assessment of the personal interests of the applicants,⁵² is

⁴⁸ At paragraph 21.

⁴⁹ See paragraph 28.

⁵⁰ See paragraphs 27 to 29 of Appeal Brief of 4 February 2008.

⁵¹ “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””, 23 January 2008, ICC-02/05-118 at page 5.

⁵² At paragraph 22.

predicated on a decision which was issued in the DRC situation,⁵³ and which does not appear compatible with the actual findings of the Single Judge in the Darfur situation.

3.4 Observations directed at the appropriateness of participation during the situation phase

58. The Legal Representatives seek to justify the creation of the aforementioned presumption in favour of participation during the situation phase on the basis that firstly, the investigation phase is intrinsically linked to the alleged victims' right to the truth, and secondly, that the drafting history of the Statute and Rules evince an intention on the part of the drafters to accommodate victim participation at this stage.
59. In terms of the Legal Representatives' contention that the criterion of appropriateness is in any case *ipso facto* met by virtue of the fact that the situation phase is linked to their right to the truth, and that "it is precisely at the situation and investigation stage that victims must have an opportunity to participate and to ensure that their own personal circumstances become an object of investigation and judicial concern",⁵⁴ the OPCD respectfully submit that a distinction must be drawn between the right to participate and the right to the truth;⁵⁵ the two are not synonymous, and are not always mutually compatible.
60. In this regard, the purpose of victim participation is to present views and concerns. It is not an evidential or investigatory process, although it may facilitate elements of the judicial process – for example, by accommodating the views and concerns of potential witnesses as regards protective measures. The filing and acceptance of an application by the Chamber does not however trigger an obligation for the Prosecution to investigate these circumstances. In this sense, the victim application and participation regime under article 68(3) is separate and independent of the legal regime governing the filing of complaints, and the obligation of the prosecution to evaluate such complaints.⁵⁶ As such, the procedure for victim participation enshrined under article 68(3) does not directly facilitate the investigative process, and yet, as

⁵³ Decision of 17 January 2006, cited at paragraph 44.

⁵⁴ At paragraph 27.

⁵⁵ In this regard, the European Court of Human Rights have held that under the European Convention, persons alleging to be victims have a right to fair and impartial proceedings under article 6(1) of the Convention (*Perez v. France*, Application no. 47287/99, 12 February 2004). They do not, however, have the right to actively invoke the protections of the remaining provisions of article 6 in criminal proceedings (see S. Treschel, *Human Rights in Criminal Proceedings* (Oxford University Press 2006) at p. 42). As such, they can not assert as of right the power to confront or call witnesses, or the right to procedural parity with the Prosecution and the Defence.

⁵⁶ See articles 15 and 53.

evidenced by the views of the Legal Representatives, appears to raise unrealistic and unmanageable expectations concerning its ability to do so.

61. In addition, procedural limitations may be necessary to ensure that overly broad participatory rights do not frustrate or impede the ability of the Court to adjudicate the truth. Truth - as understood in objective, judicial terms - can only be achieved through the issuance of a judgment, based on an independent, impartial and fair trial process. Accordingly, if victim participation, and the right to the truth were synonymous and/or automatically compatible, it follows that it would not have been necessary for the drafters to insert the caveat in article 68(3) that the Court is obliged to actively ensure that participation is not incompatible with a fair and impartial trial.
62. The inclusion of this caveat thus explicitly recognizes that judicial intervention may be required to limit participation in certain instances in order to ensure that it is not implemented in a manner which may frustrate the overarching goal of judicial truth. At paragraph 40, the Legal Representatives refer to the example the specific example of an applicant, who is temporarily absent from her house when her family members are killed. The OPCD does not dispute that such a person has a right to submit a complaint to the Prosecutor, and a right to the truth through a fair, independent, and impartial investigation, and, if the threshold elements for prosecution before the ICC are met, a fair and impartial trial. However, if the Chamber were to permit such an applicant to submit views in relation to evidentiary matters which fall outside the scope of her personal experience, this ultimate objective of a judgment predicated on fair and impartial proceedings could indeed be jeopardized.
63. In terms of the specificities of the situation phase, since there are no judgments issued during the situation phase – the right to truth cannot be realised at this stage, nor can it ever be realised outside of the context of a specific case.
64. Although the commencement of a case is necessary preceded by certain investigative steps, the Pre-Trial Chamber has no power to investigate itself, and only possesses very limited powers in terms of its ability to supervise the investigative activity of the Prosecutor. It therefore follows that the primary mechanism by which alleged victims can seek to facilitate the Court's search for the truth at this phase is *via* their interaction with the Prosecutor,⁵⁷ rather than the Pre-Trial Chamber.

⁵⁷ For example, through the filing of a complaint under article 15(2).

65. This is consistent with the fact that in those domestic jurisdictions, which according to the Honourable Single Judge,⁵⁸ permit victim participation prior to the commencement of adversarial proceedings, the alleged victims exercise this right vis-à-vis the equivalent of the Prosecutor (for example, the *juge d'instruction* in the French system) and only have limited standing before a Chamber (the *Chambre d'Instruction* in France),⁵⁹ in relation to those specific instances in which the Chamber itself is vested with the power to review the actions of the Prosecutorial equivalent.⁶⁰
66. These jurisdictions also recognize firstly, that in light of the sensitivity of the investigations phase, it is necessary to prohibit collaboration between victims, and moreover, secondly, that the public issuance of decisions concerning the alleged existence of victims could taint the investigative process, and prejudice the rights of future defendants.⁶¹ These jurisdictions therefore set out the principle of confidentiality of investigations.⁶²

⁵⁸ 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, ICC-02/05-110 at para 4.

⁵⁹ In the French system, the civil party files their complaint before the investigating judge, who generally acts independently of the investigating court (article 80 para. 4 and 81-1 Code of Criminal Procedure). During this preliminary phase, the civil party therefore has no general standing before the investigating court, except in relation to proceedings which relate to the power of the investigating court to review a failure by the investigating judge to act (for example – articles 186 and 186-1).

Code de procédure pénale, entrée en vigueur le 2 mars 1959, modifié par la loi n°2000-516 du 15 juin 2000, version consultée le 2 juillet 2008,

http://www.legifrance.gouv.fr/affichCode.do?jsessionid=0154B441FBE0B2111B7EEC33218EB16D.tpdjo01v_3?cidTexte=LEGITEXT000006071154&dateTexte=20080702

⁶⁰ As set out in the OPCD appeal brief of 4 February 2008, the European Court of Human Rights has recognized in relation to such jurisdictions that if the Chamber were to be overly involved in factual assessments at this stage which more properly fall within the role of the Prosecutor, this over-reach could impact on their impartiality during later stages of the case (*Piersack v. Belgium*, ECtHR Judgment of 1 October 1982 cited at footnote 35 of the OPCD brief).

⁶¹ As held by the Cour de Cassation « Attendu qu'en l'état de ces énonciations dont il résulte que les prévenus ont été poursuivis pour avoir divulgué le contenu demeuré confidentiel de pièces issues d'une information en cours, mesure justifiée par les impératifs de protection des droits d'autrui, au nombre desquels figure la présomption d'innocence, par la préservation d'informations confidentielles, ainsi que par la garantie de l'autorité et l'impartialité du pouvoir judiciaire, la cour d'appel a justifié sa décision au regard de l'article 10 de la Convention européenne des droits de l'homme » (Cour de cassation chambre criminelle Audience publique du mardi 19 juin 2001 N° de pourvoi:99-85188)

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007070155&fastReqId=1474164206&fastPos=3>

See also the following extract from judgement of the European Court of Human Rights in *Dupuis et al. v. France* « La Cour relève que les juridictions internes ont fondé leurs décisions sur la violation du secret professionnel ou de l'instruction. L'ingérence avait donc notamment pour but de garantir le respect du droit d'une personne qui, n'ayant pas encore été jugée, était présumée innocente. Elle avait aussi pour but une bonne administration de la justice en évitant toute influence extérieure sur le cours de celle-ci. Ces buts correspondent à la protection de « la réputation et des droits d'autrui » et à la garantie de « l'autorité et l'impartialité du pouvoir judiciaire », dans la mesure où cette dernière garantie a été interprétée comme englobant les droits dont les individus jouissent à titre de plaideurs en général (*Ernst et autres c. Belgique*, no 33400/96, § 98, 15 juillet 2003). » Judgement of 7 June 2007, at para. 72.

⁶² In accordance with article 11 of the Code of Criminal Procedure, « Sauf dans le cas où la loi en dispose autrement et sans préjudice des droits de la défense, la procédure au cours de l'enquête et de l'instruction est secrète » Code de procédure pénale, entrée en vigueur le 2 mars 1959, Modifié par Loi n°2000-516 du 15 juin

67. The OPCD submits that the same concerns and safeguards are reflected in the ICC Statutory framework, if properly interpreted. In this regard, the right of an alleged victim to participate in the investigative phase is secured through their ability to submit a complaint to the Prosecutor, and the attendant obligations on the Prosecutor to investigate this complaint, and to apprise the complainant of the Prosecutor's preliminary assessment concerning the feasibility of conducting a further investigation.⁶³ In the event that the Prosecutor decides not to investigate or prosecute a specific case, the alleged victims also have standing before the Pre-Trial Chamber in connection with any review proceedings concerning such a decision.⁶⁴ In terms of other potential scenarios, the ability of the alleged victims to seize the Pre-Trial Chamber must necessarily be interpreted in light of the limited powers of the Pre-Trial Chamber itself during this particular phase. In accordance with article 57, the Pre-Trial Chamber's power at this juncture must generally be triggered by a request from the Prosecutor.⁶⁵
68. The OPCD notes in this regard, that the Legal Representatives have cited preparatory works in support of their assertion that there is a general right to participate at the situation phase,⁶⁶ and further opine that the OPCD's appellate submissions seek to "reverse years of comprehensive discussions through an appeal".⁶⁷
69. The OPCD has revised the particular preparatory documents cited by the Legal Representatives, and respectfully submits that the text of these documents do not support the conclusions advocated by the Legal Representatives. To the contrary, a draft version of rule 89 which was submitted for debate during the Paris Conference (Rule A), and which mirrors the present text, expressly provided that the defence shall have the right to respond to applications,⁶⁸ but at the same time, included the

2000 - art. 96 JORF 16 juin 2000, version consultée le 2 juillet 2008, http://www.legifrance.gouv.fr/affichCode.do?sessionId=0154B441FBE0B2111B7EEC33218EB16D.tpdjo01v_3?cidTexte=LEGITEXT000006071154&dateTexte=20080702

Similarly, in accordance with article 57 of the code d'instruction criminelle belge, "Sauf les exceptions prévues par la loi, l'instruction est secrète. Toute personne qui est appelée à prêter son concours professionnel à l'instruction est tenue au secret. Celui qui viole ce secret est puni des peines prévues à l'article 458 du Code pénal". Code d'instruction criminelle belge, entrée en vigueur le 17 novembre 1808, L 1998-03-12/39, art. 9, 016, in force 2 October 1998, <http://www.ejustice.just.fgov.be/loi/loi.htm>

⁶³ See Articles 15 and 53 of the Statute.

⁶⁴ See article 53 (3) and Rule 92(2).

⁶⁵ For example, the Pre-Trial Chamber may issues such orders as are requested by the Prosecutor (article 57(3)(a)), or authorize the Prosecutor to take specific investigative steps (article 57(3)(d)).

⁶⁶ See footnote 63.

⁶⁷ At paragraph 35.

⁶⁸ "the written application shall be communicated to the Prosecutor and to the Defence,6 who shall at all times be entitled to reply within a period of time to be set by the Chamber in question." (Rule A(1), page 4).

following footnote: “Defence” here refers to persons subject to a warrant for arrest or who have been summoned to appear, or who have been accused, and to counsel for these persons.”⁶⁹

70. It is apparent from the definition of defence that the drafters recognized the inherent limitations of appointing a counsel during the situation phase, who would be unable to seek instructions from a specific defendant, and therefore sought to underscore that a right to initiate victim participation should generally be deferred to adversarial stages of the proceedings, during which the right of the defence to be heard in relation to the applicants could be exercised in an effective rather than illusory manner.⁷⁰ The OPCD therefore submits that in light of this drafting history, the right to participate during the situation phase should be interpreted strictly.

4. Relief Sought

71. For the reasons set out above, the OPCD respectfully requests the Honourable Appeals Chamber to:

- dismiss the observations of the Legal Representatives; and
- grant the OPCD appeals of 4 February 2008 and 18 February 2008.

⁶⁹ Footnote 6, Report on the international seminar on victims’ access to the International Criminal Court PCNICC/1999/WGRPE/INF/2 6 July 1999

⁷⁰ See *Artico v. Italy*, Judgement of 13 May 1980, Series A no. 37, p. 16 ss33.



Xavier-Jean Keita
Principal Counsel of OPCD

Dated this Thursday, 3 July 2008

At The Hague, The Netherlands