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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 THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

**Prosecution's Consolidated Response to Four Statements of Views and Concerns
of Participating Victims pursuant to Appeals Chamber's Decision of 30 June 2008**

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Introduction

1. The Prosecution and OPCD have initiated three related appeals concerning the manner in which applications by victims to participate at the investigation phase of a situation and the pre-trial phase of a case should be addressed. The Prosecution hereby responds to four statements of views and concerns regarding those appeals, filed by the legal representatives of victims in the situation.¹
2. The Prosecution stresses that, in general, in order for a victim to have any participatory rights or procedural status under Article 68(3), including at the early stages of the Court's proceedings, all of the criteria set out in that Article, and in Rule 89(1) which implements it, must be fulfilled.

Procedural History

3. On 7 December 2007, the Single Judge of Pre-Trial Chamber I ("Single Judge") rendered a preliminary decision concerning matters arising during Rule 89 proceedings ("7 December 2007 Decision").² The Office of Public Counsel for the Defence ("OPCD") sought³ and was granted leave to appeal the 7 December 2007 Decision.⁴ On 4 February 2008, the OPCD filed an appeal brief against the 7 December 2007 Decision ("First OPCD Appeal").⁵ On 15 February 2008, the Prosecution filed a response to the First OPCD Appeal.⁶

¹ See ICC-01/04-503 OA4 OA5 OA6, 30 June 2008 ("Appeals Chamber Decision"), para. 44.

² *Situation in the DRC*, ICC-01/04-417, 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, 7 December 2007.

³ *Situation in the DRC*, ICC-01/04-418, 13 December 2007.

⁴ *Situation in the DRC*, ICC-01/04-438, 23 January 2008.

⁵ *Situation in the DRC*, ICC-01/04-440 OA4, OPCD appeal brief on the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", 4 February 2008.

⁶ *Situation in the DRC*, ICC-01/04-452 OA4, Prosecution's Response to OPCD appeal brief on the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Material", 15 February 2008 ("Prosecution's Response to First OPCD Appeal").

4. On 24 December 2007, the Single Judge issued a decision on the victims' applications for participation in the proceedings ("24 December 2007 Decision").⁷ Both the OPCD and the Prosecution sought⁸ and were granted leave to appeal the 24 December 2007 Decision.⁹ On 18 February 2008, the OPCD filed its appeal against the 24 December 2007 Decision ("Second OPCD Appeal"),¹⁰ to which the Prosecution responded on 29 February 2008.¹¹ Also on 18 February, the Prosecution filed its own appeal against the 24 December 2007 Decision ("Prosecution Appeal"),¹² to which the OPCD responded on 29 February 2008.¹³
5. On 30 June 2008, the Appeals Chamber granted Victims VPRS 1 to VPRS 6, a/0071/06; a/0105/06; a/0007/06, a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06, a/0209/06; a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06 and a/0228/06 the right to participate in the First OPCD Appeal, the Second OPCD Appeal and the Prosecution Appeal,

⁷ *Situation in the DRC*, ICC-01/04-423, Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06, 24 December 2007. On 31 January 2008, the Single Judge issued a corrigendum to this decision (*Situation in the DRC*, ICC-01/04-423-Corr).

⁸ *Situation in the DRC*, ICC-01/04-428, 7 January 2008 (Prosecution's application for leave to appeal); *Situation in the DRC*, ICC-01/04-429, 7 January 2008 (OPCD's application for leave to appeal).

⁹ *Situation in the DRC*, ICC-01/04-444, 6 February 2008. In this decision, the Single Judge granted both the OPCD and the Prosecution leave to appeal the 24 December 2007 Decision ("Decision Granting Leave the 24 December 2007 Decision").

¹⁰ *Situation in the DRC*, ICC-01/04-455 OA5, OPCD Appeal Brief on the Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06, 18 February 2008.

¹¹ *Situation in the DRC*, ICC-01/04-482 OA5, Prosecution's Response to OPCD Appeal against 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings, 29 February 2008 ("Prosecution's Response to Second OPCD Appeal").

¹² *Situation in the DRC*, ICC-01/04-454 OA6, Prosecution's Document in Support of Appeal against the 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings, 18 February 2008.

¹³ *Situation in the DRC*, ICC-01/04-479 OA6, OPCD Response to Prosecution's Document in Support of Appeal against the 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings, 29 February 2008.

for the purpose of presenting their views and concerns regarding their personal interests in the issues raised on appeal (“Appeals Chamber Decision”).¹⁴

6. On 8 July 2008, the following statements of views and concerns of victims pertaining to their personal interests in the issues raised in the above three appeals have been filed:

- *Observations du BCPV en tant que représentant légal des victimes a/0007/06, a/0008/06, a/0022/06 à a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 à a/0141/06, a/0145/06 à a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/162/06, et a/0209/06 en réponse aux appels interlocutoires déposés par l’Accusation et le BCPD à l’encontre des décisions des 7 et 24 décembre 2007 (“First Statement”);¹⁵*
- *Observations des Représentants légaux de a/0071/06, VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6 suite à l’appel interjeté par le BCPD contre le décision de la Chambre Préliminaire en date du 7 décembre 2007 et aux appels interjetés par le Bureau du Procureur et le BCPD contre les décisions de la Chambre Préliminaire en date du 24 décembre 2007 (“Second Statement ”);¹⁶*
- Observations of the Legal Representative of Victims a/0016/06, a/0018/06, /0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007 (“Third Statement”);¹⁷ and
- Participation du Représentant Légal de la Victime a/105/06 à l’appel du Bureau du Conseil Public pour la Défense (BCPD) contre la Décision de la Chambre

¹⁴ *Situation in the DRC*, ICC-01/04-503 OA4 OA5 OA6, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007.

¹⁵ *Situation in the DRC*, ICC-01/04-507 OA4 OA5 OA6, 8 July 2008.

¹⁶ *Situation in the DRC*, ICC-01/04-508 OA4 OA5 OA6, 8 July 2008.

¹⁷ *Situation in the DRC*, ICC-01/04-509 OA4 OA5 OA6, 8 July 2008.

Préliminaire 1 du 07 décembre 2007 et aux appels du Procureur et du BPCD contre la Décision de la Chambre Préliminaire 1 du 24 décembre 2007 ("Fourth Statement").¹⁸

7. The Prosecution hereby presents a consolidated response to the four statements of views and concerns (collectively referred to as the "Victims' Observations"), pursuant to the Appeals Chamber Decision of 30 June 2008.¹⁹

Scope of the Statement of Views and Concerns

8. The Appeals Chamber Decision "limit[ed] the victims to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal."²⁰ The Prosecution notes that in large parts, the Victims' Observations have gone beyond a confined presentation of views and concerns and instead presented legal arguments refuting the substance of the parties' appeals or supporting the merits of the Decision.
9. The Prosecution has previously submitted that: "the purpose is to present the views and concerns of the victims relating to [these issues]: the filing is not a legal response to the brief filed by the Appellant; 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".²¹ The Prosecution has further submitted that, as a result, challenging or responding to specific legal arguments raised by the parties is not the proper purpose nor role of victims' observations.²² These

¹⁸ *Situation in the DRC*, ICC-01/04-510 OA4 OA5 OA6, 8 July 2008.

¹⁹ Appeals Chamber Decision, p. 4.

²⁰ Appeals Chamber Decision, para. 101. The Appeals Chamber further stated that "[o]bservations to be received by the victims must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings".

²¹ See ICC-01/04-488 OA5 OA6, 20 March 2008, para. 34. See also *Situation in Darfur*, ICC-02/05-142-Corr OA OA2 OA3, 23 June 2008, para. 7; *Situation in Darfur*, 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.

²² See further *Situation in Darfur*, ICC-02/05-142-Corr OA OA2 OA3, 23 June 2008, para. 7; contrast First Statement, para. 29, in which OPCV presents its observations as "in response to the appellants' arguments" (emphasis added), as opposed to presenting the views and concerns of the victims in relation to the issues in the appeal, to the extent that they impact on the personal interests of those victims.

submissions are consistent with the recent finding of the Appeals Chamber that victims or their legal representatives are not “parties” to the proceedings.²³

10. The Prosecution further notes that some of the arguments advanced by the legal representatives distinctly go beyond the issues under appeal.²⁴ Those arguments fall outside the scope for determination by the Appeals Chamber in the context of the above appeals and will therefore not be addressed by the Prosecution for the purposes of this response.²⁵

11. To the extent that the Appeals Chamber considers that the Victims’ Observations comply with the above ruling included in its Decision, the Prosecution will set out its response to the Victims’ Observations.

Consolidated Submissions in Response to Victims’ Observations

12. In its Consolidated Response to the Victims’ Observations, the Prosecution endeavours to address the views and concerns submitted by the various legal representatives in a consolidated form.²⁶

Article 68(3) cannot be interpreted as providing for a general “procedural status of victim” at the investigation phase

²³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 93.

²⁴ See for instance First Statement, paras. 17-20 and Second Statement, paras. 24-26 (whether the Pre-Trial Chamber had the power to expand the issue for which the parties have requested leave to appeal); Second Statement, paras. 85-91 (whether information extrinsic to the applications should be communicated to the parties), paras. 92-101 (concerning the scope of Article 67(2) and Rule 77); and Third Statement, paras. 8-10 (dealing with the standard of review in appeal with respect to an error in the Chamber’s exercise of discretion). In the event that the Appeals Chamber determines that these submissions are properly before it and considers them on the merits, then the Prosecution recalls in relation to the first issue that the Appeals Chamber has ruled that a Chamber may certify an issue for appeal “on its own accord” (Situation in the DRC, ICC-01/04-168, 13 July 2006, para. 20); and in relation to the last issue, the Prosecution has argued that the Single Judge made a series of errors of law (ICC-01/04-454 OA6, 20 February 2008, paras. 10-11), and has not argued its appeal on the basis of an error in the exercise of discretion.

²⁵ The Prosecution notes that the OPCV correctly stated that “the Office was granted leave to file observations only in response to the appellants’ arguments” (First Statement, para. 30).

²⁶ When referring to the “legal representatives”, the Prosecution does not necessarily refer to *all* legal representatives who presented the victims’ views and concerns, but to specific legal representatives that made certain submissions that will be identified in the relevant sections.

13. The Prosecution does not contest that during the situation phase victims may exercise certain procedural rights, in particular in the context of Articles 15(3), 19(3) and 53. Consequently, the system of victim participation during the situation phase does provide for the victims' views and concerns to be taken into consideration already during the early stages of the proceedings.²⁷ However, the Prosecution submits that Article 68(3) cannot be interpreted as providing for a general and undefined "procedural status of victim" during the investigation phase.²⁸ As admitted by one of the legal representatives, "the Court documents do not provide for any specific procedure for such status to be granted".²⁹
14. Granting a "procedural status of victim" during the investigation phase is incompatible with the obligation to render a specific determination as to whether the applicants' personal interests are affected, which the Prosecution submits can only be done in light of concrete proceedings, and whether it would be appropriate for them to participate in the proceedings in question.³⁰ Moreover, as the Prosecution has argued previously, it is premature and potentially unnecessary to grant applicants such a general procedural status during the investigation phase;³¹ and a finding of a Chamber to that effect at the investigation phase can unduly impact on the fairness and the impartiality of the proceeding.³²
15. One of the legal representatives argues that in the absence of a procedural status for victims during the investigation phase, the victims' participation may be reduced to a minimum.³³ The Prosecution submits that this argument is unsound,

²⁷ First Statement, para. 26-28; Second Statement, para. 51, 60; Fourth Statement, para. 14. See also Prosecution's Response to First OPCD Appeal, para. 25. See also Prosecution's Response to Second OPCD Appeal, para. 27.

²⁸ First Statement, para. 37; Second Statement, paras. 24-26; Third Statement, paras. 11-15. These submissions also extend to the "pre-trial stage" of the proceedings. However, since the First OPCD Appeal largely addresses the determinations of victims participating in the situation (see in particular First OPCD Appeal, paras. 5, 34-55), the views and concerns expressed by victims cannot go beyond the boundaries of the grounds of appeal raised by the OPCD (see also Prosecution's Response to First OPCD Appeal, para. 11).

²⁹ First Statement, para. 32.

³⁰ Prosecution's Response to First OPCD Appeal, paras. 15-18. Prosecution's Appeal, paras. 21-23.

³¹ Prosecution's Response to First OPCD Appeal, paras. 19-20.

³² Prosecution's Response to First OPCD Appeal, paras. 21-22. In this context, see also Third Statement, paras. 25-26.

³³ First Statement, para. 34.

as the legal representative herself contends that the granting of a procedural status alone does not entail a victim to participate in the proceedings and that in order for a victim to exercise any participatory rights, a second procedure would be required, during which the personal interests of victims will be assessed.³⁴ According to this logic, granting victims mere procedural status during the investigation phase would not increase the level of the victims' participation during that phase.

16. Moreover, the Prosecution disagrees with the legal representative that the victims' participation in the investigation phase is subject to the "power of assessment" of the Prosecution.³⁵ The very language of the relevant provisions of the Statute provide that it is not within the Prosecution's discretion to decide on whether or not victims are entitled to participate in certain stage of the proceedings during the investigation phase.³⁶
17. Finally, contrary to the contention of the legal representatives, the fact that the Appeals Chamber allows for victims to present their views and concerns in these appeals does not prove that victims are permitted to participate in the investigation phase.³⁷ The Appeals Chamber only granted victims a right to present their views and concerns in the three pending appeals in the understanding that the personal interests would be affected by their outcome. In so doing the Appeals Chamber did not pre-judge the merits of the appeals, which concerns that manner in which applications by victims to participate at the investigation phase of a situation and the pre-trial phase of a case should be addressed.

The participation of victims must be linked with identifiable and specific stages of the proceedings

³⁴ First Statement, para. 32.

³⁵ First Statement, para. 38.

³⁶ See Article 15(3) and Rule 50; Article 19(3) and Rule 58; and Article 53.

³⁷ Fourth Statement, para. 20.

18. The Prosecution submits that some of the Victims' Observations improperly characterise the periods during which investigations are being conducted and pre-trial proceedings take place as "stages", rather than "phases" of the proceedings.³⁸ This distinction is well founded in the Statute and the Rules.³⁹ Further, 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.⁴⁰
19. For instance, 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.⁴¹
20. Indeed Rule 92(2) and Regulation 86(3) highlighted in the Victims' Observations demonstrate that the participation of victims is granted only in terms of defined events or "stages of the proceedings".⁴² Rule 92 mandates notification to, *inter alia*, "victims or their legal representatives who have already participated in the proceedings". 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.

³⁸ Second Statement, para. 52; Third Statement, paras. 11 and 17; Fourth Statement, para. 13 and 34.

³⁹ 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).

⁴⁰ Prosecution Appeal, paras. 34, 38, 42-45.

⁴¹ See Second Statement, para. 57.

⁴² First Statement, para. 26; Fourth Statement, para. 14.

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 92.⁴³

21. The Prosecution further 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 current appeal, which can only be assessed once those proceedings (i.e. the appeals) are identified.⁴⁴
22. As a consequence, the findings of the Pre-Trial Chamber that the personal interests are generally affected at the investigation phase and that the victims' participation in that phase is appropriate, lack specificity: the Chamber's findings with respect to the victims' personal interests and the appropriateness of their participation are not linked with identifiable and specific stages of the proceedings.⁴⁵ In addition, and contrary to the submission of the legal representatives, any finding pertaining to the victims' personal interests and the appropriateness of their participation, cannot be "undertaken on the basis of the precise criteria set out in Rule 85".⁴⁶ The requirements of personal interests and appropriateness are prescribed in other provisions: namely Article 68(3) and Rule 89, rather than Rule 85(a). These criteria constitute additional requirements, alongside the satisfaction of the definition of victims, in order to grant any procedural status or participatory rights, and thus cannot be satisfied simply based on that definition.

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

⁴³ 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") and the Arabic version of the Rules (سبق لهم الاشتراك / سبق أن شاركوا) convey a similar effect.

⁴⁴ Appeals Chamber Decision, para. 89.

⁴⁵ See First Statement, para. 41. Prosecution's Appeal, second error (paras. 20-35 and third error (paras. 36-45).

⁴⁶ First Statement, para. 41 (emphasis added).

23. 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.⁴⁷
24. The Prosecution submits that Article 68(3) and Rule 89 are the provisions which enable the participation of victims, and that accordingly in general 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. While the procedure for assessing applications by victims under Rule 89 and Regulation 86 is distinct from the determination of guilt or innocence; contrary to the submission of the legal representatives,⁴⁸ it is not of such an autonomous nature that it allows a grant of procedural status without reference to the relevant proceedings or based only on finding in relation to rule 85.
25. The definition of "victim" in Rule 85(a) is a definition of general application, defined "[f]or the purposes of the Statute and the Rules of Procedure and Evidence". This definition is not directly linked to, or limited to, victim participation.⁴⁹ Rather, this definition is provided in the context of the general principle that the Court shall take into account the needs of all victims.⁵⁰ The definition further applies to a wide range of different issues and functions of the Court relating to victims, including protection of victims;⁵¹ consideration of the interests of victims by the Court;⁵² and reparations.⁵³

⁴⁷ First Statement, paras. 27, 32, 35 and 41; Second Statement, para. 41-42 and 73-75; Fourth Statement, para. 16-17, 20 and 36.

⁴⁸ Second Statement, paras. 73-75; see also First Statement, para. 41.

⁴⁹ 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.

⁵⁰ Rule 86.

⁵¹ 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).

⁵² 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 and 224.

⁵³ See Articles 75, 79 and 82(4); Rules 94-99, 143; and Regulations 88, 116(1)(d) and 117.

26. The Appeals Chamber has recently stated that Rule 85 “does not have the effect of mandating participation of victims instead the object and purpose of rule 85 is to define who are victims”,⁵⁴ and that “[p]articipation of victims at trial will first and foremost, take place through the procedures of rule 89(1)”.⁵⁵ One of the legal representatives also recognises that “Article 68(3) requires there to be an examination of the victims’ personal interests, and of appropriateness, before a decision granting the right to participate.”⁵⁶
27. Having conducted “a study of all the preparatory works relating to all of the articles and rules governing the participation of victims in the proceedings”, the legal representative concluded that “the Preparatory Commission for the International Criminal Court finally abandoned the idea of setting out a specific procedure for granting a procedural status of victims and considered that the procedure was fully covered by the provisions of rules 85 and 89”.⁵⁷ In the view of the Prosecution, this conclusion confirms that no procedural status may be granted to victims in the absence of specific findings in relation to the requirements under Article 68(3), as Rule 89 mandates such findings.⁵⁸
28. As a consequence, 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.⁵⁹ The Statute and the Rules do also not foresee an abstract status of victim participant, which does not entail participatory rights.⁶⁰ Rather,

⁵⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432 OA9 OA 10, 11 July 2008, para. 58.

⁵⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432 OA9 OA 10, 11 July 2008, para. 61. The Appeals Chamber further ruled as follows: “By way of written applications, applicants will have to demonstrate, firstly, that they are victims within the meaning of rule 85 of the Rules. Secondly, pursuant to article 68(23) of the Statute, victims will first have to demonstrate that their personal interests are affected by the trial in order to be permitted to present their views and concerns at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (para. 61).”

⁵⁶ Third Statement, para. 16.

⁵⁷ First Statement, para. 32 and footnote 60.

⁵⁸ See in particular Rule 89(2); see footnote 62, below.

⁵⁹ See e.g. Second Statement, para. 41.

⁶⁰ Second Statement, para. 42.

the participation of victims is granted by Article 68(3)⁶¹ and Rule 89(1) which implements and sets out the parameters of such participation.⁶²

29. As noted by the legal representatives, provisions of the Statute, notably Articles 15(3), 19(3) and 53, do provide specific roles for victims in proceedings without a showing of personal interests.⁶³ 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.⁶⁴ 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.

30. The Prosecution further submits that contrary to the suggestion by the legal representatives, the Appeals Chamber did not endorse a procedural status of victims based on the requirements included in Rule 85 alone.⁶⁵ The Appeals Chamber found that “in circumstances in which victims have already been granted leave to participate in the proceeding before the Pre-Trial Chamber, it would not enquire into their victim status but will proceed to the next stage of its enquiry”.⁶⁶ The approach followed by the Appeal Chamber does not mean that an applicant fulfilling the criteria under Rule 85 will be granted a procedural status. On the contrary, the Appeals Chamber made it clear that it will “examine the applications for participation ... in light of its interpretation of article 68(3) of the Statute for granting participation”, namely “(i) whether the individuals seeking participation are victims in the situation phase of the proceedings, (ii) whether

⁶¹ In addition to the discrete instances of victim participation provided for in Articles 15(3) and 19(3).

⁶² 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.

⁶³ First Statement, para. 26; Second Statement, paras. 45 and 57; Fourth Statement, paras. 14 and 31. See also Prosecution’s Response to First OPCD Appeal, para. 25.

⁶⁴ First Statement, para. 46.

⁶⁵ First Statement, para. 29 and footnote 56; Fourth Statement, para. 20.

⁶⁶ Appeal Chamber Decision, para. 92.

they have personal interests that are affected by the issues on appeal, (iii) whether their participation is appropriate and lastly, (iv) that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”⁶⁷

31. The approach taken by the Appeal Chamber merely confirms that, as the Prosecution has already recognised, 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 with a view to granting a victim procedural status and participatory rights in relation to specific stages of the proceedings.⁶⁸
32. The Prosecution further submits that the Statute and the Rules do not require a separation of the determination of whether a person is a victim pursuant to Rule 85 from the other necessary findings pursuant to Article 68(3).⁶⁹ Rule 89(2) requires the Chamber to consider both whether the person is a victim, and whether he or she fulfils 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. This does not require that each specific finding, especially those in relation to Rule 85 must be made 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.
33. Even if, *arguendo*, the Appeals Chamber finds it appropriate to make an initial determination under Rule 85, and to defer other determination under Rule 89 and Article 68(3), this does not support the propositions put forward by the legal

⁶⁷ Appeal Chamber Decision, para. 90.

⁶⁸ Prosecution Appeal, para. 19. See also First Statement, para. 41 and Fourth Statement, para. 30, both classifying the Prosecution’s submission as paradoxical. The above submission is also consistent with Regulation 86(8).

⁶⁹ Fourth Statement, paras. 21 and 29.

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.

These requirements for the participation of victims are not unduly onerous and do not violate the rights of the victims

34. The legal representatives suggest that examining participation in relation to each act of proceedings would be so cumbersome that it would delay the proceedings, render the victims’ participatory rights nugatory, and as a consequence, violate the participatory rights of victims.⁷⁰ The Prosecution submits that 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.

35. 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.⁷¹ The Prosecution does not consider that individual victims must separately make new full applications under Regulations 86(1) and (2) in relation to each specific set of proceedings or stage of proceedings in which they seek to participate. The Prosecution does also not argue that the analysis of whether victims’ personal interests are affected

⁷⁰ Second Statement, paras. 39-40 and 43. Third Statement, paras. 22-24. Fourth Statement, paras. 23-27, 31 and 42.

⁷¹ Second Statement, para. 52; Fourth Statement, para. 31.

under Article 68(3) is to be conducted in relation to each specific procedural activity or piece of evidence dealt with at a given stage of the proceedings.⁷²

36. A victim application can apply to multiple phases of the proceedings (investigation, pre-trial, trial, appeals), and therefore can also apply to, and be considered in respect of, multiple stages within those phases. The amount of information included in an application pursuant to Regulation 86(2) will likely be sufficient to enable the respective Chambers to make determinations on the application with respect of multiple phases and stages of the proceedings. In addition, both the Registrar and a Chamber have the power to request additional information, should that be required.⁷³

37. In light of the above, the Prosecution submits that the question at hand is not the nature or number of applications required from the victims; but rather at what point a Chamber may properly consider an application and grant participant status and participatory rights.

38. As submitted above, applications by victims to participate may only be meaningfully assessed, and may only be granted, in respect of identifiable stages of the proceedings before the Court.⁷⁴ When a concrete stage of the proceedings arises in the context of the investigation, all pending applications for participation would be considered. This could include

- a) new applications, i.e. applications that were received after the Chamber assessed the pending applications with respect to a prior stage of the proceedings;
- b) 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

⁷² Second Statement, para. 39. See also Decision of the Pre-Trial Chamber in *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-474, 13 May 2008, para. 45.

⁷³ Regulations 86(4) and (7). See also Second Statement, paras. 79-84.

⁷⁴ See paras. 18-22 above. See also Prosecution's Appeal, paras. 15, 17, 21, 30-35 and 40.

- c) applications which had previously been found to be incomplete, and which have been supplemented since.

39. 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,⁷⁵ 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.⁷⁶
40. This approach is consistent with that taken by the Appeals Chamber,⁷⁷ and it would not be more onerous than the procedure proposed by the legal representatives, whereby two distinct procedure have to be followed in order to provide victims with participatory rights: first, a procedure for the granting of a procedural status of victim; and second, a procedure devoted specifically to determining the modalities of participation.⁷⁸
41. The Prosecution submits that many of the practical consequences about 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.⁷⁹ 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 92.⁸⁰

⁷⁵ See e.g. Regulation 86(8).

⁷⁶ To the extent that the Chamber considers that it needs 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).

⁷⁷ See e.g. Appeals Chamber Decision, paras. 88-90. See also *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, paras. 23-24 and 28.

⁷⁸ First Statement, paras. 32-33. 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 (see for instance *Situation in the DRC*, ICC-01/04-101-tEN-Corr, 22 March 2006, para. 64; and *Situation in Uganda*, ICC-02/04-101, 10 August 2007, paras. 89, 96-97).

⁷⁹ See e.g. *Situation in the DRC*, ICC-01/04-374, 17 August 2007, paras. 43-44.

⁸⁰ See First Statement, para. 26, suggesting that for the purposes of Rule 92(2), there is no need for a judicial review. See further ICC-02/05-123 OA, 15 February 2008, para. 28.

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

42. The legal representatives support the finding of the Pre-Trial Chamber that the personal interests of victims are generally affected during the investigation phase and that their participation in this phase is appropriate.⁸¹ They argue that there should be a general presumption that the interests of victims are affected at the investigation phase of the proceedings, and that the burden of proof to the contrary rests with the Chamber or the parties.⁸²
43. It is not the Prosecution's submission that the Single Judge failed to consider the criteria of personal interests and appropriateness at all.⁸³ 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,⁸⁴ rendering them useless in contravention of the principles of treaty interpretation.
44. 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).⁸⁵ However, the Single Judge finding that "the personal interests of victims are affected in general at the investigation stage",⁸⁶ implies that every individual who is a victim within the situation under investigation will necessarily satisfy this requirement, which cannot be reconciled with the Appeals Chamber's demand for "careful consideration on a case-by-case basis".⁸⁷ The impugned Decision also held that the participation of victims in the investigation of the situation (and the

⁸¹ First Statement, paras. 27 and 34; Second Statement, para. 37; Third Statement, para. 16-19; Fourth Statement, para. 15.

⁸² First Statement, para. 42; Fourth Statement, para. 31.

⁸³ See for instance Fourth Statement, para. 34. see also Prosecution Appeal Brief, paras. 14-15.

⁸⁴ In this regard, the Prosecution notes the parallel argument raised by the legal representatives that if applicants meet the requirements for the definition of victims under Rule 85, then they are automatically granted a right to participate in the proceedings (see paras. 23 and following, above).

⁸⁵ *Situation in the DRC*, ICC-01/04-84, 15 August 2005, paras. 25-27.

⁸⁶ Decision Granting Leave the 24 December 2007 Decision, p. 10.

⁸⁷ *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28; see also Prosecution's Appeal, paras. 20-35.

pre-trial phase of a case) was, in general and necessarily, appropriate.⁸⁸ 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.

45. In substantiating their position, and supporting the Decision, the legal representatives rely on an early decision from Pre-Trial Chamber I in the *Situation in the DRC*, referring to it as “settled case-law to date”.⁸⁹ 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.⁹⁰

46. In relation to the legal representatives’ arguments regarding the nature of the personal interests which may found participation,⁹¹ the Prosecution recalls 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.”⁹² Moreover, 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.”⁹³

⁸⁸ The Decision recalled a finding that “the stage of investigation of a situation and the pre-trial stage of a case are appropriate stages of the proceedings for victim participation as provided for in article 68(3) of the Statute” (para. 5). As noted above, leave to appeal was granted only in the situation, and therefore this Appeal Brief deals only with these errors as they relate to victim participation in the investigation of a situation. See further Prosecution Appeal Brief, paras. 36-45.

⁸⁹ See e.g. First Statement, para. 27 and footnote 44, referring to *Situation in the DRC*, ICC-01/04-101-tEN-Corr, 22 March 2006.

⁹⁰ 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.

⁹¹ See in particular the references to international human rights jurisprudence (First Statement, para. 27) and to the Dissenting Opinion of Judge Song (Fourth Statement, para. 39).

⁹² *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, para. 16 (emphasis added).

⁹³ *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.” See also First Statement, para. 49.

47. While the legal representatives contend that the personal interests are generally affected by the investigation phase and that their participation therein is generally appropriate,⁹⁴ they also refer to the power of a Chamber to “intervene, where necessary, in order to assess the personal interests of a victim and/or the appropriateness of his or her participation in specific proceedings taking place in the context of the investigation stage, and where necessary, to revoke the participation of the victims in those specific proceedings”.⁹⁵ While this is considered a possibility or an option by the legal representatives, the Prosecution submits, as argued above,⁹⁶ that a proper determination of personal interests and appropriateness can only be made, and participation can only be granted, in relation to identifiable and specific stages of the proceedings.

48. Finally, the Prosecution disputes that there can be a general presumption that the interests of victims are affected at the investigation phase of the proceedings, and that the burden of proof to the contrary rests with the Chamber or the parties.⁹⁷ The Prosecution submits that this proposal is without foundation in the Statute, and runs contrary to both the general principle that a participant who is asserting a proposition is expected to prove it,⁹⁸ 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.⁹⁹

In order to establish moral harm on the basis of harm suffered by a second person, it is necessary to adduce some level of proof concerning the identity of the second person and the applicant's relationship with this person

⁹⁴ First Statement, para. 27 and 34.

⁹⁵ First Statement, para. 48.

⁹⁶ See paras. 18-22, 38, above.

⁹⁷ First Statement, para. 42; Fourth Statement, para. 31.

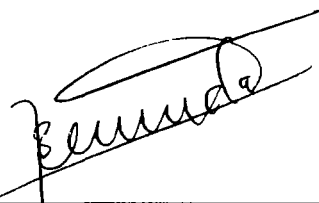
⁹⁸ Indeed, this appears to be recognised by one of the legal representatives: Fourth Statement, para. 31.

⁹⁹ 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.

49. The submissions advanced in the legal representatives appear to misconceive the issue under appeal. The issue does not relate to the question of whether “information extrinsic to the applications themselves” is required.¹⁰⁰ It does also not relate to the level or the nature of proof required,¹⁰¹ but is limited to the general question whether some level of proof concerning the identity of the second person and the applicant’s relationship with that person is required in order to establish moral harm on the basis of harm suffered by a second person.¹⁰²

Conclusion

50. The Prosecution respectfully requests that the Appeals Chamber consider this consolidated response in its determination of the three appeals.



Fatou Bensouda, Deputy-Prosecutor
on behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 18th day of July, 2008

At The Hague, the Netherlands

¹⁰⁰ Third Statement, para. 28.

¹⁰¹ Third Statement, paras. 30-31.

¹⁰² ICC-01/04-444, 6 February 2008, pp. 6, 7 and 15. The Prosecution notes that the submissions included in the First Statement are in line with its own arguments advanced in relation to the present issue (First Statement, para. 23).