Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/04**
Date: **25 July 2008**

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

Public Document

OPCD's Consolidated Response to the Observations of Legal Representatives of Victims in the Appeal of the OPCD against the Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the OPCD against the Pre-Trial Chamber I's Decision of 24 December 2007

Source: **Office of Public Counsel for the Defence**

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
Mr Emmanuel Daoud
Mr Patrick Baoudouin
Mr Joseph Keta
Ms Carine Bapita Buyangandu

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

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 7 December 2007 the Honourable Single Judge issued the "Decision on the Request of the OPCD on the Production of Relevant supporting documentation pursuant to Regulation 86(2)(e) of the Regulation of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor".[1]
2. On 23 January 2008 the Single Judge granted the OPCD leave to appeal the decision.[2]
3. On 4 February 2008 OPCD filed its '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.'[3]
4. On 6 February 2008, the Honourable Single Judge granted the Office of Public Counsel for the Defence (OPCD) and the Prosecution leave to appeal 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/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 à a/0241/06 à a/0250/06'[4] of 24 December 2007 (Decision of 24 December 2007).
5. The OPCD and Prosecution filed their respective appeal briefs on 18 February 2008.
6. On 30 June 2008, the Honourable Appeals Chamber issued the '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',[5] in which the Appeals Chamber granted four groups of alleged victims[6] the right to file observations concerning the impact of the three appeals concerning victim participation on their personal interests by 8 July 2008. The OPCD and OTP were ordered to file their responses by 18 July 2008.

[1] ICC-01/04-417
[2] ICC-01/04-438, at page 8.
[3] ICC-01/04-440
[4] ICC-01/04-423
[5] ICC-01/04-503
[6] 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 anda/0228/06

7. The OPCD notes that the Appeals Chamber granted each group of alleged victims the right to file observations of 30 pages, and also extended the page limit for the respective responses of the parties. At the same time, the Appeals Chamber did not require the parties to file a consolidated response. The OPCD therefore interprets the Appeals Chamber's decision to equate to an authorization to file four responses of a maximum of 30 pages each (which would result in an overall page limit of 120 pages). In light of the overlap of some of the Legal Representatives' submissions, the OPCD considered that it would be more efficient to address these submissions in a consolidated response. Although the present filing exceeds the authorized page limit for an individual response, it falls well within the total page limit, which is potentially available for the totality of the OPCD's response. Should the OPCD's interpretation of this decision be incorrect, the OPCD will immediately refile its submissions in accordance with the relevant directions of the Appeals Chamber.

2. Observations Concerning Issues Raised on Appeal

8. The observations of the Legal Representatives address the following five main issues:
   - the admissibility of the OPCD's appellate issues;
   - the scope and applicable law governing the application process, and in particular, whether parties are entitled to request and receive ' extrinsic materials';
   - whether participation should be granted at a stage of the proceedings, or for the duration of a phase;
   - the interpretation and application of the criterion of 'personal interests' during the situation phase; and
   - the interpretation and application of the criterion of 'appropriateness' during the situation phase.

3. Challenges to the Admissibility of the Appellate Issues

9. Both the OPCV and the Legal Representatives of VPRS 1-6 argue that the Appeals Chamber should dismiss *in limine* the OPCD appellate submission as regards the issues certified for appeal by the Single Judge in the decision of 23 January 2008, and the OPCD's appellate submissions concerning the evidential materials required to establish a right to participate on the basis of moral harm.

3.1 Whether the Scope of the Issues Certified for Appeal Exceeded the Competence of the Single Judge

10. As regards the first argument, it is asserted that the issue for which leave to appeal was granted was broader than the issue for which the OPCD sought certification, and as such, the appeal should be dismissed in accordance with the principle of *non ultra petita.*[7]
11. In its request of 13 December 2007,[8] the OPCD had sought leave to appeal the following two issues: firstly, whether the application process is a distinct procedure, unrelated to the modalities of participation or the criminal proceedings before the Court, which is not per se prejudicial to the Defence; and secondly, whether the Chamber is only obliged to provide the Prosecution and the Defence with copies of the application, and is thus not obliged to provide or order the applicants to provide information extrinsic to the applications themselves.
12. In considering the OPCD's request, the Single Judge determined that the two were in fact interlinked, and were ultimately derived from the Single Judge's legal determination as to the specific features of the application process.[9] Accordingly, any appeal on these specific issues must necessarily consider the legal parameters of the application process itself. The Single Judge therefore characterized the issue as "whether article 68(3) of the Statute can be interpreted as providing for a 'procedural status of victim' at the investigation stage of a situation and the pre-trial stage of a case; and (i) if so, whether rule 89 of the Rules and regulation 86 of the Regulations provide for an application process which only aims to grant the procedural status of victim and is thus distinct and separate from the determination of the procedural rights attached to such status; and what are the specific procedural features of the application process?".

---

[7] 'Observations of the OPCV as Legal Representative of Victims 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 and a/0209/06 in Response to the Interlocutory Appeals Filed by the Prosecution and the OPCD against the Decisions of 7 and 24 December 2007' ("OPCV Observations"), ICC-01/04-507-tENG-Corr, 8 July 2007, at paras. 17-20; '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 la décision de la Chambre Préliminaire en date du 7 décembre 2007 et aux appels interjetés par le Bureau du Procureur et le BCPD contre la décisions de la Chambre Préliminaire en date du 24 décembre', ICC-01/04-508, at paras. 24-26.
[8] Request for leave to appeal the "Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor"', ICC-01/04-419
[9] ICC-01/04-438 at page 4.

13. Whilst the wording employed by the Single Judge differs from the wording of the issue set out by the OPCD, the legal essence remains the same, and directly concerns an issue which derives from the impugned decision. In this regard, the Pre-Trial Chamber has on several occasions rephrased the appellate issues of a party, and the resultant appeals have not been dismissed on that basis.[10]
14. Moreover, since the Single Judge had rejected specific requests from the OPCD concerning the application process, in the event that the Single Judge's legal findings concerning the nature of the application process were overturned, it would have been necessary to reconsider a plethora of OPCD requests concerning the modalities of the application process, which were refused on that sole legal basis.
15. In this connection, Rule 149 provides that "Parts 5 and 6 governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber". The Appeals Chamber therefore possesses the power to substitutes its findings concerning the legal modalities of the application process for that of the Single Judge, rather than remitting the issue back to the Single Judge to decide anew. The third issue certified by the Single Judge[11] therefore simply recognises the power of the Appeals Chamber to issue its own determination of these issues, rather than reverting them to the Pre-Trial Chamber to decide anew. Such an approach would also be consistent with the fact that the Single Judge termed the decision as being urgent, and emphasized the need for legal clarity at the earliest juncture possible. In any case, the OPCD's actual appellate submissions do not exceed the scope of the initial appellate request.
16. In light of the above, the principle of *non ultra petita* is inapplicable.

3.2 Whether the OPCD failed to identify an appealable error with respect to its appellate submissions concerning the evidential proof required for moral harm

17. As regards the argument that the OPCD's appellate submissions concerning the evidential requirements for moral harm fail to identify an error, which arises from the impugned decision,[12] the OPCD submits that this assertion also has no factual or legal merit.

[10] See for example, 'Decision on Second Defence Motion for Leave to Appeal', Prosecutor v. Lubanga, ICC-01/04-01/06-489, 28 September 2006 at p. 5, 'Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008', ICC-01/04-01/06-1191, 26 February 2008.
[11] "how applications for participation at the investigation stage of a situation and the pre-trial stage of a case must be dealt with."
[12] Observations of the OPCV, at para 21-23.

18. In its Observations,[13] the OPCD contested the admissibility of certain applicants on the basis that the applicant had failed to adduce any evidence concerning the identity of the alleged victim, and the applicant's relationship to this person, and that without such information, the applications failed to meet the requisite standard of intrinsic coherence. The impugned decision of 24 December 2007 implicitly rejected these arguments by granting these applicants the right to participate, notwithstanding the fact that they had not adduced the requested information in the interim.

19. In so doing, the Single Judge held that firstly, the Registry was only obliged to provide the applicants with the application forms, and as such, rule 89 did not impose on the Chamber any obligation to order the applicants to provide any information additional to the application forms. Secondly, whilst the Chamber possessed the power under regulation 86(7) to request, as necessary, additional information, this power was limited to the categories of information set out in the decision of 17 August 2007. Accordingly, since documentation concerning the identity of the primary victim, and the applicant's relationship to this person is neither an intrinsic component of the application form, nor was it included in the decision of 17 August 2007, it was not necessary for the Single Judge to request such documentation from the applicants.

20. In terms of the nature of the legal error, the OPCD refers to the conclusion of the ICC Appeals Chamber that "[i]t may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it".[14] In conjunction with such a right, the parties also possess the right that the Chamber considers exercising the power in question, and does not improperly fetter the Chamber's discretion. Regulation 86(2)(e) provides the Chamber with the discretion to determine which types of supporting documentation would be relevant to the Chamber's assessment as to the applicant's right to participate. Having determined in its decision of 17 August 2008 that information concerning the relationship between the applicant and the primary victim would be relevant to the Chamber assessment of the right to participate under rule 89(3) (notwithstanding the absence of an express provision requiring the applicant to submit such documentation), the OPCD submits that the Honourable Single Judge committed an appellable error by failing to consider whether documentation

[13] Observation du Bureau du Conseil Public pour la Défense sur les demandes de participation à la procédure en qualité des victimes, 25 june 2007, ICC-01/04-347-Conf, par. 43; See also Observation du Bureau du Conseil Public pour la défense conformément à l'Ordonnance de la Chambre Préliminaire I en date du 24 août 2007 "Order concerning the transmission of further information on victim's application", 25 September 2007, ICC-01/04-398-Conf, par.36.
[14] Situation in the Democratic Republic of the Congo, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para. 20.

concerning the relationship between the applicant and the primary victim would also be relevant to her determination as to whether the applicant satisfied the conditions to apply on the basis of moral harm.

21. The OPCD's appeal of 4 February 2008 therefore addressed the threshold issue as to whether the Pre-Trial Chamber was obliged to exercise its discretion in considering requests for extrinsic supporting materials, and to accord the parties a right to be heard prior to the Chamber's determination as to what materials an applicant was required to adduce in order to complete their application.

22. The OPCD's appeal of 18 February 2008 addressed the more specific issue as to whether, in order to determine whether the criteria under article 68(3) had been met, it was necessary to requests applicants who were seeking to participate on the basis of moral harm, to submit information concerning their relationship to the primary victim. The OPCD submitted that whilst this requirement was not expressly delineated in either regulation 86, or the Chamber's decision of 17 August 2008, it derived from firstly, the need to impose adequate procedural safeguards to protect the integrity of the proceedings, which is linked to the Chamber's positive obligation under article 68(3) to ensure that victim participation is implemented in an appropriate manner which is consistent with fair and impartial proceedings, and the rights of the defence, and secondly, the positive obligation of applicants to demonstrate the nature of their personal interest in the proceedings.[15]

23. As regards the first aspect, the OPCD referred to the fact that the concept of 'moral harm' is not expressly provided for in the Statute, Rules or Regulations. In terms of the ambit of the right to participate under this basis, as demarcated by the applicable sources of law under article 21 of the Statute, most jurisdictions construed it as an exceptional basis for standing, which was dependent on the applicant demonstrating *inter alia* the existence of a direct or close familial relationship with the primary victim.[16]

---

[15]In light of the fact that the term 'moral harm' is not expressly referred to in the ICC regulatory regime, and the Appeals Chamber only very recently confirmed its applicability before the ICC, the fact that there are no explicit evidential requirements directed to this form of harm in Regulation 86 of the Regulations of the Court should not detract from the need for such safeguards, where necessary to ensure compliance with the criteria for participation set out in article 68(3). The Regulations were first adopted by the Judges on 26 May 2004. Given the absence of any jurisprudence concerning the parameters of article 68(3), or Rules 85 and 89, it is logical that the Regulations would have been drafted in a conservative manner so as not to predetermine any potentially litigious issues. Moreover, the Regulations are expressly subject to the Statute and Rules, and in the same manner that the Regulations can not in themselves create substantive rights (they are not cited in the applicable sources of law in article 21), the absence of an express provision in the Regulation should not be used as a barrier against the enforcement of substantive rights.

[16] OPCD Appeal Brief at paras 51 -52.

24. These submissions have been supported by the Appeals Chamber's recent judgement of 11 July 2008, in which the Appeals Chamber noted that "[m]aterial, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim. The issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims."[17] In its elaboration of this finding, the Appeals Chamber held that the existence of moral harm would be "evident for instance, when there is a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child."[18] The Appeals Chamber further held that question as to whether the harm is personal cannot be determined in an abstract manner, but "would have to be determined in light of the particular circumstances."[19]

25. The OPCD submits that in order to determine on a *prima facie* basis whether, in the particular circumstances of the applicant, it can be deduced that they have suffered personal harm, it is necessary for the applicant to provide sufficient information concerning the primary victim, and their relationship to this person. This is consistent with the finding of the European Court of Human Rights that "[w]hether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries."[20]

26. The Inter-American Court of Human Rights has also held in the context of claims by indirect victims concerning moral harm that "[i]t is true that a person's identity must, as a general rule, be proved by means of relevant documentation."[21] In the particular circumstances of this case, the Court noted that the State had not provided any means by which an applicant could establish the identity or proof of relationship through

---

[17] Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, at para. 1.
[18] At para. 32.
[19] At para. 32.
[20] Cakici v. Turkey, Application no. 23657/94**,** Judgment of 8 July 1999, at para. 98.
[21]Case of Oloeboetoe v. Surinaam, Judgment of September 10, 1993, (*Reparations and Costs)* at para 64 http://www.corteidh.or.cr/docs/casos/articulos/seriec_15_ing.pdf .

official records.[22] The Court nonetheless ordered the Commission to compile data concerning the identity of the complainants, and their relationship to the primary victims.[23]

27. That this information should be submitted in the form of identification of the primary victim, and documents establishing the relationship of the applicant with the primary victim, also derives from the overarching obligation of the Chamber to control the integrity and expeditiousness of the proceedings, which are both elements of fair and impartial proceedings.

28. In this regard, the underlying rationale behind requiring proof of identification would be vitiated unless the applicant also adduces some form of identification as regards the primary victim, since it is the circumstances of the primary victim which serve as the reference point for ascertaining whether an alleged offence under the Rome Statute has occurred. For instance, in terms of the specific example proffered by the Appeals Chamber as exemplifying moral harm – that of the parents of a child who has been forcibly recruited – without any documents concerning the identification of the alleged victim, it would not be possible to verify whether the primary victim was under the age of 15 years on the date of the alleged offence. It would therefore be illogical and inconsistent for the Chamber to reject the applications of primary victims on the basis that the birth-date set out in their identification document indicates that they were 15 years or older at the time of the alleged recruitment,[24] whilst accepting indirect victims, who claim to have suffered moral harm as a result of the alleged recruitment of their child, but who have not adduced any documentation which would permit the Court to verify the birth-date of their child. The existence of such a legal loophole would completely counteract the procedural safeguards in regulation 86 against fabricated applications.[25]

29. Similarly, as noted in the OPCD Appeals Brief of 18 February 2008, it would create an arbitrary and unfair legal distinction if one applicant applying on behalf of a minor or disabled person was rejected, for failure to adduce proof of the identity of the alleged victim and their relationship to this person, whereas another applicant, who

---

[22] At para. 64.
[23] At para. 64.
[24] See findings of the Single Judge at paras. 133-136 of ICC-01/04-423-Corr.
[25] The OPCD refers to its submissions at paragraphs 14 -17 of the 'OPCD's Observations on the 3 July 2008 Pre-Trial Chamber I Decision entitled "Decision Authorizing the submission of Observations Pursuant to rule 89(1) of the Rules on Applications a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08", ICC-01/04-522 concerning allegations that victim applications in the DRC situation have been fabricated. These allegations are set out in the Human Rights Watch Report titled 'Courting History: the Landmark International Court's First Years', dated 11 July 2008, Section VII(2).

also fails to adduce proof of the identity of the child and proof of their parentage or legal guardianship, is accepted under the basis of moral harm. Rule 89(3) would become superfluous, as all applications which fail to meet the criteria set out therein, could be resubmitted under the name of the applicant as an indirect victim.

30. In practice, this could prove deleterious to the interests of the primary victim, since rather than seeking to meet the higher evidential standard of rule 89(3), applicants could simply assert their standing on the basis of moral harm, notwithstanding the fact that firstly, the primary victim might not have consented to the applicant so acting, and secondly, there would be no corresponding obligation on the applicant to consult with the primary victim in relation to their views and concerns. Such concerns would necessarily impact on the Chamber's decision as to whether it is appropriate for such applicants to participate under circumstances in which they have submitted no information concerning the circumstances of the primary victim.

31. The OPCD would also like to note in this regard, that contrary to the submissions of Legal Representative,[26] the OPCD has not asserted for the purposes of this appeal that the applicants are required to submit a death certificate in relation to the primary victim. As concerns the Legal Representative's submissions regarding the feasibility of obtaining the information in question, the OPCD notes that the documentary threshold proposed by the OPCD mirrors the evidential requirements for submitting an application on behalf of a minor or handicapped person, and as such, does not exceed the standards currently deemed acceptable by the Court. Moreover, the potential difficulty in obtaining the information in question would be a factor taken into consideration by the Chamber in its determination as to what types of identification and proof of relationship will be accepted in order to complete the application.[27]

32. The OPCD further submits that the documents in question are necessary to permit the Chamber to render an effective determination as to whether the personal interests of the applicants are affected by the subject matter of different proceedings before the Chamber. The documentation required to sustain a request to participate is not limited to proof that the applicant meets the definition of victim under rule 85, but extends to

[26] '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', ICC-01/04-509, at para 30.

[27] The OPCD refers to its submissions set out in its Appeal Brief of 4 February 2008 that such categories of documents should be determined after providing the parties with a right to be heard, and should be construed in light of the particular legal and factual circumstances of the applicants in question – since the practicable ability of applicants to obtain official records will necessarily differ depending on the country in which they reside.

any documentation which may be relevant to the Chamber's assessment that the personal interests of the applicant are engaged by the procedure in question, and that it would be appropriate for them to submit their views and concerns regarding this procedure.

33. The OPCD observes in this regard that Regulation 86(2)(f) expressly requires applicants to submit "[i]nformation as to why the personal interests of the victim are affected". In the same manner that the Pre-Trial Chamber determined that in order to assess the situation of a victim unable to act on their own behalf, it was necessary for the applicant to submit proof of identity, kinship, guardianship or legal guardianship, the OPCD submits that such documents are also required to substantiate and define the personal interests of an applicant seeking participation on the basis of moral harm.

34. The linkage between the personal interests of the applicant and the issues being determined by the Chamber is predicated on the circumstances of the primary victim, since it is these circumstances which constitute the potential subject matter of an investigation or prosecution before the Court. It therefore follows that documentation concerning the applicant's relationship to the primary victim would be directly relevant to the Chamber's assessment as to whether the personal interests of the applicant are affected by the proceedings in question.

35. In light of the above, the OPCD submits that request of the Legal Representatives to dismiss *in limine* the OPCD's ground of appeal concerning the evidentiary requirements for granting a right to participate for applicants claiming to suffer moral harm, should be rejected.

4. The Scope and Applicable Law Governing the Application Process

4.1 The applicable law governing the application process

36. In the decision of 7 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.[28]

37. 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

[28] Decision of 3 December 2007, at para 7.

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.[29]

38. The OPCV specifically argues in this regard that in light of the fact that the texts of the court do not explicitly regulate the application process, it is exclusively governed by rules 85 and 89 of the Rules of Procedure and Evidence,[30] and does not require an assessment of the personal interests of the applicants. In this regard, the Chamber's assessment of the criteria set out in article 68(3) is deferred until the Chamber's assessment of the modalities of participation. [31]

39. The OPCD observes that the above submissions appear to be predicated on the belief that the Chamber possesses the power to grant applicants the status of 'victim', independently of article 68(3) or other legal provisions concerning the rights and functions of victims before the ICC (for example, rule 81). In response, the OPCD respectfully submits that Rule 89 and regulation 86 exist for the purpose of facilitating decisions under article 68(3), and are necessarily subordinate to article 68(3), in light of the fact that article 68(3) is contained within an hierarchically superior legal text. It is therefore not possible to construe the parameters of the rule 89 application process outside of the parameters of article 68(3).

40. As concerns the operation of rule 85, the OPCD further observes that 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. As recently stated by the Appeals Chamber, "[i]n relation to the object and purpose of rule 85, the Appeals Chamber considers that the rule does not have the effect of mandating participation of victims instead the object and purpose of rule 85 is to define who are victims."[32]

41. 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

[29] Legal Representatives of a/0071/6, VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 at para 78.
[30] OPCV Observations at paragraph 32.
[31] OPCV observations at para. 33.
[32] Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, at para. 58.

to order protective measures, to grant participation under article 68(3), to issue a judgment, or to award reparations.[33]

42. 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;[34] they do not envisage either a preliminary or free-standing finding that the applicants meet the definition of rule 85.

43. In terms of the assertion that the due process protections of the Statute are deferred to the Chamber's assessment of the modalities of participation., as noted in the OPCD Appeal Briefs of 4 and 18 February 2008, article 68(3) imposes a positive obligation on the Chamber to permit participation "at stages of the proceedings determined to be appropriate"; this is an obligation which not only regulates the modalities of participation, but also the very fact of participation. The OPCD further observes that the wording of article 68(3) is derived from the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[35] The equivalent provision in the Basic Principles was itself modeled on a United States proposition derived from the US Presidential Task Force on Victims. In response to the United States proposal to permit victims to present their views and concerns at critical stages of the proceedings, the representatives of the United Kingdom and The Netherlands expressed their concern regarding the impact on the right of the defence, and requested that the caveats, such as the 'appropriateness' of participation, be inserted into the text to protect defence rights and the impartiality of the proceedings.[36] The word 'appropriate' should therefore be interpreted broadly, so as to encompass fairness and due process considerations.

44. Finally, the Legal Representatives of a/0071/06 and VPRS 1-6 contend that the use of the term 'victim' (and by corollary, granting applicants the procedural status of 'victim' during the situation phase) is acceptable because "[w]hile it is true that the crime has not yet been established legally at the situation stage, the crime existed

[33] This is clear from the wording of Rule 85: "[f]or the purposes of the Statute and Rules of Procedure and Evidence, victims means […]".
[34] 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 […]".
[35] Principle 6(b), A/RES/40/34, 29 November 1985.
[36] See footnote 284, R. Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes'. Human Rights Quarterly, 26 (2004) 605-686.

before the investigation phase itself".[37] The Legal Representatives further assert that "national legal systems employ the term "victim" as of the investigation phase",[38] and moreover, "a person is considered a victim as soon as it has been established that he or she has suffered harm, regardless of whether the perpetrator has been identified, arrested, prosecuted, or found guilty".

45. In response, the OPCD disputes firstly, that it is possible to pronounce on the existence of an alleged offence even if the perpetrator has not been identified, and secondly, that a judicial determination concerning the existence of an alleged crime is not prejudicial to the rights of the putative defendant.

46. As regards whether it is possible to verify the existence of crimes without identifying a perpetrator, the OPCD observes that several offences under the Rome Statute are dependent on the circumstances of the defendant. For example, the absence of military necessity is a fundamental element of several war crimes provisions,[39] but which is assessed from the perspective of the defendant and not the alleged victim.[40] As commented by John Jones, "a defendant accused of the war crime of unlawful deportation may concede that there was deportation, but argue that under the circumstances it was lawful. If it was lawful, then no crime was committed and there are no victims, since there is no such thing as a 'crime-less victim as far as the ICC is concerned".[41]

47. It is therefore either not feasible to render a determination that such offences have occurred in the context of the situation phase, or highly prejudicial to the putative defendant to render such a pre-determination.

48. In terms of the latter aspect, the OPCD firstly respectfully disputes the Single Judge's characterisation of her findings as a 'preliminary determination'. A preliminary finding is one which will be automatically reviewed at a later stage of the proceedings – for example, a decision concerning the existence of alleged crimes for the purposes of issuing an arrest warrant, will automatically be reviewed in accordance with the Chamber's duty to consider whether the higher evidential threshold has been met for the confirmation of the charges. In contrast, decisions granting applicants the

---

[37] At paragraph 32.
[38] At paragraph 32.
[39] Oral rule 98*bis* decision, Prosecutor v. Oric, "Our position on military necessity. The Trial Chamber notes that the absence of military necessity is explicitly mentioned in the actus reus of wanton destruction pursuant to article 3(B) of the Statute; hence, it must be considered a negative element of the crime. As like for other elements of the crime, it is for the Prosecution to prove beyond reasonable doubt that this requirement has been met." Transcript of 8 June 2005, Page 9009 lines 16-21. http://www.un.org/icty/transe68/050608IT.htm
[40] *Ibid* at page 9011, lines 10-14.
[41] John R. W. D. Jones, 'Protection of Victims and Witnesses', Chapter 31.4, The Rome Statute of the ICC, Volume II, (Cassese, Gaeta and Jones eds. 2002) at p. 1357.

'procedural status of victim' continue throughout the situation phase, and, if the events do not eventually form the subject of a specific prosecution, will never be reviewed. Unless the decisions are overturned on appellate review, the factual findings of the Single Judge may constitute the only, and thus final pronouncement of the ICC on these alleged events.

49. Given the potential permanence and significance of such determinations, it almost beggars belief to assert that no due process protections apply to the application process by whence the determination is reached. It has thus been commented that "[t]here is no logical basis for concluding that the Chambers can excuse themselves from considering whether prejudicial effects flow from the initial determination of whether to grant the "status of victim." If granting the "status of victim," in itself, cannot be squared with providing a fair proceeding, due process or fairness principles, as well as the terms of Article 68(3), prohibit even the conferring of the theoretical right."[42]

4.2 The Right to Request and Receive 'Extrinsic documents'

50. The Legal Representatives endorse the findings of the Honourable Single Judge that notwithstanding the Chamber's power to request additional documentation under regulation 86(7), any documents so requested need not be disclosed to the parties as they do not form part of the application form.[43] The Legal Representatives further opine that that the OPCD's request for extrinsic documents is misconceived, since unlike witnesses, the credibility of applicants is not at issue.[44]

51. The OPCD notes firstly in response that the Single Judge's finding concerning what somewhat contradictory. In the Chamber's decision of 17 August 2007, the Chamber relied on regulation 86(2)(e) to elaborate further on what documents were required to complete an application form, for example, the requirement that persons acting on behalf of a primary victim should submit identification of themselves and the primary victim, and, in the absence of evidence of consent, proof of their relationship to the primary victim. Contrary to the submissions of the Legal Representatives,[45] the Pre-Trial Chamber was not simply reiterating the documentary requirements expressly set out in regulation 86; rather, the Pre-Trial Chamber relied on regulation 86(2)(e) to

[42] C. Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?', 6 Nw. U. J. Int'l Hum. Rts. 459 at para 93, http://www.law.northwestern.edu/journals/jihr/v6/n3/4/.
[43] See Legal Representatives of a/0071/06, VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 at paras. 82-84.
[44] See Legal Representatives of a/0071/06, VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 at para. 86.
[45] Legal Representatives of a/0071/06, VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 at paras. 81-83.

extrapolate as to what types of documents would be relevant to its assessment: "[a]s mentioned above, proof of identity, kinship, guardianship and legal guardianship must be submitted with the application pursuant to regulation 86(2)(e) of the Regulations".[46] These additional supporting documents have been transmitted to the parties as part of the 'complete' application.

52. The decision of 17 August 2007 therefore suggests that provided the documents in question can be considered as relevant, they would be considered to comprise part of the application form. As such, the distinction employed by the Single Judge between extrinsic and intrinsic documents is entirely arbitrary. A more accurate formulation of the issue is whether the documents in question can be considered by the Chamber as relevant to its determination. In the event that the documents are relevant, then it follows that the disclosure of these documents to the parties would be necessary to give effect to their right to be heard.

53. As noted above, Regulation 86(2)(f) further requires the applicants to submit "information as to why the personal interests of the victim are affected". This information will necessary depend on the specific proceedings in which the applicant is seeking to participate, and may vary depending on the type of participation being sought. It is therefore not feasible for the Chamber to impose a finite cap as to what documents can be considered as relevant under Regulation 86(2)(e).

54. In terms of the distinction between disclosure obligations pertaining to witnesses as compared to participating applicants, the OPCD submits that whilst the two exercise different functions before the ICC, both have the ability to affect the Chamber's adjudication of the merits of the Prosecution's case (whether it be the Prosecution's case that there are insufficient ground to investigate or prosecute, or a Prosecution case as to whether an accused is guilty beyond reasonable doubt).

55. The OPCD therefore submits that a judicial approach whereby rule 89 is construed as imposing an obligation on the Registry to provide the parties with the application form *simpliciter* would prove to be completely unworkable in the context of concrete proceedings, as exemplified by recent decisions concerning the modalities of victim participation at the trial stage.

56. In the Appeals Chamber's judgement of July 2008, the Appeals Chamber upheld the Trial Chamber's decision that Legal representatives may, in certain circumstances, tender evidence concerning the alleged guilt or innocence of the accused. In such a

[46] Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation**,** ICC-01/04-374, 17 August 2007, at para. 13.

scenario, "[i]f Trial Chamber decides that the evidence should be presented then it could rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced and depending on the circumstances it could order one of the parties to present the evidence, call the evidence itself, or order the victims to present the evidence."[47] The Single Judge's findings concerning the right of parties to receive additional documents would not be viable in such a scenario, since the application of these findings would in effect mean that the Chamber would only be obliged to order the Registry to provide the parties with the Legal Representative's application to tender evidence, and not the evidence itself (prior to its submission in Court).

57. The OPCD observes that neither the Trial Chamber nor the Appeals Chamber specified the legal basis for ordering the prior disclosure of evidence. In the absence of any express provision in the Statute and Rules to that effect, Regulation 86(2)(e) must be given full effect. Thus, in connection with an application to tender evidence, the evidence itself is clearly relevant to the Chamber's determination and to the parties' right to contest the application.

58. The OPCD further observes that in anticipation of their right to adduce evidence, the Legal Representatives would logically commence investigations. In so doing, it is possible that they might gather both potentially incriminating and exculpatory evidence, including information which may discredit the evidence which they intend to submit. In the context of tangible objects or documents, by coming within the control of the Legal Representatives, the information in question would cease to be discoverable by the defence in the normal course of their investigations.

59. Apart from regulation 86(2)(e), the Statute, Rules and Regulations do not impose any obligation on the Legal Representatives to disclose to the defence exculpatory or relevant material which may be within their control. There are also no legal provisions which sanction applicants or Legal Representatives for tendering false or misleading evidence,[48] which would be the case if the Legal Representatives tendered a document, notwithstanding non-disclosed information within their control which clearly suggested that the document in question was not authentic.

60. Given the absence of express safeguards, the OPCD submits that the Chamber has a positive obligation to utilise regulations 86(2)(e) and 86(7) to control the fairness and impartiality of the proceedings.

---

[47] Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, at para. 100.

[48] Article 70(1)(b) refers to the presentation of evidence that the party knows if false or forged.

61. The OPCD notes in this regard that regulation 86(7) appears to create a complementary mechanism to article 67(2) and rule 77, by which the defence may request the Chamber to order the Prosecutor to provide information concerning the applicants, which may be relevant to the credibility of the applicants or material to the preparation of the defence, irrespective of whether these applicants have the dual status of Prosecution witnesses.[49]

62. The scope of this obligation will necessarily depend on the scope and nature of the proceedings. In this connection, the scope of the OPCD's disclosure request was itself linked to the absence of any clear guidelines concerning the scope of victim participation during the situation phase. Previous decisions of the Pre-Trial Chamber have held that "persons accorded the status of victims will be authorised, notwithstanding any specific proceedings being conducted in the framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in the DRC."[50]

63. In the same manner that the Prosecutor is under a positive obligation to investigate exculpatory information before submitting an application for an arrest warrant or summons, the OPCD submits that the disclosure of exculpatory information or information related to the credibility of the applicants would be required to counteract the potential impact on the fairness and impartiality of the proceedings which would result if the Chamber were to render factual determination based solely on the

[49] This is consistent with the ICTY Appeals Judgement in the Prosecutor v. Krstic dated 19 April 2004, in which the Appeals Chamber held the following (at paras. 204-206):

> *While the Krstic Prosecution did disclose to the Trial Chamber the fact that the two witnesses were under investigation, it has not been established that the Prosecution also disclosed to the Trial Chamber any other evidence that may have been of relevance to the credibility of those same witnesses. The Appeals Chamber does not accept that evidence called proprio motu by a Trial Chamber can relieve the Prosecution of its obligation under Rule 68 in relation to that evidence. The scope of Rule 68 is clear: It applies to any material known to the Prosecution that either suggests the innocence or mitigates the guilt of the accused, or evidence that may affect the credibility of Prosecution evidence.*
> *The Prosecution has submitted that where a witness is called by the Trial Chamber proprio motu under Rule 98 to give evidence, the favourable or unfavourable nature of that evidence will ordinarily only be known after the evidence is given. As such, the Prosecution argues that a finding for the Defence in this case would impose a burden on the Prosecution to disclose any information in its possession which could conceivably be used for the impeachment of a witness, and that such a burden would be too onerous.*
> *The Appeals Chamber cannot see the relevance of this argument. The Prosecution's obligation to disclose under Rule 68 is a continuing obligation, precisely because the relevance to the case of certain material held by the Prosecution may not be immediately clear. Rule 68 prima facie obliges the Prosecution to monitor the testimony of witnesses, and to disclose material relevant to the impeachment of the witness, during or after testimony. If the amount of material is extensive, the parties are entitled to request an adjournment in order to properly prepare themselves.*

[50] 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' , ICC-01/04-101-Corr , 17 January 2001, at para. 71.

accounts of the applicants. The need to implement such 'counterbalancing measures' is particularly important in light of the most recent decision concerning participation in the DRC situation,[51] in which the Honourable Single Judge publicly linked the alleged offences to a specific militia and defendant.[52]

64. Whilst the OPCD recognises that there may well be cogent and compelling reasons to order that certain documents should not be transmitted to the parties, or transmitted in redacted format, an overly formulistic definition of an application form is not one of them.

65. Finally on this point, the OPCD notes that the OPCV has asserted that the evidential standard of 'grounds to believe', does not require corroboration *stricto senso* of the existence of the alleged events, since the Chamber has the means to verify if the allegations are consistent with events referred to in official reports.[53] In response, the OPCD notes that the practice of Pre-Trial Chamber I of cross-referencing the allegations with events referred to in MONUC and NGO reports has not been subsequently applied. In the 24 December 2007 decision, the Single Judge based her assessment solely on the information contained within the Applications (and potentially the Report of the Registry). As set out in the OPCD Appeal Brief of 4 February 2008,[54] by rendering such determinations in an evidential vacuum, the Chamber risks jurisdictional over-reach, and potentially jeopardizes its mandates to establish the truth.

66. Even if the Pre-Trial Chamber were to revert back to its practice of corroborating the existence of the alleged events through UN or NGO reports, the OPCD respectfully submits that such an approach would be highly problematic for the following reasons. Firstly, unlike the Prosecutor, NGOs and UN officials are not under a positive obligation to investigate, in equal measure, incriminating and exculpatory information. Indeed, in light of the fact that such reports are often prepared for advocacy purposes (in the case of the UN, to prompt action from the General Assembly or Security

[51] Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06, 3 July 2008**,** ICC-01/04-505

[52]The OPCD observes that Principle 9 of the 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' provides that: ''[b]efore a commission identifies perpetrators in its report, the individuals concerned shall be entitled to the following guarantees: (a) The commission must try to corroborate information implicating individuals before they are named publicly; (b) The individuals implicated shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission's file.'' (E/CN.4/2005/102/Add.1 8 February 2005).

[53] At para. 36.

[54] At paras. 48-54.

Council), the content is more likely to emphasise negative rather than positive allegations. Secondly, such reports might subsequently be relied upon by the Prosecution in support of their cases against particular defendants. Given the fact that the Defence would have the right to challenge the accuracy and credibility of these reports before the same Chamber, it would be highly inappropriate for the Chamber to utilise such reports as the yardstick as to what constitutes credible or reliable assertions. Thirdly, it is not appropriate for the Chamber to utilize the VPRS to conduct 'fact finding' enquiries concerning the potential existence of the alleged offences, since it would contravene the impartiality of the Chamber,[55] the neutrality of the Registry, and would also violate the right of the parties to be heard in relation to any materials upon which the Chamber bases its determination.[56]

5. Issue as to What Constitutes a Stage of the Proceedings

67. The Legal Representatives argue firstly, that the reference to 'stage of the proceedings' in article 68(3) should, as a matter of construction, be defined as the equivalent of a phase of the proceedings, and secondly, that granting a general right to participate throughout the phase would be in the interest of efficiency and expediency.[57]

68. In terms of their arguments concerning the definition of a stage of the proceedings, the OPCV assert that the Appeals Chamber has also adopted the approach of recognising a 'procedural status of victim', as evidenced by the fact that the Chamber has not required the applicants to re-establish that they meet the definition of victim under rule 85 for the purposes of interlocutory appeals.[58]

69. In response to this specific argument of the OPCV, the OPCD notes that the Single Judge's construction of a 'procedural status of victim' accords an automatic right to participate to any applicant who has been granted this status. Thus, if the Appeals Chamber had indeed adopted such an approach, it would not have been necessary for those possessing this status to request leave to participate in these appeals; the only unresolved issue would have been the modalities of their participation.

[55] It is for this reason that the European Court of Human Rights has held that there was a violation of the right to a fair trial under circumstances in which the Trial Judge as previously involved in the case as an investigating judge; the two functions of investigating culpability and adjudicating impartially being mutually incompatible. De Cubber v Belgium, 26 October 1984, Series A no. 86, (1985) EHHR 236.
[56] The Pre-Trial Chamber has held that the parties are not entitled to receive the Reports of the Registry prepared by VPRS, which contain an analysis of NGO reports which refer to the events set out in the applications.
[57] OPCV Observations at para 34.
[58] OPCV Observations at fn 59.

70. In terms of the appropriate construction of the phrase 'stages of the proceedings' in article 68(3), 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.[59] As observed by the OPCD in its Response to the Prosecution appeal, the Statute and Regulations employ the term phase to refer to 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.[60]

71. In terms of the original derivation of the phrase 'stages of the proceeding', as noted above, the text of article 68(3) was based on the 1985 UN declaration, which was itself, modeled on a United States proposal referring to a right to present views and concerns at 'critical stages of the proceedings', which was derived from the President Task Force on Victims of Crimes. In terms of what would be considered to constitute such a stage, 'critical stages' was narrowly defined as "a judicial proceeding in which there is a disposition of the charged offense or a lesser offense, or a judicial proceeding at which a sentence is imposed.'[61] A judicial proceeding in this sense is an adversarial hearing held in open court.[62] It was thus not contemplated that the right to present views and concerns would be transformed to a general right to do so throughout the entire judicial process. This understanding as to what constitutes a 'critical stage', which would justify active participation, is further evidenced by the debate during the 7th United Nations Congress,[63] which preceded the adoption of the Basic Principles.[64]

---

[59] 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 Statutes 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).

[60] 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-01/04-479.

[61] At p. 1 www.legis.state.la.us/leg_docs/99RS/CVT9/OUT/0000FMZI.PDF

[62] At p. 3.

[63] 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, September 1985. https://www.asc41.com/7th%20UN%20Congress%20on%20the%20Prevention%20of%20Crime/7th_congress.htm

[64] In preparation for the 7th United Nations Congress, a draft declaration on justice and assistance for victims was written and discussed by a panel of interregional experts[64] wherein the rights and role of the victim during the criminal justice system were expounded. All parties were in agreement that an 'active role should be assured for victims at all critical stages of the judicial proceedings' (para 8 p. 29 of the Report), however, the phrase 'all critical stages' was specifically outlined in the proposals and represents a strict and limited role of participation. The expert panel proposed that involvement in the 'critical stages' of the judicial proceedings would allow a victim to (i) appear and make representations either in person or through an authorised representative, (ii) be considered when scheduling hearings, (iii) be entitled to an explanation behind the timing and purpose of the hearings, (iv) be considered in the context of avoiding unnecessary delay in the disposition of cases and (v) compensation for financial loss because of attendance at judicial hearings. The expert panel did not include

72. The OPCV[65] and the Legal Representatives[66] further argue that a general right to participate throughout the entire phase is necessary to give effect to the ability of the alleged victims to independently petition the court for specific measures, such as protective measures. The OPCD observes, however, that the right to seek such measures is not dependent on the applicant being granted the 'procedural status of victim'. The Pre-Trial Chamber has expressly recognized that applicants have a right to be heard in relation to appropriate protective measures, prior to and independently of whether the applicant is eventually granted the right to participate.[67]

73. In terms of the Legal Representative's reliance on the 17 January 2006 decision[68] in support of the proposition that alleged victim possess the right to initiate specific proceedings,[69] the OPCD notes that this decision fails to specify what such proceedings could be.

74. The OPCD notes with concern the position of the Legal Representatives that they do not deem it necessary or practicable to consult with their client prior to the submission of their clients' views and concerns.[70] As noted by the OPCD in its Response to the Prosecutor,[71] the Basic Principles of Justice for Victims of Crime and Abuse of Power envisages that the right of alleged victims to have their interests considered by the Court can be effectuated either through passive participation – in the sense that their views and concerns are represented by the Prosecutor, or *via* direct participation – in which case the alleged victims have the right to directly submit their views and

---

reference to a right of the victim to participate at the sentencing stage of a case as there was no unanimous agreement; some experts arguing that the victim should not be in a position to influence the sentence imposed on the offender by the court, as that would endanger the independence of the judiciary. At no stage throughout the deliberations was mention made as to the role of the victim prior to the judicial process of trying a case, i.e, the pre-trial stage. In the submission of the OPCD, strict and delineated roles of participation were specifically envisaged by the interregional preparatory meeting in 1984 and later in the declaration of victims' rights produced at the 7th UN Congress in 1985.
Report of the Interregional Preparatory Meeting for the 7th UN Congress on the prevention of crime and the treatment of offenders on Topic III 'Victims of Crime'. Ottawa, 9-13 July 1984. (Report IPM) https://www.asc41.com/7th%20UN%20Congress%20on%20the%20Prevention%20of%20Crime/7th_congress.htm

[65] OPCV Observations at para. 50.

[66] Legal Representatives of a/0071/06 and VPRS 1- VPRS 6 at para 59.

[67] 'Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation', ICC-01/04-374, 17 August 2007. The OPCD further observes that the Trial Chamber has held that an applicant is entitled to request protective measures from the date of the submission of their application to the Court: Prosecutor v. Lubanga, 'Decision on victim's participation', ICC-01/04-01/06-1119, 18 January 2008.

[68] Para 75 of the 17 January 2006 decision.

[69] Legal Representatives of a/0071/06 and VPRS 1- VPRS 6, at para. 59.

[70] 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 at paras 23 and 24,

[71] At fn 13

concerns to the Court itself. The right to directly participate is itself triggered by the existence of a personal and direct interest in the proceeding in question.

75. The emphasis on views and concerns in article 68(3) thus underscores that the submissions of the representatives of the alleged victims should be focused on the personal concerns of their clients, as opposed to abstract or general arguments. It would therefore be impossible to implement this regime in a meaningful manner without consulting with the alleged victims' in order to ascertain firstly, their personal interest in the matter at hand, and secondly, their views and concerns regarding the procedure in question.

76. In the alternative, if there are indeed proceedings in which it is unnecessary to consult with their client, then this fact strongly suggests in itself that the personal interests of the alleged victims are not affected by the proceedings in question, and thus the threshold requirement for victim participation would not be met. Any submissions from a Legal Representative on such general matters would either intrude into the responsibilities of the Prosecutor, or evolve into the generalities of an *amicus curiae*. The OPCD is aware that rights should be interpreted in a manner which ensures that they are effective, and attuned to practical realities which affect their implementation.[72] However, a more relaxed approach would not make the right to participate more effective; to the contrary, it would denude the content of the right of any meaning.

77. Finally, in terms of the concerns of the Legal Representatives concerning the security risks and delays which may be engendered through such contact, the OPCD submits that these concerns are based on the false premise that it will be necessary for the Legal Representatives for the purposes of participating in every proceeding, whereas the right to participate is limited to those proceedings which directly impact on the personal interests of the applicants. The decision of the applicant to participate is predicated on their desire to voice their views and concerns; their right to participate is related to the correlation between the judicial issues involved and the personal interests of the applicant. The question as to whether the potential security risks outweigh the advantages of voicing the applicants' concerns is a matter for the applicant to take into consideration when submitting a request to participate.

[72] Loizidou v. Turkey, *(Application no. 15318/89)*, ECtHR, Judgement of 18 December 1996.

78. As regards the potential efficacy associated with granting a generic right to participate during the situation phase to all persons who meet the definition of victim under Rule 85, the OPCD respectfully submits that the present interlocutory process demonstrates the logistical impossibility of implementing a victim participation scheme at the situation phase which does not differentiate between the personal interests of the different applicants. At present, there are a total of 107 applicants who have been granted the right to participate, and 6 groups of alleged victims. As such, if, as is presaged by the Single Judge's decision, each alleged victim will posses identical participatory rights, any proceeding which concerns victim participation could potentially result in 6 different filings. Thus, in contradistinction to the Legal Representatives argument that granting a generic procedural status of 'victim' to all persons who meet the definition of victim would expedite the proceedings, the OPCD submits that it would either create a significant backlog in the proceedings (which could potentially delay the progression of an investigation to the case stage), or result in a summary consideration of their views and concerns, which would denude the process of meaning.

6. The Interpretation and Application of the Criterion of 'Personal Interests' during the Situation Phase

79. The OPCV have asserted that the personal interests of alleged victims are generally affected by investigations stage because their participation permits them to clarify the facts, sanction those responsible, request reparations, and contribute to the truth.[73] The OPCV and the Legal Representatives also argue that interacting with the Prosecution does completely meet the alleged victims' right to a remedy at this phase, since firstly, the interests of the applicants may diverge from those of the Prosecution, and secondly, it is necessary to have greater judicial scrutiny over the actions of the Prosecution,[74] with a view to ensuring that all necessary allegations are factored into the Prosecution's cases.[75] Finally, the Legal Representatives assert that there is a general presumption that the interests of alleged victims are affected at the investigative stage, and it falls on the judges and parties to demonstrate the contrary.

[73] At paragraph 27.
[74] The Legal Representative of 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 cites at fn 24 ECHR case law to the effect that the right to judicial guarantees includes the right to public scrutiny and accountability, and involvement of the next of kin to the extent necessary to safeguard their interests.
[75] Legal Representative of a/0071/06, VPR 1- 6, at para 57.

80. In response, the OPCD respectfully submits that in determining whether the alleged victims have personal interests *vis-à-vis* the proceedings before the Chamber (as opposed to the prosecutor), it is necessary to consider the legal constraints upon the powers of the Chamber itself during this particular phase of the proceedings. The Pre-Trial Chamber possesses no power to clarify the facts, sanction those responsible, order reparations, or determine the truth during the investigative phase of the proceedings.[76] Hence, if the Chamber were to grant a right to participate on such a basis, it would unfairly raise the expectations of the applicants as to their expectations of the judicial proceedings.

81. As regards the argument of the Legal Representative that victim participation is required to ensure that the Prosecution takes into account the views of the alleged victims when formulating the elements of the charges, the OPCD notes that the OTP is positively obliged to assess all information made available to them; there is no requirement that they are only obliged to assess information from someone who has been formally assessed by the Court as a victim under article 68(3). The submission of the Legal Representative would imply, conversely, that the OTP could completely disregard information simply because the person fails to comply with formal criteria for participation. The term 'victim' in article 53(1) should therefore be interpreted broadly so as not to exclude persons who choose to testify or assist investigations but not participate under article 68(3).

82. In terms of the question of judicial scrutiny of prosecutorial discretion, the Statute recognizes only a limited power on the part of the Chamber to 'police' investigations, as set out in article 53. The Pre-Trial Chamber recognized itself that it possesses no jurisdiction to review prosecutorial strategy, absent a formal decision of the Prosecutor not to prosecute or investigate.[77] The Akayesu precedent cited by the Legal Representatives thus finds no direct application to the situation phase at the ICC, since

---

[76] The OPCD observes that the Inter-American Court has held that " the right of surviving victims' to truth must include knowledge about the circumstances of the crime and the identification of those responsible., which can only be achieved through a criminal trial" R. Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes'. Human Rights Quarterly, 26 (2004) , at p. 627, citing *inter alia,* Bámaca Velásquez Case, Judgment of November 25, 2000, Inter-Am Ct. H.R. (Ser. C) No. 70 (2000) at para. 201.

[77] "Considering therefore that, since the Prosecutor has not taken any decision under article 53(l)(c) or (2)(c) of the Statute, the request made by the legal representative of the victims that the Chamber review, pursuant to article 53 (3) (b) of the Statute, the decision of the Prosecutor regarding the investigation in the Situation in the DRC is not appropriate at the present stage and has no legal basis". 'Decision on the requests of the Legal Representative for victims VPRS1 to VPRS 6 regarding "Prosecutor's information on further investigation"', ICC-01/04-399, 26 September 2007, at p. 5.

the drafters of the Statute deliberately chose to protect the independence of the Prosecutor during this phase, subject to article 53(3).[78]

83. In this regard, the OPCD respectfully submits that it would be a dangerous route to erode this independence: in advocating that the prosecution's decision to charge certain offences, or certain persons should be subject to external pressures, the opposite could also hold true - the Prosecution could decline to charge certain persons or certain crimes because of victim pressure.[79] The OPCD refers in this connection to the findings of the Inter-American Court of Human Rights to the effect that alleged victims have a right to a fair and impartial process – but they do not have a right to a certain outcome.[80]

84. In terms of the Legal Representatives reference to human rights law, the OPCD observes firstly, that human rights courts do not set standards concerning the modalities of criminal proceedings; they simply interpret whether domestic laws and the enforcement of these laws comply with the applicable human rights convention. Accordingly, the fact that the Court may refer to the existence of such a right in a State party does not itself support the conclusion that such a right exists for all State parties as an enforceable standard under the applicable convention.[81] In this regard, the judgments are often tailored to the specificities of domestic law.[82]

---

[78] The OPCD further observes that in the Trial Judgement in Prosecutor v. Akayesu (2 September 1998 at para. 417), the Chamber observed that "[i]n introducing this amendment, the Prosecution stated that the testimony of Witness H motivated them to renew their investigation of sexual violence in connection with events which took place in Taba at the bureau communal. The Prosecution stated that evidence previously available was not sufficient to link the Accused to acts of sexual violence and acknowledged that factors to explain this lack of evidence might include the shame that accompanies acts of sexual violence as well as insensitivity in the investigation of sexual violence. The Chamber notes that the Defence in its closing statement questioned whether the Indictment was amended in response to public pressure concerning the prosecution of sexual violence. The Chamber understands that the amendment of the Indictment resulted from the spontaneous testimony of sexual violence by Witness J and Witness H during the course of this trial and the subsequent investigation of the Prosecution, rather than from public pressure". This finding supports the submissions of the OPCD that the submission of complaints through article 15, and subsequent communication with the Prosecution can provide an effective mechanism for ensuring that particular offences are includes in Prosecutorial charging strategy.

[79] The OPCD notes the pressure of the Government of Rwanda on the ICTR and other States not to charge members of the RPF. See Prosecutor v. Munyakazi, 'Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda', 28 May 2008, at para. 40

[80] Villagran Morales Case No. 63 Inter-Am C.H.R 226, Judgment of 19 November 1999, at para. 228.

[81] See Prosecutor v. Popovic, Decision on the admissibility of the Borovcanin interview and the amendment of the 65 ter exhbit list', 25 October 2007. http://www.un.org/icty/popovic88/trialc/decision-e/071025.pdf

[82] This conclusion is exemplified by the ECHR cases cited by the Legal Representatives which relate to the specific duties of a state, in this case, the UK, to investigate alleged unlawful killings by state agents. Any investigation by authorities of police use of lethal force should be carried out independently and effectively to maintain public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (Hugh Jordan, 1020 Eur.Ct.H.R.,para 105, Kelly, 2004 Eur.Ct. H.R., para.97)The Legal Representatives rely upon this case law to support their assertion that there must be a sufficient element of public scrutiny within the investigation phase, however, this reference to need for public scrutiny is context specific - it is referring to the need for the public as a whole to be confident that the alleged unlawful and lethal actions of police do not go unchecked and refers in this instance to the independent enquiries set up to investigate the circumstances where a citizen has been allegedly killed by state agents. The next sentence of the

85. The OPCD further refers to its submissions concerning the distinction between human rights complaints initiated against a State, and criminal proceedings initiated against an individual.[83] The Legal Representative's reliance on the statement of the President of the Inter-American Court to the effect that "the victim cannot be a "third party" in his own case is misplaced:[84] the texts of the Inter-American Court concern the position of the 'presumed victim' *vis-à-vis* the State party in proceedings before the Inter-American Court,[85] and not in criminal proceedings against an individual within the domestic court system.

86. Finally, the OPCV argues that the Court should adopt a general presumption that the interests are alleged victims are affected by the investigations stage; it would then fall to the judges and parties to demonstrate to the contrary.[86] In response, the OPCD respectfully submits that such an approach would significantly impacts upon the fairness of the proceedings by improperly shifting the burden of proof onto the Defence, in contravention of the stipulation in article 67(1)(i) that the Defence shall have the right "not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal". This right is drafted broadly such that it is not limited to allegations adduced by the prosecution, but extends to any issues of proof, including the Chamber's factual assessment as to whether an applicant meets the definition of victim under rule 85, and whether the criteria under article 68(3) have been fulfilled.

87. The OPCD further notes that the OPCV has cited no statutory provisions or case law in support of an approach whereby in case of doubt, the Chamber will adopt a presumption in favour of the applicants (a veritable inversion of the principle of *in dubio pro reo*).[87] To the contrary, regulation 86(7) envisages that in circumstances in which the Chamber does not possess sufficient information from the application form itself to verify whether the criteria for participation have been met, the Chamber may

judgment confirms that the degree of public scrutiny will vary from case to case (para. 109) and is not automatic where there are sensitive issues involved - the disclosure of which may have prejudicial effects on individuals involved (Hugh Jordan para 121). The 'legitimate interests' of the next-of-kin refer to their right to information with regards to the conclusion of a specific enquiry into the use of lethal force on a member of their family and the reasons for the decision not to prosecute the responsible state agent.(Hugh Jordan, para. 109).

[83] Appeal Brief of 18 February 2008, at fn. 53.

[84] Legal Representatives of a/0071/06, VPRS 1-VPRS 6, at para. 47.

[85] See Study on the Access of Persons to the Inter-American Court of Human Rights, 7 October 2002, pp. 3 – 4. http://www.oas.org/consejo/cajp/docs/cp10289e08.doc

[86] OPCV Observations at para. 42.

[87] The OPCD observes in this regard that the phrase, 'to interpret in the light most favourable to', is employed by the ad hoc Tribunals to connote the principle of *in dubio pro reo.* See "Decision on Defence Motion for Extension of Time', Prosecutor v. Stakic, 26 April 2004 at para 4; Trial Judgement, Prosecutor v. Blagojevic, 17 January 2005, at footnote 2057.

request additional information from *inter alia* the Prosecutor. This approach is also not supported by domestic law or the practice of human rights courts.[88]

7. The Interpretation and Application of the Criterion of 'Appropriateness' during the Situation Phase.

88. Contrary to the submissions of the Legal Representatives, the OPCD did not assert that "there cannot be any participation of victims at the situation phase",[89] or that all such participation would be more appropriate deferred to case proceedings. The OPCD has never contested the right of alleged victims to participate in principle during this stage, in particular, in relation to challenges to admissibility, or a decision of the Prosecutor not to investigate or prosecute: however, the scope of this participation is necessarily demarcated by the type of proceedings which could conceivably impact on their personal interests, and by the need for the Chamber to actively ensure fair and impartial proceedings.

89. The OPCD has submitted that it is not necessary to utilize article 68(3) for the purposes of most forms of participation during the situation phase, such as submitting a complaint to the Prosecutor, notification by the Registrar of legal filings, or participation concerning challenges to admissibility. Moreover, for the purposes of assessing victim participation in relation to a decision not to investigate or prosecute, the prosecutor's decision can itself provide a factual reference by which the claims of the applicants can be adjudicated. For example, in relation to a decision of the Prosecutor not to prosecute, in the interests of justice, specific offences which meet the evidential threshold for prosecution, there would be a core set out information before the Chamber concerning the nature and contours of the specific offences, which is based on an impartial investigation into both incriminating and exculpatory materials. The Chamber could utilise this information as the basis for its assessment as whether there is a linkage to the alleged events referred to by the applicants. In the event that the applicants claim to have suffered harm as the result of events other than those referenced in the Prosecutor's decision not to investigate or prosecute, then the applicants' personal interests would not be affected by the proceedings in question, and as such, the question of their standing would be moot.

[88] The OPCD refers to its submissions at paragraphs 9-18 of its Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e) ICC-01/04-382 31 August 2007.

[89] Legal Representatives of a/0071/6, VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, at para 28.

90. The OPCD has, however, contested the general applicability of article 68(3) during the situation phase. As set out in the OPCD Appeal Briefs of 4 and 18 February 2008, issuing public decisions concerning the existence of alleged offences during the investigation phase, based solely on the information provided by the applicants, potentially prejudices the fairness and impartiality of the proceedings, and is inappropriate in light of the absence of procedural safeguards to counteract this potential prejudice.

91. The OPCV and Legal Representatives have nonetheless asserted that drafters of the Rome Statute and Rules envisaged that a general right to participate would be appropriate for this stage,[90] and moreover, that human rights jurisprudence recognises that such participation in the investigation is appropriate,[91] and non-prejudicial to the defence.[92]

92. The OPCD has revised the particular preparatory documents cited by the OPCV, and respectfully submits that the text of these documents do not support the conclusions advocated by the OPCV.[93] 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,[94] but at the same time, included the 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."[95] This is consistent with subsequent French proposals concerning the investigations phase, in which it is clear that they envisaged that participation at this phase would not exist in the general sense, but would be directed at decisions not to prosecute, challenges to jurisdiction, and admissibility.[96]

---

[90] OPCV Observations at footnote 42.

[91] OPCV Observations at footnote 49; Legal Representative of 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 at para. 12.

[92] OPCV Observations at footnote 53.

[93] For example, the cited proposal of Columbia states at para 2.1 that " it is our view that the rule are a framework of laws and not specific formulations, since at every stage of the proceedings the participation of the victim is defined and regulated." (UN Doc. PNICC/1999/WGRPE/DP.37, 10 August 1999). The participation of alleged victims is indeed defined and regulated during the situation phase, for example, in the context of challenges to admissibility and decisions not to prosecution. Recognition of the existence of such provisions does not equate to advocacy for a general right to participate at the investigations phase outside of the scope of these provisions.

[94] "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).

[95] Footnote 6, Report on the International Seminar on Victims' Access to the International Criminal Court, PCNICC/1999/WGRPE/INF/2, 6 July 1999

[96] see PCNICC/1999/WGRPE/DP.43. The OPCD further refers to its submissions concerning the nature of civil party participation during the investigations phase in the French legal system, as set out at para. 65 in the 'OPCD's Response to the 24 June 2008 Consolidated Statement of Views and Concerns of the Legal

93. The OPCD further notes that a CICC Preparatory Commission Report of March 2000 concerning the drafting process of the Rules of Procedure and Evidence, expressly noted that the drafters envisaged implementing a specific regime for the investigations phase, which should be distinct from the regime applicable to the general right to participate under article 68(3).[97]

94. In the same manner, the OPCD notes that the human rights case cited by the Legal Representatives is either not directly analogous direct participation before the Court during the investigations phase, [98] or does not actually correspond to the proposition that rendering judicial determinations concerning the existence of alleged victims during the investigations phase does not affect the impartiality of the proceedings [99]

95. To the contrary, human rights courts have emphasised that in order to implement alleged victims' right to a remedy, they must be accorded a right to submit a complaint, that the complaint be impartially investigated, and to be informed of the outcome of the investigations: there is, however, no right to be involved in the investigative process. [100] Indeed, such involvement could frustrate their ultimate remedy by impacting on the impartiality of the investigative process. In this regard, the European Court of Human Rights has held that one of the requirements of an effective investigation is that the authorities are required to act on their own,[101] and the persons entrusted with conducting the prosecution must be independent of or impartial to those who are alleged to have committed the crimes.[102]

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)', ICC-02/05-147, 3 July 2008.

[9797] "While issues relating to victims and witnesses were generally addressed under each relevant part of the Statute, a number of issues relating to victims under Parts 2, 5 and 6 were discussed together in informals coordinated by Håkan Friman (Sweden). The main contentious issue was the extent of the duty of the Court to inform victims of the procedures at two particular stages: the question of victims' participation at the Article 15(3) stage (request of the Prosecutor to the Pre-trial Chamber for authorization of an investigation) and 19(3) stage (challenge to jurisdiction or admissibility) is dealt with under draft Rules 2.7 and 2.18 (to be renumbered). During those informals it was agreed that a separate regime for victim participation at this stage was desirable rather than applying the general regime for notification and participation of victims in the proceedings under Part 6 (rule 6.30)", pp. 6-7 http://www.iccnow.org/documents/4thPrepComReportMarch2000.pdf

[98] For example, with respect to the case of Verdu Verdu v. Spain (Application No. 43432/02), the OPCV has asserted that it supports that victim participation in preliminary proceedings does not per se prejudice the fairness of the trial or the rights of the accused. The OPCD notes that case referred to appellate proceedings, in which Court held that there was no prejudice to the defendant, because the complaint submitted by the civil party merely reproduced the submissions of the Public Prosecutor, and as such had not introduced extrinsic factual considerations into the Chamber's determination.

[99] The OPCD refers to its submissions in fn 82 *supra*., an further notes that the cited European Court of Human Rights cases address the role of the alleged victims *vis-à-vis* the investigating authorities, and thus do not equate to a right of standing before a Court. The OPCD refers to its submissions concerning this case law in its Brief of 4 February 2008 at footnote 53.

[100] R. Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes'. Human Rights Quarterly, 26 (2004) at fn 367.

[101] The OPCD refers to its submissions concerning this case law in its Brief of 4 February 2008 at footnote 53.

[102] Orhan v. Turkey, *(Application no. 25656/94)* ECtHR Judgement 18 June 2002, at para. 335.

96. In terms of the applicability of these principles to the ICC, the OPCD observes that as regards, for example, applicants claiming to have been enlisted or conscripted as child soldiers, the victim-applicants may also be direct perpetrators of the crime in question (albeit exempt from criminal responsibility before the ICC) and may have a motive to depict the events in a certain light which is not conducive to truth finding.

97. The OPCD further submits that the extent to which applicants may appropriately utilise article 68(3) to be involved in or influence the investigative process, is linked to and delimited by the extent to which it is appropriate for the Pre-Trial Chamber to be actively involved in such matters at this phase.

98. The OPCD observes that ability of the judiciary to maintain impartiality has been emphasized in circumstances in which victim groups have asserted strong political pressure on the judicial process.[103] It is also considered to be a breach of impartiality to refer to an actual or putative defendant as a perpetrator.[104]

99. The concern to maintain judicial impartiality is particularly attenuated in circumstances in the Chamber is adjudicating the status of applicants, who have named a person who is currently a defendant before the ICC, and cited allegations which fall outside the charges brought by the Prosecution. In this regard, the OPCV has asserted that decisions granting applicants the status of victim during the situation phase do not unduly affect the fairness or integrity of process, because the OPCD or *ad hoc* counsel for the Defence have the right to submit observations.[105] However, it is apparent from the definition of defence in the draft version of Rule 89 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

[103] The OPCD refers to the Separate declaration of Judge Nieto-Navia, Decision (Prosecutor's Request For Review or Reconsideration), Prosecutor v. Barayagwiza, 30 March 2000, at paras. 11-12.

[104] "Further, it may be recalled that there are two key applications of the presumption of innocence, as a doctrine in direct contraposition to the presumption of guilt. Firstly, it refers to the treatment of suspects and accused persons before and during the trial that, in the expectation of society, such persons be accorded respect for their innocence and human dignity. Secondly, it refers to the logistics of proof in criminal case as to which party bears the persuasive burden of proof. The general operative principal in domestic and international criminal tribunals alike is that the Prosecution bears the burden of proving the guilt of the accused "beyond reasonable doubt". *By contrast, an institution before which an accused appears to testify that already characterizes the accused as a 'perpetrator' logically places the burden of disproving his guilt or proving his innocence on the accused and deprives him of a fundamental human right guaranteed by the Universal Declaration of Human Rights.* This may endanger the rights of any such accused to a fair and impartial trial in due course." Prosecutor v. Norman, 'Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman', 29 October 2003, at para. 13.

[105] OPCV Observations at para 35.

to be heard in relation to the applicants could be exercised in an effective rather than illusory manner.[106]

100. The OPCD is concerned that by issuing factual determinations outside of the scope of the prosecution charges, the Chamber is exposing itself to prejudicial and potentially incriminating evidence which the defendant does not have notice of, or the opportunity to rebut. It is for this reason that the ad hoc Tribunals prohibit the tendering of incriminating evidence (or the elicitation of testimony) which falls outside of the scope of the charges.[107] Such factual determinations in the situation phase could also create the appearance of predetermination concerning further potential applications for an amendment of the charges against these defendants in relation to the alleged crime bases set out in the applications.

101. The OPCD notes in this regard that article 60(1) provides that "[e]veryone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law". The use of the term 'everyone' emphasises that this presumption applies irrespective of the stage of the proceedings. The principle of presumption of innocence imposes an obligation on all Court authorities not to make any pronouncements concerning the culpability of a person, except in accordance with the limited provisions within the Statute which expressly permit the issuance of factual findings prior to the issuance of a final judgment, and which are ultimately amenable to review in accordance with the standard of beyond reasonable doubt.

102. The OPCD therefore submits that the presumption of innocence should apply with more force with respect to persons who do not possess any legal remedy to directly challenge the findings of the Pre-Trial Chamber issued during the situation phase. Indeed, it has been suggested that the "presumption of innocence should indeed be stronger in respect of a person against whom not even a *prima facie* case has been confirmed. First, it would be totally illogical for the judge reviewing the charges to presume that the suspect is guilty. Secondly, if the presumption of innocence were not applicable before the confirmation of charges, irreparable damage could be done to the rights of the individual prior to confirmation (for example, through a campaign depicting the suspect as a criminal or by the adoption of asset-freezing measures). Thus, any subsequent protection would prove ineffective".[108]

[106] See Artico v. Italy, Judgement of 13 May 1980, Series A no. 37, p. 16 ss33.
[107] Prosecutor v Bizimungu et al., Case No ICTR-99-50-AR73.2, Decision on Prosecution's Interlocutory Appeals Against Decision of the Trial Chamber on Exclusion of Evidence, 25 June 2004.
[108] S. Zappala, Human Rights in International Criminal Proceedings (Oxford University Press 2005) pp.84-85

103. Accordingly, jurisdictions, which permit alleged victims to participate during the investigative phase also recognise that the public issuance of decisions concerning the alleged existence of victims could taint the investigative process, and prejudice the rights of future defendants.[109] These jurisdictions therefore set out the principle of confidentiality of investigations. [110] In line with these principles, the President of the Special Court for Sierra Leone rejected a request by a defendant to testify publicly at the Truth and Reconciliation Commission prior to the commencement of his trial.[111] The President noted, *inter alia*, the following potential adverse consequences "an adverse effect on public perceptions of his innocence and a consequent disheartening of potential defence witnesses".[112] The President further held that in balancing the right of alleged victims to immediately 'know' the truth, as compared to the procedural safeguards for protecting the criminal process, "the value of fair trial must be overriding".[113]

[109] 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.
[110] In accordance with article 11 of 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 2000 - art. 96 JORF 16 juin 2000, version consultée le 2 juillet 2008, http://www.legifrance.gouv.fr/affichCode.do;jsessionid=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
[111] Prosecutor v. Norman, Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman JP against the Decision of His Lordship Mr. Justice Bankole Thompson Delivered on 30 October 2003 to Deny the TRC's Request to Hold a Public Hearing with Chief Samuel Hinga Norman JP', 28 November 2003.
[112] At para. 30.
[113] At para. 38.

8. Conclusion

104. The OPCD respectfully requests that the Honourable Appeals Chamber consider this consolidated response in its determination of the three appeals.

p.p.

Xavier-Jean Keïta
Principal Counsel of OPCD

Dated this Friday, 25 July 2008

At The Hague, Netherlands