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TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

**Public
with public Annex 1**

***Corrigendum* to Decision on the participation of victims in the trial and on 86
applications by victims to participate in the proceedings**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Mr Nkwebe Liriss
Mr Aimé Kilolo-Musamba

Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of the 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**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod Jacome

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of The Prosecutor v. Jean-Pierre Bemba Gombo hereby delivers the following Decision on victims' participation.

I. Background and submissions

1. On 12 December 2008, the Single Judge of Pre-Trial Chamber III ("Pre-Trial Chamber") issued his "Fourth Decision on Victims' Participation" in which 54 individuals were granted permission to participate as victims in the present case. The Single Judge refused permission to 3 applicants and deferred his decision in respect of a single applicant.¹
2. On 5 October 2009, the Registry submitted an *ex parte*, Registry-only "Report on the status of applications for participation in the proceedings or for reparations received by the Victims Participation and Reparations Section", in which it sought guidance from the Chamber in respect of various matters.² An addendum to this Report was filed on 15 October 2009.³
3. On 7 October 2009, during the first status conference in the present case before this Chamber, the parties and participants were instructed to file submissions as to whether Trial Chamber III should adopt the jurisprudence of Trial Chambers I and II on victims' participation.⁴
4. On 4 November 2009, the Office of the Prosecutor ("prosecution") filed the "Prosecution's Submission on whether the Chamber should adopt or depart

¹ Fourth Decision on Victims' Participation, 12 December 2008, ICC-01/05-01/08-320, pages 36 - 37.

² Report on the status of applications for participation in the proceedings or for reparations received by the Victims Participation and Reparations Section, 5 October 2009, ICC-01/05-01/08-541-Conf-Exp.

³ Addendum to the Report on the status of applications for participation in the proceedings or for reparations received by the Victims Participation and Reparations Section, 15 October 2009, ICC-01/05-01/08-562-Conf-Exp.

⁴ Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG-ET, page 28, lines 16 to 28.

from the existing jurisprudence on victim's participation at trial".⁵ The prosecution submitted the Chamber should apply the Court's established approach to i) the conditions for participation; ii) the criteria to be applied; and iii) the requirements for demonstrating personal interest under Article 68(3) of the Rome Statute ("Statute").⁶ The prosecution suggests a departure in two discrete areas. First, it seeks permission to contact dual status victims and witnesses directly, rather than *via* the Victims and Witnesses Unit ("VWU").⁷ Second, the prosecution submits that participating victims should only be granted access to confidential records in highly exceptional circumstances, namely when the applicant has established a compelling case that the particular material in question directly affects his or her interests.⁸

5. On 4 November 2009, the defence requested an extension of the time-limit to file its submissions.⁹ The Chamber granted this request on 11 November 2009, and a new deadline of 26 November 2009 was set.¹⁰
6. On 26 November 2009, the victims' legal representatives filed joint observations in response to the prosecution's submissions. They suggest the jurisprudence of Trial Chamber I as regards victims' participation should be applied in its entirety to the present case,¹¹ including the requirement that contact by the prosecution with dual status victims should be *via* the VWU.¹² They argue that limiting access to confidential documents by legal representatives to "highly exceptional situations" would hamper the right of

⁵ Prosecution's Submission on whether the Chamber should adopt or depart from the existing jurisprudence on victim's participation at trial, 4 November 2009, ICC-01/05-01/08-594.

⁶ ICC-01/05-01/08-594, paragraphs 3-14.

⁷ ICC-01/05-01/08-594, paragraph 15.

⁸ ICC-01/05-01/08-594, paragraph 16.

⁹ Corrigendum Requête aux fins d'extension de délai, 4 November 2009, ICC-01/05-01/08-597-Corr.

¹⁰ Order granting the Defence's Application for Extension of Time, 11 November 2009, ICC-01/05-01/08-604.

¹¹ Réponse conjointe des représentants légaux des victimes aux observations du Bureau du Procureur concernant l'application par la Chambre de la jurisprudence existant en matière de participation des victimes au stade du procès, 26 November 2009, ICC-01/05-01/08-619, paragraph 7.

¹² ICC-01/05-01/08-619, paragraphs 9-13.

victims to participate effectively in the proceedings.¹³ Furthermore, the legal representatives resist the prosecution suggestion that they should only be entitled to introduce evidence in exceptional circumstances, a stance which, it suggests, is inconsistent with the statutory provisions and the jurisprudence of the Court.¹⁴

7. On 26 November 2009 the defence filed submissions, addressing not only victims' participation in the proceedings, but also other aspects of the rights of the accused during the trial.¹⁵ However, in the present Decision the Chamber solely addresses the issue of victims' participation.¹⁶ The defence submits that the Chamber should not follow the existing jurisprudence on anonymous victims, who they suggest should only participate "passively" (e.g. without access to public records or other information on the case). The defence also contends that redactions to victims' applications undermine the rights of the defence.¹⁷ It is additionally submitted that any victims' applications in possession of the prosecution should be disclosed to the defence, under Article 67(2) of the Statute and Rule 76(1) of the Rules of Procedure and Evidence ("Rules").¹⁸

8. On 9 December 2009, the Trial Chamber handed down its "Decision on the Observations on legal representation of unrepresented applicants"; and ordered that:¹⁹

¹³ ICC-01/05-01/08-619, paragraphs 14-26.

¹⁴ ICC-01/05-01/08-619, paragraph 27.

¹⁵ Corrigendum Observations de la Défense relative à la jurisprudence de l'Affaire Lubanga sur les questions procédurales se rapportant aux droits de la défense, 26 November 2009, ICC-01/05-01/08-620-Corr.

¹⁶ ICC-01/05-01/08-620-Corr, paragraphs 73-93.

¹⁷ ICC-01/05-01/08-620-Corr, paragraphs 73-88.

¹⁸ ICC-01/05-01/08-620-Corr, paragraphs 89-93.

¹⁹ Decision on the Observations on legal representation of unrepresented applicants, 9 December 2009, ICC-01/05-01/08-651.

- a. The Office of Public Counsel for Victims ("OPCV") shall continue to represent the victim applicants it currently represents until the Chamber issues a decision on their application to participate;
 - b. The OPCV shall represent victim applicants who have not chosen a legal representative until a decision is made on their application to participate. Thereafter, the Registry shall arrange for another legal representative to act;
 - c. The applicants represented by Mr Wanfiyo will be dealt with in a later decision on common legal representation;
 - d. Ms Douzima-Lawson shall continue to represent the victims she represented during the pre-trial phase.
9. On 10 December 2009, the Registry submitted an *ex parte*, Registry-only, "Report on applications to participate in the proceedings" ("Registry's Report").²⁰ This addressed 86 applications to participate in the proceedings, and included the individual applications, along with the reports prepared by the Victims Participation and Reparations Section ("VPRS"), and the relevant documents and other information.²¹ The Report set out recommendations for redactions to the applications.²²
10. On 18 December 2009, the legal representatives of victims submitted their joint response to the defence submissions of 26 November 2009.²³ They addressed the arguments on anonymous victims and the probative nature of the applications to participate. It is suggested that the defence has failed to differentiate, on the one hand, between the disclosure obligations of the prosecution as regards witnesses and their statements (and other documents)

²⁰ Report on applications to participate in the proceedings, 10 December 2009, ICC-01/05-01/08-653-Conf-Exp.

²¹ ICC-01/05-01/08-653-Conf-Exp, Annexes 1 and 3-88.

²² ICC-01/05-01/08-653-Conf-Exp, Annex 2.

²³ Réponse conjointe des représentant légaux des victimes aux Observations de la Défense relative à la jurisprudence de l'Affaire Lubanga, 18 December 2009, ICC-01/05-01/08-657.

and, on the other, participating victims and their application forms,²⁴ in the sense that the legal representatives argue that the applications in possession of the prosecution are not automatically disclosable under Rule 76 of the Rules.²⁵

11. On 21 December 2009, the prosecution responded to the defence submissions of 26 November 2009.²⁶ It argued it is not obliged to disclose the victims' application forms to the defence since it has no greater access rights to them than the defence.²⁷
12. On 8 January 2010, the OPCV was appointed the legal representative of those applicant victims without representation, in accordance with the Trial Chamber decision of 9 December 2009.²⁸
13. On 19 February 2010, the Registry filed an *ex parte* Registry-only, "Filing of supplementary information relating to applications to participate in the proceedings", with supplementary information on 15 applications originally submitted in the Registry's Report of 10 December 2009 (filing 653-Conf-Exp).²⁹
14. On 22 February 2010, Trial Chamber III handed down its "Decision defining the status of 54 victims who participated at the pre-trial stage and inviting the

²⁴ ICC-01/05-01/08-657, paragraphs 26-30.

²⁵ ICC-01/05-01/08-657, paragraph 31.

²⁶ Prosecution's Response to Defence's "Observations de la Défense relative à la jurisprudence de l'Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense", 21 December 2009, ICC-01/05-01/08-661.

²⁷ ICC-01/05-01/08-661, paragraph 33.

²⁸ Désignation du Bureau du conseil public pour les victimes pour la représentation légale des demandeurs a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0573/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0427/09, a/0432/09 et a/0652/09, 7 January 2010, ICC-01/05-01/08-666.

²⁹ Filing of supplementary information relating to applications to participate in the proceedings, 19 February 2010, ICC-01/05-01/08-697-Conf-Exp.

parties' observations on applications for participation by 86 applicants".³⁰ The Trial Chamber ordered the following:³¹

- i) that the 54 individuals who were granted the status of victim in the present case by the Pre-Trial Chamber shall continue to participate in the proceedings, subject to objection for good cause based on new material that has emerged since the original decision;
- ii) the VPRS is to review the applications to participate rejected by the Pre-Trial Chamber, to establish whether, in light of events or information received subsequent to the original rejection, the application should be reconsidered by the Trial Chamber, and a report is to be filed with the Chamber;
- iii) the Registry is to transmit the applications for the 86 applicants to the parties in an appropriate redacted form, whereby any information which may lead to the identification of the victims and their whereabouts has been expunged in accordance with paragraph 33, no later than 16.00 Friday 26 February 2010;
- iv) the parties are to submit their observations, if any, no later than 16.00 on Wednesday 10 March 2010;
- v) only those completed applications that appear, *prima facie*, to be linked with the charges confirmed against the accused are to be provided to the Chamber, in accordance with the criteria set out above, and a report is to be filed on those applications which are defective; and
- vi) applicants and participating victims shall not be contacted by anyone other than their legal representatives, the VPRS and the VWU.

15. The Trial Chamber endorsed the Pre-Trial Chamber's criteria regarding the documents necessary for an application, including proof of an applicant's identity.³²

16. On 26 February 2010, 86 applications for participation were notified to the parties in redacted form, pursuant to the decision of 22 February 2010. A corrigendum was filed on 4 March 2010.³³

³⁰ Decision defining the status of 54 victims who participated at the pre-trial stage and inviting the parties' observations on applications for participation by 86 applicants, 22 February 2010, ICC-01/05-01/08-699.

³¹ ICC-01/05-01/08-699, paragraph 39.

³² ICC-01/05-01/08-699, paragraphs 35-36.

³³ Transmission to the parties of 86 applications to participate in the proceedings in redacted form, 26 February 2010, ICC-01/05-01/08-707-Conf-Exp. See also Corrigendum to document ICC-01/05-01/08-707-Conf-Exp and its annexes: Transmission to the parties of 86 applications to participate in the proceedings in redacted form, 4 March 2010, ICC-01/05-01/08-707-Conf-Exp-Corr.

17. On 16 March 2010, the prosecution,³⁴ and on 17 March 2010 the defence,³⁵ filed their respective submissions on the 86 applications by victims to participate in the proceedings.

18. On 6 April 2010, the legal representatives of victims filed their response to the observations by the prosecution and the defence.³⁶ This filing was made without leave of the Chamber, but in all the circumstances these submissions have been considered in this Decision. In future, permission must be sought from the Chamber in accordance with Regulation 24 of the Regulations of the Court.

II. Relevant provisions

19. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 68 of the Statute

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[...]

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings

³⁴ Prosecution's Observations on the 86 Applications for Victim's Participation in the Proceedings, 16 March 2010, ICC-01/05-01/08-723.

³⁵ Observations de la Défense sur les 86 demandes de participation à la procédure en qualité des victimes, 17 March 2010, ICC-01/05-01/08-725.

³⁶ Réponse du Représentant légal des demandeurs a/0293/08, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0517/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0573/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09, a/0428/09 et a/0432/09 aux Observations du Bureau du Procureur et de la Défense sur les 86 nouvelles demandes de participation de victimes, 6 April 2010, ICC-01/05-01/08-746.

determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

[...]

Rule 85 of the Rules

Definition of Victims

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

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

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

Rule 87 of the Rules

Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

[...]

Rule 89 of the Rules

Application for participation of victims in the proceedings

1. In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

[...]

Rule 91 of the Rules

Participation of legal representatives in the proceedings

1. A Chamber may modify a previous ruling under rule 89.

[...]

Regulation 56 of the Regulations of the Court (“Regulations”)

Evidence under article 75

The Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial.

Regulation 80 of the Regulations

Appointment of legal representatives of victims by a Chamber

1. A Chamber, following consultation with the Registrar, may appoint a legal representative of victims where the interests of justice so require.
2. The Chamber may appoint counsel from the Office of Public Counsel for victims.

Regulation 86 of the Regulations

Participation of victims in the proceedings under rule 89

1. For the purposes of rule 89 and subject to rule 102 a victim shall make a written application to the Registrar who shall develop standard forms for that purpose which shall be approved in accordance with regulation 23, subregulation 2 [...].

[...]

3. Victims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate.

[...]

5. The Registrar shall present all applications described in this regulation to the Chamber together with a report thereon. The Registrar shall endeavour to present one report for a group of victims, taking into consideration the distinct interests of the victims.

6. Subject to any order of the Chamber, the Registrar may also submit one report on a number of applications received in accordance with sub-regulation 1 to the Chamber seized of the case or situation in order to assist that Chamber in issuing only one decision on a number of applications in accordance with rule 89, sub-rule 4. Reports covering all applications received in a certain time period may be presented on a periodic basis.

7. Before deciding on an application, the Chamber may request, if necessary with the assistance of the Registrar, additional information from *inter alia*, States, the Prosecutor, the victims or those acting on their behalf or with their consent. If information is received from States or the Prosecutor, the Chamber shall provide the relevant victim or victims with an opportunity to respond.

8. A decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1.

III. Analysis and Conclusions

A. General principles

1) Whether the applicant is a victim

i. Criteria for granting victims' application to participate in the proceedings

20. In its decision of 22 February 2010, the Chamber endorsed the criteria established by the Pre-Trial Chamber in this case for the documents needed to complete an application and to establish an applicant's identity.³⁷

21. The parties and participants have not suggested any departure from the existing jurisprudence on the criteria for determining whether an individual may be allowed to participate as a victim under Rule 85 of the Rules. Trial Chamber I, on this issue, determined as follows:³⁸

90. Once the Trial Chamber has determined that an applicant is a natural or legal person, it will consider if there is evidence (including by reference to the victim's statements or application form) that the applicant suffered any harm as a result of the commission of a crime within the jurisdiction of the Court.

91. In relation to the link between the harm allegedly suffered and the crime, whereas Rule 85(b) of the Rules provides that legal persons must have "sustained direct harm", Rule 85(a) of the Rules does not include that stipulation for natural persons, and applying a purposive interpretation, it follows that people can be the direct or indirect victims of a crime within the jurisdiction of the Court.

92. The Rome Statute framework does not provide a definition of the concept of harm under Rule 85 of the Rules. However, in accordance with Principle 8 of the Basic Principles, a victim may suffer, either individually or collectively, from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights. This principle provides appropriate guidance.

22. The Appeals Chamber in part upheld, and in part amended, that Decision, as follows:³⁹

32. The Appeals Chamber considers that the harm suffered by a natural person is harm to that person, i.e. personal harm. Material, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim. Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is 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. The recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child. It is in this sense that the Appeals Chamber understands the Trial Chamber's statement that "people can be the direct or indirect victims of a crime within the jurisdiction of the Court". 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. Whether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court would have to be determined in light of the particular circumstances.

[...]

³⁷ ICC-01/05-01/08-699, paragraphs 35-36.

³⁸ Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paragraphs 90-92.

³⁹ Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, paragraphs 32-39.

35. The Appeals Chamber considers that there may clearly be harm that could be both personal and collective in nature. The fact that harm is collective does not mandate either its inclusion or exclusion in the establishment of whether a person is a victim before the Court. The issue for determination is whether the harm is personal to the individual victim. The notion of harm suffered by a collective is not, as such, relevant or determinative.

[...]

38. The Appeals Chamber determines the first issue on appeal as follows: the notion of victim necessarily implies the existence of personal harm but does not necessarily imply the existence of direct harm.

39. Accordingly, the Appeals Chamber confirms the finding of the Trial Chamber to the extent that the Trial Chamber determined that harm suffered by victims does not necessarily have to be direct and amends the decision to include that harm suffered by a victim applicant for the purposes of rule 85 (a) must be personal harm.

23. The Appeals Chamber addressed the link between the harm suffered by an applicant and the crimes charged against the accused:⁴⁰

58. In 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. Thus, whilst the ordinary meaning of rule 85 does not per se, limit the notion of victims to the victims of the crimes charged, the effect of article 68 (3) of the Statute is that the participation of victims in the trial proceedings, pursuant to the procedure set out in rule 89 (1) of the Rules, is limited to those victims who are linked to the charges.

[...]

61. Participation of victims at trial will first and foremost, take place through the procedure of rule 89 (1) of the Rules. By way of written applications, applicants will have to demonstrate, firstly, that they are victims within the meaning of rule 85 of the Rules. Secondly, pursuant to article 68 (3) of the Statute, victims will first have to demonstrate that their personal interests are affected by the trial in order to be permitted to present their views and concerns at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

62. Given that the purpose of trial proceedings is the determination of the guilt or innocence of the accused person of the crimes charged, and that the application under rule 89 (1) of the Rules in this context is for participation in the trial, only victims of these crimes will be able to demonstrate that the trial, as such, affects their personal interests. Therefore, only victims who are victims of the crimes charged may participate in the trial proceedings pursuant to article 68 (3) of the Statute read with rule 85 and 89 (1) of the Rules. Once the charges in a case against an accused have been confirmed in accordance with article 61 of the Statute, the subject matter of the proceedings in that case is defined by the crimes charged.

[...]

64. It is for the Trial Chamber to determine within this framework whether an applicant is a victim, because he or she suffered harm in connection with the particular crimes charged, and if so, whether the personal interests of the applicant are affected. If the applicant is unable to demonstrate a link between the harm suffered and the particular crimes charged, then even if his or her personal interests are affected by an issue in the trial, it would not be appropriate under article 68 (3) read with rule 85 and 89 (1) of the Rules for his or her views and concerns to be presented.

⁴⁰ ICC-01/04-01/06-1432, paragraphs 58-64.

24. The Chamber has applied that approach in this Decision.

ii. Personal interests of victims under Article 68(3) of the Statute

25. The parties and participants accept that Trial Chamber I's interpretation of Article 68(3) of the Statute for determining whether the interests of a victim are affected at a particular stage in the proceedings is to be followed:⁴¹

96. Following an initial determination by the Trial Chamber that a victim shall be allowed to participate in the proceedings, thereafter in order to participate at any specific stage in the proceedings, e.g. during the examination of a particular witness or the discussion of a particular legal issue or type of evidence, a victim will be required to show, in a discrete written application, the reasons why his or her interests are affected by the evidence or issue then arising in the case and the nature and extent of the participation they seek. A general interest in the outcome of the case or in the issues or evidence the Chamber will be considering at that stage is likely to be insufficient. These applications will necessarily be examined on a case-by-case basis, since the question of whether "personal interests" are affected is necessarily fact-dependent. However, involvement in or presence at a particular incident which the Chamber is considering, or if the victim has suffered identifiable harm from that incident, are examples of the factors that the Chamber will be looking for prior to granting the right to participate at any particular stage in the case.

[...]

99. Addressing the standard of proof to be applied in order for victims to participate, there is no statutory or regulatory provision in this regard. It would be untenable for the Chamber to engage in a substantive assessment of the credibility or the reliability of a victim's application before the commencement of the trial. Accordingly the Chamber will merely ensure that there are, *prima facie*, credible grounds for suggesting that the applicant has suffered harm as a result of a crime committed within the jurisdiction of the Court. The Trial Chamber will assess the information included in a victim's application form and his or her statements (if available) to ensure that the necessary link is established.

[...]

101. It is clear from the analysis set out above that participation is not a once-and-for-all event, but rather should be decided on the basis of the evidence or issue under consideration at any particular point in time.

102. When considering victims' applications for participation, the Trial Chamber will assess whether the interests of the victims relate to the prosecution's "summary of presentation of evidence". The Chamber will be assisted by the report on the applications submitted to it by the Registry's Victims Participation and Reparation Section in accordance with Regulation of the Court 86.

103. Subsequently, a victim who wishes to participate in relation to any identified stage of the proceedings should set out in a discrete written application the nature and the detail of the proposed intervention (e.g. by providing the questions that he or she seeks to put). At this stage, the victim must describe the way in which his or her personal interest is affected, for example by identifying how the harm he or she suffered relates to the evidence or the issues the Chamber is considering in its determination of the charges.

⁴¹ ICC-01/04-01/06-1119, paragraphs 96-104.

104. Once the Trial Chamber has determined that the interests of a victim or group of victims are affected at a certain stage of the proceedings, the Trial Chamber will determine if participation in the manner requested is appropriate and consistent with the rights of the defence to a fair and expeditious trial.

2) Modalities of participation

26. The parties and participants generally accept the existing jurisprudence on participation by victims at hearings and during status conferences, and on filing written submissions. However, the Chamber will address separately participation by anonymous victims, since this has been a source of disagreement.

27. Therefore, anonymous victims aside, Trial Chamber III adopts the approach of Trial Chamber I as regards victim's rights to participate at hearings and status conferences, and to file written submissions.⁴²

113. The Trial Chamber may, *proprio motu* or upon request by any of the parties or participants, permit victims to participate in closed and ex parte hearings, depending on the circumstances. Whether or not participation by victims could exceptionally encompass hearings that are *ex parte*, victims only (e.g. when considering protective measures) is an issue that can only be resolved by reference to the facts of the particular application. To the extent that it is possible and necessary, the Chamber will consult with the parties whenever the victims apply to participate in such hearings.

114. The above applies *mutatis mutandis* with regard to the right of victims to make confidential or *ex parte* written submissions.

115. By Article 68(3) of the Statute it is clear that victims have the right to participate directly in the proceedings, since this provision provides that when the Court considers it appropriate the views and concerns of victim may otherwise be presented by a legal representative.

116. The Chamber is aware, however, that the personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings, and given that the victims' common views and concerns may sometimes be better presented by a common legal representative (i.e. for reasons of language, security or expediency), the Trial Chamber will decide either *proprio motu*, or at the request of a party or participant, whether or not there should be joint representation and joint presentation of views and concerns by legal representatives at any particular stage in the proceedings. [...]

117. The Trial Chamber considers that Rule 89(1) of the Rules is clear in its effect when it provides that victims' participation may include opening and closing statements, particularly given this is not inconsistent with any other part of the Rome Statute framework. [...]

118. Finally, in relation to the request of the victims legal representatives to be granted the right to initiate procedures (for instance by filing applications and requests), the Trial Chamber considers that there is nothing in the Court's statutory and regulatory provisions which prevents victims from

⁴² ICC-01/04-01/06-1119, paragraphs 113-118.

filing requests or applications to the Chamber whenever an issue arises that affects their interests (individually or collectively), in accordance with Article 68(3) of the Statute. The Trial Chamber will decide on any application or request of this kind, having consulted with the parties and other participants to the extent that is appropriate, and bearing in mind the right of the accused to a fair and expeditious trial.

28. There is agreement as to the existing jurisprudence on proceedings under Regulation 56 of the Regulations. Trial Chamber I determined:⁴³

119. The Trial Chamber accepts the submission of the legal representatives of victims that the extent of participation by victims during trial will to a significant degree depend on the Chamber's decision as to whether or not evidence concerning reparations will, at least in part, be considered during the trial or as a separate procedure after the trial.

120. In the judgment of the Chamber, Regulation 56 of the Regulations does not, as suggested by the defence, undermine the rights of the defence and the presumption of innocence. The objective of this provision is to enable the Chamber to consider evidence at different stages in the overall process with a view to ensuring the proceedings are expeditious and effective. This will enable the Chamber to avoid unnecessary hardship or unfairness to the witnesses by removing, where appropriate, the necessity of giving evidence twice. This will guarantee the preservation of evidence that may be unavailable to the Chamber at a later stage of the proceedings.

121. In discharging its judicial function, the Chamber will be able, without difficulty, to separate the evidence that relates to the charges from the evidence that solely relates to reparations, and to ignore the latter until the reparations stage (if the accused is convicted). Should it emerge that evidence relating to reparations introduced during the trial may be admissible and relevant to the determination of the charges, consideration will need to be given in open court as to whether it is fair for the Chamber to take this into account when deciding on the accused's innocence or guilt. The Trial Chamber has borne in mind that it has a statutory obligation to request the submission of all evidence that is necessary for determining the truth under Article 69(3) of the Statute, although this requirement must not displace the obligation of ensuring the accused receives a fair trial.

122. The Chamber does not agree with the prosecution's concept of a wholly "blended approach" because there will be some areas of evidence concerning reparations which it would be inappropriate, unfair or inefficient to consider as part of the trial process. The extent to which reparations issues are considered during the trial will follow fact-sensitive decisions involving careful scrutiny of the proposed areas of evidence and the implications of introducing this material at any particular stage. The Trial Chamber may allow such evidence to be given during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination. However, the Chamber emphasises that at all times it will ensure that this course does not involve any element of prejudgment on the issue of the defendant's guilt or innocence, and generally that it does not undermine the defendant's right to a fair trial.

a) Introduction of evidence by victims and questioning of witnesses

29. Although it is accepted that victims may present and challenge the admissibility or relevance of evidence during trial in accordance with the jurisprudence of Trial Chamber I, as confirmed by the Appeals Chamber,

⁴³ ICC-01/04-01/06-1119, paragraphs 119-122.

there is disagreement as to its interpretation.

30. Trial Chamber I indicated as regards the right of victims to introduce evidence and to challenge its admissibility:⁴⁴

108. The Trial Chamber considers that the right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right (that is not dependent on the cooperation or the consent of the parties) to request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69(3) of the Statute. Rule 91(3) of the Rules enables participating victims to question witnesses with the leave of the Chamber (including experts and the defendant). The Rule does not limit this opportunity to the witnesses called by the parties. It follows that victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has "requested" the evidence. Furthermore, for the reasons set out above, the Chamber will not restrict questioning by victims to reparations issues, but instead will allow appropriate questions to be put by victims whenever their personal interests are engaged by the evidence under consideration.

109. As regards the request of the victims' legal representatives to have the opportunity to challenge the admissibility or relevance of evidence when their interests are engaged, the right to make submissions on matters of evidence is not reserved to the parties, and there is no provision within the Rome Statute framework which prohibits the Trial Chamber from ruling on the admissibility or relevance of evidence having taken into account the views and concerns of the victims, in accordance with Articles 68(3) and 69(4) of the Statute. In appropriate circumstances, this will be allowed following an application.

110. The Trial Chamber considers that victims applying to participate should be provided with access to the public redacted version of the prosecution's "summary of presentation of evidence". The victims currently participating have been provided with a copy of this document.

111. Turning to inspection, the Trial Chamber agrees with the prosecution that inspection, as provided for in Rules 77 and 78 of the Rules relates only to the prosecution and the defence. However, as a matter of general principle, and in order to give effect to the rights accorded to victims under Article 68(3) of the Statute, the prosecution shall, upon request by the victims' legal representatives, provide individual victims who have been granted the right to participate with any materials within the possession of the prosecution that are relevant to the personal interests of victims which the Chamber has permitted to be investigated during the proceedings, and which have been identified with precision by the victims in writing. The participating victims should also be provided with the public evidence listed in the prosecution's annexes 1 and 2 to its "summary of presentation of evidence" subject to a demonstration of relevance to their personal interests as stated above. If part of a document in this context is confidential, the document should be made available in a suitably redacted form.

31. This approach was approved by the Appeals Chamber:⁴⁵

93. The Appeals Chamber considers it important to underscore that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, namely, the Prosecutor and the Defence. The first sentence of article 69 (3) is categorical:

"[t]he parties may submit evidence relevant to the case, in accordance with article 64." It does not say "parties and victims may." The language of article 69 (3) cited above, and article 64 (6) (d)

⁴⁴ ICC-01/04-01/06-1119, paragraphs 108-111.

⁴⁵ ICC-01/04-01/06-1432, paragraphs 93-98.

which provides that the Court shall have the authority to "[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties" clearly envisions that evidence presented during the trial would be presented by the parties. The Rome Statute framework contains numerous provisions which support this interpretation such as those pertaining to the role assigned specifically to the Prosecutor in, inter alia, investigating the crimes, formulating the charges and determining what evidence should be brought in relation to the charges (articles 15, 53, 54, 58 and 61 (5) of the Statute). Article 66 (2) of the Statute provides: "[t]he onus is on the Prosecutor to prove the guilt of the accused". Presumptively, it is the Prosecutor's function to lead evidence of the guilt of the accused. In addition, the regime for disclosure contained in rules 76 to 84 of the Rules which sets out the specific obligations of the parties in this regard is a further indicator that the scheme is directed towards the parties and not victims.

94. However, the Appeals Chamber does not consider these provisions to preclude the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings.

95. While mindful that the Prosecutor bears the onus of proving the guilt of the accused, it is nevertheless clear that "the Court has the authority to request the submission of all evidence that it considers necessary for the determination of the truth" (article 69 (3) of the Statute). The fact that the onus lies on the Prosecutor cannot be read to exclude the statutory powers of the court, as it is the court that "must be convinced of the guilt of the accused beyond reasonable doubt" (article 66 (3) of the Statute).

96. Indeed, the Statute by virtue of article 68 (3) establishes the right for victim participation, for the first time, in international criminal proceedings. This right may be exercised where the personal interests of victims are affected at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

97. To give effect to the spirit and intention of article 68 (3) of the Statute in the context of the trial proceedings it must be interpreted so as to make participation by victims meaningful. Evidence to be tendered at trial which does not pertain to the guilt or innocence of the accused would most likely be considered inadmissible and irrelevant. If victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual.

98. The framework established by the Trial Chamber, as outlined in paragraph 86 above, is premised on an interpretation of article 69 (3), second sentence, read with article 68 (3) and rule 91 (3) of the Rules, pursuant to which the Chamber, in exercising its competent powers, leaves open the possibility for victims to move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth.

32. On the basis of this Decision by the Appeals Chamber, Trial Chamber II held that "making it possible for the Legal Representatives to propose the submission of evidence [whether incriminatory or exculpatory] would in fact assist [the Trial Chamber] in its implementation of article 69(3) of the Statute, and hence in its search for the truth."⁴⁶

⁴⁶ Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, paragraph 82. See also paragraphs 86 to 101. See also ICC-01/04-01/07-1665-Corr, paragraph 82.

33. Trial Chamber II recognised that the legal representatives of victims may question witnesses, including experts or the accused as “their intervention may potentially enable the Chamber to understand some of the matters at issue, given their local knowledge and social and cultural background.”⁴⁷

34. The prosecution submits that victims have been granted no more than an exceptional right to introduce evidence.⁴⁸ The legal representatives argue that this interpretation does not accord with the Rome Statute framework or the jurisprudence of the Court.⁴⁹

35. Trial Chamber I addressed and dismissed the prosecution stance on this issue, as follows:⁵⁰

It is to be observed that the prosecution in its submissions has misdescribed the effect of the decision of the Appeals Chamber, when it submitted that these applications should be dismissed, *inter alia*, because the applicant victims have not demonstrated “exceptional circumstances” in order to justify introducing this evidence. The Appeals Chamber did not establish or endorse this suggested criterion, and victims do not have to satisfy the Chamber that they come within an “exceptional” category in order to tender and examine evidence.

36. This Chamber agrees that the prosecution has incorrectly interpreted the Appeals Chamber Decision. The suggested exceptional circumstances criterion has no foundation within the Rome Statute framework, and it would artificially and unfairly limit the opportunity for victims to participate.⁵¹

37. As described above, Trial Chamber I in the *Lubanga* case, has required victims who wish to participate at any identified stage in the trial to apply in

⁴⁷ Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, paragraph 75.

⁴⁸ Prosecution’s Submission on whether the Chamber should adopt or depart from the existing jurisprudence on victim’s participation at trial, 4 November 2009, ICC-01/05-01/08-594, paragraphs 11.

⁴⁹ ICC-01/05-01/08-619, paragraph 27.

⁵⁰ Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, 9 July 2009, ICC-01/04-01/06-2032-Anx, paragraph 21.

⁵¹ See also Decision on the Modalities of Victim Participation at Trial, 3 March 2010, ICC-01/04-01/07-1788-tENG, paragraph 83.

writing.⁵² This has worked effectively during that trial, although it has been recognised that it may be necessary for the representatives to delay submitting applications to ask questions until 7 days before the relevant witness testifies, once the extent of the evidence to be given, and the issues, are clear.⁵³ Nonetheless, even in those circumstances, written submissions have been made, identifying the essence of the relevant victim(s) interests in the evidence, and the Chamber has been able to make appropriate Decisions. This has minimised interruptions to the proceedings and facilitated the efficient-running of the trial.

38. Finally, on the manner of questioning witnesses by the legal representatives, Trial Chamber I determined:

27. Under the scheme of the Statute, questioning by the victims' legal representatives has been linked in the jurisprudence of the Trial and the Appeals Chambers to a broader purpose, that of assisting the bench in its pursuit of the truth. The framework establishing the rights of victims as regards their participation during trial has been coupled expressly with the statutory powers of the Trial Chamber, pursuant to Article 69(3) of the Statute, "to request the submission of all evidence that it considers necessary for the determination of the truth".⁵⁴ The Appeals Chamber explained that:

The framework established by the Trial Chamber [...] is premised on an interpretation of article 69 (3), second sentence, read with article 68 (3) and rule 91 (3) of the Rules, pursuant to which the Chamber, in exercising its competent powers, leaves open the possibility for victims to move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth.'

28. In the judgment of the Trial Chamber, this link (as approved by the Appeals Chamber) between the questioning of witnesses by the victims participating in proceedings and the power of the Chamber to determine the truth tends to support a presumption in favour of a neutral approach to questioning on behalf of victims. Putting the matter generally, they are less likely than the parties to need to resort to the more combative techniques of "cross-examination". In certain circumstances, however, it may be fully consistent with the role of the victims' legal representatives to seek to press, challenge or discredit a witness, for example when the views and concerns of a victim conflicts with the evidence given by that witness, or when material evidence has not been forthcoming. Under such circumstances, it may be appropriate for the victims' legal representatives to use closed, leading or challenging questions, if approved by the Chamber.

⁵² ICC-01/04-01/06-1119, paragraph 103. See also the practice of Trial Chamber II: Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr, paragraphs 87-88.

⁵³ Transcript of hearing on 28 January 2009, ICC-01/04-01/06-T-110-ENG, page 15, line 2 to page 17, line 13; Transcript of hearing on 5 February 2009, ICC-01/04-01/06-T-119-ENG, page 1.

29. In conclusion, it follows from the object and purpose of questioning by the victims' legal representatives that there is a presumption in favour of a neutral form of questioning, which may be displaced in favour of a more closed form of questioning, along with the use of leading or challenging questions, depending on the issues raised and the interests affected.

30. Otherwise, any attempt to pre-empt the circumstances in which a particular manner of questioning is to be conducted will be unhelpful, because the Chamber will need to respond on a case-by-case basis. The victims' legal representatives shall bear in mind, therefore, the presumption in favour of neutral questioning, unless there is a contrary indication from the bench. By way of procedure, if a representative of victims wishes to depart from a neutral style of questioning, an oral request should be made to the bench at the stage in the examination when this possibility arises.⁵⁴

39. Trial Chamber II has emphasised that the questions by the legal representatives should be neutral but it accepted there may be circumstances when other types of questions may be asked:

91. The Victims' Legal Representatives shall conduct their questioning in a neutral manner and avoid leading or closed questions, unless specifically authorised by the Chamber to deviate from this rule. If the Victims' Legal Representative is authorised to challenge the credibility/accuracy of a witness's testimony, leading, closed as well as questions challenging the witness's reliability are allowed, subject to the same limitations as outlined in relation to cross-examination.⁵⁵

40. Although there are slight differences in the formulation of the approach adopted respectively by Trial Chambers I and II, the underlying position is the same, and this Chamber is persuaded – put generally – that it has been demonstrated in both trials as providing an effective means of addressing the issue of questioning by representatives of victims, and accordingly it will be followed in the present case, unless varied by order of the Chamber.

b) Access by victims to confidential documents in the record

41. The parties and participants diverge as to access by victims to the record and the documents and filings in the case, and whether the practice of Trial

⁵⁴ Decision on the manner of questioning witnesses by the legal representatives of victims, 16 September 2009, ICC-01/04-01/06-2127, paragraphs 27-30.

⁵⁵ ICC-01/04-01/07-1665-Corr, paragraph 91.

Chamber I should be applied to the present case.

42. The prosecution and the victims' legal representatives rely on Trial Chamber I's Decision as to access by victims to the relevant records. However, the prosecution submits the "highly exceptional" criterion is to be applied to access by victims to confidential filings.⁵⁶ The legal representatives argue that this interpretation does not accord with the approach of Trial Chamber I, and that it would have highly prejudicial consequences for victims' participation in the proceedings.⁵⁷

43. During the pre-trial phase, the Single Judge refused victims access to confidential information in the record of the case for the following reasons:⁵⁸

103. The Single Judge notes rule 121(10) of the Rules, according to which the record of all proceedings before the Pre-Trial Chamber "may be consulted by victims and their legal representatives participating in the proceedings pursuant to rules 89 to 91". The Single Judge is of the view that legal representatives of victims recognised as participants in the present proceedings must gain proper knowledge of the case and prepare themselves for the confirmation hearing. Therefore they must be granted access to all public decisions and documents contained in the record of the case effective as of the date of their recognition to participate in the present proceedings pursuant to rule 121(10) of the Rules, subject to any restrictions concerning confidentiality and protection of national security information. The right of access to decisions and documents does not extend to those filed on a confidential basis or, if applicable, under seal and/or ex parte. (emphasis added)

44. In contradistinction, Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, granted victims access, in defined circumstances, to confidential documents or information in the record, subject to relevant protective measures:⁵⁹

106. Due to the fact that confidential filings within the record often contain sensitive information related to national security, protection of witnesses and victims, and the prosecution's investigations, the presumption will be that the legal representatives of victims shall have access only to public filings. However, if confidential filings are of material relevance to the personal interests of participating victims, consideration shall be given to providing this information to the relevant victim or victims, so long as it will not breach other protective measures that need to remain in place.

⁵⁶ ICC-01/05-01/08-594, paragraphs 12 and 16.

⁵⁷ ICC-01/05-01/08-619, paragraphs 14-17.

⁵⁸ ICC-01/05-01/08-320, paragraph 103.

⁵⁹ ICC-01/04-01/06-1119, paragraphs 106-107. See also paragraphs 110 and 111 cited above.

107. In accordance with Rule 92(5) of the Rules, victims or their legal representatives shall be notified in a timely manner of all public proceedings and filings before the Court, and, if the Chamber determines that a victim's personal interests are materially affected, of any that are confidential to the extent that this does not breach other protective measures that need to remain in place. This will enable victims to identify the parts of the proceedings which may affect their interests. The Trial Chamber reiterates its general approach set out in the Order on notification of filings of 19 November 2007 that "the party or participant filing a document bears responsibility for determining the appropriate recipients". Accordingly, confidential filings which include the names of the legal representatives of the victims on their cover shall also be notified to the victims by the Registry. (emphasis added)

45. Furthermore, Trial Chamber II in the *Katanga and Ngudjolo* case, in its 22 January 2010 Decision,⁶⁰ adopted a somewhat broader approach:

The Chamber is of the view that, in order to promote effective participation of victims in the trial, the Legal Representatives must be able to consult all of the public and confidential decisions and documents in the record of the case, with the exception of any document classified as *ex parte*. [...]

46. Trial Chamber II seemingly restricted access to evidence in the case to the legal representatives alone and not their clients.⁶¹ Trial Chamber I decided that the legal representatives were entitled to be present during non-public court sessions because they recognised that they should not disclose to their clients, or anyone else not authorised, any of the information that is covered by protective measures ordered by the Chamber.⁶²

47. This Chamber is persuaded that in order to facilitate full participation by victims, it is in the interests of justice that those who have been granted leave to participate are afforded access to the confidential material in the case, relevant to their views and concerns. However, given the obligation of the Court to protect those affected by its activities, it is necessary that this opportunity is subject to the restriction that necessary protective measures or the security of individuals or organisations will not be adversely affected.⁶³ Therefore, in order to guarantee the effective expression of the views and

⁶⁰ ICC-01/04-01/07-1788-tENG, paragraph 121.

⁶¹ ICC-01/04-01/07-1788-tENG, paragraph 123.

⁶² ICC-01/04-01/06-2340, paragraph 38, 11 March 2010, Decision on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses.

⁶³ ICC-01/04-01/07-1788-tENG, paragraph 121.

concerns of participating victims, they are, through their legal representatives, to be notified in a timely manner of public and confidential filings whenever the Trial Chamber has resolved that their interests are engaged. In order to make this approach effective, the parties and participating victims are to inform the Chamber whenever confidential filings may engage the interests of particular participating victims. The legal representatives are not to communicate confidential information to their clients, or anyone else who is not authorised to receive it, without the permission of the Chamber.

48. In a further joint submission, the legal representatives of victims currently participating in this case have requested the notification of certain documents in order to prepare for trial.⁶⁴ They request notification, as soon as possible, of: a) the redacted version of the standard application forms of their clients, as notified to the prosecution and the defence for the purposes of Rule 89 of the Rules; b) the non-redacted version of the Second Amended Document containing the charges (filing 594-Conf-Exp-AnxA); c) the Prosecution Summary of its presentation of evidence and related documents (filings 592-AnxA, 595-Conf-Exp-AnxA and B)⁶⁵; the d) Updated Consolidated Version of the In-Depth Analysis Chart of Incriminatory Evidence (filings 781-Conf-Exp-AnxA and previous versions thereof); and e) the prosecution's witness statements, and attached documents and materials, if any, to be used at trial.⁶⁶

49. In the *Lubanga* case, the victims' legal representatives received full disclosure of witness statements and also the confidential version of the Summary of Presentation of Evidence.⁶⁷ Given the immediacy of the commencement of trial, and the need for victims to prepare for their participation therein, the

⁶⁴ Joint Submissions by the Legal Representatives of Victims on matters which require determination prior to trial with Confidential *Ex parte* Legal Representatives only Annex A, 10 June 2010, ICC-01/05-01/08-791.

⁶⁵ The updated version of the summary of presentation of evidence is contained in filing 669 of 15 January 2010.

⁶⁶ ICC-01/05-01/08-791, paragraph 8.

⁶⁷ Transcript of Hearing on 22 January 2009, ICC-01/04-01/06-T-105-ENG-ET WT, page 43, line 1 to page 44, line 18.

Chamber considers that the victims' legal representatives in this case should receive the above documents, in the redacted form provided to the defence as the case may be, no later than 16.00 on 8 July 2010.

c) Contact with individuals with dual status

50. There is disagreement as regards some, albeit limited, aspects of participation by individuals with dual status. The prosecution argues that Trial Chamber III should depart from the practice of Trial Chamber I in the *Lubanga* case, in which it was determined that contact between a dual status victim and one of the parties or another participant is to be through the VWU, and, moreover, the other parties and participants are not to be notified when this occurs. In the present case, the prosecution suggests that direct contact by the prosecution should be permitted without the intervention of the VWU.⁶⁸

51. The legal representatives submit the VWU should continue to act as the intermediary and facilitator of these meetings, thereby ensuring the protection of dual status victims.⁶⁹

52. In its 18 January 2008 Decision, Trial Chamber I in the *Lubanga* case addressed the status of participating victims in the following way:⁷⁰

132. The Trial Chamber rejects the submission of the defence that victims appearing before the Court in person should be treated automatically as witnesses. Whether or not victims appearing before the Court have the status of witnesses will depend on whether they are called as witnesses during the proceedings.

133. Furthermore, the Chamber is satisfied that the victims of crimes are often able to give direct evidence about the alleged offences, and as a result a general ban on their participation in the proceedings if they may be called as witnesses would be contrary to the aim and purpose of Article 68(3) of the Statute and the Chamber's obligation to establish the truth.

134. However, when the Trial Chamber considers an application by victims who have this dual status, it will establish whether the participation by a victim who is also a witness may

⁶⁸ ICC-01/05-01/08-594, paragraph 15.

⁶⁹ ICC-01/05-01/08-619, paragraph 9.

⁷⁰ ICC-01/04-01/06-1119, paragraphs 132-135.

adversely affect the rights of the defence at a particular stage in the case. The Trial Chamber will take into consideration the modalities of participation by victims with dual status, the need for their participation and the rights of the accused to a fair and expeditious trial.

135. The Registry's Victims and Witnesses Unit alerted the Chamber to the fact that it is not always aware of the dual status of a witness as victim who applied to participate in the proceedings or was allowed to participate, and that the lack of information may impact adversely on the protection of such victim-witness. It is self-evident that the Victims and Witnesses Unit should be assisted in providing protection to victims and witnesses by the other organs of the Court, so long as this does not conflict with their other functions and obligations. It is necessary, therefore, for careful consideration to be given to sharing information with the Victims and Witnesses Unit on matters concerning protection, including providing information on any victims who have dual status.

53. As regards contact between a party and dual status witnesses, Trial Chamber I ruled as follows:⁷¹

59. The Chamber approves the following, as agreed by the parties and participants:

a. When a party wishes to contact an individual with dual status, it shall provide notice of this to the legal representative, when it is aware the person has legal representation;

b. If a person with dual status requests to contact the parties or participants, the VWU will facilitate the contact, which will not be revealed to other parties and participants.

60. When in situations of urgency, in order to preserve or collect evidence, the prosecution or the defence does not contact the legal representative as set out in paragraph 59(a) above, the party who has contacted the individual shall as soon as possible thereafter inform the legal representative, and where applicable disclose any relevant material.

54. This Chamber is unpersuaded by the suggestion of the prosecution that it should depart from this approach, and particularly by the contention that the prosecution is best-placed to control its contact with dual status individuals. Instead, it is necessary for this important and sensitive work to be undertaken by a body that is entirely neutral as regards the issues in the case. The VWU is the relevant disinterested body of the Court, which works under the Registrar, and it has been entrusted by the Rome Statute framework with the principal responsibility for the protection of witnesses and victims.⁷² Consequently, this Chamber will adopt the approach of Trial Chamber I in the *Lubanga* case as regards victims with dual status.

⁷¹ Decision on certain practicalities regarding individuals who have the dual status of witness and victim, 5 June 2008, ICC-01/04-01/06-1379, paragraphs 59-60.

⁷² ICC-01/04-01/06-1379, paragraph 45.

d) Disclosure of applications of dual status individuals

55. The defence submits that all the applications for participation by dual status victims should be treated as prior witness statements (“*declaration préalables*”), to be disclosed to the defence in accordance with Rule 76 of the Rules, regardless of whether they contain material of relevance for the defence under Rule 77 of the Rules or Article 67(2) of the Statute.⁷³

56. The legal representatives argue that the applications for participation in possession of the prosecution do not automatically fall under Rule 76 of the Rules, unless appropriate protective measures have been put in place.⁷⁴

57. The prosecution for its part contends that it is not obliged to disclose application forms under the “normal disclosure mode”. The prosecution contends that in the present case, both parties have the same level of access to the application forms, and thus the prosecution is not in possession or control of additional information. Moreover, the defence is said to be aware of the identities of all the victims who are to be called as prosecution witnesses. The prosecution thus proposes that it will simply highlight for the defence those applications that relate to dual status victims. Thereafter, if the defence seeks further information, including non-redacted versions of the application forms, the issue should be resolved by the Chamber.⁷⁵

58. The following observations of Trial Chamber I in the *Lubanga case* are relevant to this issue:⁷⁶

⁷³ ICC-01/05-01/08-620-Corr, paragraphs 89-93.

⁷⁴ ICC-01/05-01/08-657, paragraph 31.

⁷⁵ ICC-01/05-01/08-661, paragraph 33.

⁷⁶ Decision on the defence application for disclosure of victims applications, 21 January 2009, ICC-01/04-01/06-1637, paragraphs 11-13.

11. The critical tension revealed by this application is between the right of victims to appropriate protective measures and the right of the accused to a fair trial, and, in the particular context of this application, to the exculpatory material in the possession of the prosecution and the VPRS. Whilst the Chamber will ensure that Thomas Lubanga Dyilo's fair-trial rights are fully protected, establishing the most appropriate means of implementing those rights must take into account the position and rights of the participating victims who are also witnesses.

12. In all the circumstances, balancing and applying these [...] principles, the regime established by this Chamber and the Appeals Chamber to effect disclosure and resolve related issues must be followed for those individuals who have dual status. The prosecution has indicated that it treats this group of witnesses in the same way as all other witnesses in the case, particularly as it has in its possession the non-redacted versions of the application forms, together with - it is to be inferred - any supporting documents. It has further indicated that these applications, in its view, should be considered in the same way as statements of the witnesses, and that they are covered by Rule 76(1) of the Rules. Therefore, the prosecution is in a position to disclose all exculpatory material relevant to this application, and it is the body which is subject to positive disclosure obligations.

13. Accordingly, in the view of the Chamber, the prosecution must apply the same approach to this material as it does to any other exculpatory material in its possession. The only caveat is that prior to disclosure of information relevant to these particular witnesses who hold dual status, the views of their individual representatives must be sought, and if objections to disclosure are raised, the matter should be brought immediately to the attention of the Chamber by way of a filing, for determination. It is inappropriate to order the Registry to re-classify the applications of the victims as described in paragraph 8 above. For the reasons set out hitherto this issue is properly resolved by applying the approach to disclosure which has been outlined in this Decision. (emphasis added)

59. The Chamber considers that this approach is persuasive: it is for the prosecution to determine for dual status victims whether the application forms and accompanying documents should be disclosed pursuant to Article 67(2) of the Statute and Rule 77 of the Rules. Therefore, the Chamber endorses the approach of Trial Chamber I, but given the prosecution and the defence are presently in possession of identical material in this category, this approach is to be applied in the future if the prosecution is provided with relevant information that is withheld from the defence.

60. It is for the defence to make any necessary applications to the Chamber for additional disclosure, and for the prosecution to ensure that hereafter it fulfils its disclosure obligations under the Rome Statute framework.

e) Anonymous victims

61. The prosecution submits that in light of the approach of Trial Chamber I in

the *Lubanga* case, anonymous victims should only be able to participate in trial proceedings on an exceptional basis.⁷⁷

62. The defence argues that the approach of Trial Chamber I should not be followed in the present case, particularly given the serious concerns that are said to have arisen at trial in the *Lubanga* case as to the role of intermediaries, which may influence the process of filing applications for participation. The defence thus contends that anonymous victims should only be authorised to participate “passively” in the trial proceedings, without the right to receive notification of filings or information about the hearings in the case.⁷⁸ The defence argues that their active participation is contrary to the Court’s statutory provisions and the applicable law under Article 21(3) of the Statute.⁷⁹ Moreover, the defence suggests that Rule 81(4) of the Rules does not authorise redactions to victims’ identities once the trial has commenced.⁸⁰ The defence submits that Rule 81(4) of the Rules should be interpreted in accordance with the principles of necessity and proportionality, and in the result less restrictive protective measures should be adopted. The defence argues that if adequate protective measures are in place, it is inappropriate to redact victims’ identities.⁸¹ Finally, the defence suggests that participation by anonymous victims will prejudice the integrity of the trial.⁸²

63. The victims’ legal representatives argue the Chamber should adopt the relevant practice established in the *Lubanga* case, in the sense that decisions revealing the identities of participating victims are dependent on the extent and circumstances of their participation.⁸³

⁷⁷ ICC-01/05-01/08-594, paragraph 12.

⁷⁸ ICC-01/05-01/08-620-Corr, paragraphs 73-88.

⁷⁹ ICC-01/05-01/08-620-Corr, paragraphs 76 and 87.

⁸⁰ ICC-01/05-01/08-620-Corr, paragraph 82.

⁸¹ ICC-01/05-01/08-620-Corr, paragraph 83.

⁸² ICC-01/05-01/08-620-Corr, paragraph 85.

⁸³ ICC-01/05-01/08-657, paragraph 26.

64. The legal representatives argue that Rule 81(4) of the Rules applies to evidence and not to the applications for participation. They highlight the consistent approach of various Chambers of the Court on this issue, stressing that these documents *per se* are not evidence.⁸⁴ It is suggested that none of the legal texts of the Court distinguish between “active” and “passive” participation by victims, and that a distinction of this kind would be contrary to the Statute.⁸⁵

65. In its 18 January 2008 Decision,⁸⁶ Trial Chamber I in the *Lubanga* case decided that:

130. [...] the Trial Chamber rejects the submissions of the parties that anonymous victims should never be permitted to participate in the proceedings. Although the Trial Chamber recognizes that it is preferable that the identities of victims are disclosed in full to the parties, the Chamber is also conscious of the particularly vulnerable position of many of these victims, who live in an area of ongoing conflict where it is difficult to ensure their safety.

131. However, the Trial Chamber is of the view that extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to the rights of the accused. While the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial. The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself. Accordingly, when resolving a request for anonymity by a victim who has applied to participate, the Chamber will scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants. Given the Chamber will always know the victim's true identity, it will be well placed to assess the extent and the impact of the prejudice whenever this arises, and to determine whether steps that fall short of revealing the victim's identity can sufficiently mitigate the prejudice.

66. The Single Judge during the pre-trial phase in the present case, in his Decision of 12 December 2008, ruled in similar terms:⁸⁷

99. [...] no differentiation is made between victims whose identity is known to the Defence and those for whom anonymity has been granted by the Chamber. A differentiation in participatory rights should not be to the detriment of those requesting protective measures. As explained above, anonymous victims are not to be perceived as a party to the proceedings and do not assume the role of the accuser. Therefore, the Single Judge deems it appropriate to take a systematic approach when determining the participatory rights of recognised victims.

⁸⁴ ICC-01/05-01/08-657, paragraph 28.

⁸⁵ ICC-01/05-01/08-657, paragraph 29.

⁸⁶ ICC-01/04-01/06-1119, paragraphs 130-131.

⁸⁷ ICC-01/05-01/08-320, paragraph 99.

67. Trial Chamber II did “not rule out the possibility of anonymous victims participating in the proceedings.” However, it required that any victim who is called to testify “must relinquish their anonymity.”⁸⁸

68. The Chamber is of the view that discrete, fact-sensitive decisions are to be taken in this context, bearing in mind the rights of the accused and the legitimate need for protective measures for participating victims. The Chamber is unpersuaded by the defence argument on Rule 81(4) of the Rules: this provision relates to confidential information disclosed by the prosecution that is potentially relevant to the trial proceedings, and therefore it does not, in any general sense, cover victims’ applications. The notable exception to this approach relates to those applications from dual status victims, a category that has been addressed separately in this Decision.

69. Although there are slight differences in the formulation of the approach adopted respectively by Trial Chambers I and II, the underlying position is the same, and this Chamber is persuaded – put generally – that it has been demonstrated as providing an effective means of addressing the issue of anonymous victims. This approach will, therefore, apply *mutatis mutandis* in the present trial, unless varied by order of the Chamber.

f) Protective measures

70. Trial Chamber I in the *Lubanga* case dealt with protective measures for participating victims as follows:⁸⁹

126. In order to make an informed decision on individual protective measures for each applicant, the Trial Chamber seeks the assistance of the Victims and Witnesses Unit in order to assess the individual risk that each participating victim faces. The

⁸⁸ ICC-01/04-01/07-1788-tENG, paragraph 93. See also paragraph 92.

⁸⁹ Corrigendum to “Decision on the applications by victims to participate in the proceedings”, 13 January 2009, ICC-01/04-01/06-1556-Corr-Anx1, paragraphs 126-133.

Chamber is aware of the extensive nature of this undertaking, since it currently involves 91 applicants, and accordingly the VWU is to inform the Chamber if it will be unable to complete this task in advance of the trial.

127. In this Decision the Chamber is essentially conducting a preliminary assessment on the merits of the applications by victims to participate. It is impossible at this point in time to determine the extent to which, if at all, victims will be permitted to retain their anonymity, particularly vis-à-vis the accused, whilst continuing to participate actively in the proceedings. Although the goal is complete open justice, a critical dividing line in this context may be whether the accused has been informed as to the identity of the participating victim. Depending on the facts, it may be acceptable for the victim to remain anonymous as regards the public, whilst revealing his or her identity to the accused.

[...]

131. It follows that a fact-sensitive decision, addressing what will often be a complex range of issues, needs to be made on all issues concerning a victim's participation, at each relevant stage in the trial, and including whether or not he or she is to be permitted to remain anonymous, and if so, the extent of the anonymity. Therefore, the Chamber will make a decision in due course on whether any victims are to be granted leave to participate "actively" whilst remaining anonymous, and if so, the extent of the anonymity.

132. The Trial Chamber instructs the Registry to consult with the victims and their legal representatives generally as regards the level of protection that is necessary during the trial. The Registry is to remind the victims and their legal representatives of the availability of protective and special measures other than complete anonymity, which may enable a greater degree of participation by them in the proceedings, consistent with the rights of the accused and a fair trial (e.g. confidentiality of the victims' identity towards the public).

133. In any event, unless expressly provided by the victims or their legal representatives, all victims should be referred to by the parties, participants and any organ of the Court in all filings and hearings by their pseudonym.

71. This approach appears to have worked satisfactorily in that case, which is therefore endorsed by this Chamber, and the VWU is to provide its report no later than 16.00 on 30 July 2010.

72. The Trial Chamber instructs the Registry to consult with the victims and their legal representatives generally as regards the protection that is necessary during the trial. The Registry is to remind the victims and their legal representatives of the availability of protective and special measures other than complete anonymity (e.g. confidentiality of the victims' identity towards

the public) which may facilitate a greater degree of participation by them in the proceedings than otherwise will be the case if anonymity is maintained, consistent always with the rights of the accused and a fair trial.

73. Unless otherwise agreed by the participants or their legal representatives, the participating victims are to be referred to in all filings and during hearings by their pseudonym.

B. Individual applications to participate

74. The Chamber has received 86 applications to participate, which have been evaluated in accordance with the criteria described in paragraphs 21 to 25 above.

1) Unopposed applications

75. 32 of the applications to participate are unopposed by the parties.⁹⁰ In each instance, the applicants have provided sufficient material to establish, *prima facie*, that they are victims under Rule 85(a) of the Rules; the Chamber has concluded that these applicants, for this particular purpose, suffered personal harm as a result of the crimes confirmed against the accused, namely the alleged offences of murder as a crime against humanity and war crime, rape as a crime against humanity and war crime and pillaging as a war crime, committed by the Banyamulengués in the period between 26 October 2002 to 15 March 2003.⁹¹

⁹⁰ a/0515/08, a/0516/08, a/0567/08, a/0568/08, a/0570/08, a/0571/08, a/0572/08, a/0131/09, a/0132/09, a/0135/09, a/0137/09, a/0427/09, a/0429/09, a/0573/08, a/0574/08, a/0575/08, a/0576/08, a/0577/08, a/0578/08, a/0579/08, a/0582/08, a/0583/08, a/0584/08, a/0585/08, a/0586/08, a/0548/08, a/0549/08, a/0551/08, a/0552/08, a/0557/08, a/0587/08, a/0596/08.

⁹¹ Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, paragraphs 71-72, 210 to 212.

76. The relevant case-by-case analysis in this regard is set out in Annex A of this Decision.

2) Certain common issues

77. It is convenient for the Chamber to address herein the common issues identified from the submissions of the parties. As just set out, the case-by-case analysis of these applications is set out in Annex A.

i. The Deceased

78. The brother of someone who was killed in relevant circumstances has submitted an application, although the sibling (who submitted the application) has not suggested he suffered personal harm following the death.⁹²

79. In the report submitted by the Registry, the view is expressed that this situation is to be distinguished from that where a close relative of a victim alleges emotional or psychological harm as a result of the latter's death. The Registry submitted that the Court has yet to formulate a consistent approach to participation by the relatives of victims who have been killed.⁹³

80. Pre-Trial Chamber III in the present case decided that a victim does not lose the right to participate because they have died. It established three criteria: a) the individual was a natural person; b) the death appears to have been caused by a crime within the jurisdiction of the Court; and c) a written application on behalf of the dead victim has been submitted by his or her successor.⁹⁴ In the *Lubanga* case, Trial Chamber I recognised one victim who had been killed, and permitted his uncle to act on his behalf. Trial Chamber I concluded that the

⁹² a/0512/08.

⁹³ ICC-01/05-01/08-653-Conf-Exp-Anx21, paragraph 11.

⁹⁴ ICC-01/05-01/08-320, paragraphs 39-40.

person acting on behalf of a victim in these circumstances does not have to be a relative or a legal guardian because, within the Rules, the "person acting" is undefined and unrestricted.⁹⁵ However, Pre-Trial Chamber I⁹⁶ and Trial Chamber II⁹⁷ have not adopted this approach, holding that close relatives may participate personally, but only because of the effect on them of the relative's death, which constitutes personal harm that they have suffered.

81. In relation to this single application (a/0512/08), the victim's sibling provided the Chamber with information and documents that establish identity and kinship. Therefore, given proof of kinship is not, *prima facie*, an issue, the sole question for determination is whether the views and concerns of a dead victim can be represented by another.

82. It is useful to consider the approach of the Inter-American Court of Human Rights in this context:⁹⁸

The damages suffered by the victims up to the time of their death entitle them to compensation. That right to compensation is transmitted to their heirs by succession. The damages payable for causing loss of life represent an inherent right that belongs to the injured parties. It is for this reason that national jurisprudence generally accepts that the right to apply for compensation for the death of a person passes to the survivors affected by that death. In that jurisprudence a distinction is made between successors and injured third parties. With respect to the former, it is

⁹⁵ Order issuing confidential and public redacted versions of Annex A to the "Decision on the applications by 7 victims to participate in the proceedings" of 10 July 2009 (ICC-01/04-01/06-2035), 23 July 2009, ICC-01/04-01/06-2065-Anx2, page 15.

⁹⁶ Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, 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", 31 January 2008, ICC-01/04-423-Corr-tENG, paragraphs 23-25; Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/00111/06 to a/0015/06, a/0021107, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, 14 December 2007, ICC-02/05-111-Corr, paragraphs 35-36; 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, paragraph 23.

⁹⁷ Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 10 March 2010, ICC-01/04-01/07-1491-Red, paragraphs 49-56.

⁹⁸ Inter-American Court of Human Rights, *Case of Aloeboetoe et al. v. Surinam*, Reparations and Costs. Judgment of September 10, 1993, *Series C No. 15*, paragraph 54; *Case of El Amparo v. Venezuela*, Reparations and Costs, Judgment of September 14, 1996, *Series C No. 28*, paragraphs 43 and 46; *Case of Neira-Alegría et al. v. Peru*, Reparations and Costs, Judgment of September 19, 1996, *Series C No. 29*, paragraphs 63 and 65; *Case of Caballero-Delgado and Santana v. Colombia*, Reparations and Costs, Judgment of January 29, 1997, *Series C No. 31*, paragraphs 60 and 61.

assumed that the death of the victim has caused them actual and moral damages and the burden of proof is on the other party to show that such damages do not exist. Claimants who are not successors, however, must provide specific proof justifying their right to damages, as explained below (*cf. infra*, para. 68).

83. The death of a victim should not extinguish the opportunity for the Chamber to consider his or her views and concerns, in that it would be markedly unjust if an alleged perpetrator in these circumstances prevented the ICC from receiving relevant representations from the person fatally affected. Participation by victims is not a one-sided exercise: although it is specifically intended to benefit those whose personal interests are engaged, it also enhances the Court's understanding of the relevant events. In the *Lubanga* case victims have given evidence relevant to the trial, and their advocates have questioned witnesses about issues germane to the case. Given that legal representatives can act for participating victims under Article 68(3) of the Statute, it is an unexceptional extension of that approach to allow an appropriate individual (not necessarily a relative) to provide the Chamber with relevant information (reflecting the views and concerns of the victim who died), whether through counsel or otherwise. The most fundamental restriction is that this participation should not be prejudicial to or inconsistent with the rights of the accused, and a fair and impartial trial. Accordingly, the Chamber endorses the approach of Trial Chamber I and Pre-Trial Chamber III and in the circumstances this applicant meets the requirements of Rule 89(3) of the Rules. Sufficient information has been provided as to the identity of, and the kinship between, the dead victim and the person acting on his behalf. *Prima facie*, the applicant (the deceased) is a victim under Rule 85(a) of the Rules, given, in addition to his death, his home was allegedly looted as part of the commission of crimes included in the charges against the accused, following the activities of the Banyamulengués in the period between 26 October 2002 to 15 March 2003.⁹⁹

⁹⁹ ICC-01/05-01/08-424, paragraphs 71-72 and 210-212.

84. In a number of other instances, applications on behalf of dead victims have been submitted by relatives, who also allege personal harm to themselves, either as a direct consequence of the alleged crimes or on account of crimes committed against the deceased, including the latter's murder.¹⁰⁰ In these instances, the Chamber has treated both the dead applicant and the person acting on his or her behalf as victims who have suffered personal harm.

85. For these applications, the information and documents have enabled the Chamber to establish the identity of, and the kinship between, the deceased victim and the person acting on his behalf. Thus, these applicants satisfy the requirements of Rule 89 (1) and (3) of the Rules. *Prima facie*, the deceased and the individuals acting on their behalf are victims under Rule 85(a) of the Rules: they suffered personal harm as a result of the commission of crimes included in the charges against the accused, on account of the activities of the Banyamulengués in the period between 26 October 2002 to 15 March 2003.¹⁰¹

ii. Alleged crimes of shelling and the destruction of houses by fire

86. As regards three applicants, there is objection to their participation from the parties since they allege harm as a result of shelling.¹⁰²

87. Shelling is a crime under the jurisdiction of the Court that has not been included in the charges against the accused (see the war crimes of attacks against a civilian population or civilian objects, article 8(2)(b), subparagraphs (i), (ii), (iv), (v), (ix) and article 8(2)(e), subparagraphs (i) and (iv)).

88. In the Registry's report it is suggested that harm resulting from shelling should be treated as attempted murder, since murder is included in the

¹⁰⁰ a/0516/08, a/0432/09, a/0293/08, a/0589/08, a/0593/08, a/0602/08 and a/0625/08.

¹⁰¹ ICC-01/05-01/08-424, paragraphs 71-72 and 210-212.

¹⁰² a/0517/08, a/0563/08 and a/0428/09.

charges against the accused.¹⁰³

89. Although, depending on the circumstances, the result of shelling houses may well be not only the destruction of property, but also serious injury or death, the charges in this case were confirmed on a precise and limited basis. The allegation of murder does not include killing by shelling, and accordingly the interests of these three victims are not reflected in the confirmed charges. It follows that their applications are refused, on the basis of the position currently before the Chamber.

90. For three of the applicants, who allegedly suffered harm as a result of the total destruction of their homes by fire,¹⁰⁴ there is no indication that their properties were looted before they were destroyed. In the absence of any evidence that this occurred, there is an insufficient factual basis to grant these applications, given that the basis for their participation would be that their properties were pillaged.

iii. Evidential threshold for victims' applications

91. The defence contends that certain applicants failed to provide sufficient evidence (i.e. they relied solely on personal accounts), or were absent when these events allegedly occurred (e.g. they had fled the property allegedly pillaged).¹⁰⁵

92. It is not necessary for applicants to provide corroborative witnesses for the Chamber to reach a *prima facie* conclusion. Instead, there simply needs to be sufficient evidence to establish *prima facie* that the applicant is a victim under Rule 85(a) of the Rules, on the basis that he or she suffered personal harm as a result of crimes confirmed against the accused, namely the alleged pillage,

¹⁰³ ICC-01/05-01/08-653-Conf-Exp-Anx25, paragraph 22.

¹⁰⁴ a/0595/08, a/0601/08 and a/0604/08.

¹⁰⁵ ICC-01/05-01/08-725, paragraph 15.

murder or rape by the Banyamulengués of Jean-Pierre Bemba in the period between 26 October 2002 to 15 March 2003.¹⁰⁶

93. For a discrete group of applications, the defence relied on the applicants' uncertainty about, or lack of evidence as to, which warring group in the armed conflict had committed the relevant crime (*i.e.* who had looted the applicant's house). It was suggested that this submission was often reinforced by the applicant's absence at the material time (*e.g.* the applicant and his or her family had fled).
94. It will inevitably sometimes be impossible for applicants to establish precisely who committed relevant crimes during the alleged attacks in the CAR, particularly given their absence at the material time. In the view of the Chamber it would be a considerable and unfair burden to require an applicant to demonstrate who fired a particular shell or who looted a house or other property. The accused is charged with offences allegedly committed in the period between 26 October 2002 to 15 March 2003, and there is evidence that his troops allegedly targeted the civilian population in each of the relevant locations, in an organised manner, as they advanced into, and later retreated from, the CAR in the aftermath of military clashes with the troops of President Bozizé.¹⁰⁷ Given that troops allegedly controlled by the accused were at the various locations described by the applicants at the time of the material events, notwithstanding the fact that the responsibility of others cannot be discounted, on the material provided to the Bench there is *prima facie* evidence (as opposed to proof beyond a reasonable doubt or on a balance of probabilities) that the relevant applicants are victims under Rule 85(a) of the Rules, having suffered personal harm as a result of crimes confirmed against the accused, in the period between 26 October 2002 to March 2003.¹⁰⁸

¹⁰⁶ ICC-01/05-01/08-424, paragraphs 71-72 and 210-212.

¹⁰⁷ ICC-01/05-01/08-424, paragraphs 75-86.

¹⁰⁸ ICC-01/05-01/08-424, paragraphs 71-72 and 210-212.

95. In respect of certain applications, the defence contends that the relevant applicants had provided dates or specified locations or events that did not correspond with events that are said to be the responsibility of the troops under the accused's control.¹⁰⁹

96. In these instances the Chamber has ensured that the relevant applicants have provided sufficient evidence to establish, *prima facie*, that they are victims under Rule 85(a) of the Rules, and that the Chamber has been provided with documents and other material that lead it to conclude that they suffered personal harm as a result of crimes confirmed against the accused, namely the alleged rape, murder or pillage by the Banyamulengués in the period between 26 October 2002 to 15 March 2003.¹¹⁰ Discrepancies as to dates or locations are not necessarily fatal in terms of the merits of these applications – it all depends on the overall evidence presented.

C. Legal representation

97. Since the views and concerns of many of the participating victims in all likelihood coincide and overlap, the Chamber instructs the VPRS to consult with the legal representatives of the victims and to file a proposal on common legal representation, in accordance with Rule 90(2) of the Rules, no later than 16.00 on 13 July 2010. A solution to the situation of those applicants represented by the late Mr. Goungaye Wanfiyo Nganatouwa is to be set out therein.

98. Turning to the role of the OPCV, Trial Chamber I in the *Lubanga* case¹¹¹

¹⁰⁹ ICC-01/05-01/08-725, paragraph 16.

¹¹⁰ ICC-01/05-01/08-424, paragraphs 71-72 and 210-212.

¹¹¹ Decision on the role of the Office of Public Counsel for Victims and its request for access to public documents, ICC-01/04-01/06-1211, paragraph 30 *et seq.* See also ICC-01/04-01/07-1328, paragraph 16.

addressed the role of the Office in detail:

30. The relevant provisions of the Rome Statute framework envisage that the Office of Public Counsel for Victims may fulfil a wide variety of functions during the trial stage. Rule 90(1) of the Rules establishes the right for victims to choose a legal representative. The Chamber, under Regulation 80 of the Regulations of the Court, has the power to appoint a legal representative, *inter alia*, from the Office, and Regulation 81(4) requires the Office to provide support and assistance to victims and to their legal representatives by providing legal research and advice and appearing before the Chamber. It is to be stressed that in critical respects it is for the Chamber - and not the Office - to determine the precise nature of the role of the Office in a particular case.

Although victims have a right ("are free") to choose a legal representative, it is for the Chamber to determine whether or not that representative should come from the Office (Regulation 80(2)). As indicated by the use of the word "may" in this provision, a decision of a Chamber pursuant to Regulation 80(2) is discretionary.

31. The Chamber is of the view that it is necessary that the power to determine the role of the Office of Public Counsel for Victims is vested in the Chamber, in particular because of the latter's responsibility to manage the proceedings and to ensure the fair and expeditious conduct of the trial. Significant problems could emerge if the Chamber is not able to prevent conflicts of interest or other events that may result in a damaging diminution of the Office's core role, which is to provide support and assistance to the legal representatives of victims and to the victims in accordance with Regulation 81(4) of the Regulations of the Court. One important example of potential conflicts of interest are those that may emerge between victims represented by the Office, on the one hand, and those to whom the Office should be providing support and assistance, on the other. It is necessary to stress, however, that decisions on the role of the Office of necessity will be case-specific: although the range of options is extensive, a bespoke role should be established in each case. This is the first trial to come before the International Criminal Court and the Chamber, the parties and the participants are engaged in the detailed and complex process of establishing the proper modalities of participation by victims. In line with the submissions of the victims' legal representatives, in the opinion of the Trial Chamber, during this early stage in the Court's existence it is critical that the Office concentrates its limited resources on the core functions given to it under the Rome Statute framework which, as set out above, is to provide support and assistance to the legal representatives of victims and to victims who have applied to participate (rather than representing individual victims).

33. This decision is not to deter the Office from appearing before the Chamber in respect of specific issues (at the request of victims, their representatives or the Chamber) or from representing individual victims during any reasonable initial period prior to the appointment of independent counsel.

34. The Trial Chamber notes the Decision of Pre-Trial Chamber I of 17 August 2007 in the Situation in the Democratic Republic of the Congo which ordered the Registrar to appoint automatically the Office of Public Counsel for Victims as the legal representative for victim applicants who were without a legal representative. The reason for this decision was that the applicants may need to receive support and assistance from the Office when the Registry requests additional information on the

applications pursuant to Regulation 86(4).⁵¹ Pre-Trial Chamber I ordered that the applicants were to be represented by the Office of Public Counsel for Victims "until such time as the applicant has been granted victim status and a legal representative is chosen by him or her or appointed by the Court". The Trial Chamber agrees with this general approach. As regards those victim applicants currently represented by the Office of Public Counsel for Victims, the Office shall continue to represent them until the Chamber issues a decision on their application to participate.

Thereafter, the Registrar shall arrange for a legal representative to act for them, unless there are specific reasons, which are to be set out in a filing addressed to the Chamber and the Registry only, as to why this course may be detrimental to individual participating victims.

99. Broadly, this Chamber considers there is force in the approach set out above.

Although it has been in the interests of Trial Chamber I and of individual participating victims that the OPCV acts as counsel in particular justified circumstances during the proceedings, if in the present proceedings it suggested that this role should be significantly extended, the issue will need to be determined by the Chamber, following representations.

100. Otherwise as regards representation, the Chamber endorses the following approach by Trial Chamber II:

15. At the same time, the Chamber considers that it would be has a strong connection with the local situation of the victims and the region in general. This will assist the common legal representative in presenting the genuine perspective of the victims, as is his or her primary role.¹¹²

101. If a victim wishes to participate in person at any stage of the trial proceedings, he or she shall apply in writing to the Chamber no later than 16.00 on 19 August 2010. Later applications will be considered if the delay is justified.

IV. Orders

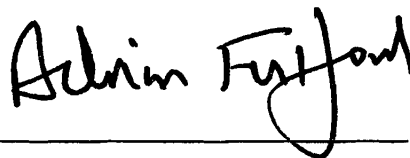
102. For these reasons, the Trial Chamber hereby:

¹¹² Order on the organisation of common legal representation of victims, 22 July 2009, ICC-01/04-01/07-1328, paragraph 15.

- a. Grants participating status to 81 applicants: of these 81 applicants, 40 are female, 37 male; in addition 2 females are acting on behalf of 2 male deceased victims and 2 males are acting on behalf of 2 female deceased victims; 1 of the applicants is also a "legal person"; 5 applicants are victims of murder alone, 6 are victims of murder and pillage, 50 are victims of pillage alone, 14 are victims of rape and pillage, 3 are victims of rape alone, and 3 are victims of rape, murder and pillage.
- b. Refuses the applications to participate by 5 applicants.
- c. Instructs the Registry to consult with the legal representatives of victims and to file a proposal on common legal representation in accordance with Rule 90(2) of the Rules no later than 16.00 on 13 July 2010.
- d. Orders the Registry to notify to the legal representatives of victims, no later than 16.00 on 5 July 2010, the following documents:
 - i. the redacted version of the standard application form of their clients as notified to the prosecution and the defence for the purposes of Rule 89 of the Rules;
 - ii. the non redacted version of the Second Amended Document containing the charges (filing 593-Conf-Exp-AnxA);
 - iii. the Prosecution Summary of its presentation of evidence and related documents (filings 592-Conf-Exp-AnxA, 595-Conf-Exp-AnxA and B and 669-Conf Exp-AnxA, B, C and D);
 - iv. the Updated Consolidated Version of the In-Depth Analysis Chart of Incriminatory Evidence (filing 781-Conf-Exp-AnxA and previous versions thereof);

- e. Orders the prosecution to provide the statements of the witnesses it intends to rely on at trial, and attached documents and materials if any, to the legal representatives of victims, in the redacted form disclosed to the defence as the case may be, no later than 16.00 on 8 July 2010.
- f. Orders that any victim wishing to participate in person at any stage of the trial proceedings is to apply in writing to the Chamber no later than 16.00 on 19 August 2010.
- g. Orders the Registry to submit to the Chamber a report on the requests for protective and special measures of victims who have been granted status to participate no later than 16.00 on 30 July 2010.
- h. Instructs the legal representatives of victims who wish to participate during the trial proceedings, in addition to Order (e), to set out in a discrete written application the nature and the detail of their proposed questions to witnesses 7 days before the witness is scheduled to testify.

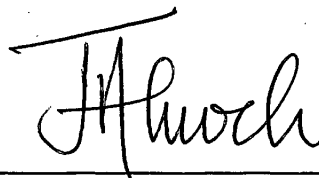
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Joyce Aluoch

Dated this 12 July 2010

At The Hague, The Netherlands