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Representing Victims before the International Criminal Court

A Manual for legal representatives

5th Revised Edition

The Office of Public Counsel for Victims

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A manual for legal representatives

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Table of Contents

Foreword to the Fifth Revised Edition 7

Part 1 An Introduction to the International Criminal Court and the Role of Victims **9**

1. Introduction to the International Criminal Court 11

1. Creation of the Court and States Parties 11
2. Crimes within the jurisdiction of the Court 11
3. Jurisdiction *ratione temporis, ratione loci* and *ratione personae* 12
4. The triggering mechanisms to activate the jurisdiction of the Court 13
5. The principle of complementarity and admissibility of a case before the Court 15
6. International cooperation and judicial assistance 17
7. Relations with the United Nations 18
8. Internal functioning 19
9. Proceedings before the Court 19
   9.1 General principles of criminal law 19
   9.2 The different stages of the proceedings 22
      9.2.1 The pre-trial stage 22
      9.2.2 The trial stage 23
      9.2.3 The appeal stage 23
      9.2.4 Reparations proceedings 24
      9.2.5 Revision of conviction or sentence 24
      9.2.6 The enforcement of sentences of imprisonment 24

2. The International Criminal Court and Victims 25

1. Notion and role of victims in the framework of the Rome Statute 25
2. Participation of victims in the proceedings before the Court 26
3. Modalities of participation of victims in proceedings before the Court 28
4. Reparations of the harm suffered 29
5. The Trust Fund for Victims 30
6. The right of victims and witnesses to protection 30

3. Creation and functions of the Office of Public Counsel for Victims 33

Part 2 Practice of the Court on matters pertaining to victims' participation **37**

1. Victims' participation in the proceedings 39

1. The notion of personal interests under article 68(3) of the Rome Statute 39
2. Appropriateness of the participation 42
3. Definition of victim 43
   3.1. Interpretation of Rule 85 of the Rules of Procedure and Evidence 43
   3.2. The notion of "victims having communicated with the Court" 48
   3.3. Natural person and the proof of identity 49
   3.4. Organisations or institutions 57
   3.5. Crimes under the jurisdiction of the Court 58
   3.6. Harms suffered 59
   3.7. The causal link 63
4. The application process 65
   4.1. In general 65
   4.2. Completeness of the applications 77
   4.3. Redactions of information about the applicants 81
   4.4. Redactions of information about the intermediaries 92
   4.5. Redactions of the name of Legal Representatives 97
   4.6. Registry's Report filed in accordance with regulation 86(5) of the Regulations of the Court 97
5. Issues related to the security of victims 97
6. Participation 99
   6.1. Participation in the proceedings in general 99
   6.2. Participation in relation to a preliminary examination 107
   6.3. Participation at the investigation stage 109
   6.4. Participation at the pre-trial stage, including at the confirmation of charges hearing 110
   6.5. Participation at the trial stage 115
   6.6. Participation in interlocutory appeals 119
   6.7. Participation at the appeal stage 120
   6.8. Participation in reparations proceedings 124

2. Modalities of victims' participation in the proceedings 139

1. Modalities of participation in general 139
2. Modalities of participation at the investigation stage 141
3. Modalities of participation at the pre-trial stage 144
4. Modalities of participation at the confirmation of charges hearing 147
5. Modalities of participation at the trial stage 154
6. Modalities of participation during interlocutory appeals 189
7. Modalities of participation at the appeal stage 190
8. Specific issues related to the modalities of participation 190
   8.1 Access to documents in general 191

8.2. Access to observations under rule 89 of the Rules of Procedure and Evidence 199
8.3. Access to the index of the situation and case record 199
8.4. Access to documents in possession or control of the Prosecution 201

3. Legal representation 209

1. Legal representation in general 209
2. Common legal representation 215
3. ***Ad hoc* Counsel** 222
4. Duty Counsel 222
5. Legal assistance paid by the Court 222
   5.1 Indigence 225
   5.2 Additional means 226
   5.3 Payment of fees 226
6. Role and mandate of the Office of Public Counsel for Victims 227
   6.1. Role of the Office in general 227
   6.2. The provision of support and assistance to the victims applying to participate 229
   6.3. The legal representation of victims applying to participate 230
   6.4. The legal representation of victims allowed to participate in the proceedings 231
   6.5. The appearance before a Chamber in respect of specific issues 234

4. Procedural matters 240

1. Procedural matters in general 240
2. Stay of proceedings 299
3. Jurisdiction and admissibility 307
4. Issues related to appeal proceedings 338
   4.1. Appealable decisions 338
   4.2. Interlocutory appeals lodged under article 82(1)(b) of the Rome Statute 344
   4.3. Interlocutory appeals lodged under article 82(1)(d) of the Rome Statute 344
   4.4. Suspensive effect 352
5. Issues related to disclosure 358

5. Evidence 384

1. Evidence in general 384
2. Issues related to the admissibility of evidence 398
3. Witnesses 425
   3.1. Witnesses in general 425
   3.2. Familiarisation of witnesses 434
   3.3. Witness Proofing 435
   3.4. Questioning of witnesses 438
   3.5. Protection and well-being of witnesses 445
   3.6. Dual status of victim and witness 458
   3.7. Expert witnesses 464

6. Issues related to Reparations 474

1. Reparations in general 474
2 Principles and Elements required for an order for reparations 478
3. Beneficiaries of an order for reparations 493
4. Redaction of information in reparation forms 496
5. Experts 499
6. Evidentiary criteria 499
7. Types of harm 502
   7. 1. Material harm 502
   7.2. Psychological harm 504
   7.3. Physical harm 505
   7.4. Transgenerational harms 505
   7.5. Other types of harm 506
8. Assessment of the harm 507
9. Liability of the convicted person 510
10. Types and modalities of reparations 513
   10.1. Symbolic reparations 513
   10.2. Individual reparations 514
   10.3. Collective reparations 514
11. Implementation of reparations 516
12. Identification, freezing and seizure of property and assets for reparations purposes 522

Part 3 Practical issues **531**

1. Filing documents in proceedings before the Court 533

1. Format of documents filed with the Court 533
2. Time limits for documents filed with the Court 533
3. Level of confidentiality of documents filed with the Court 538
4. Page limits of documents filed with the Court 538

2. Filing an application for participation or for reparations in proceedings before the Court 539

1. Use of the standards forms created by the Court 539
2. Use of the booklet accompanying the forms 539
3. Appropriate moment to file the applications 539
4. Submission of the completed applications 539

3. Requesting legal assistance paid by the Court 540

1. Applications for legal assistance paid by the Court 540
2. Criteria used for the evaluation of applications for legal assistance 540

4. Constituting a team 540

1. Lists of assistants and professional investigators 541
2. Language used in the proceedings 541
3. Composition of a team 541

5. How the OPCV may provide support and assistance to legal representatives? 542

6. Resources information on research methodology 542

1. ICC Legal Tools Database 542
2. Databases on the Law of the International Criminal Court 544
   2.1. Annotated Leading Cases 544
   2.2. Oxford Reports on International Law 544
   2.3. War Crimes Research Office Reports 544
   2.4. Commentary on the Law of the International Criminal Court 545
   2.5. Westlaw International 545
3. ICC Court Records Database 545

7. The different sections of the Court dealing with victims 545

8. Useful websites 546

1. International Courts 546
2. International Criminal Tribunals 546
3. Hybrid Courts 546
4. Other Websites 547

9. Selected book references 548

Annex Template to be used in order to file documents or material in the proceedings 550

Table of Contents

Foreword to the Fifth Revised Edition

The Rome Statute expressly provides for the right of victims to participate in proceedings before the ICC. The legal instruments of the Court, however, are not explicit in detailing the modalities of victims' participation in said proceedings. According to rule 89(1) of the Rules of Procedure and Evidence, "[t]*he Chamber shall specify the proceedings and manner in which participation [of victims] is considered appropriate*". Moreover, article 68(3) of the Rome Statute specifies that "[w]*here the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered 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*".

Since the very first proceedings, the Court has developed a number of principles pertaining to victims' participation that may be reasonably deemed today to be part of its constant jurisprudence, although their interpretation may vary on a case-by-case basis.

The main principle stipulates that the participation of victims in the proceedings shall be meaningful and effective as opposed to purely symbolic, which in turn imposes on the Court a twofold obligation: on the one hand, to allow victims to present their views and concerns at any stage of the proceedings, and on the other hand, to have them heard and examined. The practice has further demonstrated that victims play an independent and distinct role in the proceedings and that their interests should not be either confused or compared with those of the Prosecutor. The driving force bringing victims to the Court is their interest to effectively achieve their right to truth and justice, as enshrined in the Rome Statute, and consistent with international human rights law and its essential components, namely, the right to contribute to the search for the truth, the right to be heard, and the right to reparations. Finally, the practice has also demonstrated that, through different forms of contribution, either by being called as witnesses or participating through their lawyers (legal representatives), victims have a significant impact on proceedings and on the development of the Court's jurisprudence.

Legal Representatives are the voice of victims before the Court and key actors to ensure the meaningfulness of victims' participation. The scope of the mandate of the Legal Representative of victims significantly differs from those of the Prosecution and the Defence. A Legal Representative is typically due to perform functions that go far beyond legal duties stricto sensu, and include managing victims' expectations, addressing their needs, concerns and frustrations, making victims feeling engaged and motivated during complex and lengthy proceedings, and also bringing the Court closer to victims. These additional job-specific functions complement the primary duties of counsel, namely: ensuring the representation of clients' interests and concerns, including appearing in courtroom; maintaining regular and in person contact with victims in the field; explaining how victims can contribute to the search for the truth; regularly informing victims on developments in proceedings; collecting victims' instructions on all important matters; gathering evidence and ensuring victims' security and well-being.

Legal Representatives face numerous challenges in representing victims in the proceedings. They usually represent a high number of individuals and need nonetheless to establish a relationship of trust between counsel and client; to manage any possible conflicting views amongst victims; to deal with vulnerable and/or traumatised victims; to respect cultural traditions, and to maintain privileged communication while dealing with logistical and security constraints.

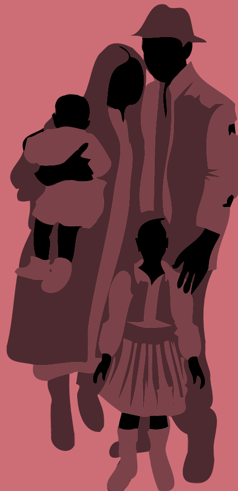
In light of those challenges, the Office of Public Counsel for Victims designed this Manual with the aim of providing a user-friendly, easy guide for Legal Representatives appearing before the Court. The Manual is now published in its 5th revised edition. Part One contains a general introduction to the International Criminal Court and to the role of victims in the proceedings before it. Part Two presents an overview of the practice before the Court organised by topic and includes *verbatim* extracts of the most important decisions from 2005 to December 2018 in relation to representation of victims' interests in the proceedings. The decisions in this section are cited in chronological order. Only the main decisions are quoted, while all decisions pertaining to each topic are listed at the end the relevant section. If a Court translation to English is not available, an unofficial translation is provided. Part Two has been revised and contains a new section on reparations. Part Three provides an explanation of practical issues relevant for the representation of victims in the proceedings before the Court. The Manual does not purport to be exhaustive and cover all the legal and procedural issues discussed before the Court, but rather provides some guidance on the main issues pertaining to victims' participation and reparations.

The publication of the Manual is the result of the dedication and extensive work of all members of the Office, past and present, who dedicated time and energy to this important project despite the constant increase of their workload. I would like to thank all of them for their invaluable contribution.

December 2018
The Hague, The Netherlands

Part 1
An Introduction to the International Criminal Court and the Role of Victims

1. Introduction to the International Criminal Court 11
2. The International Criminal Court and Victims 25
3. Creation and functions of the Office of Public Counsel for Victims 33



1. Introduction to the International Criminal Court

1. Creation of the Court and States Parties

The International Criminal Court (the "ICC") results from the adoption of the Rome Statute by the diplomatic conference organised by the United Nations on 17 July 1998. Its Statute entered into force on 1 July 2002 after the 60th ratification, in accordance with its article 126. As of December 2018, 123 countries are State Parties to the Rome Statute. 33 of them are African States, 19 are Asia-Pacific States, 18 are Eastern European States, 28 are Latin American and Caribbean States, and 25 are Western European and other States.

Article 126 of the Rome Statute

Entry into force

"1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession".

The ICC is the only existing international court today whose jurisdiction over individuals who have committed the most serious crimes, affecting the whole international community, is potentially universal. Its seat has been established at The Hague in the Netherlands pursuant to article 3 of the Rome Statute.

Article 3 of the Rome Statute

Seat of the Court

"1. The seat of the Court shall be established at The Hague in the Netherlands ('the host State').

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute".

However, article 3 of the Rome Statute, read in conjunction with rule 100 of the Rules of Procedure and Evidence, provides the possibility for the Court to sit in a State other than the host State.

Rule 100 of the Rules of Procedure and Evidence

Place of the proceedings

"1. In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part.

2. The Chamber, at any time after the initiation of an investigation, may proprio motu or at the request of the Prosecutor or the defence, decide to make a recommendation changing the place where the Chamber sits. The judges of the Chamber shall attempt to achieve unanimity in their recommendation, failing which the recommendation shall be made by a majority of the judges. Such a recommendation shall take account of the views of the parties, of the victims and an assessment prepared by the Registry and shall be addressed to the Presidency. It shall be made in writing and specify in which State the Chamber would sit. The assessment prepared by the Registry shall be annexed to the recommendation.

3. The Presidency shall consult the State where the Chamber intends to sit. If that State agrees that the Chamber can sit in that State, then the decision to sit in a State other than the host State shall be taken by the Presidency in consultation with the Chamber. Thereafter, the Chamber or any designated Judge shall sit at the location decided upon".

2. Crimes within the jurisdiction of the Court

Pursuant to article 5 of the Rome Statute, the Court has jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression. With regard to the latter, the Review Conference held in Kampala (Uganda) in June 2010 defined the crime and the conditions for the exercise of jurisdiction. On 15 December 2017, the Assembly of States Parties adopted by consensus a resolution on the activation of the jurisdiction of the Court over the crime of aggression as of 17 July 2018. On 12 November 2018, the Judges amended regulations 13, 45 and 46 of the Regulations of the Court addressing procedural issues arising in connection with the activation of the jurisdiction of the Court over said crime. In particular, the amendments clarify the exercise of judicial functions by the Pre-Trial Division under article 15 *bis* (8) of the Rome Statute.

Article 5(1) of the Rome Statute

Crimes within the jurisdiction of the Court

"1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression".

Article 8*bis* of the Rome Statute

Crime of aggression

"1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein".

3. Jurisdiction ratione temporis, ratione loci and ratione personae

In accordance with article 11 of the Rome Statute, the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute.

Article 11 of the Rome Statute

Jurisdiction *ratione temporis*

"1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3".

On 11 April 2002, 11 States simultaneously ratified the Rome Statute, crossing the threshold of 60 ratifications. Thereby, pursuant to article 126(1) of the Rome Statute, this latter entered into force on 1 July 2002, "the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification […] with the Secretary-General of the United Nations".

The jurisdiction of the Court is not universal. It is limited to the nationals or territories of States Parties or States having accepted the jurisdiction of the Court on an *ad hoc* basis. In addition to the 123 States Parties to the Rome Statute, Ivory Coast accepted the jurisdiction of the Court on an *ad hoc* basis with respect to crimes committed on its territory since 19 September 2002, before becoming a State party in February 2013. This acceptance was lodged with the Registrar through a declaration in accordance with article 12(3) of the Rome Statute.

Palestine also accepted the jurisdiction of the Court in January 2009 for acts committed on its territory since 1 July 2002. However, the Office of the Prosecutor established in April 2012 that pending the resolution of

the issue of whether Palestine qualifies as a State the criteria established in article 12(3) of the Rome Statute were not fulfilled. On 1 January 2015, the Government of Palestine (meanwhile recognised as State) lodged a declaration under article 12(3) of the Rome Statute accepting the jurisdiction of the Court over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014". On 2 January 2015, the Government of Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. The Rome Statute entered into force for Palestine on 1 April 2015. On 22 May 2018, pursuant to articles 13(a) and 14 of the Rome Statute, Palestine referred to the Prosecutor the situation in Palestine since 13 June 2014, without mentioning an end date.

On 17 April 2014, the Government of Ukraine lodged a declaration under article 12(3) of the Rome Statute accepting the Court's jurisdiction over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014. On 8 September 2015, the Government of Ukraine lodged a second declaration under the same provision, accepting the exercise of jurisdiction by the ICC in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date.

Article 12 of the Rome Statute

Preconditions to the exercise of jurisdiction

"1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9".

While the Court's jurisdiction is usually limited to the nationals or territories of States Parties or States having accepted the jurisdiction of the Court on an *ad hoc* basis, an exception does exist. Indeed, when the Security Council acting under Chapter VII of the Charter of the United Nations refers a situation to the Prosecutor, in accordance with article 13(b) of the Rome Statute, the situation concerned may relate to crimes committed occurred on the territory and by nationals of a non-State Party. In its Resolution 1593 (2005) of 1 March 2005, the Security Council referred to the Prosecutor the situation in Darfur, Sudan since 1 July 2002, even though Sudan was not a State party and did not accept the jurisdiction of the Court pursuant to article 12(3) of the Rome Statute.

In the same vein, in its Resolution 1970 (2011) of 26 February 2011, the Security Council referred to the Prosecutor the situation in Libya, which was not a State Party, in relation to any crimes under the Court's jurisdiction committed on the territory of Libya or by its nationals from 15 February 2011 onwards.

Article 13(b) of the Rome Statute

Exercise of jurisdiction

"The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: [...] *(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations"*.

At the time of publication of this Manual, the Office of the Prosecutor is also conducting preliminary examinations – for the purpose of evaluating whether an investigation may be opened – in a number of situations including Afghanistan, Bangladesh/Myanmar, Colombia, Georgia, Guinea, Iraq/UK, Nigeria, Palestine, The Philippines, Ukraine and Venezuela.

4. The triggering mechanisms to activate the jurisdiction of the Court

In accordance with article 13 of the Rome Statute, the Court may exercise its jurisdiction subject to a request of the Prosecutor acting proprio motu pursuant to article 15 of the Rome Statute, or if a situation is referred to him or her by a State Party or by the Security Council acting under Chapter VII of the Charter of the United Nations.

Article 13 of the Rome Statute:

Exercise of jurisdiction

"The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15".

Article 14 of the Rome Statute:

Referral of a situation by a State Party

"1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation".

Article 15 of the Rome Statute:

Prosecutor

"1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence".

Concerning the crime of aggression, specific conditions for the exercise of the Court's jurisdiction have been agreed upon at the Review Conference held in Kampala (Uganda) in June 2010.

Article 15bis of the Rome Statute

Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)

"1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5".

Article 15 ter of the Rome Statute

Exercise of jurisdiction over the crime of aggression (Security Council referral)

"*1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.*

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5".

At the time of publication of this Manual, the Court has been seized seven times on the basis of article 14 of the Rome Statute: by Uganda in January 2004; by the Democratic Republic of the Congo in April 2004; by the Central African Republic in January 2005; by the Republic of Mali in July 2012; by the Union of the Comoros in May 2013; by the Central African Republic in May 2014; and by a group of States, namely the Argentine Republic, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru, in September 2018.

Furthermore, the Security Council acting under Chapter VII of the Charter of the United Nations referred to the Court the situation in Darfur, Sudan on 31 March 2005 and the situation in Libya on 26 February 2011.

Moreover, pursuant to article 15 of the Rome Statute, on 31 March 2010, Pre-Trial Chamber II authorised the commencement of an investigation into the situation in the Republic of Kenya; on 3 October 2011, Pre-Trial Chamber III granted the Prosecutor's request for authorisation to open an investigation into the situation in Ivory Coast; and on 25 October 2017, Pre-Trial Chamber II authorised the Prosecutor to open an investigation into the situation in Burundi. Finally, on 20 November 2017, the Prosecutor requested authorisation to open an investigation into the situation in the Islamic Republic of Afghanistan for which no decision has yet been issued. Further, on 9 April 2018, the Prosecutor made a request before Pre-Trial Chamber I seeking a ruling on the question whether the Court may exercise jurisdiction pursuant to article 12(2)(a) of the Statute over the alleged deportation of the Rohingya people from Myanmar to Bangladesh, and on 6 September 2018, the Chamber confirmed that the Court may exercise such jurisdiction, and on 18 September 2018, the Prosecutor opened a preliminary examination over the alleged events.

5. The principle of complementarity and admissibility of a case before the Court

Under the Rome Statute, the principle of complementarity governs the relationship between the Court and national jurisdictions. In substance, the system is that of "*successive*" jurisdictions, first of national authorities and then of the Court, which implies a primacy recognised to domestic jurisdictions. However, when the Court is satisfied that the relevant State, or States, are unwilling or unable to genuinely carry out national proceedings, the Court is entitled to exercise its jurisdiction. Nonetheless, States remain under the duty to exercise criminal jurisdiction over individuals responsible for international crimes (6th preambular paragraph of the Statute). It is therefore only when national action is lacking, or does not meet certain basic requirements of genuineness and fairness that the Court is meant to come into play. The fundamental objective is "*to put an end to impunity*"

for crimes of concern to the international community as a whole and "*thus to contribute*" to their deterrence (5th preambular paragraph of the Statute).

Article 17 of the Rome Statute sets forth the relevant criteria for the purpose of assessing the admissibility of a case and provides exceptions to the primacy of States' jurisdiction.

Article 17 of the Rome Statute

Issues of admissibility

"1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".

The Court will declare a case admissible when a State is unwilling or unable to genuinely carry out an investigation or prosecution. A situation of "*unwillingness*" is deemed to occur whenever there is an inconsistency between the apparent behaviour of the State (which appears to be fulfilling its duties to investigate and prosecute under the Rome Statute) and the objectives and motives underlying such behaviour.

In assessing the unwillingness of national jurisdictions, the following factors may be taken into account by the Court:

- institutional shortcomings regarding the independence and impartiality of the judiciary (*e.g.* investigative, prosecutorial or judicial branch submitted to political authority; more broadly, faulty procedural safeguards or lack of constitutional safeguards for the independence of the judiciary);
- systematic interference of the executive power in judicial affairs;
- lack of pre-established parameters governing prosecutorial discretion;
- notorious lack of independence of judges and prosecutors, notwithstanding the existence of constitutional safeguards;
- resort to special jurisdictions or extrajudicial commissions of inquiry for crimes within the jurisdiction of the Court;
- widespread availability of and recourse to amnesties or pardons;
- lack of compliance with internationally recognised due process standards;
- lack of mechanisms ensuring adequate protection of witnesses;
- notorious corruption of the judiciary or other authorities, as shown *e.g.* by recurrent patterns of preordained outcomes of the proceedings;
- general unavailability of enforcement authorities;
- obstruction or delay of a case, whether or not due to involvement of political authorities;
- personal relationship of a judge or other authority handling the case with the suspect or accused or the victims;
- appointment of a special investigator empowered to bypass ordinary criminal procedures;
- appointment of a secret tribunal;

- proceedings limited to one offence, when the situation appears to involve the commission of several and/or more serious crimes;
- sham proceedings established in respect of at least one of several alleged perpetrators;
- promotions or other benefits awarded to officials involved in the case;
- refusal to cooperate or insufficient cooperation by enforcing authorities;
- manifest inadequacy of the investigative strategy and of specifically undertaken investigative measures;
- intimidation of victims and witnesses, *etc.*

Article 18 of the Rome Statute

Preliminary rulings regarding admissibility

"1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances".

Article 20 of the Rome Statute concerns a special aspect of complementarity. The fundamental idea underlying the exceptions set out in said provision is that only a "*genuine*" effort by national authorities to prosecute would bar the Court from exercising its jurisdiction. The first exception applies when proceedings were held "[f]*or the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court*" (article 20(3)(a) of the Rome Statute). The exception mirrors article 17(2)(a) of the Rome Statute, and would be triggered whenever national courts would characterise as an ordinary crime a conduct amounting to a "*serious crime of international concern*", *e.g.* when genocide would be charged as manslaughter or assault.

The second exception is based on the national proceedings not having been "[c]*onducted independently or impartially in accordance with the norms of due process recognized by international law*" and "[i]*n a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice*" (article 20(3)(b) of the Rome Statute). Said exception is meant to cover cases of "*apparent*" appropriate national proceedings, otherwise flawed due to lack of impartiality or independence of the national courts.

Article 20 of the Rome Statute

Ne bis in idem

"1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

*3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8*bis *shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:*

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice".

6. International cooperation and judicial assistance

The Court has the authority to make requests to State Parties for cooperation. Such requests shall be transmitted through the diplomatic channel or any other appropriate channel designated by each State upon ratification, acceptance, approval or accession pursuant to article 87(1)(a) of the Rome Statute. When a State Party fails to comply with a request for cooperation, the Court may make a finding to this effect and refer the matter to the Assembly of States Parties or to the Security Council when the latter has referred the matter to the Court, pursuant to article 87(7) of the Rome Statute.

Article 86 of the Rome Statute

General obligation to cooperate

"States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court".

The Court may also invite any non-State party to provide assistance pursuant to article 87(5)(a) of the Rome Statute.

Article 87 of the Rome Statute

Requests for cooperation: general provisions

"1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession. Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

"(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession. Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council".

7. Relations with the United Nations

The Court enjoys privileged relations with the United Nations (the "UN") but is not attached to said organisation in any way. Hence the ICC shall not be assimilated to a UN body.

The Security Council has a particularly important role with regard to the ICC. In fact, it can refer situations to

the Court when acting under Chapter VII of the Charter of the United Nations, including situations occurring on the territory of non-States Parties to the Statute.

Article 13(b) of the Rome Statute

Exercise of the jurisdiction

"The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if [...] *(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations".*

The Security Council can also request the Court to delay investigation or prosecution for a period of twelve months through a resolution adopted under Chapter VII of the Charter of the United Nations.

Article 16 of the Rome Statute

Deferral of investigation or prosecution

"No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions".

Pursuant to article 2 of the Rome Statute, in October 2004 the Court and the United Nations concluded an agreement concerning their cooperation. Said agreement acknowledges the respective roles and mandates of both organisations and defines the relationship between them, as well as the modalities of their cooperation with regard to questions of mutual interest.

Article 2 of the Rome Statute

Relationship of the Court with the United Nations

"The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf".

8. Internal functioning

Pursuant to article 34 of the Rome Statute, the Court is composed of four distinct organs:

- The Presidency, which comprises the President, and the first and second vice Presidents. They are elected by their peers by an absolute majority for a three-year mandate renewable once, in accordance with article 38 of the Rome Statute;
- An Appeals Division, a Trial Division and a Pre-Trial Division including all the 18 Judges of the Court, elected by the Assembly of States Parties for a nine-year mandate not renewable in accordance with article 36 of the Rome Statute;
- The Office of the Prosecutor, composed of the Prosecutor elected by the Assembly of States Parties for a term of nine years and of one or more Deputy Prosecutors elected for the same term of office in accordance with article 42 of the Rome Statute. Their appointment cannot be renewed;
- The Registry, in charge of the non-judiciary aspects of the administration and service of the Court. It is headed by the Registrar, elected by an absolute majority of the judges for a term of five years renewable once, in accordance with article 43 of the Rome Statute. He or she exercises his or her functions under the authority of the President of the Court.

Article 34 of the Rome Statute

Organs of the Court

"The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry".

9. Proceedings before the Court

Article 21 of the Rome Statute indicates the sources of law the Court may apply in the proceedings and establishes a hierarchy amongst them.

Article 21 of the Rome Statute

Applicable law

"1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".

Articles 22 to 33 of the Rome Statute recall the general principles of criminal law the Court is subjected to. The Court must ensure that all those principles are applied and respected through each stage of the proceedings, from the investigation to the enforcement of a sentence.

9.1 General principles of criminal law

In particular, articles 22 and 23 of the Rome Statute concern respectively the principles known under the Latin locutions "*nullum crimen sine lege*" and "*nulla poena sine lege*". According to these principles, a person shall not be criminally responsible under the Rome Statute if his or her conduct does not constitute, at the time it took place, a crime within the jurisdiction of the Court and a "[p]*erson convicted by the Court may be punished only in accordance with this Statute*". Article 24 of the Rome Statute refers to the principle of non-retroactivity regarding which "[n]*o person shall be criminally responsible* […] *for conduct prior to the entry into force of the Statute*".

Article 22 of the Rome Statute

Nullum crimen sine lege

"1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute".

Article 23 of the Rome Statute

Nulla poena sine lege

"A person convicted by the Court may be punished only in accordance with this Statute".

Article 24 of the Rome Statute

Non-retroactivity *ratione personae*

"1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply".

The principles of individual criminal responsibility are expressly recalled in articles 25 to 29 of the Rome Statute. The Court has jurisdiction over natural persons, whether the crimes they are charged with have been committed by an individual alone, or by a group of individuals, and the Statute enumerates the various ways in which participation to the crimes may have occurred (commission, solicitation, incitation, assistance, contribution). The jurisdiction of the Court is excluded for persons who were minor (under 18) at the time of the alleged crime. The Statute further applies to all persons without any distinction based on official capacity which implies that heads of States or the members of Governments do not benefit, before the Court, from any immunity their national law may confer to them. Moreover, article 28 of the Rome Statute provides for the responsibility of commanders and other superiors. The doctrine of superior responsibility prescribes the criminal liability of persons who, being in command, have failed to either prevent or punish the crimes of their subordinates. Said concept does not differentiate between military officers and civilians placed in positions of command, since the duty to prevent and punish the offences of their subordinates in situations of armed conflict is considered to

bind on both. In addition to said principle, a person acting pursuant to a superior order is not relieved from his or her own criminal responsibility pursuant to article 33 of the Rome Statute.

Article 25 of the Rome Statute

Individual criminal responsibility

"1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

3bis. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law".

Article 26 of the Rome Statute

Exclusion of jurisdiction over persons under eighteen

"The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime".

Article 27 of the Rome Statute

Irrelevance of official capacity

"1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

Article 28 of the Rome Statute

Responsibility of commanders and other superiors

"In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution".

Article 29 of the Rome Statute

Non-applicability of statute of limitations

"The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations".

Article 33 of the Rome Statute

Superior orders and prescription of law

"1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful".

The requirements of both the material and the mental elements as constitutive elements of any crime falling under the jurisdiction of the Court are recalled in article 30 of the Rome Statute, while the grounds which may exclude the criminal responsibility of a person (such as mental disease or defect, self-defense, mistake of fact or of law, *etc.*) are described in articles 31 and 32 of the Rome Statute.

Article 30 of the Rome Statute

Mental element

"1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly".

Article 31 of the Rome Statute

Grounds for excluding criminal responsibility

"1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence".

Article 32 of the Rome Statute

Mistake of fact or mistake of law

"*1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.*

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33".

9.2 The different stages of the proceedings

The proceedings before the Court are organised in different stages, namely: the pre-trial stage, the trial stage and the appeals stage. The Rome Statute also provides for reparations, revision and enforcement of sentences.

In accordance with article 64(7) of the Rome Statute, proceedings before the Court shall be held in public, unless special circumstances require that certain proceedings be held in closed session in order to protect victims and witnesses, or to protect confidential or sensitive information to be given in evidence.

9.2.1 The pre-trial stage

Before initiating an investigation, under his or her own initiative pursuant article 15 of the Rome Statute or upon referral made by a State in accordance with article 14 of the Rome Statute or by the Security Council pursuant to article 13(b) of the Rome Statute, the Prosecutor shall consider whether the three criteria set out in article 53 of the Rome Statute, namely, reasonable and sufficient legal or factual basis, admissibility under article 17 and the interests of justice, are met. During an investigation, the Prosecutor has specific powers and duties under articles 54 and 55 of the Rome Statute.

Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purpose of the trial, he or she shall inform the Pre-Trial Chamber in relation to that unique investigative opportunity pursuant to article 56(1) of the Rome Statute, in order for the Chamber to take all necessary measures to ensure the efficiency and integrity of the proceedings and to protect the rights of the Defence.

The creation of the Pre-Trial Chamber constitutes an innovation compared to proceedings before the *ad hoc* Tribunals. The Pre-Trial Chamber (composed of three judges, but certain functions can also be carried out by a Single Judge) is in charge of, inter alia, authorising the commencement of an investigation upon the Prosecutor's request using his or her proprio motu powers pursuant to article 15 of the Rome Statute; ruling on challenges regarding the admissibility or the jurisdiction of the case in accordance with articles 18 and 19 of the Rome Statute; issuing warrants of arrest or summons to appear in accordance with article 58 of the Rome Statute; and, with regards to victims, "[w]*here necessary, provid*[ing] *for the protection and privacy of victims and witnesses*" and "[s]*eek*[ing] *the cooperation of States to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims*" pursuant to article 57 of the Rome Statute. Moreover, the Pre-Trial Chamber is in charge of the proceedings leading to the confirmation of the charges hearing once the person sought by the Court is in its custody. In this respect, the Pre-Trial Chamber is responsible for matters of disclosure between the Prosecution and the Defence before the confirmation of the charges hearing, and for any matter related to the evidence and the protection of witnesses and victims. See also rules 121 to 129 of the Rules of Procedure and Evidence.

It is possible to identify two different phases within the pre-trial stage. The phase during which events are investigated by the Prosecutor without someone having been identified as a possible perpetrator of some alleged crimes committed within a territory under the jurisdiction on the Court (the situation); and the phase which starts once the Prosecutor requests the Pre-Trial Chamber to issue a warrant of arrest or a summons to

appear against a person who has allegedly committed crimes under the jurisdiction of the Court (the case). Even with the issuance of warrants of arrest or summons to appear, the investigation continues since the Prosecutor may still identify other crimes committed and/or other alleged perpetrators. The distinction between a situation and a case is of particular relevance with regard to the participation of victims in the proceedings for the purposes of the causal link a victim has to demonstrate in order to be allowed to participate, which necessarily differs from one instance to the other.

9.2.2 The trial stage

A trial is conducted before a Trial Chamber (composed of three judges) on the basis of the charges confirmed by the Pre-Trial Chamber against a person. In principle, the trial is held at the seat of the Court in The Hague in accordance with article 62 of the Rome Statute, and in the presence of the accused as requested by article 63 of the Rome Statute.

The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and with due regard to the protection of victims and witnesses. Amongst the provisions dedicated to this central stage of the proceedings, article 66 of the Rome Statute recalls the fundamental principle of the presumption of innocence and article 67 of the Rome Statute sets out the rights of the accused.

Article 68 of the Rome Statute constitutes the core provision for the participation of victims, as well as for the protection of victims and witnesses, while article 75 of the Rome Statute provides for reparations to victims. The Trial Chamber is responsible for matters of disclosure between the Prosecution and the Defence before the commencement of the trial, and for any matter related to the evidence and to the protection of witnesses and victims. In preparation for the trial, status conferences may be held in accordance with rule 132 of the Rules of Procedure and Evidence and regulation 54 of the Regulations of the Court (see also rules 131 to 148 of the Rules Procedure and Evidence).

9.2.3 The appeal stage

A decision of acquittal or conviction, or a sentence, may be appealed by the Prosecutor or the convicted person in accordance with article 81 of the Rome Statute. In accordance with article 82 of the Rome Statute, other decisions may also be the subject of appeals, such as a decision granting or denying release of the person being investigated or prosecuted and "[a] *decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings*". These appeals are known as interlocutory appeals.

A Legal Representative of victims may appeal an order for reparations issued under article 75 of the Rome Statute. Proceedings in appeal are regulated by article 83 of the Rome Statute (see also rules 148 to 158 of the Rules of Procedure and Evidence).

As per the current jurisprudence of the Court, no appeal against a negative decision concerning the participation of victims is possible. In this case, the only available remedy for a "[v]*ictim whose application has been rejected*" is to "[f]*ile a new application later in the proceedings*" in accordance with rule 89(2) of the Rules of Procedure and Evidence. Moreover, in order to participate in interlocutory appeals, victims used to be required to expressly request leave to participate. However, in its decision dated 31 July 2015, the Appeals Chamber determined that "for appeals arising under article 82(1)(b) and (d) of the Statute, victims who have participated in the proceedings that gave rise to the particular appeal need not seek the prior authorisation of the Appeals Chamber to file a response to the document in support of the appeal".

9.2.4 Reparations proceedings

Article 75 of the Rome Statute provides the possibility for victims to obtain reparations for the harm suffered from the crimes committed against them. Reparations proceedings can be initiated before the Court only if the accused is declared guilty. So far, reparations proceedings before the Court have been initiated when an accused has been declared guilty by a Trial Chamber and pending an appeal.

9.2.5 Revision of conviction or sentence

In accordance with article 84 of the Rome Statute, the convicted person, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence if new evidence has been discovered; if it has been newly discovered that decisive evidence was false, forged or falsified; or if one or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty (see also rules 159 to 161 of the Rules of Procedure and Evidence).

9.2.6 The enforcement of sentences of imprisonment

In accordance with articles 103 and 104 of the Rome Statute "[A] *sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated their willingness to accept sentenced persons*" and pursuant to article 105 of the Rome Statute "[t]*he sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it*". The enforcement of sentences is subject to the supervision of the Court, while the conditions of imprisonment are governed by the law applicable in the State of enforcement (articles 106 to 111 of the Rome Statute and rules 198 to 225 of Rules of Procedure and Evidence). Finally, article 109 of the Rome Statute sets out the obligation for the States Parties to give effect to fines and forfeiture measures ordered by the Court.

2. The International Criminal Court and Victims

1. Notion and role of victims in the framework of the Rome Statute

On 29 November 1985, the United Nations General Assembly adopted the Declaration on Basic Principles of Justice for Victims of Crimes and Abuse of Power (the "Victims Declaration"). The definition adopted in the Victims Declaration laid the foundation for the negotiations on the definition to be adopted in the texts of the ICC during the Preparatory Committee discussions.

Although the Victims Declaration is considered as soft law in public international law, the value of this instrument cannot be underestimated in providing guidance to the States as well as a moral compass on victims' issues.

During the negotiations of the Rome Statute, emphasis was placed on ensuring that the core values of the Court, which are to promote peace and security through accountability for crimes, as well as respect for the rights and the dignity of the victims, were respected. This issue was crucial and critical, given the clear recognition by the States that drafted and endorsed the Statute that the ICC should not only be retributive, but also restorative.

The definition provided by articles 1 and 2 of the Victims Declaration is significant since for the first time, not only direct victims, as well as their immediate family or dependants, were included, but also persons who have suffered harm in intervening to assist victims.

Article 1 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

"*'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States* […]".

Article 2 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

"*A person may be considered a victim* […] *regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization*".

The Rome Statute does not provide a definition of the term "*victim*", it was instead left to the Preparatory Committee in charge of adopting the Rules of Procedure and Evidence to define it. During the debate on the adoption of said definition, delegates took into account that a definition based on the Victims Declaration would entail logistical constraints. In the course of the debate, objections were raised and clarifications sought on terms such as "*collectively*", "*emotional suffering*" and even on the term "*family*". In the end, the regime sought to limit any logistical anomalies that may arise from the sheer volume of applications for victims' participation by providing that the modalities for their participation in the Court's proceedings will be decided upon by the judges on a case-by-case basis. Nevertheless, a definition was finally included in rule 85 of the Rules of Procedure and Evidence.

Similarly, after extensive debate on whether or not legal entities could also be included in the definition of the term "*victim*", a compromise was reached in the text of rule 85(b) of the Rules of Procedure and Evidence which establishes that victims "may" include certain organisations or institutions.

Rule 85 of the Rules of Procedure and Evidence

Definition of victims

"*(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".

Moreover, the legal texts of the Court paid special attention to the most vulnerable groups of victims, in particular children, the elderly and victims of gender crimes when providing for special and/or protective measures.

It has to be noted that throughout the founding texts of the Court, numerous terms are used to refer to victims. In each case, the terms used refer to a specific situation of the victim or the person concerned. Thus, the texts refer, *inter alia*, to:

Article 18(1) of the Rome Statute	*"where the Prosecutor believes it is necessary to protect persons"*
Article 43(6) of the Rome Statute	*"other who are at risk on account of testimony given by* […] *witnesses"*
Article 54(3)(f) of the Rome Statute	*"protection of any person"*
Rule 16(3) of the Rules of Procedure and Evidence	*"victims who have expressed their intention to participate in relation to a specific case"*
Rule 59(1)(b) of the Rules of Procedure and Evidence	*"victims who have already communicated with the Court"*
Rule 92(2) of the Rules of Procedure and Evidence	*"victims or their legal representatives who have already participated in the proceedings or, as far as possible, those who have communicate with the Court in respect of the situation or case in question"*
Rule 93 of the Rules of Procedure and Evidence	*"the views of victims or their legal representatives participating* [in the proceedings] [and] *the views of other victims"*
Regulation 93(1) of the Regulations of the Registry	*"persons at risk on the territory of the State of their residence"*
Regulations 2 and 94-96 of the Regulations of the Registry	*"persons at risk* […] *refers to any person at risk on account of testimony given by a witness"*

Therefore, it seems that the term "person" is used to cover people in very different situations, namely, victims applying for participation or for reparations, or individuals who were granted the status of victims in the proceedings, members of their family or any person at risk because of their interaction with the Court. It applies to victims who are participating in the proceedings before the Court by virtue of a decision on their status by the relevant Chamber, but it also refers to victims applying for participation in the proceedings (see rule 16(3) of the Rules of Procedure and Evidence), or simply to persons having communicated with the Court and who may not even be applicants (see rules 59(1)(b), 92(2) and 93 of the Rules of Procedure and Evidence).

2. Participation of victims in the proceedings before the Court

Pursuant to article 68(3) of the Rome Statute, victims may participate in the proceedings before the Court at any stage provided that their personal interests are affected. This does not mean that victims may initiate proceedings, but it does amount to an important step forward since they are now able to participate in criminal proceedings in their own right through the presentation of their views and concerns independently from the Prosecution. Article 68(3) of the Rome Statute does not prescribe a specific timeframe within which victims can be involved in the proceedings, but reserves this as a prerogative of the judges as they deem it appropriate.

In order to be allowed to participate in the proceedings, victims have to submit their request to the Registrar in writing, preferably before the beginning of the phase of the proceedings they wish to participate to. The Regulations of the Court created a section (the Victims Participation and Reparations Section) dealing especially with the participation of victims and with reparations, in charge of informing victims of their rights and assisting them, in particular, in developing standard forms for the purposes of participation and reparations.

Article 68(3) of the Rome Statute

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

"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 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 […]".

First, the Rome Statute sets the possibility for victims to be heard or to submit observations within the framework of specific procedures. In particular, in accordance with article 15(3) of the Rome Statute, victims may make representations to the Pre-Trial Chamber when the Prosecutor, acting *proprio motu*, submits a request for authorisation of an investigation. The Rome Statute also provides that in case of a challenge to the jurisdiction of the Court or the admissibility of a case, victims may submit observations pursuant to article 19(3) of the Rome Statute. Moreover, in accordance with rule 119 of the Rules of Procedure and Evidence, the Pre-Trial Chamber has to seek the views of victims before imposing or amending conditions restricting the liberty of the person in the custody of the Court.

Participation of victims to specific procedures may also be inferred from other provisions of the Rome Statute which do not explicitly confer a role to victims, but when read in conjunction with article 68(3) of the Rome Statute, may allow victims to present their views and concerns when their personal interests are affected. In particular, rule 92(2) of the Rules of Procedure and Evidence requests the Court to notify victims of the Prosecutor's decision not to initiate an investigation or not to prosecute pursuant to article 53 of the Rome Statute, in order for them to apply for participation. Accordingly, one might conclude that victims may play a role within the framework of the procedure governed by article 53 of the Rome Statute. This conclusion is in line with the concrete possibility that their personal interests would be affected by the decisions of the Prosecutor not to initiate an investigation or not to prosecute.

Victims could also play a role in proceedings initiated by a Pre-Trial Chamber pursuant to articles 56(3) and 57(3)(c) of the Rome Statute. Indeed, the personal interests of victims may also be affected by measures taken for the protection and privacy of victims and witnesses and the preservation of evidence. Article 57(3)(c) of the Rome Statute empowers the Pre-Trial Chamber to provide for such measures, where necessary. In respect of protective measures, the personal interests of victims seem self-evident when the Court decides to take or to deny such measures. Accordingly, views and concerns by relevant victims could also be submitted in the context of such proceedings. This interpretation is further supported by rules 87 and 88 of the Rules of Procedure and Evidence which provide for the possibility for victims to request protective measures or special measures. With respect to the preservation of evidence, the risk that evidence might disappear, be destroyed or otherwise deteriorate, and therefore cease to be available or useful in the context of the investigation and prosecution of the relevant crimes, represents a major concern for victims. The Rome Statute provides for a mechanism to address such risk, in particular by providing for a procedure aimed at preserving a "*unique investigative opportunity*" under article 56, which may be triggered by a request of the Prosecutor or at the initiative of the Pre-Trial Chamber. Nothing in the Statute prevents the Chamber from requesting victims to present their views and concerns with regards to this matter.

Finally, rule 93 of the Rules of Procedure and Evidence provides that the Court may not only seek the views of "[v]*ictims or their legal representatives participating pursuant to rules 89 to 91 on any issue*", but also "[t]*he views of other victims*". This provision was drafted as a compromise between those delegations who advocated for a more extensive participation of victims throughout the proceedings, and those who favoured a more restrictive approach. The formulation of rule 93 allows for a broad interpretation of the terms "*other victims*" which may be interpreted as any victim in the framework of article 68(3) of the Rome Statute.

In order to be able to participate effectively and taking into account the complexity of the proceedings before the Court, victims are free to choose their counsel provided that he or she meets the criteria of 10 years of professional experience in criminal proceedings whether as a judge, prosecutor, advocate or in other similar capacity, speaks one of the working languages of the Court, has not been convicted for a criminal offence; and has not been subject to disciplinary proceedings in his or her country of residence. Given the potentially high number of victims seeking participation in the proceedings, the Court may invite them to be represented collectively. In this case, the Chamber and the Registrar ensure that the specific interests of each victim are taken into consideration and that any conflict of interest is avoided. When a victim or a group of victims cannot afford to pay the costs of legal representation, they may seek legal assistance paid by the Court. Victims can also be represented by the Office of Public Counsel for Victims.

Rule 90 of the Rules of Procedure and Evidence

Legal representatives of victims

"*1. A victim shall be free to choose a legal representative.*

2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.

3. If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.

4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.

5. A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.

6. A legal representative of a victim or victims shall have the qualifications set forth in rule 22, sub-rule 1".

Legal representatives of victims attend the hearings before the Court. However, modalities of participation are decided upon by the relevant Chamber.

In accordance with rule 91(3) of the Rules of Procedure and Evidence, legal representatives of victims have

to be authorised by the relevant Chamber if they wish to question a witness, an expert or the accused. These restrictions on questioning do not apply during the phase of the proceedings dealing with reparations of the harm suffered by the victim, in accordance with rule 91(4) of the Rules of Procedure and Evidence.

Rule 91 of the Rules of Procedure and Evidence

Participation of legal representatives in the proceedings

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

2. A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.

3. (a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

(b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.

4. For a hearing limited to reparations under article 75, the restrictions on questioning by the legal representative set forth in sub-rule 2 shall not apply. In that case, the legal representative may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned".

Legal representatives enjoy the same prerogatives and have the same obligations as counsel for the Defence. Thus, the provisions on counsel issues in the legal texts of the Court apply to all counsel appearing before the Court.

3. Modalities of participation of victims in proceedings before the Court

The legal instruments of the Court are not explicit in detailing the modalities of victims' participation in the proceedings. According to rule 89(1) of the Rules of Procedure and Evidence, "[t]*he Chamber shall* […] *specify the proceedings and manner in which participation is considered appropriate*". Moreover, article 68(3) of the Rome Statute specifies that "[w]*here the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered 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*".

A more systematic scrutiny of the Rome Statute and of the Rules of Procedure and Evidence enables to clarify the framework in which victims can exercise their right to participate in the proceedings before the Court. Indeed, victims may, through their legal representatives:

- Attend and participate in the hearings before the Court "[u]*nless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions*" pursuant to rule 91(2) of the Rules of Procedure and Evidence;
- Make opening and closing statements in accordance with rule 89(1) of the Rules of Procedure and Evidence;
- Present their views and concerns pursuant to article 68(3) of the Rome Statute and rule 89 of the Rule of Procedure and Evidence;
- Make representations in writing to a Pre-Trial Chamber in relation to a request for authorisation of an investigation pursuant to article 15(3) of the Rome Statute and rule 50(3) of the Rules of Procedure and Evidence;
- Submit observations in proceedings dealing with a challenge to the jurisdiction of the Court or the admissibility of a case in accordance with article 19(3) of the Rome Statute;
- Request a Chamber to order measures to protect their safety, psychological well-being, dignity and privacy in accordance with article 68(1) of the Rome Statute and rule 87(1) of the Rules of Procedure and Evidence; and
- Request a Chamber to order special measures in accordance with article 68(1) of the Rome Statute and rule 88(1) of the Rules of Procedure and Evidence.

The victims' ability to participate in the proceedings before the Court, to make observations or representations is made possible by the fact that victims or their legal representatives shall receive notification of the proceedings at stake and of relevant decisions and materials pursuant to rule 92 of the Rules of Procedure and Evidence. This obligation binding on the Registrar and the Prosecutor is also reaffirmed in the framework of specific rights granted to victims in the proceedings before the Court.

4. Reparations of the harm suffered

Traditionally, the harm suffered by victims in the course of an armed conflict was, in the best case, taken into account through the payment of war indemnities to the Government of their country of origin, the State acting supposedly on behalf of its nationals.

Despite the numerous conflicts of the second half of the 20th century, it is only in 1991 that a compensation system for victims of war by the State at fault was created. Indeed, in the aftermath of the Gulf War, the Security Council set up a Commission to deal with requests originating from the occupation of Kuwait and to decide on their compensation.

Nowadays it is however recognised that victims of international crimes may claim reparations for the harm suffered. Indeed, in December 2005, the UN General Assembly adopted Resolution 60/147 which points out that victims are entitled to the following forms of reparations: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, also known as the Van Boven Principles.

The Statute of the Court provides for the possibility of reparations to victims.

Article 75 of the Rome Statute

Reparations to victims

"1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law".

Compensation can be paid directly by the convicted person or through the Trust Fund for Victims, which is funded by the proceeds of confiscated goods and complemented by voluntary contributions. Moreover, rule 97 of the Rules of Procedure and Evidence makes clear that awards for reparations can be made on an individual basis, on a collective basis or both. It also specifies that the Court itself evaluates the extent of any damage, loss or injury of the victim, if necessary appointing experts to assist it, and may invite victims or their legal representatives to make observations on the experts'reports.

The Court can also award reparations on its own initiative. Should this be the case, it shall inform the accused and the victims as far as possible. The Court is placed under an obligation to give publicity, as widely as possible, to the reparations proceedings, seeking the cooperation of States Parties if appropriate, in order for the highest number of victims to be able to make requests. If the number of victims is very important, the Court can consider that reparations on a collective basis are more appropriate and hence decide that the product of the award for reparations against the convicted person be deposited with the Trust Fund for Victims.

Rule 97 of the Rules of Procedure and Evidence

Assessment of reparations

"1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.

2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.

3. In all cases, the Court shall respect the rights of victims and the convicted person".

These provisions constitute a true novelty considering that the ad hoc Tribunals were only endowed with a very limited mandate in relation to reparations awards: pursuant to article 24(3) of the ICTY Statute and 23(3) of the ICTR Statute, these tribunals may "[i]*n addition to imprisonment,* […] *order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners*". In addition, like the ad hoc Tribunals, the Special Tribunal for East-Timor and the Special Tribunal for Sierra Leone could not issue awards for reparations, even though their statutes were largely inspired by the Rome Statute.

5. The Trust Fund for Victims

The Trust Fund for Victims (the "Trust Fund") was established in September 2002 by the Assembly of States Parties and complements the reparations functions of the Court. It is independent from the Court and is supervised by a Board of Directors. The Court may ask the Trust Fund to help implementing reparations awards ordered against convicted persons in accordance with article 75 of the Rome Statute. The Trust Fund can also play an important role in granting reparations awards to victims in case of collective awards or where it is impossible to award compensation to each victim on an individual basis.

Article 79 of the Rome Statute

Trust Fund

"1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties".

The Trust Fund may also use the contributions it receives to finance projects for the benefit of victims and their families. The funds collected come from two main sources: firstly, funds collected through fines, forfeiture and awards of reparations ordered by the Court against convicted persons; secondly funds collected through voluntary contributions made by governments, international organisations and individuals.

Rule 98 of the Rules of Procedure and Evidence

Trust Fund

"1. Individual awards for reparations shall be made directly against a convicted person.

2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.

3. The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.

4. Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.

5. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79".

The Trust Fund reports annually to the Assembly of States Parties which makes recommendations as to the best possible financial management of the resources.

6. The right of victims and witnesses to protection

The principles relating to the protection of victims and witnesses should not be viewed as a novelty of the Rome Statute. Indeed, they also exist in the Statutes of the *ad hoc* Tribunals, as well as in their respective Rules of Procedure and Evidence. Article 68 of the Rome Statute is the central article relating to the protection of victims and witnesses.

Article 68 of the Rome 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.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

[…].

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. […]".

Protective measures for victims and witnesses are of utmost importance in order to encourage them to communicate with the Court and testify without endangering their security. However, these measures cannot be applied in a manner that is prejudicial to or inconsistent with the rights of the suspect or accused and a fair and impartial trial. Article 43(6) of the Rome Statute provides for the creation of a Victims and Witnesses Unit within the Registry in order to assist and advise victims and witnesses, as well as Chambers and participants on protective measures and security arrangements. This Unit is the only one expressly mentioned in the Rome Statute with regard to protection. The protection also extends to persons who are at risk on account of testimony given by a person, *e.g.* family members of witnesses; and generally to persons at risk because of their interaction with the Court.

Article 43(6) of the Rome Statute

The Registry

"6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence".

Chambers "*may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness*" or measures aimed at facilitating the testimony of witnesses or the appearance of victims before them.

Rule 87 of the Rules of Procedure and Evidence

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.

2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:

(a) Such a motion or request shall not be submitted ex parte;

(b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of whom shall have the opportunity to respond;

(c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;

(d) When the Chamber proceeds on its own motion, notice and opportunity to respond shall be given to the Prosecutor and the defence, and to any witness or any victim or his or her legal representative, if any, who would be affected by such protective measure; and

(e) A motion or request may be filed under seal, and, if so filed, shall remain sealed until otherwise ordered by a Chamber. Responses to motions or requests filed under seal shall also be filed under seal.

3. A Chamber may, on a motion or request under sub-rule 1, h old a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, inter alia:

(a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;

(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

(c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;

(d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or

(e) That a Chamber conduct part of its proceedings in camera".

Rule 88 of the Rules of Procedure and Evidence

Special 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, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, 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 special measure is sought prior to ordering that measure.

2. A Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.

3. For inter partes motions or requests filed under this rule, the provisions of rule 87, sub-rules 2 (b) to (d), shall apply mutatis mutandis.

4. A motion or request filed under this rule may be filed under seal, and if so filed shall remain sealed until otherwise ordered by a Chamber. Any responses to inter partes motions or requests filed under seal shall also be filed under seal.

5. Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence".

Finally, it has to be noted that some persons may enjoy a dual status. Indeed, a victim may also be called as a witness by the Prosecution, the Defence or a Legal Representative.

3. Creation and functions of the Office of Public Counsel for Victims

The purpose behind the establishment of the Office of Public Counsel for Victims (the "OPCV") is to provide support and assistance to victims and legal representatives of victims, pursuant to regulations 80 and 81 of the Regulations of the Court.

Regulation 80 of the Regulations of the Court

Appointment of legal representatives of victims by a Chamber

"1. A Chamber, following consultation with the Registrar and, when appropriate, after hearing from the victim or victims concerned, may appoint a legal representative of victims where the interests of justice so require. The Chamber may appoint counsel from the Office of Public Counsel for victims as defined in regulation 81, sub-regulation 3.

2. The Registrar shall consult any prospective appointee prior to his or her appointment".

Regulation 81 of the Regulations of the Court

Office of Public Counsel for Victims

"1. The Registrar shall establish and develop an Office of Public Counsel for victims for the purpose of providing assistance as described in sub-regulation 4.

2. The Office of Public Counsel for victims shall fall within the remit of the Registry solely for administrative purposes, in accordance with article 43, paragraph 2, and it shall function in its substantive work as a wholly independent office. Counsel and assistants within the Office shall act independently.

3. The Office of Public Counsel for victims shall include at least one counsel who has ten years' experience as described in regulation 67, sub-regulation 1, and who fulfils the requirements for inclusion in the list of counsel. The Office shall include assistants as referred to in regulation 68.

4. The tasks of the Office of Public Counsel for victims shall include:

(a) Providing general support and assistance to the legal representative of victims and to victims, including legal research and advice and, on the instruction or with the leave of the Chamber, advising on and assisting with the detailed factual circumstances of the case;

(b) Appearing, on the instruction or with the leave of the Chamber, in respect of specific issues;

(c) Advancing submissions, on the instruction or with the leave of the Chamber, in particular prior to the submission of victims' applications to participate in the proceedings, when applications pursuant to rule 89 are pending, or when a legal representative has not yet been appointed;

(d) Acting when appointed under regulation 73 or regulation 80; and

(e) Representing a victim or victims throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interests of justice.

5. The Office of Public Counsel for victims shall ensure that counsel with at least ten years' experience is appointed when the Office is required to act as a legal representative".

The Office of Public Counsel for Victims was established on 19 September 2005.

Since its inception in September 2005, the Office has provided assistance to external counsel in all situations and cases before the Court. Said support has included the provision of legal advice and research, as well as the appearence at hearings on their behalf. Furthermore, the duty to provide support and assistance to victims has included direct legal representation in the proceedings. In this regard, Chambers have adopted a practice whereby the Office is appointed as legal representative for unrepresented applicants and, to some extent, for victims participating in the proceedings. The Office has been appointed to represent victims participating at different stages of the proceedings, including at the pre-trial, trial and reparations stage. The involvement of the Office in multiple situations and cases, and in different capacities, has allowed its staff to gain specific and extensive experience on victims' issues, including the handling of high number of victims given the simultaneous assignment to several proceedings.

In accordance with regulation 81(2) of the Regulations of the Court, the Office functions as an independent office. Accordingly, its members do not receive instructions from anybody in relation to the fulfilment of their mandate. Therefore, the Office falls within the Registry solely for administrative purposes. This independence is a prerequisite for carrying out the mandate of assisting legal representatives of victims and assisting and representing victims. It allows the Office to work without being subjected to pressure of any kind and preserves the privileged relationship between victims and their counsel. As a consequence, in the performance of their mandate, members of the Office are bound by the Code of Professional Conduct for Counsel before the ICC. In performing its tasks, the Office takes into account concerns relating to the security and safety of victims, and endeavours to respect the will of victims, as well as the language spoken by them and the specificities related to gender and children issues.

As part of its related role of representing the general interests of victims and raising the awareness on victims' rights and prerogatives under the Rome Statute and the Rules of Procedure and Evidence, the Office is involved in outreach activities for members of the judiciary, the legal profession and civil society in countries where investigations and/or cases are ongoing, as well as in other countries. The Office's members also participate in publications and in several conferences and seminars on victims' issues.

The Office has managed to promote numerous goals that champion victims' rights in international criminal law, including:

i) Facilitating the process by which victims, through their participation before the Court, can "*tell their story*" and have a recognised voice in the proceedings;

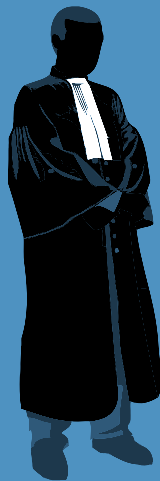
ii) Contributing to the general perception by victims of their ability to influence the proceedings before the Court by actively responding to any requests for information and by helping them navigate the procedural steps required for their participation, thereby promoting their sense of empowerment;

iii) Legally advocating for victims' rights to hold the dual status of victims and witnesses before the Court, thereby promoting their sense of dignity as a witness while at the same time contributing to meeting their need for international recognition as victim of crimes within the jurisdiction of the Court; and

iv) Paving the way for victims' rights in international criminal law through its active advocacy in the proceedings.

Part 2
Practice of the Court on matters pertaining to victims' participation

1.	Victims' participation in the proceedings	37
2.	Modalities of victims' participation in the proceedings	138
3.	Legal representation	209
4.	Procedural matters	240
5.	Evidence	385
6.	Issues related to Reparations	475



1. Victims' participation in the proceedings

Article 68(3) of the Rome Statute
Rule 85 of the Rules of Procedure and Evidence

1. The notion of personal interests under article 68(3) of the Rome Statute

The Statute grants victims an independent voice and role in the proceedings before the Court and accordingly, such independence should be preserved, including *vis-à-vis* the Prosecutor, so that victims can present their interests.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, para. 51. See also No. ICC-02/04-01/05-155, Pre-Trial Chamber II (Single Judge), 9 February 2007, p. 4.

The Chambers considers that the personal interests of victims are affected in general at the investigation stage, since the participation of victims during this phase can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, para. 63. See also No. ICC-01/04-01/07-357, Pre-Trial Chamber I (Single Judge), 2 April 2008, p. 7.

Any determination by the Appeals Chamber of whether the personal interests of victims are affected in relation to a particular appeal requires careful consideration on a case-by-case basis. Indeed, according to the Appeals Chamber, an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor. Even when the personal interests of victims are affected within the meaning of article 68(3) of the Statute, the Court is still required, by the express terms of that article, to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings and to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

See No. ICC-01/04-01/06-925 OA8, Appeals Chamber, 13 June 2007, para. 28. See also, No. ICC-01/04-01/06-824 OA7, Appeals Chamber, 13 February 2007, para. 39; No. ICC-01/04-01/06-1335 OA9 OA10, Appeals Chamber, 16 May 2008, paras. 34-36; No. ICC-01/05-01/08-566 OA2, Appeals Chamber, 20 October 2009, paras. 15-17; No. ICC-01/04-01/06-2205 OA15 OA16, Appeals Chamber, 8 December 2009, paras. 34-36 and No. ICC-01/04-01/10-509 OA4, Appeals Chamber, 2 April 2012, para. 9.

The paramount criterion for participation to be allowed is that the "*personal interests*" of the applicant victims have to be affected. This requirement is met whenever a victim applies for participation in proceedings following the issuance of a warrant of arrest or of a summons to appear (*i.e.* in a case). That the personal interests of a victim are affected in respect of proceedings relating to the very crime in which that victim was allegedly involved seems entirely in line with the nature of the Court as judicial institution with a mission to end impunity for the most serious crimes.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 9-10.

Specifying the nature and scope of the proceedings in which victims may participate in the context of a situation, prior to, and/or irrespective of, a case, is critical to ensuring the predictability of proceedings and ultimately the certainty and effectiveness of victims' participation.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, para. 88.

That the "*personal interests*" of victims may be affected by the adoption of, or the failure to adopt, measures bearing upon their security and privacy appears hardly debatable. Accordingly, it would be consistent with article 68, paragraph 3, and therefore appropriate for victims (specifically those victims who may be affected by the measures in question) to be authorised to present their "*views and concerns*" for these purposes even prior to and irrespective of their being granted victim status in a given case. In particular, participation within this context may take the form of authorisation to provide their point of view whenever the Pre-Trial Chamber considers the adoption of protective measures on its own and considers it appropriate that victims potentially affected by such measures should submit their views. Moreover, since failure to adopt protective measures may affect the victims' fundamental interest in the protection of their security, it is the view of the Single Judge that victims in the context of a situation should be allowed to submit requests aimed at obtaining the adoption of such measures by the Pre-Trial Chamber.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, para. 98.

The assessment of the personal interests of the victims in specific proceedings taking place during the investigation of a situation and the pre-trial stage of a case is only to be conducted for the determination of the specific set of procedural rights attached to the procedural status of victim.

See No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, para. 13.

The participation of victims in the proceedings is not limited to an interest in receiving reparations and their personal interests are self-evidently not limited to reparations issues.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, para. 98.

The question of whether "*personal interests*" are affected is necessarily fact-dependent. The Trial Chamber will though assess whether the interests of the victims relate to the prosecution's summary of presentation of evidence and it will be assisted in this by the report on the applications submitted to it by the Victims Participation and Reparation Section in accordance with regulation 86 of the Regulations of the Court.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, para. 102.

The victims' core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility is at the root of the well-established right to the truth for the victims of serious violations of human rights.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, para. 32.

When the right to truth is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings: (i) bring clarity about what indeed happened; and (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth.

The issue of guilt or innocence of persons prosecuted before this Court is not only relevant, but also affects the very core interests of those granted the procedural status of victim in any case before the Court insofar as this issue is inherently linked to the satisfaction of their right to the truth.

The victims' central interest in the search for the truth can only be satisfied if (i) those responsible for perpetrating the crimes for which they suffered harm are declared guilty; and (ii) those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can continue.

[…]

The interests of victims go beyond the determination of what happened and the identification of those responsible, and extend to securing a certain degree of punishment for those who are responsible for perpetrating the crimes for which they suffered harm.

These interests – namely the identification, prosecution and punishment of those who have victimized them by preventing their impunity – are at the root of the well established right to justice for victims of serious violations of human rights, which international human rights bodies have differentiated from the victims' right to reparations.

[…]

Victims have a central interest in criminal proceedings in that the outcome of such proceedings lead to the identification, prosecution and punishment of those who have victimized them.

The issue of the guilt or innocence of the persons charged before this Court is not only relevant, but it also affects the core interest of those granted the procedural status of victim in any case before the Court, because this issue is closely linked to the satisfaction of their right to justice.

The personal interests of victims are affected by the outcome of the pre-trial stage of a case insofar as this is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspects are responsible for the crimes with which they have been charged by the Prosecution.

[…]

The analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted in relation to stages of the proceedings, and not in relation to each specific procedural activity or piece of evidence dealt with at a given stage of the proceedings.

The pre-trial stage of a case is a stage of the proceedings in relation to which the analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted.

The interests of victims are affected at this stage of the proceedings [pre-trial stage of a case] since this is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspects are responsible for the crimes included in the Prosecution Charging Document, and consequently: 1. this is an appropriate stage of the proceeding for victim participation in all cases before the Court; 2. there is no need to review this finding each time a new case is initiated before the Court; 3. a procedural status of victim exists at the pre-trial stage of any case before the Court.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 32, 34-36, 38-39, 41-43, and 45. See also No. ICC-01/04-444, Pre-Trial Chamber I (Single Judge), 6 February 2008, pp. 8 and 10, and No. ICC-02/05-121, Pre-Trial Chamber I (Single Judge), 6 February 2008, p. 6.

The object and purpose of article 68(3) of the Statute and rules 91 and 92 of the Rules is to provide victims with a meaningful role in the criminal proceedings before the Court (including at the pre-trial stage of a case) so that they can have a substantial impact in the proceedings.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, para. 157.

In their application for participation in an interlocutory appeal, victims successfully demonstrated that their personal interests were affected since they stood to lose rights that they had previously gained by way of their victim status in the situation.

See No. ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, para. 97.

In order to be granted leave to express their "*views and concerns*" at the trial, the Statute requires that victims be able to demonstrate that their personal interests are affected. Accordingly, where it is clear that an intervention by a Legal Representative is not related to the personal interests of any of the victims represented by that counsel, the Chamber cannot allow it.

The Chamber is mindful of the fact that there may be many such interests. In light of the information contained in the applications for participation which have been submitted in this case, it notes that the victims are seeking not only to obtain reparations, but that they also mention other grounds, such as seeking determination of the truth concerning the events they experienced, or wishing to see the perpetrators of the crimes they suffered being brought to justice.

Where victims seek reparations, the Chamber may consider exercising its discretion pursuant to regulation 56 of the Regulations of the Court to hear witnesses and examine evidence. The Chamber is of the view that the only legitimate interest the victims may invoke when seeking to establish the facts which are the subject of the proceedings is that of contributing to the determination of the truth by helping the Chamber to establish what exactly happened. They may do so by providing it with their knowledge of the background to the case or by drawing its attention to relevant information of which it was not aware. In the latter case, the Chamber may also deem it appropriate for a particular victim to testify in person.

See No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 58-60.

The Chamber is of the view that the determination as to whether victims' personal interests justify their intervention or participation, whether, for instance, by presenting their views and concerns, asking questions or merely attending hearings, requires that account is taken of a wide variety of issues which will include the timing of the proposed participation, because different considerations may apply during the various stages of the trial.

Against this background, the proper safeguard for the defence lies not in attempting to apply varying standards or definitions to the concept of the victims' personal interests based on the party or participant calling a particular witness, but instead in ensuring that the manner and the timing of the questioning is not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial. This is a quintessentially fact-based issue, which cannot be determined in advance, absent a detailed examination of the proposed manner of questioning of all the participating victims who have applied to examine the witness in question. The Chamber must take a global view for each witness, to ensure that the overall effect of the questioning by victims does not undermine the rights of the accused and his fair and impartial trial.

See No. ICC-01/04-01/06-2340, Trial Chamber I, 11 March 2010, paras. 34-35. See also No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, para. 25.

As regards the requirement that the personal interests of the victim be affected, as set out in article 68(3) of the Statute, the Single Judge is of the view that the personal interests of victims may be affected by the outcome of the Confirmation Hearing to the extent that it aims at either (i) confirming the charges against those responsible for perpetrating the crimes which caused them to suffer harm; or (ii) declining to confirm the charges for those not responsible for such crimes, so that the search for those who are criminally liable can continue.

See No. ICC-01/04-01/10-351, Pre-Trial Chamber I (Single Judge), 11 August 2011, para. 23.

The issues on appeal relate to the evaluation of evidence at the confirmation hearing and to the scope of individual criminal responsibility under article 25(3)(d) of the Statute. The Prosecutor, by raising this appeal, contends that the Pre-Trial Chamber's erroneous findings on those issues materially affected the decision not to confirm the charges against the suspect. If the Impugned Decision is upheld and subject to article 61(8) of the Statute, the victims will not have an opportunity to present their views and concerns in the course of a trial and will be prevented from seeking reparations before this Court. Therefore, the Appeals Chamber finds that the victim's personal interests are affected by this appeal.

See No. ICC-01/04-01/10-509 OA4, Appeals Chamber, 2 April 2012, para. 10.

In addition, the Chamber is of the view that the attendance of the Legal Representatives is warranted, as items to be dealt with at the July hearing and status conferences are relevant to the Request for a Temporary Stay of the Proceedings as well as to the conduct of the proceedings as a whole. Therefore, the victims' interests may be affected by certain items as set out in the Preliminary Agenda.

See No. ICC-02/05-03/09-366, Trial Chamber IV, 6 July 2012, para. 9.

The Single Judge notes that rule 59(1) of the Rules provides that the Registrar shall inform "*the victims who have already communicated with the Court in relation to that case or their legal representatives*" of any challenge to the admissibility of the case. Victims are entitled to submit observations with regard to a challenge to the admissibility of the case, as laid down in article 19(3) of the Statute.

The Single Judge further considers that the interests of the victims who have communicated with the Court in the present case are affected by the issue as to whether or not the case against the suspect is admissible. Moreover, access to the requested material [related to the admissibility challenge] is not prejudicial to or inconsistent with the rights of the suspect under article 67 of the Statute and to a fair and impartial trial.

See No. ICC-02/11-01/11-406, Pre-Trial Chamber I (Single Judge), 18 February 2013, paras. 8 and 10.

The Chamber recalls that it instructed the Legal Representative of Victims to file submissions for the purpose of the review under article 60(3) of the Statute and who notified it (*sic*) of the scheduling of a hearing on detention.

The Chamber further notes that it has been previously considered at this Court that victims' personal interests are affected by decisions on detention. The Appeals Chamber has typically allowed victims to participate in appeals of interim release given the subject matter and the desirability for the views of victims in appeals of this nature to be heard. The Chamber considers that, in the case at hand, the requirements set out in article 68(3) of the Statute are met. Victims' personal interests are affected by the present decision and the Chamber does not consider that their participation, through the presentation of written and oral submissions, causes prejudice to the rights of the accused or any way compromises the fairness or impartiality of the trial.

See No. ICC-02/11-01/11-718-Red, Trial Chamber I, 11 November 2014, paras. 67-68.

2. Appropriateness of the participation

The participation of victims during the investigation stage of a situation does not *per se* jeopardise the appearance of integrity and objectivity of the investigation, nor is it inherently with basic considerations of efficiency and security.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, para. 57.

The Chamber is in a position to determine at its discretion the appropriateness of the stage of the proceedings at which the views and concerns of the victims may be presented. When applicants are being afforded specific protective measures, the Chamber considers that the effective exercise of procedural rights arising from the granting of the status of victims with standing to participate in the proceedings would have the effect of significantly increasing the risks to which the applicants are exposed.

See No. ICC-01/04-01/06-601-tEN, Pre-Trial Chamber I, 20 October 2006, pp. 10-11.

An interlocutory appeal is a separate and distinct stage of the proceedings and article 68(3) of the Rome Statute places the Appeals Chamber under the obligation to determine whether the participation of victims is appropriate. Therefore, the Appeals Chamber cannot be bound by a previous ruling since it only concerns a determination as to whether it is appropriate for the victims to participate before a court of first instance. Hence it would be impossible for the Pre-Trial Chamber to deem it to be appropriate for victims to participate in any interlocutory appeal that may arise or to determine that their interests would be affected by that particular interlocutory appeal. Accordingly, the Appeals Chamber reads regulation 86(8) of the Regulations of the Court to be confined to the stage of the proceedings before the Chamber taking the decision referred to in the text of the regulation. Moreover, the Appeals Chamber is of the view that regulation 86(6) of the Regulations of the Court is subordinate to article 68(3) and that any other interpretation would intervene in violation of article 68(3) of the Rome Statute.

See No. ICC-01/04-01/06-824 OA7, Appeals Chamber, 13 February 2007, para. 43.

The Court's discretion in determining the appropriateness of a victim's participation has to be exercised against the criterion of the existence of an impact on the personal interests of the applicant and this determination will also depend upon the nature, scope of the proceeding as well as the personal circumstances of each victim.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, para. 89.

The ability of victims to participate in interlocutory appeals lodged under article 82(1)(b) of the Rome Statute is not automatic, but depends upon a determination by the Appeals Chamber that participation is appropriate.

See No. ICC-01/04-01/06-925 OA8, Appeals Chamber, 13 June 2007, para. 23.

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

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, para. 104.

The stipulation in article 68(3) that victim participation shall be permitted at stages of the proceedings determined to be appropriate by the Court mandated a specific determination by the Appeals Chamber that the participation of victims is appropriate in a particular interlocutory appeal under consideration. It follows that an application from victims seeking leave to participate is required in order to enable the Appeals Chamber appropriately to make that determination.

See No. ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, para. 36.

It is important to underscore that, as the Appeals Chamber has held, "*even when the personal interests of victims are affected within the meaning of article 68(3) of the Statute, the Court is still required, by the express terms of that article, to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings and to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*".

See No. ICC-01/04-01/10-351, Pre-Trial Chamber I (Single Judge), 11 August 2011, para. 24.

3. Definition of victim

3.1. Interpretation of Rule 85 of the Rules of Procedure and Evidence

During the stage of investigation of a situation, the status of victim will be accorded to applicants who seem to meet the definition of victims set out in rule 85 of the Rules of Procedure and Evidence in relation to the situation in question.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, para. 66.

Rule 85, sub-rule (a) of the Rules of Procedure and Evidence establishes four criteria that have to be met in order to obtain the status of victim: the victim must be a natural person; he or she must have suffered harm; the crime from which the harm ensued must fall within the jurisdiction of the Court; and there must be a causal link between the crime and the harm suffered.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, para. 79. See also No. ICC-01/04-177-tENG, Pre-Trial Chamber I, 31 July 2006, p. 7; No. ICC-01/04-01/06-228-tEN, Pre-Trial Chamber I, 28 July 2006, p. 7; No. ICC-01/04-01/06-601-tEN, Pre-Trial Chamber I, 20 October 2006, p. 9; No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, para. 4; No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, para. 36; No. ICC-02/04-01/05-282, Pre-Trial Chamber II (Single Judge), 14 March 2008, para. 8; and No. ICC-01/04-01/07-357, Pre-Trial Chamber I (Single Judge), 2 April 2008, p. 8.

The criterion referred to in article 55(2) of the Rome Statute ["*grounds to believe*"], which constitutes the less demanding criterion at the preliminary stage of the proceedings before the Court can be used to assess the request for participation at that stage. Thus, the Applicants must demonstrate that there are grounds to believe that they have suffered harm as a result of a crime within the jurisdiction of the Court, such crime having allegedly been committed within the temporal and territorial limits of the relevant situation.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, paras. 99-100.

The Single Judge will undertake such assessment (*i.e.* the merits of the applications) by analysing:

(i) Whether the identity of the applicant as a natural person appears duly established;

(ii) Whether the events described by each applicant constitute a crime within the jurisdiction of the Court;

(iii) Whether the applicant claims to have suffered harm; and

(iv) Most crucially, whether such harm appears to have arisen "*as a result*" of the event constituting a crime within the jurisdiction of the Court.

While points (i) and (iii) appear to be an analysis of fact since they essentially evaluate the adequacy of the supporting evidence made available to the Chamber, points (ii) and (iv) also have to be assessed in light of the relevant normative elements to be found in the Statute.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, para. 12. See also No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, para. 20.

The Statute does not set forth general rules on the basis of which the reliability of relevant elements is to be assessed, except in respect of specific instances. Accordingly, in the absence of any such rules, the Chamber has a broad discretion in assessing the soundness of a given statement or other piece of evidence. Such an

assessment has to comply with the general principle of law that the burden of proof of elements supporting a claim lies on the party making the claim.

The Single Judge will refrain from analysing the various theories on causality and will instead adopt a pragmatic, strictly factual approach, whereby the alleged harm will be held as "*resulting from*" the alleged incident when the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent.

It is to be reasonably expected that victims will not necessarily or always be in a position to fully substantiate their claim. It is also accepted as a general principle of law that "*indirect proof*" (*i.e.* inferences of fact and circumstantial evidence) is admissible if it can be shown that the party bearing the burden of proof is hampered by objective obstacles from gathering direct proof of a relevant element supporting his or her claim; the more so when such indirect evidence appears to be based "*on a series of facts linked together and leading logically to a single conclusion*". The Single Judge will therefore assess each statement by applicant victims first and foremost on the merits of its intrinsic coherence, as well as on the basis of information otherwise available to the Chamber.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 13-15.

The Single Judge recalls that the applicants are only required to demonstratethat the elements established by rule 85 of the Rules are met *prima facie* and that itsanalysis of the applications "*will not consist in assessing the credibility of the applicants' statements or engaging in a process of corroboration stricto sensu*" but "*will therefore assess each statement by applicant victims first and foremost on themerits of its intrinsic coherence, as well as on the basis of information otherwise available to the Chamber*".

See No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, para. 5. See also, No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, para. 8 and No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, para. 21.

The Single Judge considers that at this stage of the proceedings (*i.e.* at the investigation stage), it is sufficient for her to consider whether the applicants seeking to be granted the status of victims authorised to participate in the proceedings at the investigation stage of the relevant situation have established that there are grounds to believe that the harm they suffered is the result of a crime within the jurisdiction of the Court, and that the crime was committed within the temporal, geographical and, as the case may be, personal parameters of the said situation.

See No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, para. 4.

The result, self-evidently, is that two categories of victims can participate. First, "*direct*" victims: those whose harm is the result of the commission of a crime within the jurisdiction of the Court. Second, "*indirect victims*": those who suffer harm as a result of the harm suffered by direct victims.

In light of the jurisprudence set out above, a causal link must exist between the crimes charged and the harm alleged, both for direct and indirect victims. This is consistent with the approach of Pre-Trial Chamber I which required evidence of a causal link between the harm suffered and the crimes contained in the arrest warrant issued against the suspect, as a precondition of granting leave to participate. Indeed, the Appeals Chamber put the matter beyond doubt when it found:

> *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.*

The need for this link is further underscored by rule 85(a) of the Rules which establishes:

> 'Victims' *means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.*

The Appeals Chamber found, therefore, that for direct victims, a causal link must exist between the crimes charged and the victims' harm: the injury, loss or damage suffered by natural persons must be a result of the crimes confirmed against the accused. The direct victims of these crimes are the children below fifteen years of age who were allegedly conscripted, enlisted or used actively to participate in hostilities by the militias under the control of the accused within the time period confirmed by the Pre-Trial Chamber.

The offences with which the accused is charged (*viz.* conscripting, enlisting and using children under the age of 15 to actively participate in hostilities) were clearly framed to protect the interests of children in this age group against the backcloth of article 77(2) of Additional Protocol I to the Geneva Conventions, entitled "*Protection of children*" and article 38 of the Convention on the Rights of the Child, which are each directed at the protection of children. Criminalising the conscription, enlistment and use of children actively to participate in hostilities affords children with additional safeguards, recognizing their vulnerability, and the Statute has in those circumstances made them "*direct victims*" for these purposes.

Indirect victims must establish that, as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them. It follows that the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes charged.

Furthermore, the Appeals Chamber has determined that close personal relationships, such as those between parents and children, are a precondition of participation by indirect victims. In the view of the Trial Chamber, the harm suffered by these indirect victims may include the psychological suffering experienced as a result of the sudden loss of a family member or the material deprivation that accompanies the loss of his or her contributions.

Another situation which can serve as a basis for an application of an indirect victim to participate in the proceedings is when a person intervenes to prevent one of the crimes alleged against the accused. Given that the harm of the indirect victim must arise out of harm to the direct victim, the Chamber will need to investigate, if necessary, whether the direct victim has suffered any "*relevant*" harm. However, on this issue, depending on the individual facts, psychological harm to a direct victim may be inflicted once they become aware that an attempt is being made to conscript, enlist or to use them actively to participate in hostilities. In these circumstances, the loss, injury or damage suffered by the person intervening may be sufficiently linked to the direct victim's harm by the attempt to prevent the child from being further harmed as a result of a relevant crime.

Excluded from the category of "*indirect victims*", however, are those who suffered harm as a result of the (later) conduct of direct victims. The purpose of trial proceedings at the ICC, as stated by the Appeals Chamber, "[i]*s the determination of the guilt or innocence of the accused person of the crimes charged*" and it is only victims "*of the crimes charged*" who may participate in the trial proceedings pursuant to article 68(3), when read together with rules 85 and 89(1). The charges confirmed against the accused in this case are confined to the conscription, enlistment or use of children to participate actively in hostilities. Indirect victims, therefore, are restricted to those whose harm is linked to the *harm* of the affected children when the confirmed offences were committed, not those whose harm is linked to any subsequent conduct by the children, criminal or otherwise. Although a factual overlap may exist between the use of the child actively to participate in hostilities and an attack by the child on another, the person attacked by a child soldier is not an indirect victim for these purposes because his or her loss is not linked to the *harm* inflicted on the child when the offence was committed.

See No. ICC-01/04-01/06-1813, Trial Chamber I, 8 April 2009, paras. 44-52.

The Chamber recalls the position of the Appeals Chamber, whereby "*the notion of victim necessarily implies the existence of personal harm but does not necessarily imply the existence of direct harm*". Consequently, the relatives of the deceased person, as indirect victims, may claim to have suffered harm as a result of the harm suffered by the deceased as the direct victim, and may thus submit an application for participation on the sole ground of the mental and/or material harm they themselves have suffered.

As the law applicable to the Court currently stands, there is no provision in its Statute or other governing texts that permits an application for participation to be submitted on behalf of a deceased person. Rule 89(3) of the Rules does, however, provide expressly for the possibility of a person acting on behalf of a child or a person who is disabled to allow them to express their views and concerns.

The Chamber is compelled to conclude that, whilst the work of the Preparatory Commission for the ICC was in progress, and in particular whilst the draft Rules were being prepared, the issue of participation by deceased victims was never addressed. Only the issue of the participation of minors or disabled persons was discussed, which ultimately resulted in the adoption of the aforementioned rule 89(3). It is therefore impossible to draw any conclusion as to what exactly the States Parties had in mind regarding the issue of deceased victims.

Furthermore, rule 89(3) of the Rules makes provision for action either on behalf of one of the two categories of persons mentioned therein, which thus do not include deceased persons, or with the consent of the victim. Such consent, unless the deceased thought to give express consent while still alive, will in most cases prove to be impossible to establish. In any event, said consent will be impossible to prove when the person died during an attack, as will often be the case. Finally, the Chamber should not underestimate the fact that a person acting on behalf of a deceased person cannot be in a position to convey the views and concerns of the deceased accurately, in the sense of article 68(3) of the Statute.

The Chamber considers, moreover, that the jurisprudence of the Inter-American Court of Human Rights, on which one Chamber of the Court based its ruling in accepting the participation of the successors of the deceased, would appear difficult to transpose to the present case, given that the Rome Statute draws a clear distinction between the phase of participation in the proceedings and the reparations phase, once an accused has been found guilty, with the former not being a precondition for the latter.

The Chamber accordingly holds that a relative of a deceased person can only submit an application for participation in his or her own name, by invoking any mental and/or material harm suffered personally as a result of the death of said person.

See No. ICC-01/04-01/07-1491-Red-tENG, Trial Chamber II, 23 September 2009, paras. 51-56. See also No. ICC-01/04-01/06-1432 OA9 OA10, Appeals Chamber, 11 July 2008, para. 38 and No. ICC-01/04-01/06-1813, Trial Chamber I, 8 April 2009, para. 44.

The Single Judge recalls the previous jurisprudence of the Court with regard to the notion of "*victim*" within the meaning of rule 85 of the Rules. In particular, reference is made to the "Fourth Decision on Victims' Participation" in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, in which Pre-Trial Chamber III spelled out the requirements that need to be met for the purposes of the rule 85 assessment, namely whether (1) the victim applicant is a natural person or an organization or institution, (2) a crime within the jurisdiction of the Court appears to have been committed, (3) the victim applicant has suffered harm, and (4) such harm arose "*as a result*" of the alleged crime within the jurisdiction of the Court. With reference to the second requirement mentioned above, the Single Judge recalls that not every incident alleged by the victim applicant, which falls within the meaning of article 7 of the Statute, may satisfy the requirements of rule 85 of the Rules. In this regard the Single Judge emphasizes the importance of establishing a link between the alleged incident and the present case. The alleged incident must relate to the offences alleged in the summonses to appear, or, at a later stage in the proceedings, the document containing the charges, in the case in which the application is made. Therefore, a victim applicant may be recognized as a victim to participate in the context of this case if he or she has shown that the alleged crime against humanity was committed from 30 December 2007 until the end of January 2008 in locations, including Turbo town, the greater Eldoret area (huruma, Kiambaa, Kimunu, Langas and Yumumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya.

See No. ICC-01/09-01/11-17, Pre-Trial Chamber II (Single Judge), 30 March 2011, para. 6. See also No. ICC-01/09-02/11-23, Pre-Trial Chamber II (Single Judge), 30 March 2011, para. 6; No. ICC-01/04-01/10-351, Pre-Trial Chamber I (Single Judge), 11 August 2011, paras. 19-20; and No. ICC-01/04-597-Red, Pre-Trial Chamber I (Single Judge), 18 August 2011, para. 7.

The Second Defence Request is that the Single Judge restricts her analysis to the information contained in the redacted versions of the victims' applications as transmitted by the Registry to the parties. In the alternative, the Defence requests that the Registry be ordered to disclose to the parties any information that may be relevant for the Single Judge's determination pursuant to rule 89 of the Rules.

With respect to the first limb of the alternative request as put forward by the suspects, the Single Judge notes that nothing in the statutory texts of the Court provides that the Chamber is precluded from ruling on the merits of victims' applications taking into consideration information that has been redacted vis-à-vis the parties with a view to protecting the applicants' safety. It is of significance that the Defence only refers to the provision of rule 81(2) and (5) of the Rules which elucidate that information not disclosed between the parties cannot be later introduced into evidence without adequate prior disclosure. In this respect, the Single Judge wishes to point out that this provision cannot be applicable with respect to victims' applications that, as clarified above, are not to be considered as evidence and, as such, are not subject to disclosure between the parties, but, conversely, are transmitted to the parties by the Registrar in order for them to provide their observations thereon. Furthermore, the findings made with respect to the victims' applications are limited to determine whether the information provided therein satisfies the requirements provided for by rule 85 of the Rules taking into account the general circumstances of the events as described by the applicants as well as the intrinsic coherence of the applications themselves.

Therefore, in light of the specific nature, scope and purpose of the ruling on the victims' applications for participation, the Single Judge is not persuaded that she shall restrict her analysis to the information provided by the applicants that has not been redacted in the version transmitted by the Registry to the parties. The Single Judge notes the provisions of articles 68(1) and 57(3)(c) of the Statute, which mandate the Court to take appropriate measures to protect, *inter alia*, the safety, privacy, physical and physiological well-being of the victims. The Single Judge is as well cognizant that, in accordance with the principle of proportionality enshrined in article 68(1) of the Statute, measures taken pursuant to this provision may restrict the rights of the suspect only to the extent necessary. In light of the nature/purpose and circumstances of the current proceedings, the Single Judge is convinced that the redactions applied in the victims' application are indeed limited to what is strictly necessary in light of the security situation in Kenya and the applicants' safety and do not unnecessarily restrict the rights of the Defence. In particular, the Defence has been provided with sufficient information in order for it to be able to determine whether the relevant criteria for an applicant to qualify as victim are fulfilled. It is of significance that, despite the redactions, the three suspects were in a position to submit meaningful observations. In the few applications where relevant information is redacted, such redactions are the only available measures to protect the applicants concerned, since the disclosure of any further information would unnecessarily compromise their safety and security.

See No. ICC-01/09-01/11-169, Pre-Trial Chamber II (Single Judge), 8 July 2011, paras. 17-24.

The Chamber will address the Defence's observations pertaining to apparent contradictions between information contained in certain applicants' application forms on the one hand, and in additional statements provided with the application on the other. The Chamber has previously held that in light of the evidentiary standard governing the assessment of victims' applications and considering the provisions and precedents inviting the applicants and the VPRS to provide additional information, "*clarifications provided through additional information do not warrant, ipso facto, a rejection of the application*". Rather, the Chamber "*will assess, on a case-by-case basis, whether the additional information provided by the applicant is consistent with the remainder of the facts*

alleged in the application or whether the changes appear to be of an 'opportunistic' nature, provided with the sole purpose of 'fitting the alleged facts'". This approach is consistent with the Chamber's practice of assessing each application on the merits of its intrinsic coherence.

In the view of the Chamber, obvious contradictions as to the circumstances of the loss of property undermine the intrinsic coherence of an application and, as such, affect the credibility of the applicant's account. Accordingly, in the absence of any explanation for the contradictions, the application will be rejected.

See No. ICC-01/05-01/08-2011, Trial Chamber III, 15 December 2011, paras. 19-20. See also, No. ICC-01/05-01/08-1862, Trial Chamber III, 25 October 2011, paras. 31-32.

Rule 85(a) of the Rules defines victims as "*natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court*". Accordingly, an applicant qualifies as victim pursuant to the above provision provided that: (i) his or her identity as a natural person appears duly established; (ii) the events described in the application for participation constitute(s) one or more crimes within the jurisdiction of the Court and with which the suspect is charged; and (iii) the applicant has suffered harm as a result of the crime(s) with which the suspect is charged.

The Single Judge recalls that an applicant qualifies as victim pursuant to rule 85(a) of the Rules provided that he or she demonstrates *prima facie* the existence of a link between the events described in the application and the case brought by the Prosecutor against the suspect. At this stage of the proceedings, the scope of the case against the suspect is framed by the Document Containing the Charges (DCC). Therefore, the Single Judge has assessed whether the incidents reported by each of the applicants fall within the factual scope of the case that will be discussed at the confirmation of charges hearing, as described by the Prosecutor in her counts of murder, rape, inhumane acts and persecution as crimes against humanity.

Accordingly, the Single Judge agrees with the Defence observations that those applicants who claimed to have suffered harm only as a result of crimes with which the suspect is not charged, shall not be admitted as participating victims.

[…]

At the outset, the Single Judge recalls that there is no consistent practice in the jurisprudence of the Court on whether an application for victims' participation can be submitted on behalf of a deceased person. The Single Judge also recalls, however, that an individual who has applied for participation on behalf of a deceased relative may still be admitted as an indirect victim insofar as this applicant demonstrates that he or she has suffered personal harm as a result of the death of said person. In this respect, the Single Judge observes that out of the twelve applicants who have submitted an application for participation on behalf of deceased relatives, one was deferred until further information is obtained and eleven applicants stated that they have suffered personal harm as a result of the alleged killing of the family member(s), including four applicants who have answered question 21 [in the form] in the negative or left it blank. In light of these circumstances, the Single Judge considers that the statement made by the applicants to the effect that they have allegedly suffered personal harm as a result of the killing of a family member is authoritative and indicates their intention to participate in the proceedings as indirect victims.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, paras. 25-27, and 38-39.

The Chamber recalls its decision that the close relatives of a victim authorised to participate in the proceedings who is now deceased, may decide to continue the action initiated by the victim before the Court, but that they may do so only on behalf of the deceased victim and within the limits of the views and concerns expressed by the victim in his or her initial application.

[…]

In respect of the request for protective measures for the person resuming the action, the Chamber recalls that the protective measures granted to victims authorised to participate in the proceedings also apply to persons authorised to participate on behalf of deceased victims. In this regard, the Chamber would also recall its decision granting anonymity *vis-à-vis* the public to all of the victims authorised to participate in these proceedings, including persons authorised to participate on behalf of deceased victims.

See No. ICC-01/04-01/07-3383-tENG, Trial Chamber II, 10 June 2013, paras. 6 and 12.

In order to participate in the present proceedings, it must be first determined whether a victim applicant qualifies as a victim of the case, in accordance with rule 85 of the Rules. The Single Judge notes that all victim applicants who have submitted applications to participate in the confirmation of charges hearing and in the related proceedings of the present case are natural persons. Therefore, they fall within the domain of rule 85(a) of the Rules, which defines victims as "*natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court*".

The Single Judge recalls the interpretation given to this provision by the different Chambers of the Court, according to which a victim applicant qualifies as "*victim*" in the present case, provided that: (i) his or her identity as a natural person is duly established; (ii) the events described in the application for participation

constitute the crime(s) within the jurisdiction of the Court with which the suspect is charged; and (iii) the victim applicant has suffered harm "*as a result*" of the crime(s) charged.

The Single Judge underlines that she will assess whether each victim applicant has provided sufficient information to prove the above criteria. In this respect, she recalls that the Appeals Chamber has held, *inter alia*, that "*the Pre-Trial Chamber is in the best position to determine the nature and the quantum of evidence it deems necessary and adequate at that stage of the proceedings to establish the elements of rule 85(a) of the Rules of Procedures and Evidence. What evidence (be it documentary or otherwise) may be sufficient cannot be determined in the abstract, but must be assessed on a case-by-case basis and taking into account all relevant circumstances, including the context in which the Court operates*". Such assessment will not result in "*a process of corroboration* stricto sensu" but will be based on the merits of the applications' intrinsic coherence, taking into consideration all the information available to the Chamber.

See No. ICC-01/04-02/06-211, Pre-Trial Chamber II, 15 January 2014, paras. 17-19.

(i) Whether the applicants meet the requirements of rule 85 of the Rules

At the outset, the Single Judge observes that the applications for victims' participation submitted to the Court are not case specific and that, under rule 15(1)(c) of the Rules, it is for the VPRS to link them to existing situations and cases before the Court. Thus, nothing precludes victims' applications from being "*relevant*", as provided for under rule 89(1) of the Rules, for more than one Chamber. The Single Judge further notes that the OPCV asserted that each of the 199 individuals it represented wished to participate in the case against Mr Blé Goudé.

Rule 85(a) of the Rules defines victims as "*natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court*". Consistent with the jurisprudence of the Court, the Single Judge recalls that an applicant qualifies as victim victim provided that: (i) his or her identity as natural person appears duly established; (ii) the events described in the application for participation constitute(s) one or more crimes within the jurisdiction of the Court and with which the suspect is charged; and (iii) the applicant has suffered harm as a result of the crime(s) with which the suspect is charged.

Concerning the establishment of the identity of the applicants, the Single Judge is satisfied, on the basis of its previous assessment and for the purpose of the present case, that they have been duly established.

The Single Judge is also of the view that its previous assessment of (1) the link between the events described and the crimes charged and (2) the link between those events and the harm suffered is sufficient for the purpose of the assessment of the applicants' status in the present case. Indeed, subject to any further modification in the charges of either case, the subject-matter of the present case appears to be the same of that of the *Gbagbo* Case as the same crimes are alleged in both cases and the same four incidents support the charges against the two suspects. Hence, the charges against Mr Blé Goudé are so similar to the ones against Mr Gbagbo that applicants fulfilling the criteria of rule 85 in one case will in principle satisfy the criteria in the other.

Such an interpretation is further supported by the fact that the Prosecutor considers the two cases as if they were joint cases. Indeed, during a status conference held on 1 May 2014, she asserted that the disclosure in both cases would be undertaken exactly with the same categories

Accordingly, in the view of the Single Judge, it is not necessary to assess if (1) the events described by the applicants constitute one of the crimes charged; or if (2) there is a sufficient causal link between such events and the harm suffered because the very same assessment in respect to the same applicants was already conducted by the Single Judge in the context of the *Gbagbo* Case.

Therefore, after incorporation to the case at hand of its assessment carried out in the *Gbagbo* Case, the Single Judge is satisfied that the 199 applicants fulfil the criteria set out in rule 85(a) of the Rules and grants them the status of victims of the present case.

See No. ICC-02/11-02/11-83, Pre-Trial Chamber I, 11 June 2014, paras. 12-18.

Victims' are, pursuant to rule 85(a) of the Rules, "*natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court*". The Appeals Chamber observes that this definition emphasises the requirement of the existence of harm rather than whether the indirect victim was a close or distant family member of the direct victim.

See No. ICC-01/04-01/07-3778-Red A3 A4 A5, Appeals Chamber, 8 March 2018, para. 115.

3.2. The notion of "victims having communicated with the Court"

The Single Judge considers it appropriate to start by focusing attention on a number of provisions in the Rules which refer to the concept of "*victims having communicated with the Court*": namely victims that, whilst not having (as yet) been allowed to participate in proceedings, have nevertheless been in contact with the Court. In particular, rule 59 (Participation in proceedings under article 19, paragraph 3), sub-rule 1l(b), requires the Registrar to provide information regarding any question or challenge having arisen under article 19 to "*the victims who have already communicated with the Court in relation to that case or their Legal Representatives*"; rule 92 (Notification to victims and their Legal Representatives), sub-rule 2, deals with the Court's obligation to

notify the Prosecutor's decision not to initiate an investigation or not to prosecute pursuant to article 53 to "*victims or their Legal Representatives who have already participated in the proceedings or, as far as possible ... those who have communicated with the Court in respect of the situation or case in question*"; rule 92, sub-rule 3, provides that the Court's decision to hold a hearing to confirm the charges pursuant to article 61 shall be notified to "*victims or their Legal Representatives who have already participated in the proceedings or, as far as possible ... those who have communicated with the Court in respect of the case in question*"; rule 119 (Conditional release), sub-rule 3, requires the Pre-Trial Chamber to seek the views *inter alia* of "*victims that have communicated with the Court*" in the relevant case prior to imposing or amending any conditions restricting the liberty of an arrested person. It seems beyond controversy that for the purposes of all of these provisions, victims who have applied to participate in the Court's proceedings by submitting the relevant form duly registered in the file by the relevant sections of the Registry qualify as "*victims having communicated with the Court*".

In the view of the Single Judge, at least three meaningful elements can be inferred from these rules. Firstly, in respect of crucial stages such as challenges to the jurisdiction or the admissibility of a case, the confirmation of the charges, conditional release and proceedings under article 53, a decision pursuant to rule 89 of the Rules and ensuing participation is not a pre-condition for victims being granted a procedural right as significant as notification, a right to be formally informed of procedural developments which is typically granted to individuals or entities entitled to some role in the proceedings. Secondly, "*victims having communicated with the Court*" are mentioned in rule 92, sub-rules 2 and 3 as a separate and additional group of victims besides those who "*have already participated in the proceedings*". Thirdly, and most significantly, only rule 92, sub rule 2 refers to communication by victims with the Court having occurred "*in respect of the situation or case*", while the remaining provisions only refer to victims having communicated with the Court in respect of a case.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 93-94.

3.3. Natural person and the proof of identity

The first area in which the need for selecting an appropriate standard of proof arises is the determination as to whether the existence and the identity of an applicant have been satisfactorily established. On the one hand, the Single Judge would point out that in a country such as Uganda, where many areas have been (and, to some extent, still are) ravaged by an ongoing conflict and communication and travelling between different areas may be difficult, it would be inappropriate to expect applicants to be able to provide a proof of identity of the same type as would be required of individuals living in areas not experiencing the same kind of difficulties. On the other hand, given the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings, it would be equally inappropriate not to require that some kind of proof meeting a few basic requirements be submitted. Accordingly, the Single Judge takes the view that, in principle, the identity of an applicant should be confirmed by a document (i) issued by a recognised public authority; (ii) stating the name and the date of birth of the holder, and (iii) showing a photograph of the holder.

An overview of the Applications shows that a number of Applicants submit a "*voting card*" as document proving their identity. This being a document meeting the three conditions listed above, the Single Judge will consider it as adequate proof of the existence and identity of the relevant applicant, provided that the information contained in the card is consistent with the information submitted in the application.

Some applications provide as "*proof of identity*" a statement by an individual belonging to a local authority, simply declaring that a given applicant "*is a victim*" of a specific incident. The Single Judge considers that this kind of document falls short of the requirements set forth above, especially since they do no include a photograph of the applicant and an indication of his or her date of birth. This kind of document can therefore not be taken into account for participation purposes.

Various types of documents are attached to the other applications. Since, in particular, none of these documents shows the date of birth of the holder, they also fall short of the threshold indicated above and cannot be considered sufficient for participation purposes.

At the same time, some clarifications are needed in those instances where only the voting card or other document of the person acting on behalf of a victim is provided. As regards applications submitted on behalf of a child (*i.e.*, an individual not having attained 18 years of age), the Single Judge would request VPRS to submit a report indicating from what age the Ugandan legal and administrative system allows documents meeting the three conditions indicated above to be issued to individuals. This report should also provide information about the existence and obtainability, in the Ugandan legal or administrative system, of documents establishing the link between a child and a member of his other family, such as birth certificates or other types of documents.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 16-21.

Proof of identity, kinship, guardianship and legal guardianship must be submitted with an application pursuant to regulation 86(2)(e) of the Regulations of the Court. The Chamber recognises the need for proper identification documents of all victims who apply to participate in the early stage of the Court proceedings. However, the Chamber is aware that, in regions which are or have been ravaged by conflict, not all civil status records may be available, and if available, maybe difficult or too expensive to obtain.

In areas of recent conflict where communication and travel may be difficult "*it would be inappropriate to expect applicants to be able to provide proof of identity of the same type as would be required of individuals living in areas not experiencing the same types of difficulties*".

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, paras. 13-14. See also No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, para. 16; and No. ICC-01/04-01/07-579, Pre-Trial Chamber I (Single Judge), 10 June 2008, paras. 37 and 45.

The Chamber will, at the investigation stage of the situation, allow the submission of any of the following documents – (as a proof of identity):

(i) national identity card, passport, birth certificate, death certificate, marriage certificate, family registration booklet, will, driving licence, card from a humanitarian agency;

(ii) voting card, student identity card, pupil identity card, letter from local authority, camp registration card, documents pertaining to medical treatment, employee identity card, baptism card;

(iii) certificate/attestation of loss of documents (loss of official documents), school documents, church membership card, association and political party membership card, documents issued in rehabilitation centres for children associated with armed groups, certificates of nationality, pension booklet; or

(iv) a statement signed by two witnesses attesting to the identity of the applicant or the relationship between the victim and the person acting on his or her behalf, providing that there is consistency between the statement and the application. The Statement should be accompanied by proof of identity of the two witnesses.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, para. 15. See also No. ICC-01/04-01/07-579, Pre-Trial Chamber I (Single Judge), 10 June 2008, paras. 37 and 44-46.

There is however no provision that permits applications to be made on behalf of deceased persons. Furthermore, rule 89(3) of the Rules allows the submission of an application on behalf of a person, provided that the person has given his or her consent. The Single Judge notes that such consent is impossible in the case of deceased persons. It is therefore the Single Judge's view that deceased persons do not fall within the meaning of "*natural persons*" under rule 85(a) of the Rules.

See No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, para. 36.

The Trial Chamber will seek to achieve a balance between the need to establish an applicant's identity with certainty, on the one hand, and the applicant's personal circumstances, on the other.

[…]

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.

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. The principle provides appropriate guidance.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 87 and 91-92.

Rule 89(3) of the Rules states that an application for participation may be made by a person acting on behalf of the victim concerned with the victim's consent, or on the victim's behalf in the case of a child or a disabled person. However, no provision permits the submission of an application for participation on behalf of a deceased person. Rule 89(3) authorises the submission of an application for participation on a person's behalf provided the person consents. The Single Judge notes that such consent cannot be given by a deceased person. She is therefore of the opinion that deceased persons cannot be considered to be natural persons within the meaning of rule 85(a). However, close relations of deceased and disappeared persons may be considered to be victims under the Statute, the Rules, and the Regulations of the Court provided they fulfil the necessary criteria. However, close relations of deceased and disappeared persons may be considered to be victims under the Statute, the Rules, and the Regulations of the Court provided they fulfil the necessary criteria.

[…]

A signature or thumb-print of the applicant shall be put, at the very least, on the last page of the application, and in particular in section J of the standard application for participation.

See No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, paras. 24-27.

The Single Judge will accept, as proof of identity of the applicants, any of the following documents: (i) passport, (ii) voter card, (iii) certificate of registration issued by the Electoral Commission, (iv) driving permits, (v) graduated tax ticket, (vi) "*short*" birth certificate or "*long*" birth certificate, (vii) birth notification card, (viii) certificate of

amnesty, (ix) resident permit or card issued by a Local Council, (x) identification letter issued by a Local Council, (xi) letter issued by a leader of an IDP Camp, (xii) "*Reunion letter*" issued by the Resident District Commissioner, (xiii) identity card issued by a workplace or an educational establishment, (xiv) camp registration card and card issued by humanitarian relief agencies, such as the United Nations High Commissioner for Refugees and the World Food Programme, (xv) baptism card, (xvi) letter issued by a Rehabilitation Centre.

See No. ICC-02/04-01/05-282, Pre-Trial Chamber II (Single Judge), 14 March 2008, para. 6. See also No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, para. 28.

Rule 89(3) of the Rules of Procedure and Evidence states that an application for participation in the proceedings may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child, or, when necessary, a victim who is disabled. In this case, regulation 86(2)(a) of the Regulations of the Court requires that the identity and address of that person be indicated in the application. An application presented by someone other than the victim that does not satisfy this requirement will therefore not be considered sufficient for participation purposes. Both the identity of the applicant and the identity of the person acting with his or her consent or on his or her behalf must be confirmed by documents. The link existing between a child applying for participation and the person acting on his or her behalf (kinship, guardianship, or legal guardianship) as well as the link existing between a disabled applicant and the person acting on his or her behalf (legal guardianship) should be confirmed by a document attached to the application as supporting documentation within the meaning of regulation 86(2) (e) of the Regulations of the Court. The Single Judge will accept as proof of such link any of the following documents: (i) "*short*" birth certificate or "*long*" birth certificate, (ii) birth notification card, (iii) baptism card, (iv) letter issued by a Rehabilitation Centre, (v) letter from a local Council, (vi) affidavit sworn before a Magistrate or Commissioner of Oaths.

See No. ICC-02/04-01/05-282, Pre-Trial Chamber II (Single Judge), 14 March 2008, para. 7. See also No. ICC-01/05-01/08-320, Pre-Trial Chamber III, 12 December 2008, paras. 36-38; No. ICC-01/05-01/08-699, Trial Chamber III, 22 February 2010, para. 36; and No. ICC-01/04-01/07-933-tENG, 26 February 2009, Trial Chamber II, paras. 29-30.

The Chamber has never required that an Applicant for participation in the proceedings provide certified copies of his or her proof of identification.

Only a *prima facie* presentation of proof of identity appended to the application is required for a decision on the applications pursuant to rule 89(1) of the Rules, throughout the proceedings, there will be additional opportunities for the credibility and authenticity of the Applicants' identities and the allegations within their applications to be further scrutinized.

See No. ICC-01/04-505, Pre-Trial Chamber I (Single Judge), 3 July 2008, paras. 20-21.

Given that each applicant (now an adult or close thereto) has indicated his or her wish to participate in the proceedings, the Chamber infers that when they become adults they consent to the person continuing to act for them. If that is not the case, the obligation rests on the applicant to inform the Court.

See No. ICC-01/04-01/06-1556-Corr-Anx1, Trial Chamber I, 13 January 2009, para. 78. See also, No. ICC-01/04-01/06-2063, Trial Chamber I, 21 July 2009, para. 1.

The Chamber recalls that, when examining each application, it took into account the inconsistencies in some of the forms before deciding whether or not the application in question should be dismissed. As stated in its Decision of 26 February 2009, only a blatant contradiction between the information in an application for participation and that appearing in the documents in support thereof can justify a decision to dismiss the application. Hence it will accept the applications submitted to it if the differences noted do not call into question the credibility of the information provided by the applicants regarding their identity. This will be the case, for example, where there is a minor difference between the spelling of the surname and that of the first name.

The Chamber recalls that in paragraph 30 of the Decision of 26 February 2009 it listed the documents that it was willing to accept in order to establish the identity of applicants. In the event of discrepancies between the information contained in the application form and that in the document used to prove the identity of the applicant, it has generally accepted the information stated in the latter, with the exception of certain specific cases, which are expressly noted in the annexes. Where the applicant or person acting on his or her behalf has supplied certificates, such as a certificate of habitation or of care, a death certificate or certificate of family relationship, the Chamber has ruled that these are sufficient at this stage to establish the identity of the applicant if they have been issued by a civil registry officer, or signed by two credible witnesses.

See No. ICC-01/04-01/07-1491-Red-tENG, Trial Chamber II, 23 September 2009, paras. 32-33.

The Chamber notes that most applicants who live in the Bogoro region provide death certificates and documents proving family relationships which are written and signed by heads of *groupements* and/or *collectivités*. It notes furthermore that a number of applicants attach to their applications for participation certificates issued by a civil registry office or signed by two credible witnesses. Others, however, fail to provide any documents of this nature.

In line with the position adopted by the Appeals Chamber, the Chamber considers that, when an applicant alleges that he or she has suffered mental harm following the loss of a member of his or her family, the identity of that family member and the relationship between him or her and the applicant must be established. In this regard, the Chamber will rely on the death certificate or evidence of family relationship produced to it, but also on any other document or information which allows it at this stage to satisfy itself that the statements in the applications for participation are true.

Thus the Chamber is of the view that it is not possible to ignore the difficulties encountered by applicants living in Ituri in providing documents proving the death of a family member or their family relationship with that person. It therefore considers that the submission of a certificate signed by two credible witnesses is sufficient, at this stage in the proceedings, to establish the death of a person or that individual's family relationship with the applicant. In this regard, it recalls that, in order to assess the credibility of witnesses who signed these declarations, it will take into consideration, non-cumulatively, factors such as the nature and length of the relationship of those witnesses with the applicant, or their standing in the community.

In the absence of a death certificate or a certificate establishing the family relationship between the applicant and the deceased person, the Chamber has analysed all of the factual information available to it in order to determine its value and relevance.

See No. ICC-01/04-01/07-1491-Red-tENG, Trial Chamber II, 23 September 2009, paras. 36-39.

[TRANSLATION] The Chamber recalls its previous ruling regarding which the close relatives of a deceased person shall file an application for participation on their own behalf, referring to the moral and/or material harm caused by the death of this person. The Chamber however did not rule on the case of successors of a deceased person. In such a case, the Chamber considers that the close relatives of the victim can chose to take over the application the victim has introduced before the Court but that they can only do it on behalf of the deceased victim and within the limits of the views and concerns expressed by the latter in her or his initial application.

See No. ICC-01/04-01/07-1737, Trial Chamber II, 22 December 2009, para. 30.

An "*attestation de carence*" is a valid document by which an individual can demonstrate his or her identity and thus, in principle, these documents are admissible and they provide *prima facie* proof of the identity of the applicants.

See No. ICC-01/04-01/06-2659-Corr-Red, Trial Chamber I, 8 February 2011, para. 33. See also No. ICC-01/04-01/06-2764-Red, Trial Chamber I, 25 July 2011, para. 27.

The Single Judge recalls that each victim applicant must prove his or her identity satisfactorily, meeting a few basic requirements. The same applies for proof of kinship and guardianship. However, the Single Judge is aware of the victim applicants' personal circumstances and the difficulties victim applicants in the Republic of Kenya may encounter in obtaining or producing copies of official identity documents, such as a passport. Bearing in mind that some victim applicants may have lost their identity documents in the course of the events from 30 December 2007 until the end of January 2008, the Single Judge holds that a flexible approach must be adopted.

Having due regard to the practice of other Chambers, the Single Judge, therefore, accepts the following documentation as proof of identity and/or proof of kinship, as indicated in the report of the VPRS: (i) Passport; (ii) National Identity Card; (iii) Birth Certificate; and (iv) Driver's License. In case such documentation is not available to victim applicants, the Single Judge will accept substitute forms of identification, including (i) National ID Waiting Card; (ii) Chiefs Identification Letter which provides certain basic information: (a) the full name, date and place of birth, and gender of the victim applicant; and (b) the name of the Chief, his or her signature and the use of an official stamp; (iii) Notification of Birth Cards (for minors); (iv) Clinic Cards (for minors); (v) Kenya Police Abstract Form (for lost national identity cards or Kenyan passports); (vi) a signed declaration from two witnesses attesting to the identity of the victim applicant and, where relevant, the relationship between the victim applicant and the person acting on his or her behalf. The declaration shall be accompanied by proof of identity of the two witnesses.

The Single Judge has been made aware of purported practice of identification fraud in the provision of identity documents in the Republic of Kenya. With a view to verify, to the extent possible, the identity of victim applicants, the Single Judge, therefore, adopts a cautious approach with regard to less reliable forms of formal identification documents as substitutes. She therefore requests victim applicants, who cannot provide proof of identification, to provide her with substitute forms of identification, together with a brief explanation why proof of identity is not available.

In case the applicant is an organization or institution, the Single Judge will consider any document constituting it in accordance with the law of the relevant country, and any credible document that establishes it has sustained direct harm to its property which is dedicated to the purposes set out in rule 85(b) of the Rules. Additionally, the

person acting on behalf of the organization or institution must provide information as regards his or her legal standing to act on behalf of the organization or institution.

> See No. ICC-01/09-01/11-17, Pre-Trial Chamber II (Single Judge), 30 March 2011, paras. 7-10. See also No. ICC-01/09-02/11-23, Pre-Trial Chamber II (Single Judge), 30 March 2011, paras. 7-10; and No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, para. 42.

In light of the additional information provided by the Legal Representative and the submissions of the parties, the Chamber has considered the four applications submitted to it by persons wishing to act on behalf of deceased Victims a/0025/08, a/0051/08, a/0197/08 and a/0311/09, respectively.

The Chamber recalls that, in its Decision of 23 September 2009, it considered both the general and specific submissions of the parties. It is of the view that the findings it reached at that time apply, *mutatis mutandis*, to these new applications, as does its position on, for example, the redaction of applications for participation, documents which could prove the applicants' identity, proof supplied by a death certificate or certificate of family relationship, and on the influence, if any, of intermediaries.

The Chamber recalls its decision that the close relatives of a victim authorised to participate who is now deceased may decide to continue the action initiated by the victim before the Court, but that they may do so only on behalf of the deceased victim and within the limits of the views and concerns expressed by the victim in his or her initial application.

a) Victim a/0025/08

The Chamber recalls that Victim a/0025/08 was authorised to participate in the proceedings by the Pre-Trial Chamber on 10 June 2008. According to the information provided by the person wishing to continue the action before the Court, in particular, the extract from the death certificate, a/0025/08 died in 2008. The Chamber notes that some of the victim's close relatives nominated the victim's brother to "[TRANSLATION] *take care of the family of the victim*". The statement is signed by five family members, including the designated person, and a copy of their identity documents is attached. The Chamber considers that the family relationship between the deceased victim and the person wishing to act on the victim's behalf has been established, but that it has not been shown that the victim's family explicitly mandated that individual to resume the action initiated before the Court. Hence the Chamber is of the view that it requires additional details to make a fully informed decision on the merits of this application to resume action. Accordingly, it reserves judgement, and requests the Legal Representative to provide it with a statement from the deceased victim's family specifically mandating a person to continue the action initiated by the victim before the Court.

b) Victim a/0051/08

The Chamber recalls that Victim a/0051/08 was authorised to participate in the proceedings by the Pre-Trial Chamber on 10 June 2008. It notes that this victim is reported to have died in 2008 and takes note of the victim's death certificate submitted by the family. It also takes note of the minutes of the family meeting mandating the victim's grandson to continue the action initiated before the Court, and notes that the four signatory family members, including the designated person, provided a copy of their identity documents. Lastly, the Chamber notes that, according to the information provided by the Legal Representative to the VPRS on 15 February 2011, the designated person had been assisting the applicant since the beginning of the application procedure. The Chamber therefore considers that the family relationship between the deceased victim and the person wishing to act on the victim's behalf has been established and that the person has been mandated by the family of the deceased to continue on the victim's behalf the action initiated by the victim. Accordingly, it authorises the person mandated by the family of deceased Victim a/0051/08 to continue the action before the Court on behalf of that victim.

c) Victim a/0197/08

The Chamber recalls that Victim a/0197/08 was authorised to participate in the proceedings by the Decision of 23 September 2009. It notes that, according to the death certificate transmitted to the Chamber on 25 February 2011, the victim died in 2009. It notes the minutes of the family meeting mandating the victim's brother to continue the action initiated before the Court, and notes that three of the four signatory family members, including the designated person, provided a copy of their identity documents. It also notes the Additional Information provided by the Legal Representative stating the identity of the persons who signed the minutes of the family meeting. Lastly, the Chamber notes that the mandated person provides an additional statement pertaining to the date of birth of deceased Victim a/0197/08. The Chamber therefore considers that the family relationship between the deceased victim and the person wishing to act on that victim's behalf has been established and that that individual has indeed been mandated by the family to continue on the victim's behalf the action initiated by the victim. Accordingly, it authorises the person mandated by the family of deceased Victim a/0197/08 to continue the action initiated before the Court on behalf of that victim.

d) Victim a/0311/09

The Chamber recalls that Victim a/0311/09 was authorised to participate in the proceedings by the Decision of 23 September 2009. It notes the minutes of the family meeting mandating the victim's son to continue the action initiated before the Court and notes that the four signatory family members, including the designated person,

provided a copy of their identity documents. The Chamber considers that the family relationship between the victim and the person wishing to act on the victim's behalf has been established and that the person has indeed been mandated by the family to continue on the victim's behalf the action initiated by the victim. However, the Chamber notes that the documents which the Registry transmitted to it on 25 February 2011 do not include the victim's death certificate. Although the Legal Representative concerned has stated on several occasions that the victim is deceased, the Chamber finds that it requires additional details in order to be able to make a fully informed decision on the merits of the application. Accordingly, it reserves judgement and requests the Legal Representative to provide it with certification of the death of Victim a/0311/09 as soon as possible.

The Chamber recalls that the persons designated to continue the action initiated by Victims a/0051/08, a/0197/08 and a/0311/09 by their respective families have all agreed to the disclosure of their own identity and of the identity of the deceased victims in question to the parties, since the Chamber authorises them to continue the action of their family members. Accordingly, should the Chamber grant the application for participation, the person designated to continue the action of deceased Victim a/0025/08 would not be opposed to disclosure of his identity to the parties, the identity of the victim having already been disclosed to them. The Chamber also recalls that the Legal Representative requested it to extend the protective measures previously ordered for all victims authorised to participate in the proceedings thus far to include those persons resuming the action of deceased Victims a/0025/08, a/0051/08, a/0197/08 and a/0311/09.

Since the present decision authorises the persons mandated by the families of deceased Victims a/0051/08 and a/0197/08 to continue the action initiated by the victims, the Chamber invites the Registry to disclose to the parties the identity of the victims and of the persons resuming their action. In respect of the request for protective measures for those resuming action, the Chamber considers that the protective measures granted to the victims authorised to participate in the proceedings also apply to the persons authorised to participate on behalf of the deceased victims. In this regard, the Chamber recalls its decision granting anonymity *vis-à-vis* the public to all of the victims authorised to participate in this case, including those persons authorised to participate in the proceedings on behalf of the deceased victims.

See No. ICC-01/04-01/07-3018-tENG, Trial Chamber II, 14 June 2011, paras. 18-20, 23-27, and 30-33.

The Chamber has previously decided that demobilisation certificates are admissible for the purposes of establishing an applicant's identity and age. The certificates do not provide the applicants' ages or dates of birth but instead they certify that at the time they were issued, the individual concerned was a minor.

See No. ICC-01/04-01/06-2764-Red, Trial Chamber I, 25 July 2011, para. 28.

In relation to discrepancies between the names and/or dates of birth as they appear on the documents submitted as proof of identity and the names and dates of birth submitted in the application forms of a number of applicants, the Single Judge takes note of the fact that the spelling of certain names became distorted during the electoral process and that, as a result, incorrect variants of some names may appear on the voting cards provided as proof of identity by the majority of applicants. In considering the issue as to whether the identity of the applicant has been proved to the requisite degree, the Single Judge gives weight to (i) the fact that due to the security situation in North and South Kivu, limited means are available to the applicants to prove their identities, (ii) the fact that the documents which are available may not be entirely accurate, and (iii) the overall coherence of the identity documents with the identifying information submitted.

See No. ICC-01/04-01/10-351, Pre-Trial Chamber I (Single Judge), 11 August 2011, paras. 27-28.

The Single Judge notes that, pursuant to article 68(3) of the Statute, only "*victims*" may be admitted to participate in the proceedings. As held by the Appeals Chamber, "*the notion of victim necessarily implies the existence of personal harm*". Exceptions to such general principle are those provided for in rule 89(3) of the Rules, which, as already recalled, explicitly states that an application for participation may be submitted by a person acting on behalf of a victim either with the consent of the victim or in case the victim is a child or a disabled person. To the contrary, no provision in the Court's legal texts permits an application for participation to be submitted on behalf of a deceased person.

The Single Judge is of the view that the scenarios provided for in rule 89(3) of the Rules and the instances of an application made on behalf of a deceased person are intrinsically different in nature. Indeed, participation of an individual on behalf of a victim is mainly justified in light of the explicit consent of the said victim. Only in the two cases provided for *expressis verbis* in the said provision it is possible that an application for participation be submitted by someone on behalf of the victim without the requirement of the victim's explicit consent. The Single Judge takes the view that such exceptions are grounded on the fact that a child – as well as in some instances people with serious disabilities – cannot give a legally valid consent. Accordingly, the Single Judge is of the view that the ratio behind the participation on behalf of a victim who is a child or a disabled cannot be applied in case of an application on behalf of a deceased person due to the essential difference between the two scenarios. In the instances referred to in rule 89(3) of the Rules an application is submitted on behalf of a victim – who is a natural person – either with the explicit consent of the victim or in the hypotheses in which no valid consent can be given either because the victim is a child or is disabled. Conversely, in the scenario *sub judice* a deceased individual cannot give consent for the submission of an application on his or her behalf. In any case, even assuming *arguendo* that the submission both of applications on behalf of a child or a disabled person and

on behalf of a deceased person shared one and the same ratio, the Single Judge is of the view that the express possibility for participation in the proceedings on behalf of a victim pursuant to rule 89(3) of the Rules – which is an exception to the general principle that only "*victims*" can be admitted to participate in the proceedings – cannot ground, by analogy, the possibility for participation on behalf of a deceased person.

Furthermore, as held by Trial Chamber II, it is also of relevance for resolving the matter *sub judice* that "*a person acting on behalf of a deceased person cannot be in a position to convey the views and concerns of the deceased accurately, in the sense of article 68(3) of the Statute*". Indeed, pursuant to article 68(3) of the Statute, victims' participation in the proceedings is justified in order to permit them to express their views and concerns with regard to specific issues arising in the course of the proceedings and affecting their personal interests. In light of this, no participation within the meaning of article 68(3) of the Statute can be accorded to a person who has died before the commencement of the criminal proceedings before the Court. The deceased cannot present his or her own "*views and concerns*" on the particular matters arising, *in concreto*, during proceedings which have commenced and are conducted after his or her death. The Single Judge notes, moreover, that both Pre-Trial Chamber III and Trial Chamber III referred to the jurisprudence of the Inter-American Court of Human Rights (IACtHR) in order to justify the participation of the successors on behalf of a deceased person. The Single Judge considers that the said case-law cannot be transposed to the present case, on the basis of the following considerations: (i) human rights institutions like the IACtHR, in contrast to criminal justice bodies, such as the Court, do not deal with individual criminal responsibility, but with State responsibility for human rights violations; and (ii) the jurisprudence of the IACtHR relates to the right of the successors to receive reparation for the harm suffered by the deceased person, whilst in the system of the ICC there is a clear distinction between participation in the proceedings – whose purpose is indeed to convey '*views and concerns*' within the meaning of article 68(3) of the Statute – on the one hand and reparation on the other hand, with the former not being a precondition for the latter.

Furthermore, it is of significance that, whilst article 68(3) of the Statute only makes reference to participation of "*victims*" in the proceedings, article 75 of the Statute distinguishes between reparation to victims and reparation in respect of victims. The French version of the said provision specifically indicates that reparations can be accorded to both victims and "*à leurs ayants droit*", thus clearly defining the potential beneficiary of reparations in respect of victims. Therefore, victims' family members and successors are potentially entitled to receive reparation "*in respect of*" victims, though not having sustained personal harm(s) themselves as a result of the commission of a crime within the jurisdiction of the Court and therefore not being "*victims*" within the meaning of rule 85(a) of the Rules. Therefore, the Single Judge takes the view that the approach of the Inter-American Court of Human Rights to the effect that the damages suffered by the victims up to the time of their death entitle them to compensation and that such right to compensation is transmitted to their heirs by succession is already envisaged in article 75 of the Statute, specifically dealing with reparations, and cannot be used to justify participation in the proceedings on behalf of a deceased person.

Accordingly, in light of (i) a literal reading of the applicable law; (ii) the specific purpose of the exercise of participatory rights before the Chamber; and (iii) the clear distinction between participation and reparation in the system of the Court, the Single Judge is of the view that a deceased person cannot be considered as a "*victim*" within the meaning of article 68(3) of the Statute and rule 85(a) of the Rules for the purposes of participation and cannot therefore be admitted to participate in the proceedings, through another individual acting on his or her behalf. Accordingly, applications for participation made on behalf of deceased persons will be rejected. However, the Single Judge wishes to clarify that relatives of a deceased person may be admitted, as victims themselves, to participate in the proceedings on their own behalf if they prove that they have personally suffered mental or material harm as a result of the death of said person, in accordance with the requirements provided for in rule 85(a) of the Rules. Accordingly, the Single Judge will only consider these applications insofar as they relate to a harm personally suffered by the applicant, and not to the harm suffered by a deceased member of the applicant's family on whose behalf the applicant is acting.

See No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, paras. 45-57.

Concerning the Defence's challenge to the validity of a number of identity documents, the Chamber recalls that most of these documents have already been accepted by the Chamber in its previous decisions. In addition, the Chamber recalls its "Decision on 772 applications by victims to participate in the proceedings", in which it ruled that "*whenever the documents appended by the applicants have similar features as* [the documents enumerated by the Pre-Trial Chamber] *and the Chamber is satisfied that at this stage they sufficiently establish the applicants' identity, they will be accepted as proof of identity*". The Chamber finds that "*déclarations de reconnaissance*", signed and stamped by the Chef de quartier, cartes de religion and membership cards (*cartes d'adhésion*) are sufficient to establish an applicant's identity. Conversely, the Chamber is of the view that "*cartes sanitaires*" have similar features as vaccination cards and medical cards that were previously rejected by the Chamber. For this reason, they will not be accepted as a valid means of identification.

See No. ICC-01/05-01/08-2011, Trial Chamber III, 15 December 2011, para. 17. See also No. ICC-01/05-01/08-1590-Corr, Trial Chamber III, 21 July 2011, para. 35; and No. ICC-01/05-01/08-1862, Trial Chamber III, 25 October 2011, para. 25.

The Single Judge observes that the identity document attached to the proposed collective application is to be considered authoritative in demonstrating the applicants' identity. Accordingly, the identity information contained in the said document is sufficient for the Single Judge to determine whether the identity of the applicant has been satisfactorily established, and there is no need for the same information to be provided by the applicants in the Individual Declaration which has to be filed for each victim together with the collective application form.

See No. ICC-02/11-01/11-86, Pre-Trial Chamber I (Single Judge), 5 April 2012, para. 23.

The Single Judge considers that the following range of documents may be submitted as proof of the applicants' identity, notably: (i) passport; (ii) national identity card; (iii) birth certificate; (iv) driving license; (v) electoral card; (vi) consular identity card; (vii) death certificate; (viii) documents pertaining to medical treatment; (ix) family registration booklet; or (x) a signed declaration from two witnesses, accompanied by their proof of identity, attesting the identity of the applicant.

The Single Judge observes that, pursuant to rule 89(3) of the Rules, an application for participation may also be made by "*a person acting with the consent of the victim or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is a disabled*". The Single Judge further recalls that individual victims could provide their consent for a third person ("*contact person*") to make a joint single application for all of them. In such cases, the identity of both the applicant and the person acting with the applicant's consent, on his or her behalf or of the contact person must be duly established by the documentation referred to in the paragraph above. When an application is submitted on behalf of a child or a disabled, the linkbetween the person acting on behalf and the applicant must be established, in addition to their respective identities, by the abovementioned documentation.

See No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, paras. 25-26.

The Single Judge recalls that in the 28 May 2013 Decision, she established that the victim applicants can provide one of the identification documents available in the DRC in order to demonstrate their identity as natural persons. These include, *inter alia*: (i) national identity card; (ii) certificate of nationality or attestation in lieu; (iii) passport; (iv) driving license; (v) pension booklet; (vi) student/pupil identity cards; (vii) employee identity cards; (viii) voting card; (ix) civil status acts; (x) documents issued in rehabilitation centres for children associated with armed groups; and (xi) letter from a local authority.

The Single Judge adds that an application for victims' participation may also be made by "*a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or when necessary, a victim who is disabled*", in accordance with rule 89(3) of the Rules. In such case, the identity of both the victim and the person acting with his/her consent or on his/her behalf must be established by any of the documentation referred to in the previous paragraph. Furthermore, in case of an application submitted on behalf of a victim who is a child or is disabled, the link between the victim and the person acting on his or her behalf must also be satisfactorily proven through any of the above-mentioned documentation.

The Single Judge underlines that, unless otherwise stated in her individual assessment contained in Annex A and Annex B, she has considered minor inconsistencies in the information provided by the victim applicants as not affecting the establishment of their identity as natural persons. With the expression "*minor inconsistencies*", the Single Judge identifies discrepancies in the spelling of the first and/or last name of the victim applicant between the identification documents provided and the Simplified Form, or any missing information not capable, by itself, to cast doubts on the identity of the victim applicants (such as the date or place of birth or the ethnicity of the victim applicants or the name of the local authority attesting the identity of the victim applicants). The same holds true for the establishment of the identity of a family member in respect of whom the victim applicant claims to have suffered personal harm.

See No. ICC-01/04-02/06-211, Pre-Trial Chamber II, 15 January 2014, paras. 21-23.

The Single Judge […] notes the Court's resumption of action jurisprudence, whereby closely-connected individuals may continue the action initiated by a participating victim who dies. To resume the action on behalf of a deceased victim, an applicant must provide sufficient evidence: (i) of the death of the victim; (ii) of his or her relationship to the victim; and, at least where the applicant cannot easily be presumed to be entitled to resume the action, (iii) demonstrating his or her appointment by the deceased victim's family members.

[…] [Therefore], the Single Judge sets the following procedure:

(i) When a participating victim dies, the victim's legal representative is to inform the Victims Participation and Reparations Section ('VPRS'). The VPRS is then to amend the consolidated list of participating victims accordingly. The VPRS need not formally file an updated list each time an amendment is required, but an updated consolidated list must be so filed at least twice per calendar year until the conclusion of the proceedings before this Chamber.

(ii) Resumption of action applications, including the necessary supporting materials, must be provided to the VPRS. The VPRS is then to transmit them to the Chamber and, at the same time, to the Office of the Prosecutor, defence for [the Accused] and legal representatives of victims. Redactions may be applied to the versions transmitted as necessary.

(iii) The time limit for any specific objections to the resumption of action is set at 14 days from notification of the relevant application(s).

(iv) In case any objection is raised, the Single Judge will assess the contested application. Conversely, and unless otherwise ordered, when no objection is raised the resumption of action is granted.

(v) Any granted resumption of action must be reflected in the updated list specified in point (i) above.

See No. ICC-02/04-01/15-962, Trial Chamber IX (Single Judge), 30 August 2017, paras. 3-4.

3.4. Organisations or institutions

Rule 85(b) of the Rules of Procedure and Evidence establishes four criteria that have to be met in order to obtain the status of victim, irrespective of the stage of the proceedings in which the applicants wish to participate: (i) the victim must be an organisation or an institution the property of which is dedicated to religion, education, art or science or charitable purposes, and to its historical monuments, hospitals and other places and objects for humanitarian purposes; (ii) the organisation or the institution must have suffered harm; (iii) the crime from which the harm ensued must fall within the jurisdiction of the Court; and (iv) there must be a causal link between the crime and the harm suffered.

At the investigation stage a causal link required by rule 85(b) of the Rules of Procedure and Evidence is being established once the victim presents sufficient evidence allowing to establish grounds to believe that the harm suffered is the result of the commission of crimes falling within the jurisdiction of the Court.

The application for participation was submitted by the headmaster of a school acting on the school's behalf. The documents appended to the application for participation support the conclusion that the headmaster has the *locus standi* to act on behalf of the school. Therefore, the Single Judge is of the opinion that there are grounds to believe that the school on whose behalf the applicant is acting suffered harm, especially as a result of the pillaging, burning and destruction of the school facilities which occurred when the school was attacked, and subsequently occupied by an armed group. The Single Judge considers that there are grounds to believe that the school on whose behalf the applicant is acting suffered harm as a result of the commission of one or more crimes within the jurisdiction of the Court pursuant to article 5 of the Statute and decides that the status of victims authorised to participate in the proceedings at the investigation stage of the situation in the DRC is granted to the said applicant.

See No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, paras. 140-143.

Organisations or institutions seeking to be admitted as participating victims must demonstrate that they are victims within the meaning of Rule 85(b) of the Rules, namely that they 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*'. In order to qualify as victims in the present case, an organisation will have to establish, *prima facie*, the following criteria:

i) Its quality of organisation/institution must be established;

ii) The individual acting on behalf of the organisation/institution must demonstrate his or her capacity to represent the organisation;

iii) The individual acting on behalf of the organisation/institution must establish his or her identity;

iv) The organisation/institution has suffered direct harm; and

v) The harm suffered is as a result of an incident falling within the parameters of the confirmed charges.

i. Quality of organisation/institution

The Chamber will consider any document as evidence of the establishment, creation or registration of the organization/institution.

ii. Individual acting on behalf of the organisation/institution

The individual acting on behalf of the organisation/institution must provide information on his capacity to do so. His or her identity must also be established in accordance with the criteria set out above for individual applicants. Should the person acting on behalf of the organisation/institution also wish to apply as an individual victim, he or she must also fill in a separate form for individual applicants.

iii. Direct harm suffered as a result of a crime charged

Pursuant to Rule 85(b) of the Rules, the Chamber will only accept applications emanating from organisations/institutions which properties have sustained direct harm.

[…]

As a preliminary matter, the Chamber notes that the three applicants filled in the application form for organisations. The Chamber notes that the applications are incomplete if they were to be assessed as organisations, as no proof is provided that the buildings mentioned are organisations/institutions within the meaning of Rule 85(b) of the Rules and that the individuals submitting the applications have capacity to represent the organisations/institutions. However, the Chamber considers that the content of the Applications, in particular the description of the harm suffered and of the reparation sought, shows that the applicants intended to apply as individuals rather than as acting on behalf of an organisation/institution. In light of this, the Chamber will assess the Applications in light of the criteria set in Rule 85(a) of the Rules. This is without prejudice of the applicants resubmitting a participation form as individuals acting on behalf of the organisations/institutions mentioned in their respective applications.

See No. ICC-01/12-01/15-97-Red, Trial Chamber VIII, 8 June 2016, paras. 23-26, and 28.

The Chamber notes that, whereas, […] the letter attached to the Application does not state the relationship between the designated person and the institution in question, it is nonetheless signed by the legal representative of the authority which runs the institution and vests the new person with powers to "[TRANSLATION] *represent* [said institution] *before the* [Court]".

The Chamber considers that, on the basis of the information contained in the Application and the supporting documents, the person designated as the new representative has clearly established his or her capacity to act on behalf of Victim a/0071/08 in the instant proceedings. Furthermore, the protective measures granted to victims apply also to the new representative.

See No. ICC-01/04-01/07-3721-tENG, Trial Chamber II, 12 December 2016, paras. 15-16.

3.5. Crimes under the jurisdiction of the Court

To fall within the jurisdiction of the Court, a crime must meet the following conditions: it must be included in the crimes enumerated in article 5 of the Statute, that is to say, the crime of genocide, crimes against humanity and war crimes; the crime must have been committed within the time period laid down in article 11 of the Statute; and the crime must meet one of the two alternative conditions described in article 12 of the Statute.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, para. 85. See also No. ICC-01/04-01/06-228-tEN, Pre-Trial Chamber I, 28 July 2006, p. 14; No. ICC-01/04-177-tENG, Pre-Trial Chamber I, 31 July 2006, p. 14; No. ICC-01/04-01/07-4, Pre-Trial Chamber I, 6 July 2007, para. 11 (reclassified as public on 12 February 2008); No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, para. 5; and No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, para. 37.

The second requirement pursuant to rule 85(a) of the Rules is that the incidents described by the applicants appear to constitute "[a] *crime within the jurisdiction of the Court*".

The Single Judge recalls that, for a crime to fall within the jurisdiction of the Court, it must be one of those referred to in article 5(1)(a) to (c) of the Statute and defined in articles 6, 7 and 8 of the Statute (jurisdiction *ratione materiae*) and must have been committed within the timeframe specified in article 11 of the Statute (jurisdiction *ratione temporis*). In addition, the crime must meet one of the two alternative conditions embodied in article 12 of the Statute, namely it must be committed either (i) on the territory of a State Party to the Statute or a State which has made a declaration provided for in article 12(3) of the Statute (jurisdiction *ratione loci*) or (ii) by a national of a State Party or a State which has made the said declaration (jurisdiction *ratione personae*). However, not any incident purportedly qualifying as a crime within the jurisdiction of the Court fulfils *per se* the said criterion of rule 85(a) of the Rules. In particular, it is necessary that a link between the incident(s) described by the applicant and the case brought by the Prosecutor against the suspects be established. At this stage of the proceedings, the scope of the case is delineated by the facts contained in the charges as presented by the Prosecutor in the Document Containing the Charges (DCC). The Single Judge is thus called upon to ascertain whether the incident(s) described by the applicants fall(s) within the factual scope of the case to be examined by the Chamber at the confirmation of charges hearing.

See No. ICC-01/09-02/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 44-46. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, paras. 58-60; and No. ICC-01/04-01/10-351, Pre-Trial Chamber I (Single Judge), 11 August 2011, para. 21.

The second requirement that must be fulfilled pursuant to rule 85(a) of the Rules is that the events described by the victim applicants constitute "[a] *crime within the jurisdiction of the Court*", namely one of those referred to in article 5(1) of the Statute, when committed in accordance with the temporal and territorial framework provided for in articles 11 and 12 of the Statute, respectively.

Furthermore, for the purpose of victims' participation in any given case, it is necessary that a link between the events described by the victim applicants and the case brought by the Prosecutor against the suspect be established. At this stage of the proceedings, the scope of the case against Mr. Ntaganda is shaped by the charges presented by the Prosecutor in her DCC. Therefore, it is the duty of the Single Judge to assess whether the events described by each victim applicant fall within the scope of the case to be examined by the Chamber at the confirmation of charges hearing.

[…]

The Single Judge recalls that for a victim applicant to qualify under rule 85(a) of the Rules, it suffices that he or she is a victim of at least one crime with which the suspect is charged. The status of victims in the present proceedings does not differ in nature between victim applicants who have been recognized as victims of one of the crimes allegedly committed by the suspect and victim applicants who have been recognized as victims of more than one crime with which the suspect is charged. Once admitted, they are all equally considered as victims participating in the present case. However, to the extent possible, in her individual assessment of each claim, the Single Judge has attempted to reflect the full range of victimization suffered by the victim applicants, provided that they have furnished sufficient information to this effect.

[…]

The Single Judge considers the various temporal references provided by the victim applicants to be the natural consequence of the recollection of traumatic events that took place more than ten years ago. In addition, while the determination of each application for participation under rule 85(a) of the Rules remains necessarily individual, the Single Judge recalls that the applications have been grouped by the VPRS according to appropriate criteria, mostly based on the victimization suffered and the incidents in which the victim applicants were involved. This grouping exercise aimed at organizing the considerable amount of applications received with a view not to adversely affect the right of alleged victims to apply for participation in the proceedings of the case, and at facilitating the Single Judge's determination pursuant to rule 85(a) of the Rules.

In this respect, the Single Judge observes that the narrative of victim applicants who provided less precise temporal references is consistent with the description of facts given by several victim applicants belonging to the same group, who provided specific dates falling precisely within the temporal parameters of the charges. Therefore, the Single Judge assessed the applications of those persons referring to the temporal indicators enumerated in the preceding paragraph as falling within the temporal parameters of the charges against the suspect.

See No. ICC-01/04-02/06-211, Pre-Trial Chamber II, 15 January 2014, paras. 24-25, 27, and 53-54.

Concerning this argument, the Chamber is of the view that a case-by-case analysis is required for each of these applications in order for it to determine whether, in light of the Confirmation of Charges Decisions against Mr Gbagbo and against Mr Blé Goudé, and the subsequent joinder of the cases, the alleged harm suffered is sufficiently linked to the crimes charged against either accused. This analysis is necessary as the Pre-Trial Single Judge made her determination on the basis of the Document Containing the Charges in the pre-trial stage, prior to the issuance of the Confirmation of Charges Decision in the *Blé Goudé* case and the joinder of the two cases.

See No. ICC-02/11-01/15-379, Trial Chamber I, 7 January 2016, para. 52.

3.6. Harms suffered

The term "*harm*" is not defined either in the Statute or in the Rules. In the absence of a definition, the Chamber must interpret the term on a case-by-case basis in the light of article 21(3) of the Rome Statute, according to which "*the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights*". The determination of a single instance of harm suffered is sufficient, at this stage, to establish the status of victim.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, paras. 81-82. See also No. ICC-01/04-545, Pre-Trial Chamber I (Single Judge), 4 November 2008, para. 26.

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 rule 85 if they are suffered personally by the victim. The issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims.

[…]

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.

[…]

The notion of victim necessarily implies the existence of personal harm but does not necessarily imply the existence of direct harm.

See No. ICC-01/04-01/06-1432 OA9 OA10, Appeals Chamber, 11 July 2008, paras. 1, 32, and 107.

As provided by the Appeals Chamber in accordance with rule 85(a) of the Rules, the harm suffered by a natural person must be personal harm (*viz*. suffered personally by a victim), regardless of whether he or she is a direct or indirect vicitms of a crime. Given the opportunity to participate that is thus extended to indirect vicitms, the Trial Chamber grants participation to the parents of victims for any personal harm they suffered as a result of their children's alleged recruitment.

See No. ICC-01/04-01/06-2063, Trial Chamber I, 21 July 2009, para. 28.

The Single Judge considers that for the purposes of recognition as victims in the proceedings before the Court, applications from members of the immediate family of a deceased victim will usually require less information and/or evidence regarding the nature of the relationship with the deceased victim for such applicants to be recognised as victims, as these members of the family are usually the most affected by the death of their family member. As such emotional harm is less apparent in the case of persons from a more distant family or from outside of the family circle, more information and/or evidence would be required to substantiate the claim that the relationship of the applicant and the deceased person was of such a nature that the death of that person caused emotional harm to the applicant and/or resulted in a loss of economic support.

See No. ICC-02/05-02/09-255, Pre-Trial Chamber I, 19 March 2010, para. 30.

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.

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. 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.

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.

See No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 83-85. See also, No. ICC-01/05-01/08-320, Pre-Trial Chamber III, 12 December 2008, paras. 39-40

The third element to be considered is the "*harm*" that the applicants claim to have suffered. The Single Judge notes and endorses the established jurisprudence of the Court, according to which the "*harm*" within the meaning of rule 85(a) of the Rules includes physical injury, emotional suffering and economic loss. However, it is not sufficient that the harm claimed by the applicants falls within one of the categories specified above. Within the meaning of rule 85(a) of the Rules the harm must also: (i) ensue from the crime(s) with which the suspects are charged; and (ii) be personal, *i.e.* it must have been personally suffered by the applicant.

The Single Judge holds that the standard of causation between the crime and the harm relevant for the purposes of the present decision cannot be established with precision *in abstracto*. Conversely, this shall be assessed on a case-by-case basis in light of all the circumstances of the events as described in the applications. Further, as indicated, the second element that qualifies the harm within the meaning of rule 85(a) of the Rules is that it be personally suffered by the applicants. In this respect, the Single Judge recalls and endorses the findings of other Chambers of the Court, including that of the Appeals Chamber to the effect that "*the notion of victim necessarily implies the existence of personal harm*".

Finally, with respect to the definition of harm, the Single Judge considers that the relevant harm within the meaning of rule 85(a) of the Rules could also be indirect under certain conditions. Indeed, as held by the Appeals Chamber, "*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*". In particular, the Single Judge takes the view that applicants may be admitted to participate in the present proceedings also in case they suffered harm: (i) as a result of the harm suffered by the direct victim; or (ii) whilst intervening to help direct victims of the case or to prevent the latter from becoming victims because of the commission of these crimes.

With respect to indirect victims, the Single Judge wishes to clarify that emotional harm may be claimed by an immediate family member of the direct victim, only insofar as the relationship between them has been sufficiently established. This could be, for example, the case where the applicant claims to have suffered emotional harm as a result of the death of a family member, which in turn occurred as a result of the crimes with which the suspects are charged. It is therefore required that a proof of the identity of the direct victim as well as a proof of the link between the applicant and the direct victim be provided in order for the present requirement to be met.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 50-55. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, paras. 64-69; and No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, paras. 28-30.

The notion of "*harm*" within the meaning of rule 85(a) of the Rules includes physical injury, emotional suffering and economic loss. In addition, the harm claimed by the applicant must also (i) result from the commission of a crime with which the suspect is charged and (ii) be personally suffered by the applicant.

The Single Judge has already stated in the First Decision on Victims' Participation that the causality between the commission of the crime and the harm suffered by the applicant cannot be established in abstracto but shall be assessed on a case-by-case basis, in light of the information available in the application form and the supporting material, when available. The Single Judge recalls that the link between the alleged harm and the crimes charged, at this stage, must be established on a *prima facie* basis. The applicant does not need to demonstrate that the alleged incidents forming the basis of the charges brought by the Prosecutor are the only or substantial cause of the harm suffered by the applicant. Suffice is to demonstrate that they could have objectively contributed to such harm. Nonetheless, when the harm alleged by the applicant appears to be remotely connected to the alleged crimes, his or her application for participation will be rejected or deferred as it does not meet the requirement of rule 85(a) of the Rules.

The Single Judge further recalls that the personal harm within the meaning of rule 85(a) of the Rules can also be indirectly suffered by victims. In this respect, the Appeals Chamber has stated that "[h]*arm 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*". Accordingly, the Single Judge is of the view that applicants may be admitted as victims in the present proceedings in case they have suffered harm: (i) as a result of the harm suffered by the direct victim; or (ii) whilst intervening to help direct victims of the case or to prevent the latter from becoming victims as a result of the commission of a crime with which the suspect is charged. With regard to the scenario described in sub (i), indirect victims must establish that, as a result of their relationship with the direct victim, the harm suffered by the latter gives rise to their harm. In addition, the identity of both the indirect and direct victims as well as their kinship must be sufficiently proven.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, paras. 31-33.

The third requirement to be considered is the "*harm*" that the victim applicants claim to have suffered, which is in line with the established jurisprudence of the Court, includes physical injury, emotional suffering and economic loss.

According to rule 85(a) of the Rules the harm must: (i) ensue from the crime(s) with which the suspect is charged; and (ii) be personal, *i.e.* it must have been personally suffered by the victim applicant. In this regard, the Single Judge holds that the standard of causation between the crime and the harm relevant for the purposes of the present decision cannot be established with precision in abstracto. It shall be assessed on a case-by-case basis in light of all the circumstances of the events as described in the applications.

The second element that qualifies the harm within the meaning of rule 85(a) of the Rules is that it be personally suffered by the victim applicants. In this respect, the Single Judge recalls the findings of other Chambers of the Court, including the Appeals Chamber, to the effect that "*the notion of victim necessarily implies the existence of personal harm*".

With respect to the definition of harm, the Single Judge considers that the relevant harm within the meaning of rule 85(a) of the Rules could also be indirect under certain conditions. Indeed, as held by the Appeals Chamber, "[h]*arm 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*". In particular, the Single Judge takes the view that victim applicants may be admitted to participate in the present proceedings also in case they suffered harm: (i) as a result of the harm suffered by the direct victim; or (ii) whilst intervening to help direct victims of the case or to prevent the latter from becoming victims because of the commission of these crimes.

With respect to indirect victims as described in the preceding paragraph, sub (i), the Single Judge underlines that personal harm may be claimed by an immediate family member of the direct victim, only insofar as the relationship between them has been sufficiently established. This could be, for example, the case where the victim applicant claims to have suffered personal harm as a result of the death of an immediate family member, which in turn occurred as a result of the crimes with which the suspect is charged. It is therefore required that a proof of the identity of both the direct victim and the victim applicant as well as a proof of the link between them be provided in accordance with paragraph 21 above in order for the present requirement to be met.

The Single Judge stresses that it is sufficient that any given victim applicant has personally suffered one of the recognized harms. Regardless of whether a victim applicant has suffered only physical, psychological or material harm or all three harms, his or her status of victim does not change. Nevertheless, the Single Judge has attempted in her individual assessment to recognize all the appropriate harms allegedly suffered by the victim applicants, in the event they have provided sufficient information in this regard.

[…]

As recalled above, a victim applicant may participate as victim in the proceedings if he or she has suffered personal harm as a result of a crime committed against an immediate family member. The Single Judge agrees with the submissions of the Defence that not every member of the family may claim to have suffered personal harm as a result of crimes committed against other members of the same family nucleus. The Single Judge considers that immediate family members of a victim applicant are, in principle, parents, children, siblings and spouses.

With regard to other members of the family, such as uncles, aunts, nephews, nieces or grandparents, the Single Judge considers that it would be arbitrary to assume that they are automatically excluded from the notion of "*immediate family*" on account of their second degree familiarisation with the victim applicant. However, the Single Judge considers that, in order to claim victim status within the meaning of rule 85(a) of the Rules, the victim applicant must establish that at the time of the victimization, a sufficient proximity existed between him- or herself and the family member(s) who directly suffered harm as a result of one or more crimes with which the suspect is charged. The Single Judge is of the view that such proximity necessarily depends on the particular circumstances of each case and may, for instance, be the case where the victim applicant grew up with the family member in question or where he or she raised such a family member. Conversely, instances where the victim applicant was assisting the family member or vice versa in economic activities will not suffice as such to demonstrate the required kinship between them By the same token, stating that the victim applicant considered his or her family members in question as a father will not be sufficient, in the absence of further information as to the reason of such perception by the victim applicant.

Therefore, absent the type of information exemplified above, the Single Judge may not be satisfied that a sufficiently close degree of kinship is established between the victim applicant and the family member, in order for the former to be in a position to claim personal harm as a result of crimes committed against the latter. However, the Single Judge recalls that such victim applicants may still qualify as victims under rule 85(a) of the Rules, if they provided sufficient information to demonstrate that they have directly suffered personal harm as a result of the commission of crimes with which the suspect is charged.

See No. ICC-01/04-02/06-211, Pre-Trial Chamber II, 15 January 2014, paras. 28-33, and 48-50.

At first, the Single Judge recalls that in order to qualify as victim within the meaning of rule 85(a) of the Rules, it suffices that an applicant had suffered at least one of the recognized harms (physical, psychological or material harm) as a result of at least one crime with which the suspect is charged. The status of victim in the present proceedings does not differ in nature between victim applicants who have suffered only one harm as a consequence of one of the crimes allegedly committed by the suspect and victim applicants who have suffered multiple harms resulting from the commission of more than one crime with which the suspect is charged. Once admitted, all applicants are equally considered as victims participating in the present case. However, to the extent possible, in her individual assessment of each application for participation, the Single Judge has attempted to reflect the full range of victimization suffered by the victim applicants, rovided that they have furnished sufficient information to this effect.

[…]

A number of applications have been rejected in part as the victim applicants failed to demonstrate either the identity of or the kinship with the family members in respect of whom they claim to have indirectly suffered personal harm as a result of the crimes charged, or they otherwise did not establish the sufficient degree of kinship for these family members to be considered as "*immediate*". In this respect, the Single Judge recalls that a victim applicant may participate as victim in the proceedings if he or she has suffered personal harm as a result of a crime committed against an immediate family member. The Single Judge considers that immediate family members of a victim applicant are, in principle, parents, children, siblings and spouses.

As stated in the 15 January 2014 Decision, with regard to other members of the family, such as uncles, aunts, nephews, nieces or grandparents:

it would be arbitrary to assume that they are automatically excluded from the notion of "immediate family" *on account of their second degree familiarisation with the victim applicant. However, in order to claim victim status within the meaning of rule 85(a) of the Rules, the victim applicant must establish that at the time of the victimization, a sufficient proximity existed between him or herself and the family member(s) who directly suffered harm as a result of one or more crimes with which the suspect is charged.*

The Single Judge considers that such proximity necessarily depends on the particular circumstances of each case and may, for instance, be the case where the victim applicant grew up with the family member in question or where he or she raised such a family member. Conversely, instances where the victim applicant was assisting the family member or vice versa in economic activities will not suffice as such to demonstrate the required kinship between them. By the same token, stating that the victim applicant considered his or her family members in question as a father will not be sufficient, in the absence of further information as to the reason of such perception by the victim applicant.

However, in most of these cases, the victim applicants who claim harm in respect of non-immediate family members also directly suffered personal harm as a result of crimes with which the suspect is charged. Accordingly, they qualify as victims and are entitled to participate in the proceedings of the present case.

See No. ICC-01/04-02/06-251, Pre-Trial Chamber II, 7 February 2014, paras. 21, and 23-26.

The Single Judge observes that some applicants stated, in their application forms, that they applied for participation on behalf of deceased relatives, pursuant to rule 89(3) of the Rules of Procedure and Evidence. In these instances, the Single Judge has considered the applicants as indirect victims of the crimes as they clearly claim to have suffered personal harm as a result of the victimization of their family member(s).

Conversely, a limited number of applicants applied for participation with the consent of or on behalf of victims who are not deceased, pursuant to rule 89(3) of the Rules. In these instances, in order for the applications to be considered complete, the Single Judge has evaluated whether the identities of both the victim and the person acting on behalf of or with the consent of the victim are duly established, as well as the relationship between them in case the application is submitted on behalf of a child or a disabled person.

Further, the Single Judge observes that a number of applicants submitted two application forms, thereby receiving two victim codes, because they made the following claims: (i) as direct victims as well as acting on behalf of another victim, under rule 89(3) of the Rules; (ii) as direct victims of crimes for which the suspect allegedly bears individual criminal responsibility and as indirect victims as a result of the harm suffered by a family member; or (iii) as indirect victims as a result of the harm(s) suffered by two distinct family members. In the cases mentioned under (i), the Single Judge is of the viewthat an applicant can retain two distinct victim codes, as he or she will participate in the present proceedings on his/her own behalf and, at the same time, on behalf or with the consent of another victim. Accordingly, these applications have been assesses separately.

To the contrary, in all instances under (ii) and (iii), the Single Judge has assessed the applications jointly, on the basis that one and the same applicant may claim harm as a result of a direct harm and an indirect harm, in so far as these harms arise from the commission of crimes for which the suspect allegedly bears individual criminal responsibility. Accordingly, for reasons of efficiency in keeping track of the victims in the present case, the Single Judge instructs the Victims Participation and Reparations Section (the "VPRS") to assign only one victim code to these applicants and to notify the Chamber and the parties accordingly. The Single Judge clarifies that, as a result of the joint assessment referred to in this paragraph, the final number of applicants admitted as victims in the present case is lower than the number of applications received, although all applicants qualify as victims pursuant to rule 85(a) of the Rules.

In some cases, applicants claim to have suffered harm as a result of conduct that does not underlie the crimes for which the suspect allegedly bears individual criminal responsibility, such as pillaging. The Single Judge considers, as anticipated above, that conduct falling outside the factual parameter of the case, as it currently stands, may not be considered for the purpose of qualifying as participating victims in the present case. Nevertheless, in all such instances, applicants also claimed harm as a result of conduct that constitutes crimes reflected in the article 58 Decision and in the Warrant of Arrest. Therefore and taken into account that all other conditions appear to be met, these applicants also qualify as victims under rule 85(a) of the Rules.

See No. ICC-02/11-02/11-111, Pre-Trial Chamber I (Single Judge), 1 August 2014, paras. 9-13.

3.7. The causal link

At the case stage, the Applicants must demonstrate that a sufficient causal link exists between the harm they suffered and the crimes for which there are reasonable grounds to believe that the persons brought to the court bears criminal responsibility and for which the Chamber has issued an arrest warrant.

See No. ICC-01/04-01/06-172-tEN, Pre-Trial Chamber I, 29 June 2006, p. 6. See also No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, para. 38.

The causal link required by rule 85 of the Rules of Procedure and Evidence at the case stage is substantiated when a victim, and where applicable, close family or dependants, provide sufficient evidence to allow the Chamber to establish that the victim has suffered harm directly linked to the crimes contained in the arrest

warrant or that the victim has suffered harm whilst intervening to help direct victims of the case or to prevent the latter from becoming victims because of the commission of these crimes.

See No. ICC-01/04-01/06-172-tEN, Pre-Trial Chamber I, 29 June 2006, pp. 7-8. See also No. ICC-01/04-01/06-601-tEN, Pre-Trial Chamber I, 20 October 2006, p. 9; and No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, paras. 28-31.

With respect to incidents that are not included in the warrants of arrest issued in the case, the Chamber has to be satisfied that the applicants have suffered harm "*as a result of a crime within the jurisdiction of the Court, such crime having allegedly been committed within the temporal and territorial limits of the relevant situation*". Accordingly, the statements made by the applicants in support of their claim need to be corroborated by sufficient information from other sources (particularly, but not exclusively, U.N. and NGO reports), confirming at least to a high degree of probability the occurrence of the incidents related by the applicants, both in temporal and territorial terms.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, para. 106.

During the trial stage of a case the right of victims to participate is principally dependent on whether their personal interests are affected in accordance with article 68(3) of the Statute, and rule 85 of the Rules which provides a definition of "*victims*" should be read in light of that article. Rule 85 of the Rules does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I, and this restriction is not provided for in the Rome Statute framework.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, para. 93.

The Single Judge notes, however, that she will only consider these applications insofar as they relate to the harm allegedly suffered by the applicant, and not to the harm suffered by the deceased member of the applicant's family on whose behalf the applicant is acting.

See No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, para. 25.

For the purposes of participation in the trial proceedings, the harm alleged by a victim and the concept of personal interests under article 68(3) of the Statute must be linked with the charges confirmed against the accused.

See No. ICC-01/04-01/06-1432 OA9 OA10, Appeals Chamber, 11 July 2008, para. 2.

The Chamber notes that some of the seven applicants claim, to differing extents, to have suffered harm due to the African Union ("AU") absence from the Haskanita area. In particular, these applicants allege that, since the AU Mission in Sudan ("AMIS") left the MGS Haskanita as a result of the attack perpetrated by the rebels on the camp, they had to leave the village of Haskanita and/or lost their employment at the base.

The information provided to the Chamber does not support the conclusion that the attack on the MGS Haskanita directly led to the absence of the AU in Haskanita.

In any event, even if it could be established that the attack on the MGS Haskanita somehow contributed to the harm allegedly suffered by the applicants, such harm would be too remote from the alleged crimes to meet the requirement of having occurred "*as a result*" of those crimes, within the meaning of rule 85(a) of the Rules.

[…]

The Chamber is of the view that the deficiency identified by the Single Judge in the *Abu Garda* case, in relation to the link between the crimes with which the suspects are charged and the harm allegedly suffered by the applicants, persists, since neither applicant refers to the crimes allegedly committed at the MGS Haskanita as having been the cause of the harm suffered. The Chamber is, therefore, not satisfied that the harm claimed by the applicants was caused by the attack on the compound itself (and the crimes allegedly committed during such attack) as opposed to the attack allegedly perpetrated on the village of Haskanita. Moreover, in both cases, the applicants contend that that they abandoned the village of Haskanita only after the rebels arrived in the town and began pillaging. It seems, therefore, that they left the area of Haskanita in response to the attack allegedly perpetrated by the rebels on the village of Haskanita and not as a result of the attack on the MGS Haskanita.

For these reasons, the Chamber is of the view that the applicants cannot be considered to be victims of the Case since the events as a result of which they allegedly suffered harm are not the incidents which form the basis of the crimes with which the suspects are charged. Accordingly their applications are rejected.

See No. ICC-02/05-03/09-89, Pre-Trial Chamber I, 29 October 2010, paras. 13-15, and 21-22.

The Chamber has taken into account the overall picture provided by the applicant, bearing in mind the applicant's account and any documents submitted to the Chamber, in order to reach a *prima facie* determination as to whether the applicant suffered harm as a result of a crime included in the charges against the accused.

See No. ICC-01/04-01/06-2659-Corr-Red, Trial Chamber I, 8 February 2011, para. 28. See also No. ICC-01/04-01/06-2764-Red, Trial Chamber I, 25 July 2011, para. 23.

The link between the commission of the crime and the harm suffered by the applicant shall be assessed in light of the information available and established on a *prima facie* basis. The Chamber finds it sufficient that an applicant demonstrates, for example, that the alleged crimes could have objectively contributed to the harm suffered. Accordingly, the crimes charged do not have to be the only cause of the harm suffered by the applicant.

See No. ICC-01/12-01/15-97-Red, Trial Chamber VIII, 8 June 2016, para. 22.

4. The application process

4.1. In general

According to rule 89(1) of the Rules the Prosecution and the Defence are entitled to reply to any application for participation filed by victims.

See No. ICC-01/04-73, Pre-Trial Chamber I, 21 July 2005, p. 2.

The use of standard application forms is not compulsory as long as the applicant provide the information referred to in regulation 86(2) of the Regulations of the Court.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, para. 102.

The Single Judge considers that the process to decide upon applications for the procedural status of victim in situation and case proceedings before the Pre-Trial Chamber ("*the application process*") is a specific procedural feature provided for in rule 89 of the Rules and regulation 86 of the Regulations. Its object and purpose is limited to the determination of whether such procedural status should be granted to applicants. Hence, the application process is prior to, distinct and separate from, the determination and exercise of the modalities of participation by those to whom the procedural status of victim has been granted.

Furthermore, in the view of the Single Judge, the application process is not related to questions pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witnesses as it only aims at determining whether the procedural status of victim should be granted to applicants. Hence, it can be distinguished from criminal proceedings before the Court, which include the investigation of a situation, the initiation of a case and the pre-trial, trial and appeal stages of a case, which are governed by specific articles, rules and regulations. Moreover, the Single Judge considers that the application process is not related to questions pertaining to the award of reparations, which are the subject of the proceedings provided for in article 75 of the Statute and rule 94 of the Rules.

[…]

Moreover, the Single Judge finds that, according to rule 89 of the Rules and regulation 86 of the Regulations, the exhaustion of domestic remedies is not a condition to be fulfilled by applicants, unlike what is provided for in article 35 of the European Convention on Human Rights and article 46 of the American Convention on Human Rights.

[…] [I]nformation concerning the conditions under which the applicants have been granted asylum in a third country, the qualification of interpreters who were mentioned in the application form, the applicants' prior statements if any, to other international institutions, the identity and role of persons listed as witnesses during the application process and the resubmission of an application if a witness has a conflict of interest, are unnecessary for the Chamber's decision on the applications.

[…]

As explained above, the application process is not related to questions pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witnesses. Hence, article 67(2) of the Statute is not applicable in the context of the application process. Moreover, the Single Judge emphasizes that the role of Applicants in the application process can by no means be confused with that of witnesses in criminal proceedings.

The Single Judge also recalls that, as it has already stated, the Prosecution's obligation under rule 77 of the Rules is limited to permitting the Defence to inspect only those books, documents, photographs and tangible objects (a) on which the Prosecution intends to rely at the confirmation hearing or trial; (b) which are material to the preparation of the defence for the purpose of the confirmation hearing or the trial; or (c) which have been obtained from or belonged to the suspect or accused person. Hence, the Single Judge considers that this rule is also not applicable in the context of the application process.

See No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, paras. 5-6, 12, 17, and 20-21. See also No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, paras. 20-23; and No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, para. 8.

Finally, the Single Judge observes that not notifying the rule 89(1) observations does not unduly prejudice the applicants. Pursuant to rule 89(2) of the Rules, applicants are entitled to submit new applications should their applications be rejected. However, they are neither entitled to reply to the observations of the Prosecution and the Defence nor to request leave to appeal the decision of the Chamber on the merits of their applications.

While the absence of notification of rule 89(1) observations will prevent applicants from knowing the specific challenges made in the parties' observations, the Chamber's decision on their applications will indicate any further information required or the reasons for which the applications were rejected. Hence, notification of the Chamber's decision will place applicants in a position to re-apply under rule 89(2) of the Rules to correct any deficiencies.

See No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, paras. 16-17. See also No. ICC-01/04-437, Pre-Trial Chamber I (Single Judge), 18 January 2008, p. 3.

[D]ue to the specific object and purpose of the application process, applicants "*are neither entitled to reply to the observations of the Prosecution and the Defence nor to request leave to appeal the decision of the Chamber on the merits of their applications*"; and that, pursuant to rule 89(2) of the Rules, applicants are only entitled "*to submit new applications should their applications be rejected*".

[I]f applicants do not have procedural standing to seek leave to appeal the decisions of the Chamber on the merits of their applications, they do not have standing to seek leave to appeal interlocutory decisions of the Chamber addressing potential procedural matters relating to the application process prior to a decision on the merits of their applications.

See No. ICC-01/04-437, Pre-Trial Chamber I (Single Judge), 18 January 2008, pp. 3-4.

[...] [T]he Chamber considered that it was not necessary to determine in any great detail at this stage of the proceeding the precise nature of the causal link between the crime and the alleged harm and that the determination of a single instance of harm suffered was sufficient.

Moreover, the Appeals Chamber noted that in rendering a decision, the Chamber must not necessarily recite each and every factor that was before it, but must "*identify which facts it found to be relevant in coming to its conclusion*".

See No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, para. 3.

The first element taken into consideration by the Single Judge in deciding on the status of an applicant will be the application itself; the second element taken into consideration by the Single Judge will be the observations submitted by the Defence and the Prosecutor, and any additional information that the Chamber may receive pursuant to regulation 86(7) of the Regulations of the Court; and, the third element taken into consideration will be any information from the application itself, viewed in a light most favorable to the Applicants, from which the Single Judge may directly infer the material, moral and contextual elements of the crimes within the jurisdiction of the Court.

A decision to grant an Applicant a procedural status in the proceeding in no way predetermines any factual findings that could be made by a Chamber in any judgment on the merits.

See No. ICC-01/04-505, Pre-Trial Chamber I (Single Judge), 3 July 2008, paras. 29-30.

The Single Judge finds that with respect to victim applications, the intermediaries who assist applicants in accessing the Court are essential to the proper progress of the proceedings. Intermediaries who assist applicants, do not only explain the relatively complicated 17-page application form to applicants who are, for the most part, wholly unfamiliar with the Court's proceedings, but also provide logistical support to the applicants to ensure that the application, which is often filled out in relatively inaccessible villages in the DRC, is filed with the Court.

See No. ICC-01/04-545, Pre-Trial Chamber I (Single Judge), 4 November 2008, para. 25.

In the opinion of the Chamber, a distinction should be made between a decision granting or denying victim status to an applicant and a decision defining the modalities of his or her participation. It considers that, in the interest of the proper administration of justice, victims authorised to participate in the proceedings at the pre-trial stage must, in principle, and subject to the considerations set forth below, automatically be authorised to participate in the proceedings at the trial stage, without the need for their applications to be registered and assessed a second time. In the Chamber's view, the analysis by the Pre-Trial Chamber, in particular in respect of the criteria set forth in rule 85 of the Rules with reference to the confirmation of charges, remains completely valid in principle, and does not have to be revisited at the subsequent stages of the proceedings. The same does not apply to the modalities of participation set forth in article 68 of the Statute and rule 89 of the Rules, which the Chambers generally consider must be reassessed, taking into account the stage of the proceedings, the prejudice which may be caused to the rights of the Defence and the requirements of a fair trial.

See No. ICC-01/04-01/07-933-tENG, Trial Chamber II, 26 February 2009, para. 10.

The Chamber notes that no provision of the Court's Statute, or of its Rules and Regulations, requires applications for participation to be completed by the applicants themselves. Furthermore, it accepts that the role of intermediaries in completing the application forms for participation is important, in that they provide persons who may be illiterate with explanations about the content of a form which is long, and complicated in places by the use of legal terms, and may indeed help them to produce a sketch describing the location where the events occurred. At this stage in the proceedings the Chamber has assessed the veracity of the facts reported by applicants by conducting a *prima facie* analysis of their consistency, and their relation to the charges

confirmed by the Pre-Trial Chamber. In the Chamber's view, the fact that one statement is similar to others is not in itself sufficient to affect its credibility, but means that the statement needs to be scrutinised in light of the other information contained in the application for participation.

Being concerned, however, to give due weight to the Defence observations, the Chamber calls on the Registry to remind intermediaries that their role is restricted to explaining to applicants any terms which they may not understand and assisting them in drafting their application. They should not, however, exert any influence whatsoever on the actual content of statements, in particular in respect of anything relating to the nature of the alleged crimes or the harm suffered.

See No. ICC-01/04-01/07-1491-Red-tENG, Trial Chamber II, 23 September 2009, paras. 42-43.

Regulation 86(8) of the Regulations of the Court is clear in its terms: a decision on an application to participate is to apply throughout the proceedings in the same case, subject to the opportunities and limitations provided by rule 91 of the Rules. Applying the natural meaning of the words emphasised above, together with a purposive approach, it is clear that a decision on victims' participation taken during the pre-trial stage shall continue to apply at the trial stage, subject to revision under rule 91(1) of the Rules. It is open to the parties to object to the continued participation of any victim, for good cause based on new material that has emerged since the original decision. This approach is broadly consistent with the approach of Trial Chamber I in the *Lubanga* case, in that in its Decision of 18 January 2008 on victims' participation, the Chamber observed:

> *The victims who have the opportunity to participate prior to trial by way of written and oral submissions with the leave of the Chamber are those who currently have been allowed to participate by Pre-Trial Chamber I* (i.e. *victims a/0001/06 to a/0003/06 and a/0105/06), subject to a review by the Chamber of their applications to participate in light of the criteria set out above, and any other victim granted that status hereafter.*

Thereafter, Trial Chamber I carried out a review of their applications in its Decision of 15 December 2008. However, under the approach which the Chamber now approves, it will not undertake a review of those applications granted by the Pre-Trial Chamber unless an application is made by one of the parties, which is based on new material that has emerged since the original decision, or issues are otherwise validly raised for the Chamber's consideration.

By way of an exception to this general approach, the Chamber respectfully agrees with the practice of Trial Chamber II, by which participation is not to be continued at trial if the harm allegedly suffered was not *prima facie*, the result of the commission of at least one crime within the charges confirmed by the Pre-Trial Chamber. However, in the view of the Chamber, each of the 54 victims currently participating has allegedly suffered harm as a result of the commission of at least one crime within the charges confirmed by the Pre-Trial Chamber.

Additionally, the VPRS is to review each of 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, following a report from the VPRS to the Chamber.

If new documents or information are received by the VPRS which may have a material impact on the decision permitting a victim to participate, the Chamber is to be advised immediately. The Chamber understands, however, that for the 54 current participants, no new documents have been submitted. Otherwise, as set out above, the victims authorised to participate in the proceedings at the pre-trial stage shall automatically participate at trial, without the need to re-file their applications for assessment by the Trial Chamber.

See No. ICC-01/05-01/08-699, Trial Chamber III, 22 February 2010, paras. 17-22.

In the view of the Majority, the Statute only envisages a presumption in favour of oral testimony, but no prevalence of *orality* of the procedures as a whole.

See No. ICC-01/05-01/08-1022, Trial Chamber III, 19 November 2010, para. 14.

Contrary to the Majority's argument, article 69(2) of the Statute clearly imposes the principle of primacy of orality in proceedings before the Court. It determines that, as a general rule, "*the testimony of a witness at trial shall be given in person*".

See No. ICC-01/05-01/08-1028, Trial Chamber III, 23 November 2010, para. 6.

For the purposes of proper and expeditious preparation of the confirmation of charges hearing in the present case, it is crucial that the VPRS supports the Chamber in a timely and efficient manner. To that end, the Single Judge sets out her expectations with regard to the assistance provided by the VPRS which will enable the Single Judge to prepare the upcoming proceedings efficiently.

The VPRS will have to first make a distinction between those victims applying for participation in the proceedings and those applying solely for the purposes of reparations. It is recalled that only applications of those victims, who explicitly indicate their wish to participate in the proceedings, may be considered by the Court for participation. In this context, the Single Judge takes note of the first periodic report of the VPRS of 24 February 2011 in the context of the situation in the Republic of Kenya, in which the VPRS informed the Chamber that a large number of applications, using the standard form for reparations, have been received by the VPRS. Subsequently, Legal Representatives submitted declarations by twelve victim applicants in which their intention to participate in the proceedings was expressed, regardless of the reparation standard forms

used. Consequently, a sample declaration was provided for the Chamber's consideration. It was submitted that further declarations by the remaining victim applicants, who submitted applications for reparations but equally wished to participate in the current proceedings, may be presented in due course, if this approach was acceptable to the Chamber.

The Single Judge considers the sample declaration, together with the information contained in the application form for reparations, to be sufficient in order to satisfy herself that the victim applicant wishes to participate in the proceedings. However, noting the fact that those victim applicants had been assisted by Legal Representatives and that the new standard application form, combining the application for participation and reparations, was available at the website of the Court as of 14 September 2010, the Single Judge holds that the Chamber will only accept an application for reparations together with a declaration which has been submitted to the Court before 14 September 2010.

See No. ICC-01/09-01/11-17, Pre-Trial Chamber II (Single Judge), 30 March 2011, paras. 13-16. See also No. ICC-01/09-02/11-23, Pre-Trial Chamber II (Single Judge), 30 March 2011, paras. 13-16.

The way in which applications for participation are processed by the Chamber will largely depend on the time of their filing. Applications that have been filed at a time when no judicial proceedings are conducted by the Chamber will need to be kept by the Victims Participation and Reparation Section ("VPRS"). Only when judicial proceedings have been initiated, or upon an order from the Chamber, will those applications which relate to the subject-matter of these specific proceedings be transmitted by the VPRS to the Chamber for examination under rule 85 of the Rules and article 68(3) of the Statute.

If applications for participation are filed at a time when a judicial proceeding is conducted, the Chamber will assess them on receipt, to determine whether the applicants should be granted the right to participate as victims in that proceeding.

In the process of assessing applications for participation, the Chamber will be assisted by the VPRS, which shall conduct an initial examination of the applications, including the assessment of their completeness and the analysis of their compliance with the relevant criteria, and transmit to the Chamber those complete and reviewed applications which are related to the subject-matter of the judicial proceedings that have been or are about to be initiated by the Chamber. The VPRS shall report to the Chamber every three months on the applications it has received. The Chamber takes note of directions to the VPRS issued by Pre-Trial Chamber II with respect to the situation in the Republic of Kenya. The Chamber finds it appropriate that the VPRS also follows those directions, *mutatis mutandis* and consistently with the jurisprudence of the Chamber, in the present situation.

See No. ICC-01/04-593, Pre-Trial Chamber I, 11 April 2011, paras. 11-13.

The issue pending before the Single Judge is whether or not the Registrar should file all applications, even when a request for additional information or documentation pursuant to regulation 86(4) of the Regulations of the Court proves to be unsuccessful, as stipulated in the First Decision on Victims' Participation. In this regard, the Single Judge first of all observes that the First Decision was taken in abstracto, with a view to instructing the VPRS in carrying out its task, by establishing the general framework governing victims' participation in the present case.

Furthermore, the Single Judge recalls that the VPRS is entrusted with the task of processing victims' applications for participation and reparation in situations and cases currently pending before the Court. In this respect, the Single Judge observes that the same deadline of 8 July 2011 applies to both the present case and the case of *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, in which the number of applications received so far by the Registry is 550. This brings the total number of victims' applications in the two cases, to be transmitted to the Chamber by 8 July 2011, up to 2350, bearing in mind that this is a provisional estimate pending expiration of the said deadline.

Accordingly, the Single Judge is of the view that the approach taken in the First Decision is to be attuned to the change of circumstances as presented by the Registrar. The Single Judge notes that rule 89(4) of the Rules states that:

Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

Taking into account the information submitted by the Registrar, in particular the 2350 victims' applications to be processed in the two cases within the established deadline, and considering the responsibility of the Chamber to effectively organize the management of victims' applications as envisaged in rule 89(4) of the Rules, the Single Judge believes that it is appropriate to instruct the VPRS that only complete applications be transmitted to the Chamber for its consideration. However, the Single Judges expects the VPRS to act expeditiously and without delay and to request, pursuant to regulation 86(4) of the Regulations of the Court, supplementary information as the case may be, so as to ensure that as many complete applications as possible are transmitted to the Chamber within the deadline. In the view of the Single Judge, such approach will enable

the Chamber to manage victims' applications in an effective manner without prejudicing the expeditiousness of the proceedings.

See No. ICC-01/09-01/11-147, Pre-Trial Chamber II (Single Judge), 28 June 2011, paras. 6-10.

The Single Judge notes that no provision in the Court's legal texts requires the applications for participation to be filled in by the applicants in person. In fact, during the application process, intermediaries or other persons might assist the applicant in filling in the forms, most commonly when the applicant is illiterate or does not speak the language in which the form is to be completed. Thus, with respect to those applicants who clarify that they were assisted in filling in the application form, the Single Judge is of the view that the fact that they do not indicate English as a spoken language does not ground *per se* the rejection of the applications. This is so, regardless of whether the applicants define the person assisting them as an "*interpreter*". The same principle holds true for the change of the handwriting within one and the same application. However, the Single Judge takes the view that the applications shall be rejected in case there are indications that the involvement of those assisting the applicants in filling in the forms casts doubts on whether the description of the facts therein appropriately reflects the applicants' own accounts of the events.

The assessment as to the credibility of the applicants shall be conducted in light of the specific circumstances of each application. In particular, the Single Judge is of the view that applications using a similar description of facts could still reflect the applicants' own accounts of the events, when, *inter alia*, the applicants were assisted in filling in the form by the same person or they refer to the very same specific events. Once again, it is to be clarified that the applications will be rejected, should the Single Judge consider that the applicants were forced or improperly influenced in filling in their applications.

The Single Judge wishes to clarify that, while the applicants are requested to provide a general description of the harm suffered, it is not necessary for them to provide a detailed description of the constitutive elements of a particular offence. Conversely, it is for the Single Judge to consider whether the event(s) as described by the applicants may constitute one of the crimes charged against the suspects.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 31-36.

The Single Judge considers that repetitive descriptions across numerous applications do not, *per se*, justify rejecting victims' applications to participate. Many of the individual applicants received assistance from intermediaries in completing their application forms. The same intermediary often helped to complete several different application forms, the experiences of these victims were quite similar and it is thus understandable that similar language and expressions would appear in these applications.

See No. ICC-01/04-01/10-351, Pre-Trial Chamber I (Single Judge), 11 August 2011, para. 30. See also No. ICC-01/04-01/06-2764-Red, Trial Chamber I, 25 July 2011, para. 25.

The Chamber is aware that the preparation of observations on the applications places a heavy burden on the parties. In this regard, the Chamber recalls its 21 July 2011 Decision, in which it held that the Chamber will put into place a schedule for the filing of future applications which ensures compliance with the requirement under article 68(3) of the Statute that victims' rights to have their views and concerns presented in the proceedings are reconciled with the rights of the accused and a fair and impartial trial. In accordance with this precedent, in relation to the forthcoming sets of applications, the Chamber decides that it will apply the 21-day timeline for the parties to respond pursuant to regulation 34(b) of the Regulations of the Court. In addition, in line with the oral Decision of 30 September 2010 the Office of Public Counsel for the Defence ("OPCD") is instructed to continue to assist the Defence with the observations on the forthcoming sets of applications.

See No. ICC-01/05-01/08-1726, Trial Chamber III, 9 September 2011, paras. 6-7.

Under the existing legal framework collective victims' applications cannot be imposed but individual victims may be encouraged to join with others so that a single application is made by a person acting on their behalf, with their consent, in accordance with rule 89(3) of the Rules.

See No. ICC-02/11-01/11-33, Pre-Trial Chamber III (Single Judge), 6 February 2012, para. 8.

The Single Judge considers that the information required in the collective application form would be sufficient to determine whether the applicant qualifies as a victim pursuant to rule 85 of the Rules for the sole purpose of participation in the current proceedings. Should a victim be called to testify at the confirmation of charges hearing, further information could be provided, if needed, in order to allow proper questioning of the victims.

Furthermore, the Single Judge is of the view that the recollection of the events and harm common to the members of the group, provided in the Group Form, in conjunction with the information contained in the Individual Declaration fulfill the requirements of regulation 86 of the Regulations of the Court. Accordingly, the collective application form will also provide the Legal Representative with sufficiently detailed information to enable him or her to fulfill his or her mandate pursuant to article 68(3) of the Statute and rules 90 and 91 of the Rules.

See No. ICC-02/11-01/11-86, Pre-Trial Chamber I (Single Judge), 5 April 2012, paras. 20-21.

In relation to the specific challenges concerning redactions of the identities of the individuals who assisted the applicants in completing their application forms, the Chamber recalls that redactions of these individuals' identities have been explicitly authorised by the Chamber. Notwithstanding this general principle, there may be specific instances where the identity of the intermediary is disclosed. This is the case, in particular, when the intermediary is a person known to the parties, when he or she works for the Court or he or she is a participant involved in the present proceedings.

See No. ICC-01/05-01/08-2247-Red, Trial Chamber III, 19 July 2012, para. 25.

In this regard, the Chamber has previously held that "*when there are indicators that there might have been a misunderstanding or that there is a doubt as to the extent of the intermediary's involvement in the completion of the applications for participation, it will either reject the application for participation or defer its decision until further information pursuant to regulation 86(7) of the Regulations of the Court is received*".

See No. ICC-01/05-01/08-2247-Red, Trial Chamber III, 19 July 2012, para. 27. See also No. ICC-01/05-01/08-1590-Corr, Trial Chamber III, 21 July 2011, para. 26; No. ICC-01/05-01/08-1091, Trial Chamber III, 23 December 2010, para. 34; and No. ICC-01/05-01/08-1017, Trial Chamber III, 18 November 2010, para. 52.

As a general rule and to the extent that the information provided in the Additional Statement is consistent with or complementary to the information contained in the Original Application, the Chamber bases its assessment on the information provided in both the Original Application and the Additional Statement. In relation to apparent contradictions between the Original Application and the Additional Statement, the latter was provided upon the request of the Chamber and directly collected by the VPRS in order to verify whether the information contained in the Original Application was accurate. Accordingly, in the absence of any indication undermining the reliability of the information recorded in the Additional Statement, this information should be considered as reflecting a reliable account of the alleged events. As a result, in case of contradictions between the information provided in the Original Application and the Additional Statement, the Chamber's assessment is based on the information provided in the Additional Statement and, if applicable, additional observations conveyed in the VPRS reports. In case of inconsistencies between the Original Application and the Additional Statement, the Chamber assesses the applications on a case-by-case basis and in light of the intrinsic coherence of the Additional Statements.

See No. ICC-01/05-01/08-2247-Red, Trial Chamber III, 19 July 2012, paras. 31-34.

The Single Judge considers that an application for victims' participation shall be rejected only in the event the applicants do not understand the language in which the form is written and do not state that they were assisted by someone in filling in the form. To the contrary, the Single Judge observes that all applicants identified were assisted by someone in filling in the form. In this respect, the Single Judge underlines that there is no requirement in the legal texts of the Court according to which the application forms must be filled in by the applicants themselves or that any person assisting the applicants must be a qualified interpreter.

Thus, the Single Judge considers that, absent any indication that the person assisting the applicant has influenced the latter's recollection of the events, the information contained in the application shall be considered to be the appropriate reflection of the applicant's account.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, paras. 42-43.

The Single Judge wishes to point out that, whilst distinct sections of the Registry are vested with different responsibilities in respect of victims' involvement in the Court's proceedings, all of them are important players in ensuring that the statutory responsibilities of the Court vis-à-vis the victims, as well as the proper conduct of the proceedings, are accurately fulfilled.

The Single Judge is of the view that, in accordance with rule 92(3) and (8) of the Rules, the first step in the victims' application process is the outreach action on behalf of the Court. In this regard, the Single Judge underlines that a comprehensive and timely outreach mission, targeted at potential victim applicants in the present case, is essential in order for the application stage to run smoothly and efficiently. All of the relevant Registry's sections are expected to be involved in such field outreach. In particular, the Single Judge refers to the Public Information and Documentation Section (the "PIDS") which, in light of its neutral role as institutional representative and promoter of the Court, should take a central role in the initial phase of the approach of potential victim applicants. Subsequently, other specialized sections of the Registry, namely the Victims Participation and Reparations Section (the "VPRS"), in cooperation and coordination with the PIDS and the Victims and Witnesses Unit (the "VWU"), shall take action.

Consistent with its mandate under regulation 105(1) of the Regulations of the Registry, the outreach action by the PIDS should be aimed at providing potential victims, in a timely manner, with accurate, concise, accessible and complete information both on the Court's overall mandate and, more specifically, on the various roles which the victims are statutorily called to play in the proceedings. Further, the specific substantive and procedural features of victims' participation, on the one hand, and of victims' reparations, on the other, as well as their respective independence, should be clarified. Regarding their participation at the pre-trial stage of this case, potential victim applicants should be provided with accurate information as to the material, temporal and

geographical parameters of the case of the Prosecutor against the suspect, as defined in the Warrants of Arrest. As for the possibility to claim reparations before the Court, it should be explained that the option to apply for reparations pursuant to article 75 of the Statute will only be available to victims if the suspect is committed to trial and found guilty by the relevant Trial Chamber. Furthermore, it should be clarified in simple terms that the victims' right to apply for reparations, should that stage be reached, is not conditional upon previous participation in the proceedings, be it at the pre-trial or at the trial stage.

The Single Judge's opinion that accurate and timely outreach action is instrumental to the application process is supported by what has been stated in the Registry Observations, according to which "*collecting less information* […] *had been expected to lead to less paperwork and therefore reduce the staff time needed to scan, enter data into the database and analyse, and less information to redact in the versions prepared for transmission to the parties*". It was further acknowledged that "*applicants provided numerous supplementary documents which* […] *reduced this effect, and significant challenges were faced in putting the documents in order*". Consequently, providing precise and strictly necessary information for the purposes of the current proceedings to affected communities prior to engaging in the actual application process is vital for ensuring victims' participation, where desirable, as well as for the effectiveness of the proceedings as a whole.

The Single Judge is mindful that the usual length and complexity of the proceedings before the Court, as well as the ensuing fact that a significant amount of time can elapse between the opening of a case and the time when victims may be awarded reparations, might in some instances result in their disappointment and frustration. Access to immediate and meaningful assistance would often be beneficial to them. In light of this, the Single Judge believes that the unique role of the Trust Fund for Victims should also be adequately illustrated during the outreach missions. In particular, it should be highlighted that projects for the benefit of victims of crimes within the jurisdiction of the Court (*i.e.*, within the scope of the DRC situation) have already been put in place in the country. More specifically, it should be stressed that those projects might be particularly beneficial to the victims who suffered from events falling out of the scope of either the case against the suspect or any other case brought by the Prosecutor in the situation in the DRC.

The Single Judge takes the view that the outreach role played by the PIDS in the field is key in creating the background and paving the way for the VPRS to plan and carry out its own field missions in the most effective way. Ideally, whilst ensuring that proper coordination is put in place, there should be no overlapping between the action of the PIDS and the one of the VPRS: the better and the earlier the former prepares the ground – by disseminating accurate and targeted information about the case and the various options which might be available to victim applicants – the more effective the latter can be in focussing on its specific mandate to collect applications for participation and/or reparations among affected groups, as well as in pursuing and developing crucial relationships with relevant intermediaries who may assist them.

At the outset, the Single Judge recalls the need to improve the victims' participation system in order to ensure "*its sustainability, effectiveness and efficiency*" and the efforts undertaken by other Chambers of the Court in this regard, including by developing application forms for victims' participation tailored to the characteristics of the specific case at hand.

In light of the foregoing, the Single Judge takes the view that the availability of a concise and simplified individual form might significantly assist victims willing to participate in the current case, as well as the VPRS in processing their applications and the Chamber in its assessment of the requirements set forth in rule 85 of the Rules. This would enhance the overall efficiency and expeditiousness of the proceedings leading to the confirmation of charges hearing. That being said, it is advisable to construct the victims' application system in each case, mindful of the feedback on the practices already tested, and also considering the specificities of the case at hand.

The Single Judge recalls that rule 85 of the Rules provides the definition of victims as follows:

(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.

As interpreted in the case law of the Court, an applicant qualifies as a victim pursuant to the above provision provided that: (i) the identity of the applicant appears duly established; (ii) the event(s) described in the application for participation constitute(s) one or more crimes within the jurisdiction of the Court, with which the suspect is charged; and (iii) the applicant has suffered harm as a result of the crime(s) with which the suspect is charged.

Bearing in mind the above requirements and in light of the specific features of the case against the suspect, the Single Judge will use for the purposes of this case a concise and simplified one-page individual application form (the "*Simplified Form*"), containing only such information which is strictly required by law for the Chamber to determine whether an applicant satisfies the requirements set forth in rule 85 of the Rules.

The Single Judge emphasises that the features of the Simplified Form have been devised considering the very limited and clear purpose of the application phase, *i.e.* to determine whether an applicant meets the requirements of rule 85 of the Rules for the purposes of being granted the status of victim in the present case. In view of this, the Simplified Form is structured according to the elements enshrined in rule 85 of the Rules. It would thus allow each applicant to concisely bring forward the salient elements of the relevant events, particularly their spatial and temporal parameters, as well as (in broad terms) the nature of the alleged crime and, to the extent possible, the identity of the alleged perpetrator(s). By allowing the victim to provide a concise account of all those elements which will ground the Chamber's determination under rule 85 of the Rules, it is expected that the Simplified Form will also prove significantly instrumental in streamlining the process of redactions. In principle, the information submitted in concise form, whilst accurate and precise enough to be assessed against the backdrop of rule 85 of the Rules, should minimise the concerns for identification and, hence, the need to resort to protective measures, ultimately allowing for the transmission of such information to the parties in non-redacted form, to the extent possible.

[…]

The Single Judge wishes to highlight that the Simplified Form, while containing exclusively information required by rule 85 of the Rules, should not be regarded as an instrument preventing the submission, by an applicant, of information which goes beyond the domain of rule 85 of the Rules. The Single Judge is mindful that such information may be important, although not directly pertinent for the purposes of the assessment under rule 85 of the Rules. It could include, *inter alia*, the contact details of the applicants, their level of language(s) proficiency, preferences as to their legal representation, security concerns related to them or to members of their families. This information will be submitted separately and shall be collected and safely stored by VPRS. Accordingly, VPRS is hereby instructed to establish an electronic log in which all additional information provided by each victim applicant having filled in the Simplified Form shall be securely inserted and remain stored within the VPRS's information system.

Finally, the Simplified Form does not prejudice the participatory rights envisaged by the Court's legal framework once the status of victim has been granted. Accordingly, the PIDS as well as the VPRS are instructed to inform all applicants in due time that, should their application for participation be granted, they will have ample opportunities throughout all stages of the proceedings to present their stories, in particular to voice their "*views and concerns*", as well as to exercise the rights provided by the statutory framework of the Court and any other rights deemed appropriate by the Chamber, in compliance with article 68(3) of the Statute and with the Rules.

[…]

Having satisfied itself that the applications are complete, the VPRS should transmit them to the Chamber for determination. The Single Judge endorses the approach of grouping victims' applications, which has already been applied in the jurisprudence of the Court. […] Thus, the grouping of the collected applications will not be assigned to a contact person, with the view to prevent some of the complexities experienced by the VPRS when dealing with groups of individuals prepared by such a contact person, "*which can in fact be more complicated than dealing with individuals in some respects*". Instead, the VPRS will itself perform the grouping of victims who have filled in the Simplified Form in line with appropriate criteria as listed below, for the purpose of submitting them thereafter to the Chamber. In this way, the Single Judge achieves the ultimate goal, *i.e.* that the Chamber receives the applications collectively, by way of their grouping, and, at the same time, takes note of the issues experienced by the VPRS in other cases.

The Single Judge recalls that "*grouping victims already at the application stage not only facilitates the application process itself, but* […] *also* […] *the actual participation of victims subsequently, for instance making it easier for victims' legal representatives to manage the interaction with their clients if they are already organised in groups according to location or crime*". The Single Judge agrees that grouping victims at this stage by the VPRS could facilitate the application process and could be time-efficient and beneficial for victims' participation. The grouping of applications will also simplify and expedite the decision-making by the Chamber as envisaged by rule 89(4) of the Rules. The Single Judge will assess the applications individually but will take a decision on each distinct group of applicants as established according to appropriate criteria.

Finally, the grouping of applications should be done in accordance with criteria deemed appropriate in regard to the specificities of the case. The criteria which could be used by the VPRS in this regard may include, *inter alia*: (i) the location of the alleged crime(s); (ii) the time of the alleged crime(s); (iii) the nature of the alleged crime(s); (iv) the harm(s) suffered; (v) the gender of the victim(s); and (vi) other specific circumstances common to victims. When appropriate given the specific circumstances, the VPRS could apply more than one criterion in grouping victim applicants.

See No. ICC-01/04-02/06-67, Pre-Trail Chamber II (Single Judge), 28 May 2013, paras. 11-22, 24-25, and 33-35.

It must be noted that the parties' rights to reply to victims applications set out in Rule 89(1) of the Rules is not absolute. Rule 89(1) provides that the transmission of victim applications to the parties, and their right to reply thereto, is '[s]*ubject to the provisions in the Statute, in particular article 68, paragraph 1* […]'. In this regard, the Chamber notes: (i) the Court's obligation under Article 68(1) of the Statute to protect the safety, physical

and psychological well-being, dignity and privacy of victims; (ii) the right of the accused to not have measures adopted which are prejudicial to or inconsistent with his/her right to be tried with undue delay, as required by Articles 67(1)(c) and 68(1) and (3) of the Statute; and (iii) the Chamber's general obligation under Article 64(2) of the Statute to ensure the fair and expeditious conduct of the proceedings.

Bearing in mind these statutory provisions and the context set out above, as well as the fact that admitting victims to participate in proceedings is only assessed at a *prima facie* standard, the Chamber considers that limiting the parties' submissions to applications which cannot be clearly resolved by the Registry is an appropriate procedure which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

The Chamber additionally notes that Rule 89 of the Rules contains no express requirement for individual consideration of each application by the Chamber. Rather, it provides, in Rule 89(2), that the Chamber '*may*' reject an application if it considers that the applicant is not a victim or the criteria in Article 68(3) of the Statute are otherwise not fulfilled. More generally, the Chamber considers that Rule 89(1) of the Rules should be interpreted in light of Rule 89(4), which gives the Chamber discretion to '*consider the applications in such a manner as to ensure the effectiveness of proceedings*'.

The Chamber considers that designating the Registry to assess victim applications based on clear guidelines outlined by the Chamber, who retains ultimate authority over the process, is the most efficient and appropriate way to '*consider the applications*' in the case. The Chamber notes that the Registry makes these kinds of assessments regularly, as past victim participation decisions have required the Registry to: (i) filter out incomplete applications from the ones transmitted to the Chamber and (ii) make detained reports on the merits of the applications in order to inform the Chamber's assessments.

The Chamber does not consider that such a procedure detracts from the meaningful participation of victims in ICC proceedings. In fact, this kind of procedure will expedite the processing of victims' applications and allow them to participate through their LRVs at the earliest possible juncture. These judicial economy benefits also will expedite the trial proceedings generally, which is clearly in the interests of the victims and the parties.

See No. ICC-01/04-02/06-449, Trial Chamber VI, 6 February 2015, paras. 29-33.

At the outset, the Single Judge recalls her responsibility to determine, pursuant to article 68(3) of the Rome Statute (the "Statute") in conjunction with rules 85 and 89 of the Rules of Procedure and Evidence (the "Rules"), whether an applicant qualifies as a victim for the purposes of participating in the pre-trial proceedings, as well as the modalities of such participation. To this effect, the Single Judge considers that detailed guidance, and early involvement by the Chamber throughout the victims' application process is crucial to organise the subsequent participation phase in an efficient and expeditious manner.

The purpose of the present decision is to address and streamline issues relating to the victims' applications for participation in the pre-trial proceedings leading to the confirmation of charges hearing in the case of *The Prosecutor v. Dominic Ongwen* (the "*Ongwen* case"), with a view to rationalizing the application process and enhancing its predictability, efficiency and expeditiousness.

Such practice has already been adopted by this Chamber in previous cases and it has proved to be efficient, in so far as it clarifies, phase by phase, the respective roles of various organs and sections of the Court in respect of potential victims and communities of victims. In this regard, the Single Judge wishes to point out that, whilst distinct sections of the Registry are vested with different responsibilities in respect of victims' involvement in the Court's proceedings, their coordinated action, under the overall supervision of the Chamber, ensures that the statutory responsibilities of the Court vis-à-vis the victims, as well as the proper conduct of the proceedings, are accurately fulfilled. […].

V. Simplified application form for the purposes of the present case

The Single Judge recalls the constant need to improve the victims' participation system in order to ensure "*its sustainability, effectiveness and efficiency*" […]. An integral and decisive component of this improvement is the application form to be used in each case, which is the primary tool in the hands of every applicant victim to convey information relevant to the Single Judge's determination as to whether or not applicants qualify as victims in a given case.

In this regard, the Single Judge recalls the positive experience in the case of *The Prosecutor v. Bosco Ntaganda* (the "*Ntaganda* case"), in which the development and subsequent use of a one-page individual application form (the "Simplified Form") led to the successful and expedited processing by the VPRS and the admission by the Single Judge of 1120 victims participating in the confirmation of charges hearing and the related proceedings.

The Single Judge observes that the Simplified Forms used in the *Ntaganda* case led to significant savings in terms of (i) paper work; (ii) time required by the applicants to fill it in; (iii) time and resources employed by the VPRS to process and transmit the Simplified Forms to the parties and the Chamber; and (iv) time and resources used by the Chamber in its final determination on each application for victims' participation received. In light of the foregoing, the Single Judge considers that the Simplified Form should be retained in the present case, albeit with minor wording changes due to the specificities of this case, as specified in the annex to this decision.

The Single Judge wishes to underline that, while leading to a number of advantages in the management of the application process, the Simplified Form complies with the requirements of the definition of a victim, as entrenched in rule 85 of the Rules:

(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.

As interpreted in the case law of the Court, an applicant qualifies as a victim pursuant to the above provision provided that: (i) the identity of the applicant appears duly established; (ii) the event(s) described in the application for participation constitute(s) one or more crimes within the jurisdiction of the Court, with which the suspect is charged; and (iii) the applicant has suffered harm as a result of the crime(s) with which the suspect is charged.

Bearing in mind the above requirements, the Single Judge is of the view that the Simplified Form will enhance the efficiency of the victims' application process also in the present case. Indeed, it contains only such information which is strictly required by law for the Single Judge to determine whether an applicant satisfies the requirements to qualify as a victim under rule 85 of the Rules. […].

As already emphasised by the Single Judge, the features of the Simplified Form have been devised considering the very limited and clear purpose of the application phase, *i.e.* to determine whether an applicant meets the requirements of rule 85 of the Rules for the purpose of being granted the status of victim in the present case. In view of this, the Simplified Form is structured according to the elements enshrined in rule 85 of the Rules. It would thus allow each applicant to concisely bring forward the core elements of the relevant events, particularly their spatial and temporal parameters, as well as (in broad terms) the nature of the alleged crime and, to the extent possible, the identity of the alleged perpetrator(s). By allowing the victim to provide a concise account of all those elements which will ground the Chamber's determination under rule 85 of the Rules, it is expected that the Simplified Form will also prove instrumental in streamlining the process of redactions. In principle, the information submitted in concise form, whilst accurate and precise enough to be assessed against the backdrop of rule 85 of the Rules, should minimise the concerns for identification and, hence, the need to resort to protective measures, ultimately allowing for the transmission of such information to the parties in non-redacted form, to the extent possible.

The Single Judge wishes to highlight that the Simplified Form, while exclusively containing information required by rule 85 of the Rules, should not prevent the applicants from submitting additional information and documentation relevant to their application as described in the Simplified Form, regardless of whether it strictly relates to the rule 85 requirements or not. The Single Judge is mindful that such information may include, *inter alia*, the contact details of the applicants, their level of language(s) proficiency, preferences as to their legal representation and security concerns related to them or to their family members. This information will be submitted separately and shall be collected and safely stored by the VPRS. Accordingly, the VPRS is hereby instructed to establish an electronic log in which all such additional information provided by each applicant victim who has filled in the Simplified Form shall be stored within the VPRS's information system. Such electronic log must be available to the Chamber and the VPRS only, unless otherwise decided by the Single Judge.

Finally, the Simplified Form does not prejudice the participatory rights envisaged by the Court's legal framework once the status of victim has been granted. Accordingly, the PIDS and the VPRS are instructed to inform all applicants that, should their application for participation be granted, they will have ample opportunities throughout all stages of the proceedings to convey their "*views and concerns*" to the Chamber, as well as to exercise the rights provided by the statutory framework of the Court and any other rights deemed appropriate by the Chamber, in compliance with article 68(3) of the Statute and the relevant provisions of the Rules.

VI. Collection of applications; role of the VPRS and intermediaries

The Single Judge considers that the VPRS should be directly involved in assisting the applicants to fill in the Simplified Forms. This type of assistance is compatible with the mandate of the VPRS pursuant to regulation 86(9) of the Regulations, according to which the VPRS "*shall be responsible for assisting victims and groups of victims*".

In performing this task, the VPRS may avail itself of the assistance of suitable individuals, based in the field, who will serve as intermediaries operating under the control and supervision of the VPRS, which bears responsibility for their conduct. They may be identified and selected, at the discretion of the VPRS, from amongst those vested with leading roles in the affected communities and who, by the nature of their positions, are trusted by the population. Such individuals may include, for example: community leaders, chefs de village, or staff members of NGOs. The VPRS is instructed to start with the identification and training of intermediaries while the PIDS conducts its outreach mission in order to maximize the time and deploy the intermediaries and the VPRS staff at any suitable moment after the end of the outreach mission.

VII. Processing and transmission of applications for victims' participation

[…]

The Single Judge will hereunder set out the principles that shall govern the processing and transmission to the Chamber and the parties of the applications for victims' participation. In this respect, as soon as the Simplified Forms are filled in, the VPRS shall process them without delay in order to prepare them for transmission to the Chamber and the parties, in accordance with the instructions provided in the following paragraphs. In line with previous practice, the Single Judge will only consider complete applications for victims' participation. To this effect, the VPRS is expected to ensure that the information contained in the applications is complete prior to their transmission to the Chamber. Should some applications miss information required pursuant to rule 85 of the Rules, the VPRS shall, if circumstances allow so, promptly request additional information from the applicants concerned, in accordance with regulation 86(4) of the Regulations.

In line with the jurisprudence of the Court, the Single Judge recalls that an application for victims' participation is considered to be complete if it contains the following information, supported by documentation, if applicable:

(i) the identity of the applicant;

(ii) the date of the crime(s);

(iii) the location of the crime(s);

(iv) a description of the harm suffered as a result of the commission of the crime(s) allegedly committed by the suspect;

(v) proof of identity, through one of the identification documents available in Uganda;

(vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim;

(vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship; and

(viii) a signature or thumb-print of the applicant on the Simplified Form.

The Single Judge recalls that the VPRS shall, pursuant to regulation 86(5) of the Regulations [of the Court], present to the Chamber all applications together with a report (the "Regulation 86(5) Report"). Although the Regulation 86(5) Report shall be structured by the VPRS according to the specific circumstances of each case, it should include, *inter alia*, an overview of any outstanding features of the applications as a whole and information as to whether any conflict of interests seems to exist among different groups of victims. The Regulation 86(5) Report should be accompanied by three annexes, in which the victim applicants will be grouped in accordance with criteria deemed appropriate in light of the specificities of the case. The criteria which could be used by the VPRS may include, *inter alia*: (i) the location of the alleged crime(s); (ii) the time of the alleged crime(s); (iii) the nature of the alleged crime(s); (iv) the harm(s) suffered; (v) the gender of the victim(s); and (vi) other specific circumstances common to victims. When appropriate, the VPRS could apply more than one criterion in grouping victim applicants.

The three annexes will include the following documents:

(i) Annex A will contain a chart, together with copies of their Simplified Forms, with the VPRS' individual assessment of applicants who, in the view of the VPRS, qualify as victims of the case pursuant to rule 85 of the Rules.

(ii) Annex B will contain a chart, together with copies of the Simplified Forms, in regard to which the VPRS could not make its determination due to unclear aspects of those applications.

(iii) Annex C will contain a chart, together with copies of their Simplified Forms, with the VPRS' individual assessment of all applicants who, in the view of the VPRS, do not qualify as victims of the case pursuant to rule 85 of the Rules.

The Single Judge is mindful that rule 89(1) of the Rules provides that the Registrar shall transmit "*a copy of the application*[s] *to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber*". The Single Judge considers that, in the interest of the judicial administration and expeditiousness of the proceedings, the parties shall receive the Regulation 86(5) Report together with copies of the Simplified Forms and the VPRS' individual assessment falling under Annex A and Annex B. The Prosecutor and the Defence will be entitled to submit observations, if they wish to do so, within a time limit of fourteen days as of the transmission of said applications for victims' participation. In this respect, the Single Judge reminds the parties that the observations under rule 89(1) of the Rules are "*not mandatory and serve the purpose of assisting the Single Judge in her determination as to whether or not each applicant qualifies as victim pursuant to rule 85 of the Rules*".

The VPRS' individual assessment and the Simplified Forms to be included in Annex C shall be transmitted only to the Chamber. If the Chamber, upon review, will decide that some or all applications for victims' participation included in Annex C may qualify as victims pursuant to rule 85 of the Rules, it will request the VPRS to transmit

those applications to the Prosecutor and the Defence (with redactions vis-à-vis the latter if needed). The parties will be provided fourteen days to submit their observations, if any, in accordance with rule 89(1) of the Rules.

In light of the information to be included in the Regulation 86(5) Report and taking into account that the Simplified Forms shall only contain the relevant rule 85 information, the Single Judge expects none or few redactions to the Regulation 86(5) Report and to Annexes A and B. Bearing in mind that the redaction of information is the exception to the principle of full disclosure, the concise information to be provided by the applicants in the Simplified Forms should result in very limited redactions, if any, of only the identifying information of the applicants, either when a need for protection is detected by the VPRS, or when the applicant expressed an informed intention to have his or her identity not disclosed to the Defence.

Accordingly, the Single Judge instructs the VPRS to redact, if necessary, any identifying information from the Regulation 86(5) Report, Annex A, and Annex B, prior to their transmission to the Defence. In the view of the Single Judge, this provides victim applicants with an appropriate protective measure at the application stage, which is not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial. The Single Judge reminds the VPRS that any such redaction should abide by the principle of proportionality enshrined in article 68(1) of the Statute.

With regard to the transmission of the Regulation 86(5) Report together with the Annex A and Annex B to the Prosecutor, the Single Judge recalls that the Prosecutor is under an obligation, pursuant to articles 54(1)(b) and 68(1) of the Statute, to "*respect the interests and personal circumstances of victims*", as well as to protect their safety, physical and psychological well-being, dignity and privacy. Pursuant to article 54(1)(a) of the Statute, the Prosecutor has an obligation to investigate incriminating and exonerating circumstances equally. In light of the Prosecutor's statutory duties with respect to victim protection, and of the fact that applications for participation may contain exculpatory information, the Single Judge is of the view that no redactions should be made to the Regulation 86(5) Report, Annex A, and Annex B to be transmitted to the Prosecutor. As already clarified by this Chamber, this difference in treatment between the parties is instrumental in allowing the Prosecutor to properly discharge her statutory obligations and, as such, does not constitute a violation of the principle of equality of arms.

Lastly, in line with the practice of the Single Judge, PIDS and the VPRS are instructed to raise with the Single Judge, if need be and on a continuous basis, any issues that may arise in regard to the collection and processing of the applications, in order to readily address and resolve such issues before the transmission of the applications to the Chamber

See No. ICC-02/04-01/15-205, Pre-Trial Chamber II (Single Judge), 4 March 2015, paras. 1-3, and 14-36.

The Single Judge underlines that the process of admission of victims to participate in the proceedings does not have as its object and purpose the determination of the truthfulness of the claims of the applicants or the reliability of the narrative of the relevant events put forward by the applicants. Rather, its purpose is to determine whether the claim of the applicant fits within the case before the Court, so as to justify participation. To the extent that it is encompassed by the charges, the applicant's claim is then tested as part of the proceedings on the merits of the case.

For these reasons, the Single Judge does not attach any consequences to the fact that the applications challenged by the Defence are not based on the personal recollection of the applicants, but on information that the applicants, who were in any case very young children at the time of the relevant events and cannot be faulted for not having a recollection, received from members of their families. Considering that the claims of the applicants otherwise fit into the parameters of the case, the Single Judge sees no reason not to admit them to participate.

See No. ICC-02/04-01/15-350, Pre-Trial Chamber II (Single Judge), 27 November 2015, paras. 11-12.

In the present proceedings, victims will be admitted to participate in accordance with the following procedure.

The Registry shall transmit to the Chamber all applications, which in the Registry's assessment are complete and that fall within the scope of the charges as defined by the Decision on the confirmation of charges against Ahmad Al Faqi A1 Madhi […]. Such transmissions must be effectuated on a rolling basis and, in any case no later than 25 July 2016. The Registry shall transmit all applications to the Chamber together with an *ex parte* report, available to the Prosecution and the […] LRV pursuant to Regulation 86(5) of the Regulations. This deadline is without prejudice to receipt and review of subsequent applications to participate in any reparations proceedings which could occur in this case.

The applications that, in the view of the Registry, are incomplete and/or fall outside the scope of the charges as confirmed shall not be transmitted to the Chamber. The Registry shall inform those applicants accordingly.

Where the Registry is not in a position to determine whether an applicant qualifies as a victim, it shall transmit the application to the Chamber with an indication of the unclear status of the applicant.

In accordance with Rule 89(1) of the Rules, the Registry shall transmit the applications to the parties, who shall have an opportunity to submit observations on the applications for participation. Consistent with Article 68(1) of the Statute, applications should be transmitted in unredacted form to the Prosecution and in redacted form

to the Defence, when the applicant has expressed some security concern. Observations, if any, shall be filed within seven days of notification of the applications.

Unless objections are raised within this timeframe to the admission of certain applicants by any of the parties, applications transmitted to the Chamber will be admitted.

For the purpose of the present proceedings, standard forms covering both participation and reparation applications shall be used by applicants.

See No. ICC-01/12-01/15-97-Red, Trial Chamber VIII, 8 June 2016, paras. 9-15.

4.2. Completeness of the applications

The Chamber notes that, pursuant to rule 89(2) of the Rules and regulation 86(7) of the Regulations, it may request additional information from the applicants before deciding on the application, if the relevant and necessary information was not provided in the first place.

The Chamber has also previously noted that the Registrar is "*under the obligation pursuant to rule 89(1) of the Rules and regulation 86(5) of the Regulations, to present all applications he receives to the Chamber, whether or not they are complete, since the Chamber alone has the power to reject or accept applications made under article 68(3) of the Statute and rule 89 of the Rules*".

However, pursuant to rule 89(4) of the Rules, "*the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision*". Where there are a number of applications, by requesting that only complete applications are transmitted, the Chamber would be able to deal more efficiently with applications submitted with all relevant information and documentation.

With respect to incomplete applications, pursuant to regulation 86(7) of the Regulations, the Registry would automatically request the missing relevant information from the applicants. Only after receiving the requested information may the Registry submit to the Chamber the additional information attached to each application together with the Report.

Regarding the applications which remain incomplete after requests for additional information have been made, the Registry shall, within a reasonable period of time following the request for additional information, present the incomplete applications to the Chamber together with a report thereon.

The Chamber considers that an application is complete if it contains the following information:

(i) the identity of the applicant;

(ii) the date of the crime(s);

(iii) the location of the crime(s);

(iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court;

(v) proof of identity;

(vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim;

(vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship;

(viii) a signature or thumb-print of the Applicant on the document, at the very least, on the last page of the application.

As mentioned above, proof of identity, kinship, guardianship and legal guardianship must be submitted with the application pursuant to regulation 86(2)(e) of the Regulations. The Chamber recognises the need for proper identification documents of all victims who apply to participate in the early stage of the Court proceedings. However, the Chamber is aware that, in regions which are or have been ravaged by conflict, not all civil status records may be available, and if available, may be difficult or too expensive to obtain.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, paras. 7-13. See also No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, paras. 24-26; No. ICC-02/05-01/09-62, Pre-Trial Chamber I (Single Judge), 10 December 2009, para. 8; No. ICC-02/05-02/09-255, Pre-Trial Chamber I (Single Judge), 19 March 2010, para. 4; No. ICC-01/09-01/11-17, Pre-Trial Chamber II (Single Judge), 30 March 2011, paras. 18-19; No. ICC-01/09-02/11-23, Pre-Trial Chamber II (Single Judge), 30 March 2011, paras. 17-19; No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, para. 22; and No. ICC-01/04-02/06-211, Pre-Trial Chamber II, 15 January 2014, para. 60.

When the Applicant is a minor, if the application is submitted by a person who is not the next- of-kin or legal guardian of the Applicant, the application must contain the consent of the next-of-kin or legal guardian that an application has been made on the minor's behalf. In other words, the minor's consent to have a third-party submit an application on his or her behalf is insufficient.

See No. ICC-01/04-505, Pre-Trial Chamber I (Single Judge), 3 July 2008, para. 31.

As the Applicant is a minor, his application must be submitted on his behalf by a person who has attained the age of majority. Since the present application was submitted by the Applicant himself, it must be considered incomplete.

[…]

If the application is submitted on behalf of the Applicant's mother, then the application is incomplete as it lacks proof of identity of the primary applicant, proof of legal guardianship, and proof of consent of the primary applicant for her daughter to act on her behalf. If the application is submitted on behalf of the Applicant, then the application is also incomplete because it lacks information which would identify a harm suffered by the primary applicant, as it is unclear whether the items were taken from the Applicant or from the Applicant's mother.

[…]

The application submitted on behalf of this deceased applicant appears to have been submitted by his mother. As has been the practice of the Chamber, the Single Judge would proceed to evaluate this application with the primary applicant being the person acting on behalf of the deceased person. However, it appears that the Applicant is in fact the person who claims to act on behalf of another Applicant and has submitted her own application as well. Thus, the application of the latter is denied on the ground that the applicant is deceased.

[…]

The person acting on behalf of the Applicant has neither submitted proof of identity nor proof of consent of the primary applicant. Thus, this application is incomplete.

See No. ICC-01/04-545, Pre-Trial Chamber I (Single Judge), 4 November 2008, paras. 33, 60, 68, and 102.

The Chamber recalls that, as far as minors are concerned, the provisions of rule 89(3) of the Rules do not exclude the possibility of a minor submitting an application for participation in the proceedings as victim on his or her own initiative. In the Decision of 26 February 2009, the Chamber held that minors and disabled persons were capable of submitting their own applications for participation and that proof of legal guardianship could be provided by two credible witnesses. It will nonetheless assess the admissibility of such applications on a case-by-case basis, in accordance with the information gathered specifically by the Registry in relation to the minor's maturity and powers of discernment.

See No. ICC-01/04-01/07-1491-Red-tENG, Trial Chamber II, 23 September 2009, para. 98.

In line with the Court's jurisprudence, the obligation on an applicant is limited to providing the Chamber with sufficient material to establish, *prima facie*, his or her identity and the link between the alleged harm and the charges against the accused. The Chamber has to take into account the overall picture provided by the applicant to the Chamber, bearing in mind the applicant's account and any documents submitted to the Chamber, in order to reach a *prima facie* determination as to whether the applicant suffered harm as a result of a crime included in the charges against the accused. The similarities between the applications do not in any way undermine their credibility.

See No. ICC-01/04-01/06-2659-Corr-Red, Trial Chamber I, 8 February 2011, paras. 28-29.

The Single Judge considers that victims' applications must also contain, as a *minimum*, sufficient information to satisfactorily establish the requirements of rule 85(a) of the Rules. Accordingly, and without prejudice to the specificities of each individual application, the Single Judge considers that a number of applications shall be rejected, in their entirety or in part, mainly for one or more of the following reasons:

(i) the applicants – whether applying on their own behalf or not – do not submit an adequate proof of identity and/or kinship, when applicable;

(ii) the applicant applies to participate in the proceedings on behalf of a deceased person;

(iii) the applicants claim to have suffered harm as a result of the death of a family member without adequately proving either the existence of the direct victim or the link between the two or both;

(iv) the lack of intrinsic coherence within the applications themselves casts doubts on the credibility of the applicants;

(v) the events described in the applications fail to meet one or more of the parameters shaping the present case.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 58-59. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, paras. 72-73.

The Single Judge notes that both Defence teams argue that a large number of applications should be rejected since the applicant fails to identify the suspects (or groups to which the suspects allegedly belonged) as responsible for the crimes as a result of which the harm was suffered. In this respect, the Single Judge notes the provision of regulation 86(2) of the Regulations of the Court, according to which the application form shall contain "*the identity of the person or persons the victim believes to be responsible*" but only "*to the extent possible*". Accordingly, and concurring with the findings of other Chambers of the Court, the Single Judge, in her 30 March 2011 Decision, did not insert the identification of perpetrators among the information necessary for the applications submitted to be considered complete. Furthermore, the Single Judge agrees with the finding of Trial Chamber III which stated that at times it will inevitably be impossible for the applicants to establish precisely who committed the relevant crime(s) and that, consequently, it would be an unfair burden to require the applicant victims to identify the actual perpetrator(s) of the crime(s) allegedly causing them harm within the meaning of rule 85(a) of the Rules. In light of the above, the Single Judge takes the view that the identification of the perpetrators is not a requirement for a victim's application for participation to be considered complete.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 21-24. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, paras. 31-34.

The Single Judge notes that the identification of the perpetrators of the incidents alleged by the applicants constitutes a facet of the requisite link between the alleged harm and the alleged crimes against the suspect in the present case. However, it would be unfair, at this stage, to place on victims the onerous burden of identifying in a conclusive way or providing a considerable degree of precision with respect to the identification of those responsible for their victimisation. The Single Judge further recalls that the link between the alleged harm and the crimes charged, at this stage, must be established on a *prima facie* basis.

It should be noted that the criteria which the applicants have used to identify the alleged perpetrators will not be considered by the Single Judge in isolation, but will be evaluated and weighed alongside and together with all the pertinent factors related to the alleged events and the charges against the suspect. The Single Judge's ruling thus hinges upon an overall assessment of the account of events as described by the applicant, the intrinsic coherence of the application, the parameters and the circumstances surrounding the alleged events alongside the Chamber's finding regarding the material time and place of the crimes charged.

See No. ICC-01/04-01/10-351, Pre-Trial Chamber I (Single Judge), 11 August 2011, paras. 36 and 39.

As previously held, applications for victims' participation will be assessed only if they are complete, namely when they contain the following information supported by documentation, if applicable:

(i) the identity of the applicant;

(ii) the date of the crime(s);

(iii) the location of the crime(s);

(iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court;

(v) proof of identity;

(vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim;

(vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship;

(viii) a signature or thumb-print of the Applicant on the document at the very least on the last page of the application.

However, the Single Judge underlines that regulation 86(2) of the Regulations of the Court provides that applications for victims' participation shall contain a series of information, including any relevant supporting documentation "*to the extent possible*". Likewise, this provision requires a description of the person or persons the victim believes to be responsible for the harm suffered, but only "*to the extent possible*". Accordingly, and concurring with other Chambers of the Court, the Single Judge considers that the identification of the perpetrators and any relevant documentation in support of the application are not among the information necessary for an application for victims' participation to be considered complete. Therefore, the Single Judge considers that applications for victims' participation may not be rejected on the sole basis that they lack information and documentation listed in regulation 86(2) of the Regulations of the Court, provided that the applicant has demonstrated *prima facie* to meet the criteria of rule 85(a) of the Rules.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, paras. 36-37.

[…] [T]he Single Judge points out that with regard to the description of the harm suffered as one of the necessary information required by regulation 86(2) of the Regulations, victim applicants are not required to detail the nature of the physical or psychological prejudice that they suffered or the inventory of the belongings pillaged but to describe, including in their own words, the harm suffered as a result of the commission of the crime(s)

allegedly committed by the suspect. More precise information detailing the prejudice suffered by victims may become relevant for the purposes of reparation proceedings before a Trial Chamber, in the event the charges are confirmed and the accused is convicted at trial.

In the same vein, the absence of personal information such as the ethnicity, gender, date of birth as well as information about the place and date where the application form was signed does not automatically render the application incomplete, so as to lead to its rejection on this ground. Such information, although sometimes missing from the application forms accessible to the parties, still appears in the identification document(s) provided by the victim applicants or in other information accessible only to the Chamber pursuant to the 28 May 2013 Decision.

Furthermore, the Single Judge recalls that "*at times it will inevitably be impossible for the applicants to establish precisely who committed the relevant crime(s) and that, consequently, it would be an unfair burden to require the applicant victims to identify the actual perpetrator(s) of the crimes(s) allegedly causing them harm* […]". However, the Single Judge has remained attentive to whether the victim applicants mention unequivocally that the perpetrators of the crimes from which they suffered personal harm are individuals or entities that are not related to the charges brought by the Prosecutor against the suspect. Such statement may lead to the rejection of the application for participation, on the basis that there is no link between the harm suffered by the victim applicant and the charges brought against the suspect.

See No. ICC-01/04-02/06-211, Pre-Trial Chamber II, 15 January 2014, paras. 62-64.

The Chamber reiterates the Court's jurisprudence, and in particular the determination of the Pre-Trial Single Judge vis-à-vis these 270 Applications. In this regard, the Pre-Trial Single Judge determined, both for victims participating in the *Gbagbo* case as well as the *Blé Goudé* case, that applications will be considered as complete, when they contain the following information, if applicable: (i) the identity of the applicant; (ii) the date of the crime(s); (iii) the location of the crime(s); (iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court; (v) proof of identity; (vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim; (vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship; (viii) a signature or thumb-print of the applicant on the document at the very least on the last page of the application.

The Chamber also reiterates and endorses the conclusions of the Pre-Trial Single Judge as regards the *prima facie* determination to be made at this stage of the proceedings, which equally reflects established Court jurisprudence. In this regard, and pursuant to Regulation 86(2) of the Regulations, applications for victims' participation shall contain information and supporting documentation to the extent possible. Accordingly, applications may not be rejected solely on the basis that they lack information and/or documentation, provided that the applicant has demonstrated *prima facie* that it meets the criteria under Rule 85(a) of the Rules.

Accordingly, when making a *prima facie* determination, the Chamber may decide on the basis of the intrinsic coherence of the application, even if there are some discrepancies between the application and the supporting documents or lack thereof. More importantly, in accordance with Regulation 86(8) of the Regulations, the Chamber has found no compelling reason to re-evaluate or modify the participation of the victims concerned pursuant to Rule 91(1) of the Rules.

Nevertheless, as stated in paragraph 39 above, if and when the victims request more significant participation in the proceedings, the Chamber may require more information to be provided to the Chamber and the parties, or seek clarifications where documents are lacking or contradict other information provided.

[…]

As regards the challenges raised by the *Gbagbo* Defence in relation to language and interpretation issues, the Chamber notes that there is no requirement that the application forms must be completed by the applicants themselves or that any person assisting the applicants in the process must be a qualified interpreter. Applications should only be rejected if it is clear from the application itself that the applicant did not understand the language used therein and no one assisted him/her in the process. Absent such information or any indication that the person assisting the victim or interpreting has influenced the process, the information contained in the application form is presumed to be an appropriate reflection of the victim's account.

[…]

Accordingly, when making a *prima facie* determination, the Chamber may make a decision on the basis of the application itself, even if there are some discrepancies between the application and the identity documents, supporting documents or lack thereof. Moreover, minor discrepancies may be not be given significant weight when making a determination pursuant to Rule 89 of the Rules. The Chamber has therefore taken the above reasoning into consideration when analysing the individual applications forms in Annex B to this decision.

Nevertheless, as stated in paragraph 39 above, if and when the victims request to give evidence or express their views and concerns in the proceedings, the Chamber may require more information or clarification where documents are lacking or contradict other information provided.

See No. ICC-02/11-01/15-379, Trial Chamber I, 7 January 2016, paras. 44-47, 50, and 58-59.

The applications that, in the view of the Registry, are incomplete and/or fall outside the scope of the charges as confirmed shall not be transmitted to the Chamber. The Registry shall inform those applicants accordingly.

Where the Registry is not in a position to determine whether an applicant qualifies as a victim, it shall transmit the application to the Chamber with an indication of the unclear status of the applicant.

[…]

As a preliminary matter, the Chamber notes that the three applicants filled in the application form for organisations. The Chamber notes that the applications are incomplete if they were to be assessed as organisations, as no proof is provided that the buildings mentioned are organisations/institutions within the meaning of Rule 85(b) of the Rules and that the individuals submitting the applications have capacity to represent the organisations/institutions. However, the Chamber considers that the content of the Applications, in particular the description of the harm suffered and of the reparation sought, shows that the applicants intended to apply as individuals rather than as acting on behalf of an organisation/institution. In light of this, the Chamber will assess the Applications in light of the criteria set in Rule 85(a) of the Rules. This is without prejudice of the applicants resubmitting a participation form as individuals acting on behalf of the organisations/institutions mentioned in their respective applications.

[…]

For future applications, the Chamber stresses that it expects the appointed common legal representative and the Registry to ensure that applications are presented in the most accurate and complete possible manner, using the correct form. Supporting materials should be provided whenever possible, particularly in order to establish that the harm suffered is a result of a crime charged.

See No. ICC-01/12-01/15-97-Red, Trial Chamber VIII, 8 June 2016, paras. 11-12, 28, and 35.

[…] The Additional Information fails to make it clear whether the individuals acting on behalf of the organisations are also applying as individuals. In this regard, the Single Judge recalls that in the Decision on Victim Participation, the Chamber had indicated that individuals representing organisations and willing to participate as victims as well shall fill in a separate form. Accordingly, the

Single Judge treats the Additional Information as supplementary material to characterise the applicants as organisations before the Chamber.

See No. ICC-01/12-01/15-156-Red, Trial Chamber VIII, 12 August 2016, para. 7.

The Chamber is fully mindful of the practical difficulties faced by applicants in providing documentary evidence in support of their applications, including official records. […] Having regard to these factors, the Chamber does not consider the lack of jugement d'homologation to be fatal to those 18 Resumption Applications […].

The Chamber has, in addition, identified some other errors in the Registry Reports and in the Resumption Applications themselves. However, having regard to the nature of the errors and the totality of the documentation provided for each of those Resumption Applications, none of these errors is considered by the Chamber to be material.

See No. ICC-01/05-01/08-3558, Trial Chamber III, 29 August 2017, paras. 6-7.

4.3. Redactions of information about the applicants

The Applicants are currently facing serious security risks in the Democratic Republic of the Congo; these current circumstances require that the *ad hoc* counsel for the Defence be provided with a redacted copy of the applications after having expunged any information that could lead to their identification, including the Applicants' identity and the place and time in which they have allegedly been victimized being understood that the scope of the redactions allows for a meaningful exercise by the *ad hoc* counsel for the Defence of his right to reply to the Applications and it is in no way prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial.

See No. ICC-01/04-73, Pre-Trial Chamber I, 22 July 2005, p. 4

The issue of whether to redact the Applications before transmitting them to the Prosecution and the Defence requires it to balance competing obligations: its obligations under article 57(3)(c) of the Statute to protect the privacy of victims and witnesses and under rule 86 of the Rules of Procedure and Evidence to take into account the needs of victims and witnesses in making orders, and its general obligation to ensure the fairness of the proceedings, as well as the requirement under rule 89(1) of the Rules of Procedure and Evidence to transmit copies of the Applications to the Prosecution and the '*defence*', who shall be entitled to reply. The scope of the redactions cannot exceed what is strictly necessary.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, paras. 20-21. See also No. ICC-01/04-73, Pre-Trial Chamber I, 21 July 2005, pp. 3-5; No. ICC-01/04-01/06-494-tEN, Pre-Trial Chamber I, 29 September 2006, p. 4; No. ICC-01/05-01/08-320, Pre-Trial Chamber III (Single Judge), 12 December 2008, para. 79; and No. ICC-02/05-01/09-62, Pre-Trial Chamber I (Single Judge), 10 December 2009, para. 12.

The Chamber's "*only obligation under rule 89 of the Rules is to order the Registrar to provide the Prosecution and the Defence with copies of the applications, such that they make observations on the applications within a time limit set by the Chamber*". Hence, "*rule 89 of the Rules does not require the Chamber to provide, or to order the applicants to provide, to the Prosecution or the Defence, for the purpose of submitting their observations, information extinsic to the applications themselves*".

See No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, paras. 14-15. See also No. ICC-01/04-417, Pre-Trial Chamber I (Single Judge), 7 December 2007, para. 10; No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, para. 20; and No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, para. 7.

The Single Judge considers that the Statute and the Rules do not embrace two different notions of "*victims*", one for protection purposes pursuant to article 68(1) and rules 81, 87 and 88 of the Statute, and the other for the purpose of participation in situation and case proceedings. On the contrary, in the view of the Single Judge, the notion of "*victim*" is the same both in respect of protection and participation in the proceedings.

See No. ICC-01/04-01/07-361, Pre-Trial Chamber I (Single Judge), 3 April 2008, para. 35.

As regards protective and special measures, applying the general principle contained in rule 86 of the Rules, the Trial Chamber recognises there are particular specials needs to be taken into account for child and elderly victims, victims with disabilities, and victims of sexual and gender violence when they are participating in the proceedings. Generally, the Chamber will take into account to the fullest extent possible the needs and interests of victims or groups of victims, and it recognises that these may sometimes be different or in opposition. Under rule 88 of the Rules the Chamber may order special measures to assist victims and witnesses, including measures to facilitate the testimony of a traumatized victim or witness, children, the elderly and victims of sexual and gender violence.

Similarly, the Trial Chamber accepts the submission of the Office of Public Counsel for Victims that protective and special measures for victims are often the legal means by which the Court can secure the participation of victims in the proceedings, because they are a necessary step in order to safeguard their safety, physical and psychological well-being, dignity and private life in accordance with article 68(1) of the Statute.

The Chamber also accepts the suggestion of the Legal Representatives of victims that protective measures are not favours but are instead the rights of victims, enshrined in article 68(1) of the Statute. The participation of victims and their protection are included in the same statutory provision, namely article 68 in its paragraphs 1 and 3, and to a real extent they complement each other.

Both the prosecution and the defence resisted any suggestion that victims should remain anonymous as regards the defence during the proceedings leading up to and during the trial. However, 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.

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.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 127-131. See also No. ICC-01/05-01/08-699, Trial Chamber III, 22 February 2010, para. 24; and No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 61-69.

In accordance with rule 89(1) of the Rules, the Office of the Prosecutor and the Defence are to be provided with a copy of the applications, and they have the right to reply to them within the time- limit set by the Chamber.

However, when making these applications available to the parties the Chamber must apply article 68(1) of the Statute, which mandates the Court to take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims.

Most of the applicants request that their identity, along with other information included in their application forms, is not disclosed to the prosecution, the defence, the State Parties or the general public. Most applicants refer to their fears of retaliation and the safety of their own lives and those of their families as the main reasons for requesting these protective measures.

The Trial Chamber has not received specific detailed information as to the individual security risks of the applicants, although it is aware of the potential high levels of insecurity in relevant parts of the Democratic Republic of Congo.

In order to make an informed decision on individual protective measures for each applicant the Trial Chamber would need the assistance of the Victims and Witnesses Unit so as to assess the individual levels of risk that each applicant faces. Nonetheless, the Chamber is aware of the cost and time involved in the Victims and Witnesses Unit carrying out this procedure as regards all 105 applicants.

At this stage the Chamber is essentially conducting a preliminary assessment on the merits of the applications that may lead to some of them being rejected and this could result in applicants not being granted the status of participants in the proceedings. For this limited purpose, the Chamber adopts the observations of Single Judge Politi when addressing a similar issue, namely that «[g]*iven the practical and financial obstacles necessarily associated with measures other than redactions (in particular, measures in the field or relocation)* […] *the adoption of any measures other than redactions would exceed the scope of the present proceedings and would therefore be unjustified*».

The Trial Chamber has carefully applied the principle of proportionality approved by the Appeals Chamber, that protective measures should:

i) restrict the rights of the suspect or accused only as far as necessary;

ii) be put in place where they are the only sufficient and feasible measure. The Trial Chamber deems that the above two requirements are met given that:

iii) in light of the current and significant insecurity situation in relevant parts of the Democratic

Republic of Congo, non-disclosure of the applicants' identities is necessary. This will not restrict the rights of the accused at this moment, or create an irreversible situation that cannot be corrected in due course, given that the Trial Chamber will make any necessary judgements as to these redactions at the time any of the applicants are granted status as victims, in order to guarantee the fairness of proceedings.

The Trial Chamber deems that the above two requirements are met given that:

i) In light of the current and significant insecurity situation in relevant parts of the Democratic Republic of Congo, non-disclosure of the applicants' identities is necessary. This will not restrict the rights of the accused at this moment, or create an irreversible situation that cannot be corrected in due course, given that the Trial Chamber will make any necessary judgements as to these redactions at the time any of the applicants are granted status as victims, in order to guarantee the fairness of proceedings.

ii) Consistent with the Chamber's 18 January Decision on victims' participation, if victims are granted status to participate in the proceedings, their active role in the trial will depend on additional discrete applications in which they must set out specifically how their interests are affected at a given phase of the proceedings. At that stage the Chamber will take into account whether the victim is requesting continued anonymity for the purposes of determining the appropriate form of participation. At this preliminary juncture, however, redactions to applications are necessary and appropriate and are the only feasible and appropriate measures at this stage of the proceedings, namely the initial application process.

Therefore, all applications for participation must be provided to the prosecution and defence in a confidential redacted form, whereby all information which may lead to the identification of the applicants and their individual whereabouts has been expunged. The Trial Chamber concurs with the reasoning of Pre-Trial Chamber I in a decision on a similar issue, in that "*the scope of the redactions cannot exceed what is strictly necessary in light of the applicant's security situation and must allow for a meaningful exercise by the Prosecution and the Defence of their right to reply to the application for participation*".

Hence, the following redactions are authorised:

i) name of applicant;

ii) name of parents;

iii) place of birth;

iv) exact date of birth (year of birth shall not be redacted);

v) tribe or ethnic group;

vi) occupation;

vii) current address;

viii) phone number and email address;

ix) name of other victims of, or of witnesses to, the same incident;

x) identifying features of the injury, loss or harm allegedly suffered;

xi) name and contact details of the intermediary assisting the victim in filing the application.

As set out above, these redactions shall be further considered by the Trial Chamber for those applicants granted victim status. At that moment in time the Chamber will then re-evaluate the appropriateness of the protective measures in light of the participation of victims in the proceedings on a fact-specific basis.

Redacted applications are to be transmitted to both parties alike in light of fundamental considerations of fairness (namely, the need to preserve the equality of arms), which require that both parties be placed on an equal footing in respect of the exercise of a right which is bestowed on them both by the statutory texts.

See No. ICC-01/04-01/06-1308, Trial Chamber I, 6 May 2008, paras. 19-30. See also No. ICC-01/05-01/08-699, Trial Chamber III, 22 February 2010, paras. 27 and 33; No. ICC-01/04-01/07-933-tENG, Trial Chamber II, 26 February 2009, paras. 49 and 51-52; No. ICC-01/04-01/07-1094-tENG, Trial Chamber II, 4 May 2009, paras. 6-7; No. ICC-01/04-01/07-1129-tENG, Trial Chamber II, 12 May 2009, paras. 6-7; No. ICC-01/04-01/07-1151-tENG, Trial Chamber II, 19 May 2009, para. 8; and No. ICC-01/04-01/07-1206-tENG, Trial Chamber II, 12 June 2009, paras. 11 and 13.

For the limited purpose of making observations on the applications for participation, the parties are not unduly or disproportionately prejudiced by non-disclosure of the applicants' identities, nor is material unfairness created for the accused. The critical stage will occur later, when the Chamber re-evaluate the protective measures in light of the circumstances of participation by any of the applicants in the trial.

See No. ICC-01/04-01/06-2659-Corr-Red, Trial Chamber I, 8 February 2011, para. 37.

Pursuant to rule 89(1) of the Rules, the Prosecutor and the Defence shall be provided by the Registrar, subject to article 68(1) of the Statute, with copies of victims' applications, who shall be entitled to provide their observations thereto. In this regard, the Single Judge notes article 68(1) of the Statute which provides for the taking of appropriate measures to protect, *inter alia*, the safety, privacy, physical and psychological well-being of the victims in a manner that is not "*prejudicial to or inconsistent*" with the rights of the accused and a fair and impartial trial. To this end, the VPRS, together with the Victims and Witnesses Unit (the "VWU"), is requested to suggest to the Single Judge for her review redactions to the victims' applications it believes may be necessary to protect the victim applicants in question. It is emphasized that in so doing, the VPRS and VWU pay full tribute to the principle of proportionality, as requested in the last sentence of article 68(1) of the Statute. The redacted versions of all victims' applications shall be transmitted to the Prosecutor and to the Defence at the same time the applications are submitted to the Chamber. The parties are invited to provide their observations thereto within two weeks as of notification thereof, if they so wish.

See No. ICC-01/09-01/11-17, Pre-Trial Chamber II (Single Judge), 30 March 2011, para. 22. See also No. ICC-01/09-02/11-23, Pre-Trial Chamber II (Single Judge), 30 March 2011, para. 22.

In respect of the request for protective measures for those resuming action, the Chamber considers that the protective measures granted to the victims authorised to participate in the proceedings also apply to the persons authorised to participate on behalf of the deceased victims.

In this regard, the Chamber recalls its decision granting anonymity vis-à-vis the public to all of the victims authorised to participate in this case, including those persons authorised to participate in the proceedings on behalf of the deceased victims.

The Chamber further reminds the parties of their obligation under the Code of Professional Conduct for Counsel to ensure that their team members do not disclose to third parties the identity of the victims authorised to participate in the proceedings, including the identity of persons authorised to participate on behalf of the deceased victims, and, to this end, to limit disclosure to a restricted number of team members.

See No. ICC-01/04-01/07-3018-tENG, Trial Chamber II, 14 June 2011, paras. 32-34.

The First Defence Request is that the Prosecutor be provided with the unredacted version of the victims' applications in order for him to discharge his obligations under article 54 and article 67(2) of the Statute.

At first, the Single Judge wishes to point out that the information provided by the applicants in their applications for participation can under no circumstances be considered as evidence subject to disclosure within the legal framework of the Court. Indeed, such information has been provided by the applicants to the Chamber only for the purposes of substantiating an application for participation but not to give evidence on either points of fact or law in the present case. Further, the relevant information was not collected by the Prosecutor during his investigation and cannot therefore be defined as "*evidence*". In this respect, it is worthy clarifying that only evidence collected by the parties is subject to disclosure between them for the purposes of the confirmation of charges hearing. Accordingly, the information provided by the applicants in their applications for participation is not to be disclosed between the parties even if information provided therein can be considered exonerating in nature. However, this does not mean that the information contained in the victims' applications is of no relevance for the Prosecutor's obligations to investigate exonerating and incriminating circumstances equally, as provided for in article 54(1)(a) of the Statute. This is equally true for the Prosecutor' prerogative under article 54(3)(b) of the Statute to request the presence of and question, *inter alia*, victims. In fact, the applications for participation could lead to the Prosecutor's determination that the applicants may possess information to be considered exculpatory within the meaning of article 67(2) of the Statute, in which case, the Prosecutor' investigation should extend to cover such information. However, only in case information in the victims'

possession is collected by the Prosecutor and reveals itself as exculpatory in nature and/or in any way material for the preparation of the Defence, the Prosecutor will be under the statutory obligation to disclose to the Defence any such evidence pursuant to article 67(2) of the Statute and rule 77 of the Rules.

The Single Judge notes that the same view has recently been taken by the Appeals Chamber which stated as follows:

> *It is reasonable that, in particular where the submissions in the victims' applications for participation indicate that victims may possess potentially exculpatory information, the Prosecutor's investigation should extend to discovering any such information in the victims' possession. Such information would then be disclosed to the accused pursuant to article 67(2) of the Statute and rule 77 of the Rules of Procedure and Evidence.*

Therefore, in light of the relevance that victims' applications can have to the Prosecutor's obligations under the Statute and to the extent clarified above, the Single Judge considers that the Prosecutor should be provided with unredacted versions of the victims' applications. Thus, he will be placed in a position to verify whether information in the possession of the applicants could be considered exculpatory in nature and, as the case may be, to collect such evidence and disclose it to the Defence as requested by the legal texts of the Court. According to the Single Judge, this does not constitute a violation of the principle of equality of arms between the Prosecutor and the Defence since the approach is based upon a substantial difference between the parties, in terms of their nature and role in the proceedings before the Court. In particular, the Prosecutor is an organ of the Court entrusted, by virtue of articles 54(1)(b) and (e) and 68(1) of the Statute, with the obligation to protect, *inter alia*, victims.

Consequently, and considering that full disclosure is the principle while redaction of information only constitutes the exception, the Single Judge is of the view that providing redacted versions of the applications to the Prosecutor is not necessary, also in light of the autonomous duty of the Prosecutor to protect victims. Furthermore, the transmission of the unredacted versions of the applications to the Prosecutor would permit him to properly discharge his statutory obligations, as clarified above. The Registry is therefore hereby ordered to transmit to the Prosecutor the unredacted versions of all the victims' applications for participation received in the present case.

See No. ICC-01/09-01/11-169, Pre-Trial Chamber II (Single Judge), 8 July 2011, paras. 8-16.

The legal basis for the non-disclosure of identifying information of the victim applicants in their applications for participation is to be found in articles 68(1) and 57(3)(c) of the Statute, which mandate the Court to take appropriate measures to protect, *inter alia*, the safety, privacy, physical and psychological well-being of the victims. The Single Judge is cognizant that, in accordance with the principle of proportionality enshrined in article 68(1) of the Statute, measures taken pursuant to this provision may restrict the rights of the suspect only to the extent necessary. At first, the Single Judge considers that the redactions of the specific locations of the events appear necessary to protect the applicants' safety and security. Indeed, the locations concerned are so small that, in combination with other information provided in the applications, their disclosure to the Defence would create a risk that the applicants would be identified. In these circumstances, the copy of the applications shall be transmitted to the Defence with the necessary redactions, as was duly done by the Registrar. With respect to the Defence request that information of a more general nature of the locations of the events be given to it by the Registrar, the Single Judge notes rule 89(1) of the Rules, which states that:

> *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.*

The provision of rule 89(1) of the Rules thus makes it clear that the parties are only entitled to receive a copy of the victims' applications for participation. Accordingly, it is on the applications as submitted by the applicants that the parties are permitted to provide their observations. The applicable law does not envisage that the applications be, in all or in part, replaced or supplemented by any analysis of the Registrar. Moreover, the opposite would run counter to the ratio of rule 89(1), which is that the parties provide their observations on the applications engaging directly and solely with the information as submitted by applicants. In light of the above, the Single Judge is of the view that the request of the Defence to "*order the Registry to replace the redaction of entire locations with information concerning the general locality*" shall be rejected.

As far as the redactions to the applicants' identity documents are concerned, the Single Judge is of the view that, in light of the nature, purpose and circumstances of the current proceedings, the concerned redactions are limited to what is strictly necessary due to the security situation in Kenya and the applicants' safety and do not amount to an unnecessary restriction of the rights of the Defence. Indeed, the redactions applied are the only available measures to protect the applicants concerned, since the disclosure of any further information would compromise their safety and security. Such redactions cannot, accordingly, be reduced and the Defence request to that effect shall be rejected.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 108-113.

With respect to those victims who did not indicate the wish that their identity be withheld from the Defence or expressed no preference in this regard, the Single Judge is of the view that a cautious approach is warranted in the present circumstances. Indeed, the Single Judge concurs with the Defence that the wording of the concerned

question used in the application form is unclear. Furthermore, the absence of security concerns at the time when the applications have been filled in does not mean that any such concern could not in the meantime have become warranted. The Single Judge is, in fact, mindful of the Court's obligation to take appropriate measures with a view to providing for the protection of victims and witnesses within the meaning of articles 57(3)(c) and 68(1) of the Statute. In this sense, it seems appropriate, before disclosing the identity of such victims to the Defence, to request that their Legal Representative contact them in order to receive clear and updated instructions on the matter.

With respect to the victims who allegedly did not provide adequate justification for the request for non-disclosure to the Defence, the Single Judge notes that the Defence refers to an Appeals Chamber's Judgment with respect to redaction of evidence pursuant to rule 81(4) of the Rules. As stated above, the Single Judge recalls once again that the provision of rule 81(4) of the Rules – together with the Appeals Chamber's guiding principles in the interpretation and application thereof – only deals with restrictions on disclosure of evidence and, therefore, is not directly applicable in the present scenario. The Single Judge recalls that, pursuant to the applicable law, it falls within her duty to provide for the protection of victims, taking due account of all the existing circumstances. In light of this, the Single Judge considers that a finding of a risk of the security of victims, which would justify the non-disclosure of their identity to the Defence is not conditioned upon the victims comprehensively justifying its existence. The Single Judge has therefore reviewed the applications concerned in their entirety, not limiting her evaluation to the specific section dealing with the security concerns as expressed by the applicants. Upon such review, the Single Judge is of the view that the information provided by those victims, also in light of the volatile security situation in Kenya, sufficiently justifies the non-disclosure of their identity to the Defence.

However, the Single Judge considers that what is expressed above with respect to the potential change of circumstances from the time of the submission of the application is also valid for those victims who requested that their identity not be disclosed to the Defence because of perceived security risks. The Legal Representative of victims is thus instructed to contact also such victims for the purposes of verifying their preference as to the disclosure of their identity to the Defence and inform the Chamber accordingly. The Single Judge also requests the Legal Representative to inform the victims of the availability of protective measures other than that of the complete anonymity *vis-à-vis* the Defence, such as the confidentiality of the victims' identity towards the public. In this respect, the Single Judge concurs with the proposal of the Defence to the effect that victims should also be clarified of "*the difference between disclosure of their identity to the public and disclosure of their identity to the Defence, to see if that has a bearing on the individual' preference*".

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 118-121.

Pursuant to rule 89(1) of the Rules, the Registry must provide a copy of the applications for participation to the Office of the Prosecutor and the Defence who are entitled to reply within a time limit to be set by the Chamber. However, the transmission of applications to the parties is subject to article 68(1) of the Statute, which mandates the Court to take appropriate measures to protect *inter alia* the safety, privacy, physical and psychological well-being, dignity and privacy of victims.

The Chamber notes that the Registry submitted that the redaction of identifying information constitutes the principal, if not the only, protective measure available to the Registry, even more so with respect to applicants located on the territory of the Sudan, where the Court has no access. The Registry also stated that it has prepared redacted versions of all six applications and is ready to transmit them to the parties in accordance with rule 89(1) of the Rules, should the Chamber so order. It submits that "*consistent with its established guidelines*" and in consultation with the VWU where necessary, it proposes to redact "*any information which could be used to identity the applicant, his or her family or third persons such as intermediaries and community members referred to in the applications*". In this regard, the Registry noted the approach taken by Pre-Trial Chamber I, which ordered redacted versions of applications to be provided to the Defence and non-redacted to the Prosecution, and sought the Chamber's instructions as to the modalities of transmission of the applications to the parties.

The Chamber recalls and adopts the guidelines given by different Chambers as to the identifying information that may be redacted in the applications for participation:

i) applicant's name(s);

ii) name of relatives;

iii) place of birth;

iv) date of birth;

v) name of tribe or ethnic group, if this could be an identifying feature leading to the applicant, bearing in mind the overall circumstances;

vi) occupation, if a specific occupation would enable the applicant to be identified;

vii) relevant address;

viii) telephone number and email address;

ix) names and details of any person who helped the victim to fill out the application for participation;

x) name of victims of and/or witnesses to the acts described; and

xi) characteristics enabling the applicant to be identified from the injury, loss or harm suffered.

The VPRS, in consultation with the VWU, should propose to the Chamber any further redaction that it considers may be necessary, in the context of the case, explaining in these cases the reasons having led it to propose those redactions. In this respect, the Chamber concurs with the reasoning of other Chambers, in that "*the scope of redactions cannot exceed what is strictly necessary in light of the applicant's security situation and must allow for a meaningful exercise by the Prosecution and the Defence of their right to reply to the application for participation*".

Finally, the Chamber endorses the position of other Trial Chambers and considers that the principle of equality of arms requires that the same versions be disclosed to the Prosecution and to the Defence. Therefore, all applications for participation must be provided to the Prosecution and Defence in a confidential redacted form. Applicants will be referred to only by their reference number.

See No. ICC-02/05-03/09-231-Corr, Trial Chamber IV, 17 October 2011, paras. 31-37.

The Single Judge is aware that the redactions applied to the applications for victims' participation received by the Defence reduced to a certain extent its ability to make observations thereon. However, the Single Judge reiterates that this is inherent in the process of adopting protective measures to protect the victims, as provided for in articles 57(3)(c) and 68(1) of the Statute. In this regard, the Single Judge considers that the level of redactions, as employed for the 62 applicants, was the only available measure to protect them. Moreover, the Single Judge is of the view that these measures are proportionate and necessary and that they do not materially undermine the rights of the suspect under article 67 of the Statute.

The Single Judge points out that despite the ability of the Defence to submit the desired observations was decreased with regard to some applicants, the Single Judge is still mandated to assess that whether applicants meet the requirements of rule 85(a) of the Rules before being admitted as participating victims. Lastly, the Single Judge recalls that the redactions applied may be revisited at a later stage and on a case-by-case basis, depending on the level of participation of each victim.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, paras. 34-35.

4. Redaction of information from the application forms

Article 68(1) of the Statute provides that the "*Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses*". These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Rule 81(3) of the Rules of Procedure and Evidence provides that "[w]*here steps have been taken to ensure the confidentiality of information in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles*". Rule 87 of the Rules of Procedure and Evidence provides that "[u]*pon the motion of the Prosecutor or thedefence 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*".

As regards the individuals hereby authorised to participate as victims, the Appeals Chamber notes that 26 have requested anonymity *vis-à-vis* the convicted person. The Victims and Witnesses Unit (the "VWU") has provided an assessment of the protective measures requested by the applicants and recommended that any information that could lead to the identification and precise location of the victims who requested anonymity (or their families) be redacted. This assessment was based on the actual security situation in the areas in which the applicants currently reside and the capacity of the Court to respond to security issues that victims could face in those areas. The VWU indicated that the respective legal representatives of the victims have not provided any information in response to a request for information regarding any threats towards their clients due to their interaction with the Court.

From the VWU's assessment, it appears that it is necessary at this point to maintain the anonymity of the victims hereby authorised to participate and that redaction of identifying information from their applications for participation is the only available protective measure. The Appeals Chamber notes that the redactions applied by the VPRS were aimed at information which would create a risk of identifying the applicant or persons who assisted the applicant in completing the form.

In certain instances, it appears that the information redacted seems to have gone beyond this aim. The Appeals Chamber specifically notes that, as also pointed out by the convicted person the names of the VPRS legal officers who received supplementary information from applicants were redacted. The Appeals Chamber could not discern the reasons for such redactions. Therefore, the Registrar is requested to provide in a separate confidential document the names of the staff members of the VPRS that were redacted from the application forms transmitted to the parties. However, the Appeals Chamber does not consider that the disclosure of the names of staff members of the VPRS would have led to different submissions by the parties. Therefore, the Appeals Chamber does not consider it necessary to give the parties a second opportunity to make submissions on the applications. Furthermore, the Appeals Chamber reminds the Registrar that redactions to victims'

applications for participation transmitted to the parties should be limited to those that are justified for the purposes of protection and strictly necessary.

The Appeals Chamber is of the view that the convicted person has not been prejudiced in his ability to meaningfully assess the victims' applications, notwithstanding the redactions applied, and that there is no material benefit to be gained by ordering the transmission to the convicted person of the other information which he identifies as having been unnecessarily redacted. The Appeals Chamber will bear in mind the rights of the convicted person and any prejudice that may be caused by the participation of anonymous victims in determining the appropriate modalities of participation.

See No. ICC-01/04-01/06-3045-Red2 A4 A5 A6, Appeals Chamber, 27 August 2013, paras. 20-23.

The Single Judge is of the view that the redactions applied to the applications for participation, even those presented by victim applicants who had no concern with regard to their identity being disclosed to the Defence, are necessary, at this stage of the proceedings, in light of the volatile security situation in the region. The Single Judge also notes that most of the victim applicants returned to the villages where the crimes allegedly took place. In addition, the redactions applied are proportionate to the rights of the Defence, as the latter has been able to submit meaningful observations even in the absence of certain pieces of information. These observations have been taken into account by the Single Judge and have been of assistance in her determination under rule 85(a) of the Rules. Moreover, the redactions applied were the only measure available to protect the victim applicants concerned.

The Single Judge considers that redactions applied to the application forms of victims admitted to participate by the present decision may be lifted, should the circumstances surrounding the security situation in the region change.

See No. ICC-01/04-02/06-211, Pre-Trial Chamber II, 15 January 2014, paras. 45-46.

The Single Judge considers that providing the Prosecutor with unredacted victims' applications submitted in the situation in Uganda and in the case concerning *Joseph Kony* et al. will enable the Prosecutor to comply with her obligation under article 54(1)(a) of the Statute, while at the same time respecting the interests and personal circumstances of victims and protecting their safety, physical and psychological well-being, dignity and privacy, in accordance with articles 54(1)(b) and 68(1) of the Statute.

Bearing in mind these statutory obligations of the Prosecutor, and considering the different roles of the Prosecutor and the Defence in the proceedings, the Single Judge is of the view that the provision of the unredacted victims' applications to the Prosecutor is not prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial. Providing the Prosecutor with the unredacted victims' applications is necessary to enable the Prosecutor to discharge her statutory duties.

In this regard, the Single Judge also notes, as indicated in the request, that in case any investigations initiated by the Prosecutor upon consideration of the victims' applications lead to information which is exculpatory in nature or material to the preparation of the Defence, it is for the Prosecutor to disclose such information to the Defence pursuant to article 67(2) of the Statute and rule 77 of the Rules of Procedure and Evidence.

[…]

In light of above considerations, and bearing once again in mind in particular the different statutory obligations and role of the Prosecutor as compared to the Defence, the Single Judge is also of the view that it is not necessary for the Defence to receive the victims' applications submitted in the situation in Uganda and the case concerning *Joseph Kony* et al. in a redacted form.

See No. ICC-02/04-01/15-280, Pre-Trial Chamber II (Single Judge), 29 July 2015, paras. 3-5, and 7.

b. The identity of the person(s) killed and their link with the victim

[…]

The Chamber notes that the […] information may indeed be necessary for the Defence to verify the indirect victim status of the victim applicant. […] Consequently, the Chamber authorises the lifting of redactions relating to the identity of the person(s) killed and their link with the victim.

c. Information concerning the description of the Bogoro attack and the harm suffered by victims

[…]

The Chamber notes that certain details included by the victims in their description of the Bogoro attack and of the harm suffered may prove useful in allowing the Defence to test the credibility of victims and assess the extent of the alleged harm. […] Consequently, the Chamber authorises the lifting of redactions that are strictly related to the description of the Bogoro attack, the harm suffered, and the link between this harm and the crimes for which Mr Katanga has been convicted.

See No. ICC-01/04-01/07-3583-tENG, Trial Chamber II, 1 September 2015, paras. 19 and 24.

Moreover, although redactions may limit the Defence's ability to make observations, the Chamber considers that this does not unduly prejudice its right to reply for the purpose of a *prima facie* determination pursuant to Rule 89 of the Rules. The Chamber also notes that redactions are the only available measure available to protect applicants and third parties at this stage of the proceedings.

Nevertheless, if the LRV wishes to present evidence on issues concerning the victims' interests, or propose victim(s) who wish to make unsworn statements to present their '*views and concerns*', the application by the LRV is required to include, at a minimum, the name and identifying information of the victim.

As regards the specific submissions made by the *Gbagbo* Defence concerning the 270 Applications which contain redactions to locations of the alleged crimes, the Chamber observes that this information is already available to the Defence in the decision of the Pre-Trial Single Judge which granted participation status to these individuals. Therefore, it is unnecessary to order the Registry to transmit anew lesser redacted versions of these applications. For this reason, considering the limited nature of the *prima facie* determination of the criteria for admission of participation provided for in Rule 85(a) of the Rules, the Chamber considers that, if any further information related to the location of the alleged crimes has been inadvertently redacted, it is not necessary for the Chamber to review these applications or modify the participatory status of these victims pursuant to Rule 91(1) of the Rules.

In relation to applications where the identities of the applicants have been redacted, even though they did not oppose their disclosure to the Defence, the Chamber considers the LRV Response on this matter to be of assistance. She confirms that she has requested information from the victims on their consent and that all of them have confirmed they do not want to disclose their identity to the Defence. Although the Chamber recognises that the victims may have had a different view when they completed their application forms, their communication with the LRV should prevail and be regarded as their informed decision on the matter. Accordingly, redactions to their identities vis-à-vis the Defence shall remain. Notwithstanding, for the purpose of trial, the Registry, in consultation with the LRV should contact all participating victims so that they can indicate whether they have an objection to disclosure of their identities to the Defence, and if so, the reasons for non-disclosure.

In relation to applications in which certain other information has been redacted (namely, identification and kinship documents, details of injuries and photos that would enable the applicant to be identified), the Court's jurisprudence has consistently held that this can be considered to be identifying information and thus subject to redactions in order to protect the victims' safety and well-being pursuant to Article 68(3) of the Statute. Moreover, for the limited purpose of *prima facie* analysis, general references to the harm suffered may suffice. Accordingly, insofar as the information is identifying, redactions to identification and kinship documents, injuries suffered, as well as photos, shall remain. As regards the 270 Applicants, there is no reason for the Chamber to re-evaluate or modify their participation pursuant to Rule 91(1) of the Rules. For the same reasons, the Chamber considers it is unnecessary to transmit lesser redacted versions of the 270 Applications and the 259 Applications to the Defence.

See No. ICC-02/11-01/15-379, Trial Chamber I, 7 January 2016, paras. 38-42.

The Chamber confirms that it will not rule on the participation of applicants in the reparation proceedings and that applicants participate in the proceedings simply by virtue of filing their request for reparations. Once the Chamber has received all of the requests for reparations, it will rule on their merits.

[…]

Consequently, it is the Chamber's view that the redactions relating to the names and the information relating to the identity of the new applicants, with the exception of the information relating to the applicants' current place of residence, must be lifted. In keeping with the Decision of 1 September 2015, it follows that the redactions relating to "[TRANSLATION] *the names of deceased family members for whom psychological harm is claimed*" must also be lifted.

See No. ICC-01/04-01/07-3653-Corr-tENG, Trial Chamber II, 16 February 2016, paras. 12 and 16.

[…] [A]ll participating victims, with the exception of the victims who decided to relinquish their anonymity *vis-à-vis* the public in the context of their presentation of evidence or views and concerns, enjoy anonymity *vis-à-vis* the public. The Chamber sees no reason to depart from this finding in relation to the Deceased Victims. […] The Chamber is of the view that this protective measure also applies to the Deceased Victims' family members, including the Successors. Accordingly, the Chamber grants the Request for non-communication to the public of the identity and address, or place of residence, of the family members mentioned in the jugement d'homologation, and non-communication to the public of the address, or place of residence, of the Successors.

Regarding communication of the identities of the Deceased Victims and the Successors to the parties, the Chamber orders the Legal Representative to contact the Successors to determine whether they consent to such communication. In the event the Successors consent, the Legal Representative shall file lesser redacted versions of the Application Forms and Supporting Documents, lifting redactions in accordance with the information obtained from the Successors. In the interest of efficiency, for any future requests for resumption of actions, the Legal Representative shall seek the Successors' position before submitting the request. In case the Successors

consent, redactions in the Supporting Documents shall be limited to identifying information in relation to other family members mentioned in the documents and the places of residence of the Successor. Upon submission of the Supporting Documents to the Chamber, in line with the system set out in paragraph 49 below, the VPRS shall further file lesser redacted versions of the Application Forms of the relevant Deceased Victims, lifting redactions of the identities of the Deceased Victims.

[…]

Concerning […] the redactions of the stamps, the Chamber is satisfied […] that the redactions are necessary to maintain confidentiality of the place where the documents were signed, and are therefore consistent with the Chamber's order.

However, noting the Defence observation that while the exact dates of death are provided in the Request, the specific days of death are redacted in the Supporting Documents", the Chamber considers that these redactions are not justified.

See No. ICC-01/05-01/08-3346, Trial Chamber III, 24 March 2016, paras. 40-41, and 43-44.

The Chamber notes that, in connection with the case at hand, the Applications to Resume Action filed during the trial, and during the reparations stage, along with the relevant supporting documentation, were transmitted to the Defence in redacted form. […] The Chamber considers that the redactions applied to the Applications to Resume Action and the related supporting documentation are justified and do not unduly affect the Defence's ability to submit observations in an informed manner. […].

See No. ICC-01/04-01/07-3682-tENG, Trial Chamber II, 14 April 2016, para. 26.

With regard to the other relevant information contained in victims' application forms, the Chamber has taken note of the Prosecutor's submission to the effect that the family relationship between these applicants and alleged victims of the crimes charged is material for the preparation of the Defence. […] The Chamber is mindful of both the Prosecutor's submission to the effect that granting the lifting of these redactions might lead, directly or indirectly, to the identification of some of the applicants, who did not consent to disclosure of their identity as participating victims, and of the notes of caution struck by the LRV in presenting her opposition thereto. Nevertheless, the Chamber reiterates that redaction of information which is found to be material to the preparation of the defence can only be justified under exceptional circumstances and that, in this case, the lifting of redactions bearing on such information is warranted in order to preserve the rights of the defence.

See No. ICC-02/11-01/15-506, Trial Chamber I, 9 May 2016, para. 31.

The Single Judge emphasises at the outset that the victims' role in the proceedings is significantly more limited as compared to the parties, and the Legal Representatives do not have the same disclosure obligations as the Prosecution. The Single Judge also observes that Article 68(1) of the Statute requires the Chamber to take appropriate measures to protect, *inter alia*, the safety, privacy, physical and psychological well-being of the victims. The measures taken must, however, not prejudice or be inconsistent with the accused's rights to a fair and impartial trial. The Single Judge, in line with various chambers of this Court, rejects the notion that the participation of anonymous victims in the trial proceedings, in and of itself, violates [the Accused]'s right to a fair and impartial trial.

While the preference is for full disclosure of the victims' identities to the parties, the Single Judge is conscious of the vulnerable position of these victims, as the situation on the ground remains volatile, and thus rejects the Defence's argument that the victims' contentions about the risks to their security are unfounded. Further, the Single Judge considers the Defence's arguments that the measures instituted are not appropriate because the detention centre monitors [the Accused]'s calls and '*nothing has befallen*' the victims at the four alleged IDP Camp attacks, inapposite. The victims do not consent to the revelation of their identities and the Legal Representatives have demonstrated that there remain valid reasons to maintain the victims' anonymity vis-à-vis the Defence in the present case. At this time, consultation with the VWU or VPRS is not necessary.

However, this does not mean that victims' identities need not be disclosed in all contexts. For instance, should a victim's participation in the proceedings increase to the extent that he or she is called to appear as a witness, he or she must relinquish his or her anonymity vis-à-vis the Defence. In such a case, the calling participant must disclose identifying information about the victim in accordance with the disclosure and redaction regime in place.

Further, the Single Judge considers that victims presenting their views and concerns also assume a more active role in the proceedings and their continued anonymity before the Chamber could prejudice the accused or be inconsistent with his rights to a fair and impartial trial. Thus, victims presenting their views and concerns before the Chamber shall also relinquish their anonymity vis-à-vis the Defence. The Single Judge notes that exceptional circumstances may warrant a victim's continued anonymity.

See No. ICC-02/04-01/15-471, Trial Chamber IX (Single Judge), 17 June 2016, paras. 11-14.

The Chamber considers that it would be appropriate to order the redaction of information pertaining to the current residence or other contact information that may be used to locate victims who may be eligible.

Nonetheless, the Chamber considers that the names of the victims who may be eligible and other identifying information about them could be useful to the Defence when it examines the eligibility of said victims and the reliability of their claims. Consequently, the identities of victims who may be eligible should not be redacted if they have consented to the disclosure of such information to the Defence.

Regarding victims who may be eligible but who have refused to disclose their identities to the Defence for security reasons, the Chamber considers that, at this stage of the proceedings, it would also be appropriate to provide their application files to the Defence. However, mindful of the victims' concerns, the Chamber instructs the Victims Participation and Reparations Section ("VPRS") to redact their names as well as any other identifying information.

[…]

The Chamber considers that information describing the harm suffered and the incidents that caused it may also be useful in enabling the Defence to gauge the extent of the harm alleged. Consequently, the Chamber considers that any information relating strictly to the description of the harm suffered, the events that caused the harm, and the link between such harm and the crimes of which Mr Lubanga has been convicted, should not be redacted, except for information that might reveal the identities of victims who may be eligible who have refused to disclose that information to the Defence.

See No. ICC-01/04-01/06-3275-tENG, Trial Chamber II, 22 February 2017, paras. 14-16 and 18.

[…] The Chamber recalls that, in order to decide on the appropriate protective measures during investigation, prosecution and trial, judges must strike a balance between the free exercise of the defence's rights, the need to protect victims and witnesses under article 68 of the Statute, and the circumstances of the case, in keeping with the principle of proportionality. Moreover, such decisions must not impair the meaningful exercise of the defence's right of response.

The Chamber notes that the same principles apply to the reparations phase.

[…]

Firstly, the Defence contends that the only part of the files that should have been affected by redaction of the current places of residence of Potentially Eligible Victims was subsection G, "*Victim contact information*". The Chamber finds that this interpretation is mistaken. The Chamber considers that, for the purpose of effectively protecting Potentially Eligible Victims in accordance with article 68(1) of the Statute and the relevant principles highlighted above, the redactions ordered are applicable to the files of Potentially Eligible Victims in their entirety. It may thus prove necessary to redact a place name, which could be used to locate a Potentially Eligible Victim, appearing anywhere in section 2, "*Claim to victim status*".

[…]

[…] [T]he Chamber's Order of 22 February 2017 did not explicitly address the issue of information pertaining to third parties, such as witnesses or the relatives of Potentially Eligible Victims. Nonetheless, the Chamber considers that any information which might be used to identify and locate a person named or mentioned in an application for reparations, but who has not expressly consented to the disclosure of his or her identity to the Defence, must also be redacted, […]. Accordingly, the Chamber finds that it is justified to redact a place name that might be used to locate a witness or a relative of a Potentially Eligible Victim, the role of a former child soldier within the UPC/FPLC or a commander's name that might be used to identify the direct Potentially Eligible Victim.

See No. ICC-01/04-01/06-3328-tENG, Trial Chamber II, 5 June 2017, paras. 4-5, 9 and 12.

At the outset, the Single Judge acknowledges that absent exceptional and exigent circumstances the Legal Representatives are entitled to submit their views and concerns on matters [related to redactions to be applied to application forms].

Turning to the matter at hand, the Single Judge notes that the Request is narrowly tailored to 43 applications which the Prosecution seeks to disclose, citing its obligations under Rule 77 of the Rules. These 43 applications are the remaining applications related to Prosecution witnesses scheduled to testify in the proceedings, and there is no indication that further review would reveal a larger pool of relevant applications.

In this case, distinct from a situation where the Defence seeks to compel a disclosure in the face of the Prosecution's objection, the Prosecution seeks permission to make a disclosure. As a general rule, it is for the Prosecution to determine whether a document is disclosable under Rule 77 of the Rules. Permission is required in the present instance because the Prosecution received these victim applications through Registry filings in the case record and wishes to disclose certain *ex parte* information not contained in the confidential redacted versions of these applications transmitted by the Registry to the Defence.

The Legal Representatives argue that the statutory framework excludes the Prosecution's disclosure of victim applications. However, the Court's jurisprudence recognises that victim applications can contain disclosable information, and does not exclude the Prosecution's disclosure of victim applications pursuant to its Rule 77 obligations. Indeed, the Prosecution's obligations under Rule 77 of the Rules are broad, and the assessment of whether certain victim applications fall within its Rule 77 disclosure obligations are dependent on the

circumstances, *i.e.* case specific. The Single Judge further recalls the applicable two-prong Prosecution disclosure framework set out previously.

As to the first prong, the Single Judge is of the view that the Prosecution's contention that the material falls under its Rule 77 disclosure obligation is correct. A victim application of a family member of a witness making assertions concerning events about which the witness will give evidence is *prima facie* relevant for use by the Defence for several purposes, not limited to potentially impeaching the witness's testimony or testing the witness's credibility. Indeed, the Defence has utilised recently disclosed victim applications of family members in its questioning of several witnesses.

Rather than caution for a rigid criteria allowing the disclosure of applications of only immediate blood relatives or a spouse, the expansive nature of the witnesses and victims' definition of family means that an extended family member could have such a proximate relationship with a witness that his or her victim application could contain information material to the preparation of the Defence. Accordingly, the Single Judge sees no reason to conclude that the Prosecution overstates its disclosure obligations, noting that the Prosecution is better placed than the Chamber to assess if a person is a family member of a witness.

As to the second prong, whether Rules 81 or 82 of the Rules restrict disclosure to the Defence, the Legal Representatives present no specific information suggesting that any part of Rule 81 of the Rules would restrict disclosure in this instance. The Single Judge further recalls that the Disclosure Decision emphasised that '*the preference is for full disclosure of the victims' identities to the parties*'. However, being conscious of the vulnerable position of these victims, the Single Judge held that there remained valid reasons to maintain the victims' anonymity vis-à-vis the Defence. However, '*this does not mean that victims' identities need not be disclosed in all contexts*' and the Single Judge considers that one of these contexts is when these identities fall under the Prosecution's disclosure obligations.

For these reasons, the Single Judge therefore considers that the applications covered by the Request must be disclosed. The Single Judge will now turn to some final considerations as to how disclosure is to be effected.

First, the Single Judge is of the view that, contrary to the CLRV's contention, Regulation 42(4) of the Regulations of the Court – and the ensuing duty to seek the prior consent of the person subject of the protective measure – does not apply in the present case. Rule 87 of the Rules, which set out the regime of protective measures subject to Regulation 42 of the Regulations of the Court, governs measures '*to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness*'. The Prosecution seeks to provide further information only to the Defence, and not the broader public. As such, neither Rule 87 nor Regulation 42 are implicated.

Second, the Legal Representatives submit that they should verify that a given victim's application falls within the relevant criteria before his or her application form is disclosed to the Defence and should have the opportunity to consider the proposed redaction before the disclosure occurs The Single Judge is of the view that verification of information and proposal of the appropriate redaction is primarily the Prosecution's purview. However, paying heed to the protection of the victims' interest, the Prosecution should give the relevant legal representative an opportunity to review the lesser redacted applications covered by the Request before they are disclosed. Any consultations in this regard must be concluded within 15 days of the issuance of the present Decision, except for applications related to P-218. For applications related to P-218, any consultations must conclude by 7 July 2017.

Third, the [Legal Representatives] submit that the relevant [counsel] should speak with the dual status person and ascertain whether the family member whose victim application is to be disclosed knows of the dual status witness's role in the proceedings and also inform the family member of his or her lesser redacted victim application's proposed disclosure to the Defence. The Single Judge is of the view that while the relevant legal representative may speak with the family member or the dual status witness, [he or she] is not permitted to reveal the identity of a protected witness to a family member unaware of the fact that the witness will testify before the Court. Nor is it necessary that such contact occur before the disclosure to the Defence.

Further, and as noted by the [Common Legal Representative of Victims], certain witnesses, particularly victims of gender based crimes, may not have informed their partners of what happened to them and consequently that they are witnesses or participating victims. The Single Judge reminds the parties and the participants that care must be taken when using the information contained in victim applications. In particular, any use of the applications must not reveal protected information about witnesses to other victim applicants.

See No. ICC-02/04-01/15-907, Trial Chamber IX (Single Judge), 6 July 2017, paras. 16-27.

4.4. Redactions of information about the intermediaries

Although the safety of the intermediaries is an important concern, the Chamber must balance this concern against its general obligation to ensure the fairness of the proceedings as well as the requirement under rule 89(1) of the Rules of Procedure and Evidence to transmit copies of the applications to the Prosecutor and the defence, who are entitled to reply to them. A distinction can be made between the Chamber's obligation to protect victims and witnesses in the proceedings under the Statute, Rules and Regulations, and a further obligation to protect staff members of nongovernmental organisations who choose to act as intermediaries. Thus, in balancing these issues, the Chamber considers that the rationale for redacting information concerning

the intermediaries before it is transmitted to the Prosecution and the OPCD is not very persuasive at the stage of the situation.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, para. 31.

The Chamber is alive to the potential risks to the intermediaries employed by the prosecution once their identities are revealed to the accused, as well as the possible adverse implications as regards their future usefulness, but there is now a real basis for concern as to the system employed by the prosecution for identifying potential witnesses. On the evidence, there was extensive opportunity for the intermediaries, if they wished, to influence the witnesses as regards the statements they provided

to the prosecution, and, as just set out, there is evidence that this may have occurred. In the circumstances it would be unfair to deny the defence the opportunity to research this possibility with all of the intermediaries used by the prosecution for the relevant witnesses in this trial, where the evidence justifies that course.

On the basis of the history and the submissions set out extensively above, and applying the Rome Statute framework and the analysis just rehearsed, the Chamber has adopted the following approach:

a. Given the markedly different considerations that apply to each intermediary (or others who assisted in a similar or linked manner), disclosure of their identities to the defence is to be decided on an individual-by-individual basis, rather than by way of a more general, undifferentiated approach.

b. The threshold for disclosure is whether *prima facie* grounds have been identified for suspecting that the intermediary in question had been in contact with one or more witnesses whose incriminating evidence has been materially called into question, for instance by internal contradictions or by other evidence. In these circumstances, the intermediary's identity is disclosable under rule 77 of the Rules. Given the evidence before the Chamber that some intermediaries may have attempted to persuade individuals to give false evidence, and that some of the intermediaries were in contact with each other, the Chamber considers that in these circumstances the defence should be provided with the opportunity to explore whether the intermediary in question may have attempted to persuade one or more individuals to give false evidence. However, in each instance the Chamber has investigated, and will investigate, the potential consequences of an order for disclosure for the intermediary and others associated with him, and whether lesser measures are available. Applications in this regard will be dealt with by the Chamber on an individual basis.

c. The identities of intermediaries (or others who assisted in a similar or linked manner) who do not meet the test in b. are not to be disclosed.

d. Disclosure of the identity of an intermediary (or others who assisted in a similar or linked manner) is not to be effected until there has been an assessment by the VWU, and any protective measures that are necessary have been put in place.

e. The identities of intermediaries who did not deal with trial witnesses who gave incriminating evidence are not to be revealed, unless there are specific reasons for suspecting that the individual in question attempted to persuade one or more individuals to give false evidence or otherwise misused his or her position. Applications in this regard will be dealt with by the Chamber on an individual basis.

f. The threshold for calling intermediaries prior to the defence abuse submissions is that there is evidence, as opposed to *prima facie* grounds to suspect, that the individual in question attempted to persuade one or more individuals to give false evidence.

See No. ICC-01/04-01/06-2434-Red2, Trial Chamber I, 31 May 2010, paras. 138-139. See also, No. ICC-01/04-01/06-2596-Red, Trial Chamber I, 17 November 2010, para. 60.

The Chamber, whilst acknowledging the presumption that disclosure will be effected in full, must weigh the security concerns of the individuals and organisations referred to in the victims' application forms and the right of the accused to a fair trial, including his right, first, to exculpatory evidence under article 67(2) of the Rome Statute and, second, to inspect material in the possession or control of the Prosecution that is relevant for preparation of the Defence under rule 77 of the Rules of Procedure and Evidence. Since authorising the redactions [contained in victims' application forms], the emerging evidence has led to a re-evaluation of the relevance of a number of issues in the trial. In particular, the true identities of a number of witnesses called by the Prosecution, the Defence and some participating victims have been extensively examined, and there is evidence before the Chamber that some false identities may have been provided to the Court. In addition, there is evidence which suggests that witnesses who have claimed they are former child soldiers, or those who claim to be their relatives, have not told the truth. As a result, information that hitherto was considered irrelevant may now have become disclosable under rule 77 of the Rules, because it is material to the preparation of the Defence if it is in possession of the Prosecution. The Chamber notes, however, that the information currently under consideration is in the hands of the Legal Representative and the Victims Participation and Reparations Section, and it is not with the Prosecution. However, to the extent that elements of this material have been used as the basis for questioning by the Legal Representative in court or may assist in determining the true identities of certain individuals who are relevant to this trial – whether as victims, witnesses or otherwise – the Chamber

will review the redactions previously granted. The Chamber additionally notes that the fact that an individual assists participating victims does not mean that his or her name will be automatically redacted.

See No. ICC-01/04-01/06-2586-Red, Trial Chamber I, 4 February 2011, paras. 4-5.

Unless there are substantive reasons for suspecting that the individuals who assisted the applicants to fill in the application forms to participate as victim attempted to persuade one or more of them to give false evidence, or otherwise misused their position, disclosure of the identities of those who provided assistance is not required.

See No. ICC-01/04-01/06-2659-Corr-Red, Trial Chamber I, 8 February 2011, para. 30.

The Chamber notes that, in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I ordered the lifting of redactions relating to the identities of intermediaries because irregularities had been found in the identities and testimonies of certain victims. Trial Chamber I was of the view that this information was required by the defence team […] in order to shed light on these irregularities. Moreover, Trial Chamber I was of the view that the disclosure of this information did not constitute a material risk to the security of intermediaries.

The Chamber notes that, in this case, no irregularity affecting the applications for reparations has been brought to its attention. Furthermore, the Chamber notes the observations made by VPRS that identifying victims could, on the one hand, put at risk the security not only of intermediaries but also of the victims with whom they are in contact and, on the other hand, hamper the work of VPRS on the ground.

In this regard, the Chamber considers that redactions relating to the identities of intermediaries must be maintained.

See No. ICC-01/04-01/07-3583-tENG, Trial Chamber II, 1 September 2015, paras. 13-15.

The Single Judge recalls at the outset that '*it is for the Prosecution to disclose lesser redacted versions of applications for participation of dual status witnesses in accordance with its disclosure obligations and in a manner consistent with the Redaction Decision*'. The Single Judge also recalls the redaction requirements set out in its previous decisions.

The Single Judge notes that standard redactions under category B.3. of the Redaction Protocol cover the identifying and contact information of '*innocent third parties*', to protect individuals who have not agreed to be part of the Court process, who may even not even be aware of it, and who may be placed at risk of because of a perception that they are potential witnesses or collaborators with the Court. In this connection, the Single Judge observes that the term '*intermediary*' is defined in the '*Guidelines Governing the Relations between the Court and Intermediaries*'('Guidelines') as someone '*who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more broadly on the other*'. However, as stated in the Guidelines, not everyone who carries out these functions in cooperation with an organ or unit of the Court or Counsel will be considered intermediaries for the purposes of the Guidelines, and not all may have explicitly agreed to be part of the Court process.

The Single Judge accepts that the intermediaries referred to in the LRV Requests may not necessarily have a formalised relationship with the Court, and that it is possible that some of the factors in category B.3. of the Redaction Protocol may indeed be relevant in assessing whether the requested redactions are warranted. However, the Single Judge considers that, through assisting individuals to complete application forms, the relevant intermediaries have engaged in the Court process, and he does not consider that that they are therefore appropriately categorised as falling under category B.3 of the Redaction Protocol relating to '*innocent third parties*'.

Turning now to *Gbagbo* Defence's contention that the same information should be redacted under category A.5 of the Redaction Protocol ('*identifying and contact information of intermediaries*') – the Single Judge notes that this category is limited to the redaction of information concerning intermediaries who assist in investigations and that it seeks to ensure '*that intermediaries can continue assisting the disclosing party in the investigation in a safe and effective manner*', and is therefore not considered applicable in the present circumstances.

The Single Judge therefore concludes that the redactions sought do not fall under any of the standard categories of the Redaction Protocol.

However, the Single Judge notes that both the LRV and Registry have emphasised that there is a risk that the intermediaries '*may be perceived as potential witnesses or collaborators with the Court*', and their identification thus poses a real risk to the safety, dignity, privacy and well-being of the intermediaries and the applicants, and could jeopardise the activities of the VPRS in the field.

Consequently, pursuant to the Chamber's obligations to protect victims and witnesses and to ensure the integrity of the proceedings under Articles 64(2) and 68(1) of the Statute, the Single Judge is of the view that applying the redactions sought is the most appropriate measure to protect the safety of the intermediaries, and also of other individuals who have applied or may apply for participation through these intermediaries or are otherwise in contact with these intermediaries in the field. In so finding, the Single Judge considers that the Defence has not demonstrated how the identity or contact information of these intermediaries is relevant to any known issues in this case. Noting further that the identity of the individuals with dual status has been disclosed to the Defence and that the redactions sought are of very limited nature, the Single Judge is also satisfied that

no undue prejudice will result from applying the redactions requested. This ruling is without prejudice to the lifting of these redactions at any further stage of the proceedings, either *proprio motu* or upon request of a party or participant, if the redacted information becomes relevant to a live issue in the case.

Consequently, the Single Judge grants the requests for redactions in relation to the thirteen applications for participation and authorises the Prosecution to maintain, on an ongoing basis, redactions to the identifying and contact information of intermediaries referred to in the material attached to the LRV Requests. However, in order to facilitate investigations and the Defence's ability to prepare for trial, the redacted identities of the intermediaries concerned should be substituted by pseudonyms for each individual intermediary.

See No. ICC-02/11-01/15-202, Trial Chamber I, 2 September 2015, paras. 14-21.

As stated by the Chamber in the 2 September 2015 Decision, "*through assisting individuals to complete application forms, the relevant intermediaries have engaged in the Court process*", and they no longer qualify as "*innocent third parties*"; this finding *a fortiori* applies to individuals who, besides having acted as intermediaries, are to be called before the Court as witnesses. Furthermore, since their identity as witnesses to be called by the Prosecutor has already been disclosed to the Defence, the argument supporting the redaction of their identity based on the need to avoid that they be wrongly perceived as potential witnesses is no longer applicable. The 2 September 2015 Decision had already anticipated that the need to revisit the decision granting the redaction might materialise, by stating that the ruling made at that stage was "*without prejudice to the lifting of these redactions at any further stage of the proceedings, either* proprio motu *or upon request of a party or participant, if the redacted information becomes relevant to a live issue in the case*".

The Chamber is not persuaded by the LRV's argument that the consent of the intermediaries is required before lifting redactions to their identity. Indeed, these individuals have already agreed to disclose their identity as witnesses to be called by the Prosecutor and as victims participating in the present case. It does not therefore appear necessary to seek their consent to disclose the mere fact that they facilitated the application of other victims.

Moreover, the Chamber notes that the deadline for applying as a participating victim in the present case has now expired. The LRV's argument that revealing the identity of the intermediaries will affect the intermediaries' ongoing activities in this case therefore lacks persuasiveness. […].

As regards the LRV's additional argument that disclosing an intermediary's identity "*could reasonably*" enable the Defence to identify certain victims who are not to be called as witnesses by the Prosecutor and who did not consent to the disclosure of their identity, the Chamber first notes that the LRV fails to adequately substantiate this argument. Second, and more fundamentally, the Chamber has taken note of the Prosecutor's submission that the information at stake in the Prosecutor's First Request is material to the preparation of the case by the defence, including for the purposes of its ability to adequately investigate; accordingly, granting the lifting of redactions initially authorised, on the basis of the additional role that the intermediaries are to play in the proceedings, is the appropriate outcome of the weighing exercise the Chamber is called to make each time it debates the appropriateness of a protective measure vis-à-vis the rights of the defence.

As regards the LRV Alternative Request, the Chamber is not satisfied that the Defence's interests would be equally or adequately protected by applying pseudonyms to the intermediaries' identifying information. What the Prosecutor submits that it is material information, as such subject to disclosure, is the role that the relevant witnesses have played in the context of the applications of other victims, rather than merely their identity; this information would not be available to the Defence if pseudonyms were to be applied in lieu of redactions.

Consequently, the Chamber decides that the identity of intermediaries who assisted victims in their application process and who are also to be called as witnesses by the Prosecutor shall be disclosed to the Defence.

[…]

Finally, with regard to the LRV's request for redactions to the application forms of P-0350 (a/10179/14) and P-0489 (20094/13), the Chamber notes the Prosecutor's submission that the relevant intermediaries are not Prosecutor's witnesses and that the Defence does not seek lifting of redactions of identifying information of intermediaries who are not Prosecutor's witnesses. Accordingly, the Chamber grants the LRV's request.

[…]

In line with the principles established in the 2 September 2015 Decision as well as in this decision, the Chamber decides that the redactions to the names and organisational affiliations of victims' intermediaries who are also witnesses for the Prosecutor shall be lifted.

See No. ICC-02/11-01/15-506, Trial Chamber I, 9 May 2016, paras. 16-21, 27 and 30.

Where intermediaries are used to assist in the process of identifying victims who may be eligible, and prepare their files, the Chamber considers that, for now, their identities should be redacted.

See No. ICC-01/04-01/06-3275-tENG, Trial Chamber II, 22 February 2017, para. 19.

In the Trial Chamber's assessment of whether redactions to disclosable information are justified, there should be no burden placed on the defence. Rather, the Trial Chamber should consider the reasons for authorising the redactions being sought and, in reaching its overall decision as to whether they are justified, and in balancing the appropriate factors, should give the defence an opportunity to make submissions. This may entail receiving submissions from the defence on the impact that nondisclosure would have on the fairness of the proceedings. Although the defence may have an interest in presenting such submissions, there is no burden to meet in that regard. In addition, the Trial Chamber must bear in mind that the defence is at a disadvantage in being able to make a case given its inability to access the withheld information.

[…] [T]he Appeals Chamber recalls, generally, that the Trial Chamber has an independent duty to take the necessary steps to protect the safety of individuals at risk on account of the activities of the Court and to ensure the confidentiality of information, and that the Trial Chamber is the "*ultimate arbiter*" in case of disagreement among the parties and the participants in that regard. […].

The Appeals Chamber further finds that Mr Gbagbo's argument regarding the extension of the role of the Victims in this case beyond that contemplated in the Statute has no merit. As argued by the Prosecutor, pursuant to rule 93 of the Rules, the Trial Chamber may invite submissions from the participating victims concerning their views on "*any issue*". In this case, the Trial Chamber gave the Victims the opportunity to make submissions on the non-disclosure of the name and organisation of the relevant intermediary. The Appeals Chamber also recognises that the victims will sometimes be in a better position to assess the risk to victims and their intermediaries and there is, therefore, an interest in the Trial Chamber receiving their submissions.

[…]

The Appeals Chamber recalls that written applications for the participation of victims in the proceedings shall contain, to the extent possible, *inter alia*, "[a] *description of the harm suffered resulting from the commission of any crime within the jurisdiction of the Court*", "[a] *description of the incident, including its location and date and, to the extent possible, the identity of the person or persons the victim believes to be responsible*", and "[a]*ny relevant supporting documentation, including names and addresses of witnesses*". Under rule 89(1) of the Rules, the Registry is under an obligation to provide copies of such applications to the defence and to the Prosecutor. The Registry applies redactions to the copies provided to the defence when the Registry deems it necessary. Nevertheless, the fact that victims' applications are provided to the defence by the Registry under rule 89(1) of the Rules does not mean that they cannot be the subject of separate disclosure obligations of the Prosecutor once they are in her possession or control, in particular if the copies that have been provided to the Prosecutor contain lesser redactions than those provided to the defence or no redactions at all. Depending on the circumstances, and in particular if the Prosecutor decides to call the victims in question as witnesses (so-called '*dual status*' victims), she may determine that the applications in question are disclosable under rule 77 of the Rules, as being material to the preparation of the defence, in which case any limitations to the disclosure of the applications, including the redaction of particular information contained therein, would need to be authorised under the Statute or rules 81 or 82 of the Rules, as the case may be. Accordingly, contrary to the Victims' position, the Appeals Chamber finds that applications for participation of '*dual status*' victims may indeed fall within the scope of the Prosecutor's disclosure obligations under rule 77 of the Rules. These obligations, as a whole, must be interpreted broadly. The Appeals Chamber also notes that the Prosecutor, for her part, acknowledges that her disclosure obligations include victims' application forms for '*dual status*' individuals.

[…]

The Appeals Chamber emphasises that there is a distinction between the determination of whether information is material to the preparation of the defence – an assessment under rule 77 of the Rules – and whether redactions are justified under the Statute or rules 81 or 82 of the Rules, based on the appropriate balancing of all relevant factors. In general, the Appeals Chamber considers that, where the Prosecutor has made a determination that information is disclosable under rule 77 of the Rules, such information must be disclosed, subject to any concerns as set out in the Statute and in rules 81 and 82 of the Rules.

In assessing the justification for redactions, the Appeals Chamber recalls its holding that:

> *The overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception rather than the rule.*

It follows from this principle that, in the Trial Chamber's assessment of whether redactions to disclosable information are justified, there should be no burden placed on the defence. Rather, the Trial Chamber should consider the reasons for authorising the redactions being sought and, in reaching its overall decision as to whether they are justified, and in balancing the appropriate factors, should give the defence an opportunity to make submissions. This may entail receiving submissions from the defence on the impact that non-disclosure would have on the fairness of the proceedings. Although the defence may have an interest in presenting such submissions, there is no burden to meet in that regard. In addition, the Trial Chamber must bear in mind that the defence is at a disadvantage in being able to make a case given its inability to access the withheld information.

After the initial decision is taken on redactions, the Appeals Chamber considers that, again, there is no statutory basis – nor is there any practical reason – for imposing a burden on the defence should it later seek the lifting of redactions to information which is otherwise disclosable. Rather, the Trial Chamber in such circumstances should consider whether the justification continues to exist to maintain the redactions. Indeed, given the paramount need to ensure full disclosure, the Trial Chamber itself, with the assistance of the Prosecutor, should keep such matters under review and a decision on redactions may be amended at a later date if circumstances change. In its review, the Trial Chamber should give the defence an opportunity to make submissions, which may include whether, in the defence's view, there are changed circumstances which impact upon how the withheld information fits within the overall defence case. However, the defence has no burden to meet in that regard.

[…]

The Appeals Chamber therefore finds that the Trial Chamber committed an error of law in placing the burden of demonstrating the need for lifting the redactions in question on Mr Gbagbo. The Appeals Chamber further finds that, as Mr Gbagbo's request was rejected on the basis that he failed to discharge the burden placed upon him, the error materially affected the Impugned Decision.

See No. ICC-02/11-01/15-915-Red OA9, Appeals Chamber, 31 July 2017, paras. 1, 42-43, 56, 60-62, and 64.

4.5. Redactions of the name of Legal Representatives

A Legal Representative is entitled to participate in the proceedings in accordance with the terms set by the Chamber and anonymity is incompatible with the functions to be preformed by a legal representative.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, para. 48.

4.6. Registry's Report filed in accordance with regulation 86(5) of the Regulations of the Court

There is no express provision in the Rome Statute or the Rules of Procedure and Evidence requiring the Chamber to transmit the Report to the participants. The function of the Report is to assist the Chamber in issuing only one decision regarding the granting of the victims status, on a number of applications.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, para. 38. See also No. ICC-02/05-93, Pre-Trial Chamber I (Single Judge), 21 August 2007, p. 4; and No. ICC-02/05-01/09-62, Pre-Trial Chamber I (Single Judge), 10 December 2009, paras. 16-18.

The report will not, as a rule, be disclosed to the parties or the participants. However, should the Chamber consider that the Report contains particular fact or matter which can be disclosed, it will decide subject to having secured an appropriate level of protection for confidential information, the disclosure of which could be harmful to the welfare of individual victims.

See No. ICC-01/04-01/06-1022, Trial Chamber I, 9 November 2007, paras. 25-26.

The report of the Victims Participation and Reparations Section filed in accordance with regulation 86(5) of the Regulations of the Court should contain, *inter alia*: (i) summaries of the matters contained in the original applications, set out on an applicant-by-applicant basis (these will take the form of narrative summaries, along with a grid or a series of boxes dealing with formal matters, for ease of reference but in each case based solely on the application forms); (ii) a grouping of applications in one report when there are links founded on such matters as time, circumstance or issue; (iii) any other information which may be relevant to the chamber's decision on the application (for instance,

as supplied by States, the Prosecutor and intergovernmental or non-governmental organisations pursuant to regulation 86(4) of the Regulations of the Court; and (iv) any other assistance the Victims Participation and Reparations Section can give to assist the Chamber in its task of assessing the merits of the applications, whilst carefully the avoiding expressing any views on the merits. Moreover, the reports should not contain any comment or expression of views on the overall merits of the application to participate. But this is not to prevent the VPRS, for instance, from directing the attention of the Trial Chamber in a neutral way to particular issues or facts that it is considered are likely to be relevant to the Chamber's decision.

See No. ICC-01/04-01/06-1022, Trial Chamber I, 9 November 2007, paras. 19-20.

The Registry shall transmit to the Chamber all applications, which in the Registry's assessment are complete and that fall within the scope of the charges as defined by the Decision on the confirmation of charges against Ahmad Al Faqi A1 Madhi […]. Such transmissions must be effectuated on a rolling basis and, in any case no later than 25 July 2016. The Registry shall transmit all applications to the Chamber together with an *ex parte* report, available to the Prosecution and the […] LRV pursuant to Regulation 86(5) of the Regulations. This deadline is without prejudice to receipt and review of subsequent applications to participate in any reparations proceedings which could occur in this case.

See No. ICC-01/12-01/15-97-Red, Trial Chamber VIII, 8 June 2016, para. 10.

5. Issues related to the security of victims

When the safety of an applicant so requires, the Pre-Trial Chamber may instruct the Registrar to transmit to the Prosecutor and the Defence a redacted copy of the applicant's application for participation expunged of any information which could lead to his or her identification.

See No. ICC-01/04-01/06-494-tEN, Pre-Trial Chamber I, 29 September 2006, p. 3.

The OPCV is entitled to seek and obtain any information relating to victims' safety and security, as well as the overall assessment of the general situation in Uganda whenever such information may be necessary and/or appropriate for the purposes of the proper discharge of the Office's statutory tasks.

See No. ICC-02/04-01/05-222, Pre-Trial Chamber II (Single Judge), 16 March 2007, p. 5.

Pursuant to article 57(3)(c) of the Statute, one of the functions of the Pre-Trial Chamber is, where necessary, to provide for the protection and privacy of victims and witnesses. Rule 86 of the Rules of Procedure and Evidence establishes as a general principle that a Pre-Trial Chamber, in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68 of the Statute.

See No. ICC-01/04-329-tEN, Pre-Trial Chamber I (Single Judge), 23 May 2007, p. 3. See also No. ICC-01/04-342-tEN, Pre-Trial Chamber I (Single Judge), 19 June 2007, p. 5.

In order not to expose them to further risks, the applicants should not be contacted directly by any organ of the Court, but only through their Legal Representatives or through the Victims Participation and Reparations Section if they have no Legal Representatives and, if necessary, through the Victims and Witnesses Unit.

See No. ICC-01/04-329-tEN, Pre-Trial Chamber I (Single Judge), 23 May 2007, pp. 3-4. See also No. ICC-01/04-358-tENG, Pre-Trial Chamber I (Single Judge), 17 July 2007, p. 4, and No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, p. 59.

The Victims and Witnesses Unit has a duty first and foremost to the interests of victims and witnesses and to act impartially in the exercise of this duty.

See No. ICC-02/04-98-tENG, Pre-Trial Chamber II (Single Judge), 12 July 2007, p. 4.

Article 57(3)(c) empowers the Pre-Trial Chamber to provide "*where necessary, for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information*". The only functions which may affect the "*personal interests*" of victims and may be exercised prior to a case pertain to the protection and privacy of victims themselves and possibly the preservation of evidence.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, para. 97.

As regards protective and special measures, applying the general principle contained in Rule 86 of the Rules, the Trial Chamber recognises there are particular specials needs to be taken into account for child and elderly victims, victims with disabilities, and victims of sexual and gender violence when they are participating in the proceedings. Generally, the Chamber will take into account to the fullest extent possible the needs and interests of victims or groups of victims, and it recognises that these may sometimes be different or in opposition. Under Rule 88 of the Rules the Chamber may order special measures to assist victims and witnesses, including measures to facilitate the testimony of a traumatized victim or witness, children, the elderly and victims of sexual and gender violence.

Similarly, the Trial Chamber accepts the submission of the Office of Public Counsel for Victims that protective and special measures for victims are often the legal means by which the Court can secure the participation of victims in the proceedings, because they are a necessary step in order to safeguard their safety, physical and psychological well-being, dignity and private life in accordance with Article 68(1) of the Statute.

The Chamber also accepts the suggestion of the legal representatives of victims that protective measures are not favours but are instead the rights of victims, enshrined in Article 68(1) of the Statute. The participation of victims and their protection are included in the same statutory provision, namely Article 68 in its paragraphs 1 and 3, and to a real extent they complement each other.

Both the prosecution and the defence resisted any suggestion that victims should remain anonymous as regards the defence during the proceedings leading up to and during the trial. However, 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.

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.

In the view of the Chamber, the process of "*appearing before the Court*" is not dependent on either an application to participate having been accepted or the victim physically attending as a recognised participant at a hearing. The critical moment is the point at which the application form is received by the Court, since this is a stage in a formal process all of which is part of "*appearing before the Court*", regardless of the outcome of the request. Therefore, once a completed application to participate is received by the Court, in the view of the Chamber, "*an appearance*" for the purposes of this provision has occurred. Whilst the Chamber readily understands that considerable demands are made on the Victims and Witnesses Unit and there are undoubted limitations on the extent of the protective measures that can be provided, nonetheless to the extent that protection can realistically be provided by the Court during the application process, the responsibility for this rests with the Victims and Witnesses Unit, pursuant to Article 43(6).

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 127-131, and 137.

Given the security situation in the areas where the victims lived, the Single Judge found that that the victims were taking an inherent risk by appearing before the Court to exercise the rights attached to the procedural status of victim without requesting that their identities not be disclosed to the Defense. The Single Judge further found that pursuant to articles 57(3)(c) and 68(1) of the Statute, it is the duty of the Single Judge to minimize the risk. One way to minimize the risk faced by victims is to not disclose their identities to the public or media.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 20-22.

The security situation has repercussions on the range of protective measures currently available and which can be implemented to protect Victims who are particularly vulnerable and live in a risk area in the DRC.

See No. ICC-01/04-01/07-628, Pre-Trial Chamber I (Single Judge), 23 June 2008, pp. 8-9.

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 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.

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.

[…]

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.

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).

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.

See No. ICC-01/04-01/06-1556-Corr-Anx1, Trial Chamber I, 13 January 2009, paras. 126-133. See also No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 70-73.

The Chamber observes that the mere assertion that someone is in danger in itself does not necessarily lead to a proper conclusion that the individual is, in fact, going to be in danger – just because counsel claims it.

See No. ICC-01/04-01/06-2586-Red, Trial Chamber I, 4 February 2011, para. 6.

6. Participation

6.1. Participation in the proceedings in general

If a victim applying for the status of victims in respect of a situation also requests, pursuant to regulation 86(2)(g) of the Regulations of the Court, to be accorded the status of victim in any case from the investigation of such a situation, the Chamber automatically takes into account this request as soon as a case exists, so that it is unnecessary to file a second application.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, para. 67. See also No. ICC-01/04-01/06-172-tEN, Pre-Trial Chamber I, 29 June 2006, p. 6.

The use of the present tense in the French version of the text ('*la Cour permet*') of article 68(3) of the Rome Statute makes it clear that the victims' guaranteed rights of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, para. 71.

Because of the lack of an explicit indication of the intention to participate at the pre-trial stage in applications, the Chamber cannot consider these applications for participation.

See No. ICC-01/04-01/06-601-tEN, Pre-Trial Chamber I, 20 October 2006, p. 8.

The purpose of a decision under rule 89 of the Rules is not "*to make a definitive determination of the harm suffered by the victims, as this will be determined subsequently, where appropriate, by the Trial Chamber in the context of a case*". Nor is it, the Single Judge would add, to make a final determination of the nature of the crimes which the events described by the applicant may constitute, or to analyse whether the constituent elements of each such crime are effectively present: both these analyses pertain to the determination of the guilt of the accused, rather than to the assessment of the status of victims whose personal interests are affected within the meaning of article 68, paragraph 3, of the Statute.

[…]

The logical interpretation of rule 92(2) of the Rules of Procedure and Evidence implies that victims in the context of a situation may be entitled to play a specific role in proceedings under article 53 of the Rome Statute. This would apply to all victims whose status in that context has been recognised by a Chamber either prior to or during such proceedings. In addition, the views and concerns which may be submitted by such victims relate not only to the review procedures triggered by a State or the Security Council referrals (article 53(3)(a) of the Rome Statute), but also to the exercise of the *proprio motu* review powers vested in the Pre-Trial Chamber under article 53(3)(b) of the Statute. Thus, article 53 of the Statute seems to provide the most significant scenario where victims may play an influential role outside the context of a case due to the concrete possibility that their personal interests would be affected by the decisions of the Prosecutor.

[…]

There is a possibility that, in special circumstances, article 56 of the Rome Statute may also be applied prior to the case stage and "*views and concerns*" by victims could also be submitted in the context of such proceedings.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 13, 95, and 100.

The Decision on victims' applications for participation does not create a procedure which enables victims in the context of a situation to participate in "*evidence gathering*". The Decision only permits victims to play a role in the process of the "*preservation of evidence*"under articles 56(1) and 57(3)(c) of the Statute. Moreover, the Decision, does not establish a right for victims in the context of a situation to trigger proceedings pursuant to those provisions.

[…]

The process of victims' participation is neither automatic nor unconditional. It is regulated and governed by the provisions of the Statute and the Rules, in particular article 68(3) of the Rome Statute, which is also applicable in the context of articles 56 and 57. Article 68(3) entrusts the Chamber with wide supervisory powers to first assess and then grant requests for participation and presentation of "*views and concerns*". Thus, the participation procedure, far from granting an automatic right to victims, is subject to rigorous judicial scrutiny aimed at ensuring proper and effective participation.

[…]

If the Single Judge acknowledges that some persons might try to obtain information or interfere with the proceedings through the victim participation procedure, it couldn't lead to the categorical denial of victims' rights in absence of concrete evidences establishing such risks. Moreover, victims may decide to engage in preparatory enquiries regardless of the approach taken in the Decision. Neither the Single Judge (nor the Chamber or the Prosecutor) can evidently monitor victims' activities outside the framework of judicial proceedings.

See No. ICC-02/04-112, Pre-Trial Chamber II, 19 December 2007, paras. 31-32, 35, and 42. See also No. ICC-01/04-101-tEN, Pre-Trial Chamber I, 17 January 2006, para. 73.

It is clear form article 68(3) of the Rome Statute that victims have the right to participate directly in the proceedings since their views and concerns may be presented by a Legal Representative.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, para. 115.

The granting of the procedural status of victim in situation or case proceedings automatically gives the applicants the right to participate in such proceedings. However, the extent of their participation must be subsequently determined by the Chamber because article 68(3) of the Rome Statute does not pre-establish a set of procedural rights (*i.e.* modalities of participation) that those granted the procedural status of victim may exercise, but rather leaves their determination to the discretion of the Chamber; according to article 68(3) of the Statute, the Chamber must determine such procedural rights in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Once, in exercising its discretion, the Chamber decides on the set of procedural rights that are attached to the procedural status of victim, such rights belong to all applicants for whom the procedural status of victim has been granted.

See No. ICC-01/04-01/07-357, Pre-Trial Chamber I (Single Judge), 2 April 2008, pp. 11-12. See also No. ICC-02/05-118, Pre-Trial Chamber I (Single Judge), 23 January 2008, p. 5; No. ICC-02/05-121, Pre-Trial Chamber I (Single Judge), 6 February 2008, p. 9; No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, para. 5; No. ICC-01/04-438, Pre-Trial Chamber I (Single Judge), 23 January 2008, p. 5; and No. ICC-01/04-444, Pre-Trial Chamber I (Single Judge), 6 February 2008, p. 11.

At the outset, the Single Judge notes that neither the Statute nor the Rules expressly prohibit the recognition of the procedural status of victim to an individual who is also a witness in the case. Indeed, the Single Judge observes that among the criteria provided for in rule 85 of the Rules for the granting of the procedural status of victim in any given case, there is no clause excluding those who are also witnesses in the same case. Moreover, the Single Judge also notes that neither the Statute nor the Rules contain any specific prohibition against the admissibility of the evidence of individuals who have been granted the procedural status of victim in the same case. In this regard, the controlling provision is article 69(4) of the Statute, which provides that: "*The Court may rule on the relevance or admissibility of any evidence, taking into account,* inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the* Rules of Procedure and Evidence".

See No. ICC-01/04-01/07-632, Pre-Trial Chamber I (Single Judge), 23 June 2008, paras. 18-19.

A party wishing to contact a person with participating victim status must so inform his or her Legal Representative in advance. It is then for the Legal Representative to approach the victim concerned as soon as practicable in order to provide him or her, pursuant to article 15(1) of the *Code of Professional Conduct for Counsel*, with all explanations reasonably needed to make informed decisions, including decisions concerning an interview with a party, making a statement to that party or agreeing, where applicable, to appear as an exculpatory witness. The Legal Representative and all members of his or her team are bound to comply with the obligations set out in the Code of conduct and must not adopt an attitude which is prejudicial to the determination of the truth.

Where a client has informed the Legal Representative that he or she consents to meeting the party and stated whether he or she wishes the Legal Representative to be present at the interview, the latter shall immediately inform the party concerned.

Where the victim is particularly vulnerable and/or his or her security situation gives cause for concern, the Legal Representative shall immediately inform VWU and the party wishing to hold the interview so that all appropriate measures may be taken, *inter alia*, an assessment by VWU of the victim's physical and psychological wellbeing, the conditions in which the interview should be conducted and the need for a VWU representative to be present at the interview.

The party wishing to meet a victim shall inform his or her Legal Representative and, where applicable, VWU, of the place, date and time of the meeting, once the Legal Representative has sought the views of the victim on the matter. It shall discharge this obligation as promptly as possible, and in any event at least one week before the date on which the interview is scheduled.

If the victim, Legal Representative or VWU consider that the interview should not take place at the proposed location, it will be for VWU, in consultation with the party wishing to conduct the interview, to find a new meeting place which is both neutral and appropriate. In such case, VWU will exceptionally arrange for the victim to be transported from his or her place of residence to the appointed meeting place and accompany him or her during transit. VWU must receive any such request at least 15 days in advance. If the victim is participating in the Court's protection programme, VWU will assume the responsibility for making the practical arrangements for the meeting.

The interview [between a party and the represented victim] may take place only if the victim has been duly informed and he has consented of his or her own accord.

At the start of the interview, the party conducting it shall present itself and explain in what capacity it is acting. It shall also state that any statement made by the victim may be used before the Court and that he or she may potentially be called to appear as a witness for that party's case.

The presence of the Legal Representative at a meeting between the represented victim and a party is subject to a request from the victim, who must have been informed in advance of the scope of the interview. Counsel must comply with the victim's position. If the victim does not wish his or her Legal Representative to be present, the Legal Representative will not therefore attend. If the Legal Representative considers it useful and if the client consents, it will be up to the Legal Representative to request the client subsequently to provide him or her with all relevant information about the content of the interview.

If, however, the victim concerned wishes to have him or her present, the Legal Representative may attend the interview and shall take care not to disrupt it. Similarly, he or she shall refrain from any conduct which would influence any of the client's responses or, once again, which might obstruct the determination of the truth.

If a Legal Representative authorised to attend an interview wishes to have a substitute attend, he or she may designate a team member or, exceptionally and in close consultation with the services of the Registry, a person who is included on the Registry's list of counsel to attend on his or her behalf. The name and contact details of the substitute or team member shall be communicated to the parties and he or she shall be bound by the same professional conduct obligations as the Legal Representative. The Legal Representative will be held accountable for any breach of the Code of Conduct which his or her substitute or team member commit under the conditions set out in article 32.

Should the party omit to inform the victim's Legal Representative in advance, it must notify him or her as soon as possible that the interview was held. If the Legal Representative is unable to obtain from the victim a copy of the statement made or, failing that, oral information about its content, he or she may contact the party which held the interview to request that any document which would compensate for the lack of prior notification be sent to him or her on a confidential basis – where applicable, in redacted or summary form. The Legal Representatives are bound by confidentiality obligations and may use any information received from the Defence only in order to exercise their mandate to advise and assist.

See No. ICC-01/04-01/07-2571-tENG, Trial Chamber II, 23 November 2010, paras. 29-39.

The Single Judge notes article 68(3) of the Rome Statute, rule 89(1) of the Rules of Procedure and Evidence, and regulation 24(2) of the Regulations of the Court.

At the outset, the Single Judge notes that, within the context of the proceedings leading to the Chamber's ruling on victims' applications for participation as established by rule 89 of the Rules, only the Prosecutor and the Defence are entitled to submit observations on the applications transmitted by the Registry to the Chamber. No reference is made in any provision to the submission by the applicants' Legal Representatives of a response to the observations provided by the parties in accordance with rule 89(1) of the Rules.

Consequently, the Single Judge considers that, in the absence of any specific provision addressing the possibility for the applicants' Legal Representatives to respond to the observations submitted by the parties on the victims' applications for participation, the general regime of responses as set out by regulation 24 of the Regulations of the Court applies. In this regard, the Single Judge recalls the wording of regulation 24(2) of the Regulations which provides that, subject to any order of the Chamber, victims and their Legal Representatives may file a response to any document when they are permitted to participate in the proceedings in accordance with article 68, paragraph 3, and rule 89, sub-rule 1.

Taking into consideration that, at this stage, a decision as to whether the four applicants are to be recognized as victims and should be allowed to participate in the proceedings is yet to be taken, the Single Judge concludes that their Legal Representative is not permitted to submit any response to documents filed by the parties in accordance with regulation 24(2) of the Regulations. The Request advanced by the OPCV is thus to be rejected.

See No. ICC-01/09-02/11-147, Pre-Trial Chamber II (Single Judge), 1 July 2011, paras. 5-8.

[TRANSLATION] It is for the Chamber to rule on: (i) the Legal Representative's request for leave to terminate his mandate to represent Victims a/0381/09 and a/0363/09; and (ii) whether to maintain the victim status of a/0381/09 and a/0363/09. The Chamber will first discuss the second issue.

1. Whether to maintain the victim status of a/0381/09 and a/0363/09

The Chamber recalls that, in its Decision of 31 July 2009, it granted victim status to Applicants a/0381/09 and a/0363/09, pursuant to rule 89 of the Rules, after considering the information they had provided in their respective applications for participation, and on the basis of a *prima facie* review of the conditions stipulated in rule 85. At that time, it considered that it was incumbent upon the applicants to establish that said conditions and the criteria laid down by the Appeals Chamber were fulfilled *prima facie* "*without any need for it to conduct an in-depth assessment of the credibility of their statements*".

Now, following interviews with Victims a/0381/09 and a/0363/09 via her representative pan/0363/09 with a view to their appearance before the Chamber as witnesses in February 2011, the Legal Representative decided to remove the two victims from his list of witnesses, informing the Chamber of serious doubts as to the veracity of their accounts.

More specifically, in relation to Victim a/0381/09, the Legal Representative indicated to the Chamber that the information he had obtained during individual interviews with said victim and additional analyses had "*led him to question the veracity, in part or in whole, of the person's account*". He stated that, despite these "*serious doubts*", he had not yet reached the conclusion that the person in question "*had lied and was not a victim of the crimes with which the accused have been charged in the present case*". Accordingly, he informed the Chamber of his intention to continue to investigate the matter, "*so that the whole truth is established*", and to report to the Chamber and the Registry on the outcome of the investigations.

As regards Victim a/0363/09, the Legal Representative indicated, *inter alia*, that in light of the information communicated by the Prosecutor on the photograph submitted by pan/0363/09 which brought a contradiction to light, he had contacted the representative of Victim a/0363/09 and her partner in order to obtain further explanations on the matter, but that "*after several discussions with those persons,* [he] *did not obtain satisfactory responses which would allow him to explain the situation*". He therefore concluded that "*all of this affects his relationship of trust with the representative of the victim, pan/0363/09, such that, at this stage, he is not in a position to defend effectively the interests of the victim in question*".

The Chamber has noted the removal of a/0381/09 and a/0363/09 from the list of victims it had authorised to appear, in light of the explanations provided by the Legal Representative, thereby giving credence to the questions he raised as to their credibility. In respect of the latter victim, the Chamber also decided, in its Decision of 11 February 2011, not to authorise the appearance of the person acting on the victim's behalf as a witness of the Chamber, on the basis of the information provided by the Legal Representative. As a result of the emergent contradiction between that person's statements and the photograph submitted in support of those statements, the Chamber found that "[TRANSLATION] *everything leads* [it] *to believe that pan/0363/09 did not tell the entire truth on at least one aspect of her account*". In light of the specific nature of the circumstances, and of the Legal Representative's submissions in particular, the Chamber was then moved to conclude that "[TRANSLATION] *the credibility of pan/0363/09 has been questioned by her own Legal Representative to such an extent that it is impossible for him, or the Chamber, to consider that her testimony could make a useful contribution to the determination of the truth*".

In response to the Legal Representative's stated intention to have his team conduct in-depth investigations into these two files, the Chamber requested the Legal Representative to transmit to it the "*outcome of its investigations and in particular any information which could call into question a/0381/09 and a/0363/09's status of victim participating in the proceedings*".

The Legal Representative has since informed the Chamber, in his Application of 25 March 2011, that, following additional interviews with both Victim a/0381/09 and the person acting on behalf of Victim a/0363/09, the relationship of mutual trust between them had been "*so undermined*" that he considered that he was no longer able to exercise his mandate to represent them and hence had to withdraw it. Relying on his professional obligations towards his clients, he submits that he cannot disclose information concerning the victim status of the two persons in question.

Although it does not possess as much information about the situation of a/0381/09 as that of a/0363/09, the Chamber nevertheless notes that the Legal Representative has expressed doubts as to the veracity of the statements provided by both persons in question, and that he made no distinction between the two when he requested to terminate his mandate to represent both victims, using exactly the same, significant wording to express the loss of the requisite trust between counsel and client. The Chamber must therefore conclude that neither Victim a/0381/09 nor the representative pan/0363/09 provided a satisfactory explanation to assuage the Legal Representative's doubts as to the veracity of the accounts. The Chamber sees no reason to doubt the Legal Representative's good faith and hence needs no further information in order to rule on the status of the two persons concerned. Accordingly, in light of all of the information currently available to it, the Chamber considers, pursuant to rule 91(1) of the Rules, which provides that a chamber may modify a previous ruling under rule 89, that it must amend the part of the Decision of 31 July 2009 granting a/0381/09 and a/0363/09 the status of victim participating in the proceedings, and hence decides to revoke their standing.

Furthermore, it follows from this decision that there is no longer a need to implement the aforementioned Decision of 11 February 2011, since it concerned the communication of the outcome of the Legal Representative's investigations. In this regard, the Chamber stresses that the main purpose of the investigations was to determine whether there was cause to call into question their status of victims participating in the proceedings. Insofar as these victims have not testified and are no longer participating in the proceedings, the Chamber considers that it no longer requires such information, and nor does the Defence, which may in any event verify it if it still considered the information absolutely necessary.

2. The Legal Representative's request to terminate his mandate to represent Victims a/0381/09 and a/0363/09

Since the Chamber has hereby decided to withdraw victim status from a/0381/09 and a/0363/09, it considers that the Legal Representative's request for leave to terminate his mandate to represent said victims has become moot.

See No. ICC-01/04-01/07-3064-tENG, Trial Chamber II, 7 July 2011, paras. 40-50 (reclassified as public on 15 August 2011).

By a decision of 14 June 2011 on the applications to resume action submitted by the family members of five deceased victims the Chamber ordered the common Legal Representative of the main group of victims to transmit to it as soon as possible (i) in respect of the application to resume the action of deceased Victim a/0025/08, a statement by the family of the victim designating a person specifically to continue the action initiated before the Court; and (ii) in respect of Victim a/0311/09, a document certifying the victim's death. In light of the additional documents provided by the Legal Representative and of its prior analysis in the 14 June 2011 Decision, the Chamber is now able to rule on the two applications it received from the persons wishing to act respectively on behalf of deceased Victims a/0025/08 and a/0311/09.

In respect of Victim a/0025/08, the Chamber recalls that it considered the family relationship between the deceased victim and the person wishing to act on his behalf to have been demonstrated. It notes that the Legal Representative has provided a specific mandate, as it requested. Accordingly, it authorises the person mandated by the family of deceased Victim a/0025/08 to continue the action on behalf of this victim initiated before the Court.

In respect of Victim a/0311/09, the Chamber recalls that it considered the family relationship between the victim and the person wishing to act on the victim's behalf to have been established and that the person had indeed been mandated by the family to continue, on the victim's behalf, the action that the victim had initiated. It notes that the Legal Representative has provided it with the requested death certificate. Accordingly, it authorises the person mandated by the family of deceased Victim a/0311/09 to continue on behalf of the victim the action initiated before the Court.

The Chamber recalls that the person designated to continue the action of Victim a/0311/09 has agreed that his own identity, as well as that of the victim, be disclosed to the parties, since the Chamber authorises the person to continue said action. Likewise, if his application is accepted by the Chamber, the person designated to continue the action of deceased Victim a/0025/08 does not object to his identity being known to the parties, as the victim's identity has already been disclosed to them. As this decision authorises the persons mandated by the families of deceased Victims a/0025/08 and a/0311/09 to continue the action initiated by said victims, the Chamber invites the Registry to disclose to the parties without delay the identity of Victim a/0311/09 and of the persons resuming their action. It further recalls that it considers that the protective measures granted to the victims authorised to participate in the proceedings also applyto the persons authorised to participate on behalf of the deceased victims. In this regard, it draws the parties' attention to their obligations relating to confidentiality and protection, including that of limiting the disclosure of such information to a restricted number of their team members.

See No. ICC-01/04-01/07-3185-Corr-tENG, Trial Chamber II, 18 November 2011, paras. 1-7.

The Chamber considers that the appropriate approach in the context of this case is as follows: (i) only victims who wish to present their views and concerns individually by appearing directly before the Chamber, in person or via video-link, should have to go through the procedure established under rule 89 of the Rules and (ii) other victims, who wish to participate without appearing before the Chamber, should be permitted to present their views and concerns through a common Legal Representative without having to go through the procedure established by rule 89 of the Rules. Victims in the second category of participation may register with the Court as victim participants. The registration process will be considerably less detailed and onerous than the application forms required by rule 89(1) of the Rules and regulation 86 of the Regulations of the Court and will not be subject to individual assessment by the Chamber.

See No. ICC-01/09-01/11-460, Trial Chamber V, 3 October 2012, para. 25; No. ICC-01/09-02/11-498, Trial Chamber V, 3 October 2012, para. 24.

(a) The interpretation of article 68(3) of the Statute

The Chamber wishes to clarify the approach it will adopt to allow victims to present their views and concerns during the trial, pursuant to article 68(3) of the Statute and rule 89 of the Rules.

Article 68(3) of the Statute provides that victim participation is restricted to distinct "*stages of the proceedings*", but goes no further in defining the meaning of such a "*stage*". Instead, this statutory provision leaves it to the discretion of the Court to determine the stages of the proceedings at which the participation of victims is appropriate.

The Chamber will apply article 68(3) of the Statute in accordance with the existing jurisprudence of the Court that interprets "*stages of proceedings*" in terms of specific procedural activities, those being activities such as the examination of a particular witness or the discussion of a particular piece of evidence.

Victims' requests to present their views and concerns will be considered by the Chamber, taking into account the following three questions: (i) whether the factual or legal issue raised in the application affects the personal interests of the victim; (ii) whether it is appropriate for the victim to participate at the relevant stage of proceedings, in the determination of which the Chamber retains a broad discretion; and (iii) whether the manner of the victim's participation would cause any prejudice to or inconsistency with the rights of the accused and the requirements of a fair and impartial trial.

(b) Anonymous victims

The Chamber will carefully scrutinise whether and to what extent it may allow the participation of anonymous victims, taking into account the potential for prejudice to the parties and participants. The Chamber must strike a balance between the rights of the accused and the requirements of a fair trial, on the one hand, and the rights of victims combined with the need to protect certain individuals in the difficult contexts on the other. Each application requires the Chamber to carry out this balancing act, reliant on a case-by-case analysis.

The Chamber recalls that it has already set out some principles as to the limited extent of anonymous victims' participatory rights in its "Order requesting observations from the Legal Representatives on the agreement as to evidence pursuant to rule 69 of the Rules of Procedure and Evidence" (the "Order"). In this Order, the Chamber stated that it will "*consider only those observations submitted on behalf of non-anonymous victims*". In line with the Chamber's approach, participation by anonymous victims will depend on the impact such participation may have on the rights of the accused, and whether the participation would have a significant impact on the conduct of the proceedings. For instance, victims requiring access to non-public information; victims who are granted leave to present their views and concerns in person; and victims called to testify may be required to relinquish their anonymity.

(c) Participation in person

The jurisprudence of the Court has identified that there is no absolute statutory right of victims to participate in proceedings in person. Since the Chamber is required to ensure the fair and expeditious conduct of the proceedings and to safeguard the rights of the accused pursuant to article 64(2) of the Statute, the Chamber finds it appropriate that, unless otherwise authorised by the Chamber, victims will present their views and concerns through the CLR.

(d) Dual status individuals

[…]

The Chamber concurs with the current jurisprudence of the Court that, whilst the views and concerns of a victim may be presented either in person or through a representative, the manner in which a victim may contribute to the determination of the truth at trial is by giving evidence under oath, thereby becoming a "*dual status*" individual. This may occur in one of two ways: (i) the victim is called as a witness by a party; or (ii) by the Chamber, upon request of the CLR or on its own initiative, pursuant to article 69(3) of the Statute as further developed below.

The Chamber will establish whether the participation of dual status individuals in the relevant stage of proceedings would be appropriate and in particular whether their participation may be effected in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and expeditious trial.

See No. ICC-02/05-03/09-545, Trial Chamber IV, 20 March 2014, paras. 14-20, 22, and 23.

The Chamber has acknowledged that the close relatives of a victim authorised to participate in the proceedings and who is now deceased may decide to continue the action initiated by the victim before the Court, but that they may do so only on behalf of the deceased victim and within the limits of the views and concerns expressed by the victim in his or her initial application. To this end, the person concerned must provide evidence of the death of the victim in question, his or her relationship to the victim, and his or her appointment by their family members.

[…] [The Chamber] notes further that the persons wishing to resume the action initiated by the two deceased victims have provided, respectively, through their legal representatives, a death certificate for the victim in question and documents indicating the family relationship with the victim. They have also submitted a document signed by family members of the deceased victim granting them a mandate to act on behalf of the victim.

The Chamber considers, therefore, that the persons intending to resume the action initiated by victims a/0170/08 and a/0294/09 have demonstrated the family relationship with the deceased victims. As regards victim a/0170/08, the Chamber notes that, although the family relationship is not stated on the record of the family meeting, the information on the identity documents provided in the light of all the information contained in the request is sufficient to establish the said family relationship. The successors have also established that they have been given a mandate by their respective families to continue the action initiated by the deceased victims.

[…]

[…] [The Chamber] further recalls that the protective measures granted to the victims authorised to participate in the proceedings also apply to the persons authorised to participate on behalf of the deceased victims. In this regard, and having regard to the Defence submission concerning the current composition of its team, it draws the parties' attention to their obligations of confidentiality and protection.

See No. ICC-01/04-01/07-3547-tENG, Trial Chamber VIII, 26 May 2015, paras. 6-8, and 11. See also No. ICC-01/04-01/07-3691-tENG, Trial Chamber VIII, 20 May 2016, para. 7.

Child Applicants

The Chamber considers that, pursuant to Article 21(3) of the Statute, read in conjunction with Article 12(1) of the Convention on the Rights of the Child, victims cannot be excluded from participating solely on the basis of their age. Moreover, pursuant to Article 1 of the Convention on the Rights of the Child, any person below the age of 18 should be considered a child, unless the age of majority is attained earlier. Moreover, even if the Chamber were to take into consideration the age of majority of any domestic legislation, it should be noted that the statutory framework provides that an adult may act on behalf of a child. Therefore, this is not an essential requirement for participation.

See No. ICC-02/11-01/15-379, Trial Chamber I, 7 January 2016, para. 60.

The Chamber notes that all the successors have submitted, through the Legal Representative, a certificate attesting to their family member's death or a copy of the entry in the civil register recording their relative's death. They have also produced a document signed by members of their family that authorises them to act on behalf of the deceased victims or applicants and that indicates their relationship with the deceased, as well as identity documents for each member of the family council.

The Chamber considers that the information contained both in the Request and in the relevant applications for reparations is sufficient to establish the respective family relationships between the deceased applicants and the successors. The Chamber likewise considers that, on the basis of the records of the meetings of family councils, the successors have established that they were appointed by their respective families to continue the action brought before the Court by their deceased relatives.

See No. ICC-01/04-01/07-3691-tENG, Trial Chamber VIII, 20 May 2016, paras. 8-9.

In the present case, the Chamber notes that further to the issuance of the Judgment pursuant to Article 74 of the Statute, victims may still participate in the sentencing as well as in the reparations stage. In this respect, the Chamber considers it appropriate to follow the jurisprudence of Trial Chambers II and VI and, provided that the relevant conditions are met, authorise family members of victims participating in the proceedings and who subsequently dies, or other closely-connected individuals, to resume the actions initiated by the deceased victims, on behalf of the deceased victim and within the limits of the views and concerns expressed by the victim in his or her initial application. […].

Regarding the conditions to be met for a successor to be authorised to resume the actions initiated by a deceased victim, the Chamber considers that the successor must provide evidence of (i) the death of the victim who had been authorised to participate in the proceedings; (ii) the family link or other close connection between the successor and the deceased victim; and (iii) a mandate authorising the successor to continue the actions on behalf of the deceased victim. […].

[…]

The Chamber emphasises that it is called not to rule upon new applications for participation, but to decide on applications for resumption of actions initiated by the Deceased Victims who have already been authorised to participate in the proceedings. As it will not reexamine the merits of the claims made in the respective Application Forms, the Chamber will not consider whether the challenges to the credibility of the Deceased Victims impact the transmission of participatory rights to the Successor.

[…] Regarding the practice of the "*specific mandate*", followed by Trial Chamber II, the Chamber notes that Trial Chamber VI took a different approach by accepting a statement attesting to the relationship between the victim and the applicant which "*clearly referred to the applicant's intention to resume the action initiated by* [the deceased victim]". The Chamber therefore agrees […] that these requirements are case-specific, taking into account, *inter alia*, the specificities of the applicable domestic law. In the present case, and with reference to the requirements under CAR law, the Chamber is of the view that a provision in the procès-verbal of the Conseil de famille, approved by a jugement d'homologation, satisfies the "*mandate*" criterion.

Further, noting the relevant provision of the CAR Code de la famille, the Chamber is satisfied that the family link or other close connection between the Successor and the Deceased Victim is confirmed by the jugement d'homologation. Indeed the jugement d'homologation validates the decision of the Conseil de famille, composed of family members, nominating a person among its members to act as a successor. However, in the interest of clarity, the Chamber orders the Legal Representative to specify, for each of the Individual Applications, the specific family relationship or other close connection between the Successor and the Deceased Victim. For any future requests, this relationship shall be specified directly in the Individual Applications.

[…]

As a result, all participating victims, with the exception of the victims who decided to relinquish their anonymity vis-à-vis the public in the context of their presentation of evidence or views and concerns, enjoy anonymity vis-à-vis the public. The Chamber sees no reason to depart from this finding in relation to the Deceased Victims. […] The Chamber is of the view that this protective measure also applies to the Deceased Victims' family members, including the Successors. Accordingly, the Chamber grants the Request for non-communication to the public of the identity and address, or place of residence, of the family members mentioned in the jugement d'homologation, and non-communication to the public of the address, or place of residence, of the Successors.

Regarding communication of the identities of the Deceased Victims and the Successors to the parties, the Chamber orders the Legal Representative to contact the Successors to determine whether they consent to such communication. In the event the Successors consent, the Legal Representative shall file lesser redacted versions of the Application Forms and Supporting Documents, lifting redactions in accordance with the information obtained from the Successors. In the interest of efficiency, for any future requests for resumption of actions, the Legal Representative shall seek the Successors' position before submitting the request. In case the Successors consent, redactions in the Supporting Documents shall be limited to identifying information in relation to other family members mentioned in the documents and the places of residence of the Successor. Upon submission of the Supporting Documents to the Chamber, in line with the system set out in paragraph 49 below, the VPRS shall further file lesser redacted versions of the Application Forms of the relevant Deceased Victims, lifting redactions of the identities of the Deceased Victims.

[…]

Concerning […] the redactions of the stamps, the Chamber is satisfied […] that the redactions are necessary to maintain confidentiality of the place where the documents were signed, and are therefore consistent with the Chamber's order.

However, noting the Defence observation that while the exact dates of death are provided in the Request, the specific days of death are redacted in the Supporting Documents", the Chamber considers that these redactions are not justified. […].

The Chamber recalls that the 16 September 2011 time limit applied to the submission of any new victims' applications to the Registry. […] [T]he requests for resumption of actions do not constitute new applications. […] In these circumstances, the Chamber finds that at this stage, the imposition of a time limit for future requests for resumption of actions is neither warranted nor appropriate. […].

The Chamber decides that any new applications for resumption of actions shall be submitted and processed in line with the following system:

i. When the Legal Representative is informed that a participating victim has passed away and a family member or other closely connected individual wishes to resume the action before the Court, she shall assist that individual to collect the relevant documents […]. They will then submit the dossier to the Registry, together with a "*resumption of action*" application form, to be prepared by the Registry following the format included in Annex B, and duly completed by the individual with the assistance of the Legal Representative.

ii. Upon receipt of such application, the Registry shall assess it in accordance with the criteria set out in paragraph 23 of the present Decision.

    a) Should the Registry consider that the applicable requirements are met, the Registry shall transmit it, with any relevant documents in its possession, to the Chamber.

    b) Should the Registry consider that a resumption application is incomplete or does not, for any other reason, meet the applicable requirements, it shall inform the Legal Representative so that, if appropriate, the Successor is given a further opportunity to provide the necessary information or supporting documents.

iii. Upon receipt of the application, and barring a clear and material error apparent in the Registry's assessment, the Chamber will approve such assessment and authorise the applicant to resume the actions initiated by the deceased victim.

See No. ICC-01/05-01/08-3346, Trial Chamber III, 24 March 2016, paras. 22-23, 26, 31-32, 40-41, 43-44, 47, and 49.

The Chamber is fully mindful of the practical difficulties faced by applicants in providing documentary evidence in support of their applications, including official records. It notes in this respect the Registry's submission that the current situation in the Central African Republic presents practical challenges for victims to obtain a jugement d'homologation, as there are a limited number of administrative and judicial institutions providing such documents and the judicial/administrative process can be costly and complex. […] Having regard to these factors, the Chamber does not consider the lack of jugement d'homologation to be fatal to those 18 Resumption Applications […].

The Chamber has, in addition, identified some other errors in the Registry Reports and in the Resumption Applications themselves. However, having regard to the nature of the errors and the totality of the documentation provided for each of those Resumption Applications, none of these errors is considered by the Chamber to be material.

See No. ICC-01/05-01/08-3558, Trial Chamber III, 29 August 2017, paras. 6-7.

6.2. Participation in relation to a preliminary examination

The very first scenario envisaged by the Statute wherein victims are called upon to play a role is indeed meant to take place prior to a situation, let alone a case, being brought before the Court: such a scenario is the procedure for the authorisation of an investigation *proprio motu* by the Prosecutor. In this scenario, the "*personal interests*" of the alleged victim (or victims) may be affected since victims' representations to the Pre-Trial Chamber can provide factual and legal elements for the decision to authorise the investigation into the situation within which the same victims claim to have suffered harm as a result of the commission of crimes within the jurisdiction of the Court.

Rule 50(1) of the Rules of Procedure and Evidence clarifies who these "*victims*" may be. It specifies that prior to submitting a request to the relevant Pre-Trial Chamber, the Prosecutor "*shall inform victims, known to him or her or to the VWU, or their Legal Representatives*". In light of the above, the following two conclusions can be drawn:

(i) victims, as well as any other subject, may contact the Court (in particular the Office of the Prosecutor) prior to and irrespective of whether a situation or a case is pending before it, with the view of triggering the exercise of the Prosecutor's *proprio motu* powers;

(ii) if the Prosecutor considers appropriate to exercise such powers, victims may be involved in the proceedings under article 15 of the Rome Statute provided only that they be known to the Court (either the Prosecution or the Victims and Witnesses Unit).

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 90-92.

The Chamber further notes that according to article 15(3) of the Statute in conjunction with rule 50(3) of the Rules and regulation 50(1) of the Regulations of the Court, in response to the notification provided by the Prosecutor, victims "*may make representations in writing*" to the Chamber within 30 days following the date of their notification, which took place on 23 November 2009.

The Chamber considers that one of its fundamental functions is to ensure the proper conduct of the proceedings throughout the pre-trial process. In particular, pursuant to rule 50(4) of the Rules, the Chamber may decide "*on the procedure to be followed*" with respect to any issue related to the Prosecutor's Request, including victims' representations. Thus, it is essential to organize the procedure of receiving, if any, victims' representations in accordance with article 15(3) of the Statute and rule 50(3) of the Rules.

The Chamber notes that article 15(3) of the Statute and rule 50(3) of the Rules use the term "*victims*" as defined in rule 85 of the Rules. Accordingly, it is the Chamber's view that representations made in accordance with article 15(3) of the Statute and rule 50(3) of the Rules must be confined to those who qualify as "*victims*" within the meaning of this rule, bearing in mind the specific nature of the article 15 proceedings. As the Appeals Chamber stated, "*the location of rule 85 in the Rules is indicative of a general provision relating to victims, applicable to various stages of the proceedings* […] [and that] *the object and purpose* [of this rule] *is to define who are victims*".

The Chamber thus considers that for the purpose of representations at this stage and given the limited scope of article 15 proceedings, the conditions set out in rule 85 of the Rules should be assessed on the basis of the intrinsic coherence of the information given by the victim(s).

The Chamber is duty bound to ensure that proceedings are carried out in an expeditious manner. Being mindful that victims' representations at this particular stage is a procedure of limited scope, which is merely confined to the Prosecutor's request for authorization of an investigation, the Chamber finds it appropriate to request the Victims Participation and Reparations Section (the VPRS) to: (1) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations (collective representation); (2) receive victims' representations (collective and/or individual); (3) conduct an assessment, in accordance with paragraph 8 of this order, whether the conditions set out in rule 85 of the Rules have been met; and (4) summarize victims' representations into one consolidated report with the original representations annexed thereto.

See No. ICC-01/09-4, Pre-Trial Chamber II, 10 December 2009, paras. 5-9.

Considering, however, that irrespective of whether VPRS 3 and VPRS 6 have *locus standi* [to submit a request for the purposes of investigating the person as military commander under article 28(a) of the Statute for crimes allegedly committed by his troops in Ituri], the Chamber may review the alleged decision of the Prosecutor on its own initiative, pursuant to article 53(3)(b) of the Statute, in conjunction with articles 53(1)(c) and 53(2)(c);

Noting, however, that the Prosecutor submits that to date no decision on "*interests of justice*" grounds not to proceed against the accused with respect to crimes allegedly committed in Ituri has been taken;

Considering therefore that, in view of the Prosecutor's declaration, which the Chamber, in light of the information available to it, sees no reason to disbelieve, there is no decision for the Chamber to review and there is, accordingly, no basis for it to exercise its powers under article 53(3)(b) of the Statute.

See No. ICC-01/04-582, Pre-Trial Chamber I, 25 October 2010, pp. 4-5.

The Chamber has considered the procedure adopted by Pre-Trial Chamber II for victims' representations in the situation of the Republic of Kenya. The Chamber recognises the importance of engaging victims as early as possible in the process and of ensuring they are able to make appropriate representations within the context of the present application. The Chamber has taken into account the steps taken by the Prosecution to notify any potential victims and their representatives of the opportunity to file representations, and it has borne in mind the limited purpose of representations at this stage as well as the security concerns raised by the Prosecution. The Chamber is of the view that the procedure adopted by Pre-Trial Chamber II will disproportionately delay the Chamber in resolving the present request for authorisation, given the steps that would need to be followed. In the view of the bench, it is in the best interest of the victims for this application to be considered expeditiously.

The Chamber therefore concludes that it is appropriate to ask the VPRS to prepare a report for the Chamber based on the representations that are received following the notice given by the Prosecutor pursuant to rule 50(1) of the Rules. The Chamber may request additional information pursuant to rule 50(4) of the Rules at a later stage, if needed.

Rule 85 of the Rules provides the definition of "*victims*" for the purposes of article 15(3) of the Statute and rule 50(3) of the Rules. The Chamber is therefore of the view that any individual representations, to the extent possible, are to include sufficient information about the identity of any individuals who make representations in this context; the harm they suffered; and the link with any crimes coming within the jurisdiction of the Court. Similarly, with collective representations, community leaders, to the extent possible, are to provide sufficient information about the community they represent; the harm suffered by members of that community; and the links to any crimes coming within the jurisdiction of the Court. For the limited purpose of ensuring the efficient conduct of the article 15 proceedings, the Chamber requests the VPRS to undertake an initial *prima facie* assessment to ensure that only those representations emanating from sources who are potentially victims within the meaning of rule 85 of the Rules are sent to the Chamber for consideration, within the context of the Prosecution's present application. This initial rule 85 assessment by the VPRS is unrelated to any subsequent applications that may be made to participate in the proceedings, which will be considered separately in due course.

See No. ICC-02/11-6, Pre-Trial Chamber III, 6 July 2011, paras. 7-10.

6.3. Participation at the investigation stage

It is systematically consistent to interpret the term "*procédure*" in the French version and "*proceedings*" in the English version of article 68(3) of the Statute as including the stage of investigation of a situation, and therefore as giving victims a general right of access to the Court at this stage.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, para. 46.

The participation of victims at the investigation stage does not *per se* jeopardise the appearance of integrity and objectivity of the investigation, nor is it inconsistent with basic considerations of efficiency and security.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, para. 57.

Participation of victims during the investigation of a situation may stem from rule 93 of the Rules of Procedure and Evidence, which allows a Chamber to "*seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue*" and to "*seek the views of other victims, as appropriate*". Thus, it can be inferred that victims may be invited by the Chamber to express their views on one or more issues at any stage of the proceedings (including the stage of the investigation of a situation) provided that the Chamber considers it appropriate.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, para. 102.

The participation of victims at the investigation stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered; hence, the investigative stage of a situation and the pre-trial stage of a case are appropriate stages of the proceedings for victims' participation. As a consequence, there is a procedural status of victim in relation to situation and case proceedings before the Pre-Trial Chamber.

See No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, paras. 11 and 14.

Granting victims a procedural status at the pre-trial stage of a case is neither mandatory nor prohibited by internationally recognized standards concerning the rights of the accused and a fair and impartial trial.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, para. 72.

The Chamber considers that article 68(3) of the Statute constitutes the basic norm according to which victims' participation may take place in proceedings before the Court. There are also other provisions in the Statute, such as articles 15(3), 19(3) and 75, which specify particular instances where victims have the right to participate. However, the Chamber is of the view that unless the Statute allows *expressis verbis* for victims' participation at specific stages of the proceedings, their participation is governed by the normative framework of article 68(3) of the Statute.

Article 68(3) of the Statute sets out certain criteria that must be met before victims, who meet the requirements of rule 85 of the Rules, are permitted to participate at "*stages of the proceedings*". Before examining such criteria, the Chamber will have first to determine whether and to what extent a situation stage may qualify as a "*stage of the proceedings*" within the meaning of article 68(3) of the Statute. Thereafter, the Chamber will have to determine (1) whether the relevant stage is "*appropriate*", and (2) whether the personal interests of the victims are affected.

The Chamber finds that hitherto the Court's jurisprudence has been consistent in recognizing the possibility of victims' participation during the stage of the situation. However, while Pre-Trial Chambers I and II adopted a broad definition of the notion of "*stage of the proceedings*" as encompassing the situation as a whole, the Appeals Chamber distinguished between the investigation itself conducted by the Prosecutor on the one hand, and judicial proceedings, on the other, stating that "*article 68(3) of the Statute correlates victim participation to* 'proceedings'*, a term denoting a judicial cause pending before a Chamber*" and that "*in contrast, an investigation is not a judicial proceeding*". By so doing, the Appeals Chamber, confined victims' participation during the situation stage to judicial proceedings, which "*include proceedings affecting investigations, provided [that victims'] personal interests are affected by the issues arising for resolution*". It follows that the Appeals Chamber clearly acknowledged that victims can be allowed to participate in judicial proceedings taking place at the stage of a situation. The Chamber, accordingly, sees no reason to depart from the unified approach undertaken by the different Chambers that victims may participate in proceedings related to the situation stage. Therefore, victims participation may take place only when an issue arises which may require judicial determination.

Since it has been established that judicial proceedings within the situation may qualify as a "*stage of the proceedings*" within the meaning of article 68(3) of the Statute, the Chamber will turn on to examine the two criteria under the said provision. With respect to the first criterion, the Chamber must consider whether the relevant stage of the proceedings is deemed "*appropriate*" for the purpose of victims' participation. If the answer is in the affirmative, then the Chamber must assess the second criterion, namely whether the victims' personal interests are affected by those judicial proceedings, which will be assessed on a case-by-case basis and only when an issue arises which may require judicial determination.

In the present decision the Chamber will provide scenarios by way of example constituting an issue leading to judicial proceedings which may be deemed appropriate for victims' participation, and where victims' personal interests may be affected. In this respect, the Chamber notes that so far there is a divergence in the approaches taken by the different Chambers of the Court with respect to the envisaged scenarios. In particular, the Appeals Chambers Judgment of 19 December 2008, which addressed the question of victims' participation in the context of the situation, fell short of any guidance as to the possible scenarios that could lead to such participation at the situation stage.

In its judgment of 19 December 2008, the Appeals Chamber stated: "*Having determined that the Pre-Trial Chamber cannot grant the procedural status of victim entailing a general right to participate in the investigation, the Appeals Chamber is not in a position to advise the Pre-Trial Chamber as to how applications for participation in judicial proceedings at the investigation stage of a situation should generally be dealt with in the future*". Therefore, in the absence of any clear guidance of the Appeals Chamber with respect to the issue at stake, the Chamber finds it essential to define the procedural framework for victims' participation at the situation stage.

The three different hypotheses are the following: (a) the Chamber is seized of a request that is not submitted by victims of the situation; (b) the Chamber decides to act *proprio motu*; and (c) the Chamber is seized of a request emanating from victims of the situation who have filed an application for participation in the proceedings with the Registry.

See No. ICC-01/09-24, Pre-Trial Chamber II, 3 November 2010, paras. 7-15. See also No. ICC-01/05-31, Pre-Trial Chamber II, 11 November 2010, paras. 1-2.

In light of the Appeals Chamber Judgment, victims may not be granted a general right to participate at the stage of the investigation in a situation. The victims are entitled, however, to participate in any judicial proceeding conducted at this stage, including proceedings affecting investigations. The Chamber shall therefore not grant participatory rights to victims, unless there is a judicial proceeding in which they would be able to participate.

The Chamber notes that the Statute and the Rules envisage various judicial proceedings that can be conducted at the situation stage: *inter alia*, proceedings regarding a review by the Pre-Trial Chamber of a decision by the Prosecutor not to proceed with an investigation or prosecution pursuant to article 53 of the Statute; proceedings concerning the preservation of evidence or the protection and privacy of victims and witnesses pursuant to article 57(3)(c) of the Statute; and proceedings concerning preservation of evidence in the context of a unique investigative opportunity pursuant to article 56(3) of the Statute. Victims can participate in such judicial proceedings if they demonstrate that their interests are affected. The Chamber also takes note of rule 93 of the Rules, according to which the Chamber may seek the views of victims or their Legal Representatives on any issue. Victims may participate in judicial proceedings by presenting their views in this way also at the stage of the investigation of a situation.

See No. ICC-01/04-593, Pre-Trial Chamber I, 11 April 2011, paras. 9-10.

Considering that the Victim Participation Framework adopted in the DRC situation is of general application and that there is no reason to depart from it for any victim applications related to the Libya situation. Therefore the Chamber orders the VPRS to abide by the Victim Participation Framework in the context of any victim applications related to the Libya situation.

See No. ICC-01/11-18, Pre-Trial Chamber I, 24 January 2012, p. 4.

6.4. Participation at the pre-trial stage, including at the confirmation of charges hearing

At the outset, the Single Judge notes that the Prosecution and Defences' proposition is contrary to the latest empirical studies conducted amongst victims of serious violations of human rights, which show that the main reason why victims decide to resort to those judicial mechanisms which are available to them against those who victimised them is to have a declaration of the truth by the competent body.

In this regard, the Single Judge underlines that the victims' core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility is at the root of the well-established right to the truth for the victims of serious violations of human rights.

The Single Judge does not intend to address in the present decision the question of whether or not this right, and the victims' core interests that underlie it, can at times also be satisfied through mechanisms alternative to criminal proceedings.

However, the Single Judge observes that when this right is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings:

(i) bring clarity about what indeed happened; and

(ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth.

As a result, the Single Judge considers that the issue of the guilt or innocence of persons prosecuted before this Court is not only relevant, but also affects the very core interests of those granted the procedural status of victim in any case before the Court insofar as this issue is inherently linked to the satisfaction of their right to the truth.

In this regard, the Single Judge considers that the victims' central interest in the search for the truth can only be satisfied if

(i) those responsible for perpetrating the crimes for which they suffered harm are declared guilty; and

(ii) those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can continue.

The Single Judge also notes that the above-mentioned empirical studies show that a large majority of victims wish to have those who victimised them prosecuted, tried and convicted, and subjected to a certain punishment.

In other words, the interests of victims go beyond the determination of what happened and the identification of those responsible, and extend to securing a certain degree of punishment for those who are responsible for perpetrating the crimes for which they suffered harm.

These interests – namely the identification, prosecution and punishment of those who have victimised them by preventing their impunity – are at the root of the well established right to justice for victims of serious violations of human rights, which international human rights bodies have differentiated from the victims' right to reparations.

The Single Judge does not intend to address in the present decision the question of whether these victims' interests can only be satisfied through the criminal investigation, prosecution and sanction of those responsible for serious violations of human rights or whether, under very specific conditions, alternative mechanisms, in which victims can confront and challenge those responsible for their harm, could also be feasible to satisfy such interests. Nevertheless, the Single Judge would like to emphasise that the Preamble of the Statute expressly recalls that "*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*", a duty that has been upheld by the Human Rights Committee, as well as by the case law of the Inter-American and European Courts of Human Rights.

Moreover, the Single Judge observes that when this right is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings lead to the identification, prosecution and punishment of those who have victimised them.

As a result, in the view of the Single Judge, the issue of the guilt or innocence of the persons charged

before this Court is not only relevant, but it also affects the core interests of those granted the procedural status of victim in any case before the Court, because this issue is closely linked to the satisfaction of their right to justice.

It is for these reasons that, in previous decisions, the Chamber has stated that the personal interests of victims are affected by the outcome of the pre-trial stage of a case insofar as this is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspects are responsible for the crimes with which they have been charged by the Prosecution.

Moreover, the Single Judge also notes that this basic tenet that the issue of the guilt or innocence of the persons charged affects the very core interests of those granted the procedural status of victims in any case before the Court has also been affirmed by Pre-Trial Chamber II in its 10 August 2007 decision.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 31-44. See also No. 02/04-01/05-252, Pre-Trial Chamber II, 10 August 2007, paras. 9-11.

At the outset, the Single Judge would like to emphasise that the Chamber has repeatedly stated that:

(i) the analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted in relation to stages of the proceedings, and not in relation to each specific procedural activity or piece of evidence dealt with at a given stage of the proceedings;

(ii) the pre-trial stage of a case is a stage of the proceedings in relation to which the analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted;

(iii) the interests of victims are affected at this stage of the proceedings since this is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspects are responsible for the crimes included in the Prosecution Charging Document, and consequently:

1. this is an appropriate stage of the proceedings for victim participation in all cases before the Court;

2. there is no need to review this finding each time a new case is initiated before the Court; and

3. a procedural status of victim exists at the pre-trial stage of any case before the Court;

(iv) article 68(3) of the Statute does not pre-establish a set of procedural rights (*i.e.* modalities of participation) that those granted the procedural status of victim at the pre-trial stage of a case may exercise, but rather leaves their determination to the discretion of the Chamber;

(v) when determining the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case, the Single Judge:

1. need not make a second assessment of the victims' personal interests; and

2. must ensure that such procedural rights are determined "*in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*"; and

(vi) once the Chamber makes a decision on the set of procedural rights that are attached to the procedural status of victim at the pre-trial stage of a case, such rights belong to all natural and legal persons for whom the procedural status of victim has been granted in relation to such stage of the proceedings.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, para. 45. See also No. ICC-02/05-121, Pre-Trial Chamber I (Single Judge), 6 February 2008, pp. 6, and 8-9.

The Single Judge notes articles 60(1), 68(3) of the Statute, and rule 85 and 121(1) of the Rules of Procedure and Evidence.

At the outset, the Single Judge notes that the applications of the victims concerned have been lodged with the Registry of the Court in December 2010, at a time when proceedings in the present case were not yet opened. Hence, the treatment of the applications was governed by the Chamber's "Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya", dated 3 November 2010, which does not call for treatment of any victim application, unless there is an issue which may require judicial determination at the stage of the situation.

Further, the Single Judge notes that the applications of the victims concerned have not yet been submitted to the Chamber, which means that the status of the victim applicants has not been decided yet pursuant to rule 85 of the Rules. Thus, the status of the victims concerned for the time being is that of applicants. Consequently, only when a judicial decision on the status and participation modalities is taken, can the victims concerned exercise their rights under article 68(3) of the Statute and present their "*views and concerns*".

Even assuming *arguendo* that the applications of the victims concerned were to be treated now, it is the view of the Single Judge that their intervention at this particular stage is not appropriate. Most importantly, the Single Judge wishes to recall the purpose of an initial appearance of a person appearing voluntarily before or surrendered to the Court as provided in article 60(1) of the Statute and rule 121(1) of the Rules. Following the explicit language of article 60(1) of the Statute, "*the Pre-Trial Chamber must satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial*". Further, pursuant to rule 121(1) of the Rules, "*the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges*". That said, and considering

the issues indicated by the victim applicants which they wish to raise at the initial appearance of the three suspects in the present case, the Single Judge holds that this would go beyond the scope and purpose of the initial appearance as defined by the Statute and the Rules.

Lastly, the Single Jude would like to express her concern that one of the victim applicants has not indicated his or her intention to participate in proceedings before the Court, but submitted only an application for reparations. Nevertheless, the Legal Representative submitted the Motion also on behalf of that victim applicant. The Single Judge reminds all concerned that any wish for participation in the proceedings must be expressed explicitly by the victim applicant and that Legal Representatives shall receive appropriate instructions from their clients to that effect. The submission of an application for reparations is not sufficient.

In light of the foregoing, the Single Judge must reject the Motion by victims to participate in article 60 Initial Appearance proceedings.

See No. ICC-01/09-01/11-14, Pre-Trial Chamber II (Single Judge), 30 March 2011, paras. 3-8.

The Single Judge was notified of a Second Motion by victims to participate in the initial appearance of the suspects in case the Government of Kenya is permitted to address the Court in relation to its admissibility challenge; and to participate in the admissibility proceedings.

At the outset, the Single Judge notes that the requests put forward by the victim applicants in their Second Motion to Participate have been already adjudicated by this Chamber in previous decisions. The Single Judge recalls that she has rejected the requests for participation in the initial appearance of the suspects on 7 April 2011 of both the victim applicants and the Government of Kenya. The Chamber has sufficiently made clear in previous decisions that the initial appearance serves a limited purpose as set out in article 60(1) of the Statute, which shall not be repeated again. Therefore, the request of the seven victim applicants to participate in the initial appearance of the suspects on 7 April 2011, in case the Government of Kenya attended, is without merit.

Further, the victim applicants request to participate in relation to the "*procedural arrangements governing the manner in which the admissibility challenge is processed*". The Single Judge notes that this request is made after the Chamber has already taken its Decision on the Conduct of article 19 Proceedings setting out, *inter alia*, the timeframe, the nature, and modalities for victims to participate in those distinct proceedings. In light of the above, the request to participate in the "*procedural arrangements governing the manner in which the admissibility challenge is processed*" must equally fail.

See No. ICC-01/09-01/11-40, Pre-Trial Chamber II (Single Judge), 6 April 2011, paras. 5-12.

NOTING article 68(3) of the Statute, rules 89-93 of the Rules and regulation 86 of the Regulations of the Court;

CONSIDERING that rule 93 of the Rules, in providing that "*a Chamber may seek the views of other victims, as appropriate*", allows the Chamber to seek the views of victims irrespective of whether they have made an application for participation in the proceedings before the Court or have been granted rights of participation, and, as such, embodies a process which is distinct from that of victim participation set out in rules 89-91 of the Rules;

CONSIDERING that the application of rule 93 of the Rules in accordance with the Registrar's Proposal would be inappropriate in the current circumstances as it would operate to circumvent the system of victim participation and create a more limited form of participation for all of the victim applicants in question;

CONSIDERING, therefore, that the Revised Deadline for the transmission of Applications continues to be effective and that, in principle, applicants whose Applications have not been submitted by this date will not be permitted to participate in the proceedings related to the confirmation hearing;

CONSIDERING, therefore, that any further observations from the OPCV are unnecessary, without prejudice to the question of whether there was a valid basis for its intervention before the Chamber on this issue;

FOR THESE REASONS,

REJECTS the request of the OPCV to submit further observations on the Registrar's Proposal;

REJECTS the Registrar's Proposal, and

ORDERS the VPRS to transmit to the Chamber complete Applications by the Revised Deadline.

See No. ICC-01/04-01/10-229, Pre-Trial Chamber I (Single Judge), 10 June 2011, pp. 4-5.

The Single Judge is not persuaded by the Defence argument that permitting anonymous victims to question witnesses or present submissions concerning the evidential foundation of the parties' respective cases constitutes *per se* a prejudice to the rights of the suspects. A determination in this respect will be made by the Chamber only upon request and on a case-by-case basis in light of: (i) the victim's personal interests as alleged by the Legal Representative; (ii) the scope of the procedural right requested; and (iii) the principle of fairness and expeditiousness of the proceedings.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, para. 126.

With regard to the participatory rights of the victims, the Single Judge recalls that according to article 68(3) of the Statute "[w]*here 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 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*". Alongside article 68(3) of the Statute, a number of other provisions provide certain explicit rights that the victims may exercise through their legal representative, at the confirmation of charges hearing and in the related proceedings.

Pursuant to rule 91(2) of the Rules, the Common Legal Representative has the right to attend all public sessions of the confirmation of charges hearing as well as all public hearing convened in the related proceedings. The Common Legal Representative shall also be entitled to the transcripts of any such hearings.

In the event that the Chamber decides to hold parts of the confirmation hearing in camera or *ex parte*, it retains the option to decide, on a case-by-case basis, whether to authorise, *proprio motu* or upon a motivated request, the Common Legal Representative to attend those sessions. The same applies to any other *ex parte* or in camera hearing convened in the present case. Likewise, the Common Legal Representative shall also be given access to the transcripts of any such hearings to which she has been authorised to attend.

In addition, pursuant to rule 89(1) of the Rules, the Common Legal Representative is entitled to make opening and closing statements at the confirmation of charges hearing in compliance with the schedule to be issued by the Single Judge in due course.

The Single Judge further considers that upon a motivated request specifying why and how the victims' personal interests are affected by the issues concerned, the Common Legal Representative may be authorized to make oral submissions during the confirmation of charges hearing, subject to any direction given by the Chamber. In its determination, the Chamber will take into consideration *inter alia*, the stage of the proceedings, the nature of the issue(s) at stake, the rights of the suspect and the principle of fairness and expeditiousness of the proceedings.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, paras. 47, and 49-52.

The Single Judge notes that to date, one week after the filing of the Defence Submissions, the Defence has not submitted any version of its Submissions to be made available to the OPCV. As a result, the Defence is effectively preventing the OPCV to properly exercise its right to respond to the Defence Submissions. This is in particular so considering that half the time allocated to the OPCV to prepare its only submissions on the merits following the adjournment of the confirmation of charges hearing has already elapsed.

In these circumstances, the Single Judge considers that her intervention is needed in order to guarantee the proper exercise of the victims' right to participate in the proceedings.

However, in the absence of any input of the Defence as to what specific information within the Defence Submissions, if any, must be withheld from the participating victims, the Single Judge is of the view that it is not appropriate that the confidential annexes are at present notified to the OPCV. Rather, the Single Judge considers it necessary that the Defence be ordered to file within an appropriately short time limit confidential redacted versions of its Submissions to be made available to the OPCV. The Single Judge specifies that such confidential redacted versions shall be filed in addition to the public redacted versions of the Defence Submissions, and shall contain only those redactions which the Defence deems necessary *vis-à-vis* the participating victims. In particular, the Single Judge emphasises that the confidential redacted versions shall not contain redactions of references to confidential filings or evidence submitted by the Prosecutor of which the OPCV has been notified.

[…]

Finally, the Single Judge reminds the Defence of its obligation to promptly provide notice to the OPCV of all its submissions in order to enable the exercise of the victims' rights under article 68(3) of the Statute, unless specific reasons exist warranting the non-communication of certain submissions.

See No. ICC-02/11-01/11-639, Pre-Trial Chamber I (Single Judge), 24 March 2014, paras. 11-14, and 16.

The Single Judge considers that the core elements of the system designed by rule 89 are, in essence, the following: (i) victims who wish to participate in the proceedings must make written application to the Registrar; (ii) the application is transmitted to the Chamber; (iii) a copy of the application is provided to the Prosecutor and the Defence, who are entitled to reply within a time limit to be set by the Chamber; and (iv) the Chamber, *proprio motu* or upon request of the Prosecutor or the Defence, may reject the application *inter alia* if the person does not qualify as a victim.

In the present proceedings […] victims will be admitted to participate in accordance with the following procedure. The Registry shall assess all victim applications for participation collected or otherwise received. The Registry must transmit to the Chamber all applications which are complete (including with respect to the necessary identity documents, as applicable) and in which the applicant alleges to have personally suffered harm, whether direct or indirect, as a result of one or more crimes with which [the suspect] is or will be charged by the Prosecutor. In the present case, prior to the charges being presented by the Prosecutor 30 days before the commencement of the confirmation of charges hearing, the Registry shall assess the applicants' claims against the factual parameters of the case as set out in the warrant of arrest against [the suspect] as well as

against the factual parameters, identified in the concise statement of the facts underlying the crimes with which the Prosecutor intends to charge, which the Prosecutor will file in the record of the case by 21 September 2015. Such applications by applicants who, in the Registry's assessment, qualify as victims shall be provided to the Chamber as annexes to the transmission report provided for by regulation 86(5) of the Regulations of the Court. It is not required that this transmission report includes an applicant-by-applicant assessment.

The applications that, in the view of the Registry, are incomplete and/or fall outside the scope of the present case […] are not to be transmitted to the Chamber. The Registry shall inform those applicants accordingly. Statistics as to the numbers of these applications which are not transmitted to the Chamber shall be included in the Registry's report under regulation 86(5) of the Regulations.

In accordance with rule 89(2) of the Rules, all complete applications falling within the scope of the present case […] which are transmitted to the Chamber shall also be provided, at the same time, to the Prosecutor and the Defence. Consistent with article 68(1) of the Statute, which is also explicitly referred to in rule 89(2) of the Rules, if an applicant has expressed security concerns in case his identity and involvement with the Court were to be known to the Defence, the Registry shall transmit the application to the Defence in redacted form, expunging the person's identifying information. Considering that, in the present case, a simplified application form of one page only has been already adopted […] and that the Registry has been reviewing those applications already in its possession with a view to preparing the necessary redactions vis-à-vis the Defence, the Single Judge considers that any process of redactions to the applications can be carried out expeditiously.

The Prosecutor and the Defence, in accordance with rule 89(2) of the Rules, are entitled to provide observations on the applications transmitted to them and to the Chamber, and may, as provided for by rule 89(4), request that one or more individual applications be rejected. The Single Judge sets the time limit for any specific objection from the parties to the admission as victims of any individual applicant at 14 days from notification of the relevant application(s). In case any objection is raised by either party, the Single Judge will assess the contested application(s) individually. Conversely, those victims whose participation in the proceedings is not objected by either party within the relevant timeframe are admitted to participate in the proceedings.

Indeed, the Rules do not require that an explicit, positive determination on each application be made by the Chamber – which may, rather, "*reject*" applications – and, in the Single Judge's view, the positive assessment conducted by the Registry and the absence of objections from either party provide sufficient guarantees. Also, the Chamber retains the authority to reject applications on its own motion. Furthermore, the Single Judge considers that this system is also consistent with the fact that applications to participate in the proceedings are only assessed on their face, *i.e.* only on the basis of the claims of the individual applicant, and are intended as mere procedural mechanisms to participate in the proceedings.

In case the Registry, for any reason, is unable to determine whether a particular applicant or group(s) of applicants qualify as victims in the present case, the Registry shall consult the Single Judge in order to obtain guidance as to whether the concerned application(s) should be transmitted or not to the Chamber and the parties. In case any such application is eventually transmitted, the parties, as for any other applications transmitted by the Registry, will be entitled to raise any objection, in the absence of which the concerned applicant is admitted to participate in the proceedings.

See No. ICC-02/04-01/15-299, Pre-Trial Chamber II (Single Judge), 3 September 2015, paras. 2-9.

6.5. Participation at the trial stage

In a general sense, victims have multiple and varied interests, but it is critical to emphasise and repeat that for victims to participate in this trial these interests must relate to the evidence and the issues the Chamber will be considering in its investigation of the charges brought against the suspect: the extent of the evidence and the issues to be considered by the Chamber during this trial are defined by the alleged crimes the accused faces. In contrast, the general interests of the victims are very wide-ranging and include an interest in receiving reparations, an interest in being allowed to express their views and concerns, an interest in verifying particular facts and establishing the truth, an interest in protecting their dignity during the trial and ensuring their safety, and an interest in being recognised as victims in the case, among others. The crimes under the Chamber's jurisdiction, as international crimes, may have many and various consequences for victims, of a direct and an indirect nature. Against that background the Chamber will ensure that victims are provided appropriate access to justice within the context of the focus of the trial process, and it will bear in mind the wide-ranging particular needs and interests of individual victims and groups of victims.

In the view of the Trial Chamber it is necessary to stress that the participation of victims in the proceedings is not limited to an interest in receiving reparations: article 68(3) of the Statute provides for participation by victims whenever their personal interests are affected, and these are self- evidently not limited to reparations issues. Therefore, as indicated during the hearing of 29 October 2007, the Trial Chamber considers that the participation by victims should encompass their personal interests in an appropriately broad sense, and, for the reasons analysed hereafter, whenever necessary they should be entitled to express their views and concerns through statements, examination of witnesses or by filing written submissions.

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.

The Chamber is conscious that different considerations may apply at the trial, as opposed to the pre-trial stage. By the time applications to participate in the proceedings are made to the Trial Chamber a considerable amount will be known about the facts and issues that will arise. Accordingly, not only is the approach outlined above a correct interpretation of the relevant provisions but it is the procedure that will best enable the victims at this stage in the proceedings before the Court to present their views and concerns fairly.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 97-100. See also No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 53-57.

A. Status of victims' applications for participation determined by the Pre-Trial Chamber

(i) Status of victims authorised to participate during the confirmation of charges phase

The Registry did not submit to the Chamber for consideration the applications of the 89 victims authorised to participate by the Pre-Trial Chamber, as it assumed that these victims are authorised to participate during the trial phase.

The Chamber notes that by decision issued on 27 July 2010, the Single Judge ordered, *inter alia*, the Victims Participation and Reparations Section to file any complete victims' applications for participation by 20 October 2010. The Chamber notes the information that Pre-Trial Chamber I deemed necessary for an application to be considered complete. Furthermore, the Chamber notes that Pre-Trial Chamber I considered that an applicant is to be authorised to participate in the proceedings in a case when (i) the applicant's identity as a natural person appears to be duly established; (ii) the applicant has suffered harm; (iii) the events described in the application for participation constitute the crime(s) within the jurisdiction of the Court with which the suspect is charged; and (iv) the harm suffered by the applicant appears to have arisen "*as a result*" of the crimes charged. The Pre-Trial Chamber further indicated that at that stage of the proceedings, the scope of the case was delineated by the charges presented by the Prosecutor in the Document Containing the Charges, wherein it was alleged that on 29 September 2007, the suspects, jointly and with rebel forces under their command and control, committed the war crimes of violence to life through acts of murder (and attempted murder), of intentionally directing attacks against personnel, installations, materials, units or vehicles involved in a peacekeeping mission and of pillaging at the Military Group Site Haskanita ("MGS Haskanita"), in Haskanita village, Um Kadada Locality, in North Darfur, the Sudan.

In light of the above, and in accordance with rules 89 and 91(1) of the Rules as well as regulation 86(8) of the Regulations of the Court, the Chamber is of the view that victims authorised to participate in the proceedings at the pre-trial stage are, in principle, and subject to the considerations set forth below, authorised to participate in the proceedings at the trial stage, without the need for their applications to be filed and assessed anew. The Chamber considers that the analysis of the Pre-Trial Chamber, in particular with respect to the criteria set forth in rule 85 of the Rules with reference to the confirmation of charges remains valid in principle and does not need to be revisited at subsequent stages of the proceedings.

Notwithstanding the above, the Chamber may rule on applications for participation previously accepted by the Pre-Trial Chamber (1) where the victim concerned was authorised to participate solely on the basis of the commission of a crime corresponding to a charge which was not confirmed by the Pre-Trial Chamber; and (2) where new information has emerged since the original decision authorising the victim to participate in the proceedings. In the instant case, the Chamber notes that each of the 89 victims authorised to participate in the proceedings have suffered harm as a result of the commission of at least one crime within the charges confirmed by the Pre-Trial Chamber. The Chamber will therefore not re-examine previously accepted applications for participation unless a request in this sense is made by one of the parties or the Registry based, on new information that has emerged since the original decision.

(ii) Review of applications rejected by the Pre-Trial Chamber

With regard to applications previously rejected by the Pre-Trial Chamber on the grounds that they were incomplete, the Chamber will assess them if a new application is filed, duly completed, and in accordance with the criteria set out below. In addition, concerning the other applications rejected by the Pre-Trial Chamber, the VPRS should review them to establish whether, in view of information subsequently received, the application should be filed for consideration by the Trial Chamber.

B. Filing of new applications for participation

(i) Link with the charges

According to the jurisprudence of the Appeals Chamber, for the purposes of participation in trial proceedings "*the harm alleged by a victim and the concept of personal interests under article 68(3) of the Statute must be linked with the charges confirmed against the accused*". Hence, the VPRS must transmit to the Chamber only those victim applications that appear, *prima facie*, to be linked with the charges confirmed against the accused persons.

(ii) Criteria for assessing when an application is "complete" and related issues

On 6 September 2011, the Chamber instructed the Registry to file only complete applications, unless otherwise ordered. In this respect, the Chamber, in light of the relevant case-law on this matter, including the position of Pre-Trial Chamber I in the present case, considers that an application may be considered complete if it contains the following information:

(i) The identity of the applicant;

(ii) The date of the crime(s);

(iii) The location of the crime(s);

(iv) A description of the harm suffered as a result of the commission of any crime confirmed in the Decision on the Confirmation of Charges;

(v) Proof of identity;

(vi) If the application is made by a person acting with the consent of the victim, the express consent of the victim;

(vii) If the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim with disabilities, proof of legal guardianship; and

(viii) A signature or thumb-print of the applicant on the document, at the very least on the last page of the application.

With regard to documents accepted in order to establish the identity of applicants, the Chamber notes the positions adopted by Pre-Trial Chamber I and other Trial Chambers, and considers that the list should include the following documents (each of which suffices):

(i) National identity card, passport, birth certificate, death certificate, marriage certificate, family registration booklet, will, driving licence, card from a humanitarian agency;

(ii) Voting card, student identity card, pupil identity card, letter from local authority, camp registration card, documents pertaining to medical treatment, employee identity card, baptism card;

(iii) Certificate/attestation of loss of documents (loss of official documents), school documents, church membership card, association or political party membership card, documents issued in rehabilitation centres for children associated with armed groups, certificates of nationality, pension booklet; or

(iv) A statement signed by two credible witnesses attesting to the identity of the applicant or the relationship between the victim and the person acting on his or her behalf, providing that there is consistency between the statement and the application. The statement should be accompanied by proof of identity of the two witnesses.

As regards the credibility of witnesses called upon to sign statements, the Chamber will take into consideration, factors such as the nature and length of the relationship of those witnesses with the applicant, or their standing in the community. In these instances, the Trial Chamber will welcome any information the VPRS considers relevant, which should be included in the reports provided to the Chamber.

With regard to possible discrepancies between the identification documents, the Chamber is of the view that, except where there is a blatant contradiction, applications should be accepted if the differences at issue do not call into question the credibility of the information provided by the application on identity and age, and there are documents providing information which, taken together, enable the identity and age of the applicants to be determined on initial scrutiny.

Finally, the Chamber will adopt a flexible approach when assessing applications containing documents presenting similar features as the documents enumerated above. In any event, the Chamber stresses that the parties, while submitting their observations on victims' applications, will have an opportunity to challenge documents submitted for the purposes of an application.

See No. ICC-02/05-03/09-231-Corr, Trial Chamber IV, 17 October 2011, paras. 8-24.

Witnesses P-0007, P-0008, P-0010, P-0011, and P-0298 were granted permission to participate in the proceedings as victims, as the information submitted was sufficient to establish, on a *prima facie* basis, that they were victims under rule 85 of the Rules.

In the view of the Majority, given the Chamber's present conclusions as to the reliability and accuracy of these witnesses, it is necessary to withdraw their right to participate. Similarly, the father of P-0298, P-0299, was granted permission to participate on account of his son's role as a child soldier. The Chamber's conclusions as to the evidence of P-0298 render it equally necessary to withdraw his right to participate in his case. In general

terms, if the Chamber, on investigation, concludes that its original *prima facie* evaluation was incorrect, it should amend any earlier order as to participation, to the extent necessary. It would be unsustainable to allow victims to continue participating if a more detailed understanding of the evidence has demonstrated they no longer meet the relevant criteria.

[…]

In all the circumstances, the Chamber has concluded that D-0033 and D-0034 were consistent, credible and reliable witnesses and it accepts that there is a real possibility that victims a/0229/06 and a/0225/06 (at the instigation or with the encouragement of a/0270/07) stole the identities of D-0032 and D-0033 in order to obtain the benefits they expected to receive as victims participating in these proceedings. The Chamber is persuaded there are significant weaknesses as regards the evidence of a/0225/06, a/0229/06, and a/0270/07, to the extent that their accounts are unreliable. Given the material doubts that exist as to the identities of a/0229/06 and a/0225/06, which inevitably affect the evidence of a/0270/07, the permission originally granted to a/0229/06, a/0225/06, and a/0270/07 to participate as victims is withdrawn. In general terms, if the Chamber, on investigation, concludes that its original *prima facie* evaluation was incorrect, it should amend any earlier order as to participation, to the extent necessary. It would be unsustainable to allow victims to continue participating if a more detailed understanding of the evidence has demonstrated they no longer meet the relevant criteria.

See No. ICC-01/04-01/06-2842, Trial Chamber I, 14 March 2012, paras. 484 and 502.

The Chamber recalls its decision that the close relatives of a victim authorised to participate in the proceedings who is now deceased, may decide to continue the action initiated by the victim before the Court, but that they may do so only on behalf of the deceased victim and within the limits of the views and concerns expressed by the victim in his or her initial application.

By decision of 31 July 2009, Victim a/0253/09 was authorised to participate in the proceedings. The Chamber notes that, according to the death certificate attached to the Application, this victim died in 2012. The Chamber also notes the minutes of the family meeting, mandating one of the victim's close family members to continue the action initiated before the Court, as formulated in the application for participation. The Chamber observes that the three signatory family members, one of whom is the designated individual, provided a copy of their identity documents.

The Chamber therefore considers that the family relationship between the deceased victim and the person wishing to act on her behalf has been established and that the person has been mandated by the family of the deceased to continue the action initiated by the victim on her behalf. Accordingly, the Chamber authorises the person mandated by the family of deceased Victim a/0253/09 to continue the action before the Court on behalf of that victim.

See No. ICC-01/04-01/07-3383-tENG, Trial Chamber II, 10 June 2013, paras. 6-8.

In this regard, the Chamber also considers that the *Blé Goudé* Defence request for access to the supporting documents to the 259 Applications to be reasonable, noting that it submits that it is unable to make adequate submissions until it receives such documents. The Chamber considers that the supporting documents could provide further information to the Defence that may be of relevance for the preparation of their observations on the 259 Applications. Moreover, since these supporting documents have been transmitted to the Chamber, they may be used in its determination of the victims' status pursuant to Rules 85 and 89 of the Rules. Thus, their transmission to the parties, with any redactions deemed necessary, may allow the parties to make more substantive observations to the 259 Applications. However, in line with the Decision on Victim Participation, the Registry should transmit unredacted versions of the supporting documents to the Prosecution.

See No. ICC-02/11-01/15-276, Trial Chamber I, 7 October 2015, para. 15.

The Chamber recalls the applicable procedure for admission of victims to participate in this case. The Chamber also observes the Court's practice as regards the resumption of action during trial proceedings, in which relatives or closely connected individuals have been allowed to continue the action initiated by deceased victims.

In particular, the Chamber notes that pursuant to the established practice, in order to resume action on behalf a deceased victim in the course of an ongoing trial, the applicant must provide evidence on the following: (i) of the death of the victim; (ii) of his or her relationship to the victim; and (iii) where the applicant cannot easily be presumed to be entitled to continue the action or represent the family, he or she must demonstrate his or her appointment by the deceased victim's family members.

The Chamber disagrees with the *Gbagbo* Defence's arguments that the possibility to present views and concerns cannot be transmitted to others and that even if so, such inherited right would be regulated by Ivorian civil law. As the practice at the Court has consistently shown, persons that are closely-connected with the deceased victims may present the views and concerns expressed by the latter. As stated by Trial Chamber II in the *Katanga and Ngudjolo* case:

les proches parents de la victime peuvent décider de poursuivre l'action que cette dernière avait engagée devant la Cour mais qu'ils ne peuvent le faire qu'au nom de la victime décédée et dans la limite des vues et préoccupations exposées par celle-ci dans sa demande initiale.

Accordingly, the resumption of action is not, as suggested by the *Gbagbo* Defence, a "*right*" to be inherited, but the possibility to continue the original legal action of a deceased victim, within the limits of the views and concerns expressed by the deceased victim in his or her initial application to participate in the proceedings pursuant to Article 68(3) of the Statute and Rule 89 of the Rules.

As regards the relationship between the applicant and the deceased victim, the Chamber deems that any "*closely-connected individual*" may submit an application for resumption of action, including "*the spouse of a deceased victim; an only surviving child of a deceased victim, where the child has reached the age of eighteen and the deceased victim was either unmarried or the victim's spouse is already deceased; or the parents of an unmarried deceased victim who either has no children or whose children are below the age of eighteen*".

In respect of the procedure to be adopted, the Chamber agrees with the *Gbagbo* Defence that parties should have the possibility to make submissions in future instances in which a resumption of action application would arise. In light of the valid concern raised by the *Gbagbo* Defence, it would be inappropriate to adopt a procedure in this case in which the parties would not be able to raise objections in relation to future resumption of action applications.

Accordingly, the Chamber deems it appropriate to establish the following procedure for future resumption of action applications, which satisfies the concerns raised by the *Gbagbo* Defence:

a. When a participating victim dies, the LRV is to inform the Victims Participation and Reparations Section ("VPRS"). The VPRS is then to amend the consolidated list of participating victims accordingly. The VPRS need not formally file an updated list each time an amendment is required, but an updated consolidated list must be so filed at least twice per calendar year until the conclusion of the proceedings before this Chamber.

b. Resumption of action applications, including the necessary supporting materials, must be provided to the VPRS. The VPRS is then to transmit them to the Chamber and, at the same time, to the parties. Redactions may be applied to the versions transmitted as necessary.

c. The time limit for any specific objections to the resumption of action is set at 14 days from notification of the relevant application(s).

d. In case any objection is raised, the Chamber will assess the contested application and rule accordingly. Conversely, and unless otherwise ordered, when no objection is raised the resumption of action is granted.

e. Any granted resumption of action must be reflected in the updated list specified in point (i) above.

See No. ICC-02/11-01/15-1052, Trial Chamber I, 11 October 2017, paras. 11-17.

6.6. Participation in interlocutory appeals

In determining victim participation in interlocutory appeals arising in the situation phase of the proceedings before the Pre-Trial Chamber, article 68(3) as interpreted by the Appeals Chamber in the case of Mr. Lubanga should also be made applicable to interlocutory appeals in the situation phase of proceedings.

[…]

Applicants who have not been granted the status of victim in the situation do not meet the first criterion under the Court's interpretation of article 68(3) of the Statute and therefore are denied the right to participate in the appeal.

See No. ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, paras. 89 and 93.

The Appeals Chamber has, since the year 2007, former Judge Sang-Hyun Song and Judge Van den Wyngaert dissenting, consistently applied its interpretation of the provisions regulating victim participation in interlocutory appeals pursuant to article 82(1)(b) and (d) of the Statute. By virtue of its interpretation of article 68(3)of the Statute, the Appeals Chamber determined that victim participation in an interlocutory appeal "*mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration*". Thus, pursuant to this interpretation, in order for victims to participate in an appeal, an application seeking leave to participate is necessary. Participation is then permitted where it is demonstrated that the victims' personal interests are affected by the issues on appeal and if the Appeals Chamber deems such participation to be appropriate. With respect to regulation 86(8) of the Regulations of the Court, the Appeals Chamber determined that such a decision was "*confined to the stage of the proceedings before the Chamber taking the decision referred to in the text of the regulation*".

In the same way, the Appeals Chamber interpreted regulations 64(4) and 65(5) of the Regulations of the Court as not recognising victims to be participants with an automatic right to participate in an interlocutory appeal. In the Decision on the OPCV's Request, the Appeals Chamber, being seized with the OPCV's Request to revisit its interpretation of the abovementioned provisions and to find that victims, as participants for the purposes of regulation 24 and 64(4) and (5) of the Regulations of the Court, have an automatic right to file a response to the document in support of the appeal, found merit in the request and, for the reasons that follow, granted same.

Article 21(2) of the Statute provides that "[t]*he Court may apply principles and rules of law as interpreted in its previous decisions*". Thus, the Appeals Chamber is not obliged to follow its previous interpretations of principles and rules of law through binding stare decisis; rather it is vested with discretion as to whether to do so. In this respect, the Appeals Chamber has previously stated that absent "*convincing reasons*" it will not depart from its previous decisions. Thus, in principle, while the Appeals Chamber has discretion to depart from its previous jurisprudence, it will not readily do so, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions.

In the case at hand, the Appeals Chamber considers that, with the benefit of hindsight, the current practice of requiring victims to seek authorisation to participate in an interlocutory appeal, has resulted in considerable delays in the proceedings given the added procedural steps involved. These include the time spent in:

(i) deciding on the applications for participation in each appeal;

(ii) waiting for the victims to file their substantive observations on the appeal; and

(iii) waiting for the parties to file their responses thereto.

In view of the delay occasioned by these procedural steps and the need for more efficient proceedings, the Appeals Chamber is convinced that a modification of its interpretation of the relevant provisions of the Statute, Rules of Procedure and Evidence and Regulations of the Court is necessary in order to make the participation of victims in interlocutory appeals more efficient.

The Appeals Chamber is persuaded by the interpretation of the relevant statutory framework relating to victim participation first espoused by former Judge Sang-Hyun Song. As a result, the Appeals Chamber interprets the term "*participant*" in regulations 64(4)and 65(5) of the Regulations of the Court to include victims. The Appeals Chamber considers that this interpretation of these regulations obviates the need for a "*specific determination*" by the Appeals Chamber, pursuant to article 68(3) of the Statute, on the appropriateness or otherwise of victim participation in a particular interlocutory appeal.

Furthermore, the Appeals Chamber notes that regulation 86(8) of the Regulations of the Court provides in relevant part, that "[a] *decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case*". In this regard, because appeals pursuant to article 82(1)(b) and(d) of the Statute involve issues arising from the proceedings a quo, the Appeals Chamber considers such interlocutory appeals to be an extension of the proceedings before the relevant Pre-Trial or Trial Chamber in that "*same case*". As such, the Appeals Chamber will not, in the absence of compelling reasons, overturn prior decisions of a relevant Chamber on the status, personal interest and/or participatory rights accorded to victims in that case. Instead, these criteria underlying victim participation will be assumed for the purposes of the interlocutory appeal, given the victims' prior participation in the proceedings which gave rise to the appeal.

However, in the event that the Appeals Chamber considers that the personal interests of victims are not affected by the issues arising in a particular appeal or that the participation of victims would be inappropriate, it could issue an order to that effect. This is expressly acknowledged by regulation 86(8) of the Regulations of the Court, whereby a prior decision of a Chamber concerning victim participation is "*subject to the powers of the relevant Chamber in accordance with rule 91(1)*". In addition, any participation of victims that would exceed the filing of a response to the document in support of the appeal pursuant to regulation 64(4) and (5) and 65(5) of the Regulations of the Court, would require prior authorisation of the Appeals Chamber.

Consequently, the Appeals Chamber determines that, for appeals arising under article 82(1)(b) and (d) of the Statute, victims who have participated in the proceedings that gave rise to the particular appeal need not seek the prior authorisation of the Appeals Chamber to file a response to the document in support of the appeal.

See No. ICC-02/11-01/15-172 OA6, Appeals Chamber, 31 July 2015, paras. 12-19.

Note of the author: following the above decision, it has been consistent practice that victims who have participated in the proceedings that gave rise to the particular appeal have an automatic right to file a response to the document in support of the appeal. Relevant decisions to previous practice can be found at the end of the section on "Victims'participation in the proceedings".

6.7. Participation at the appeal stage

The victims who participated in the trial proceedings in the case of *Prosecutor v. Thomas Lubanga Dyilo* and whose right to participate in the proceedings as victims was not withdrawn, may, through their Legal Representatives, participate in the present appeal proceedings for the purpose of presenting their views and concerns in respect of their personal interests in the issues on appeal.

Under article 68(3) of the Statute, the Court shall permit victims to present their views and concerns where their personal interests 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*". The Appeals Chamber recalls that 129 victims participated in the trial proceedings in the case of *Prosecutor v. Thomas Lubanga Dyilo*, and that in the Conviction Decision, Trial Chamber I decided to withdraw the right to participate in the proceedings in respect of nine of those victims. The remaining 120 victims are part of two

different groups (Victims V01 and V02) and participated in the proceedings leading to the Conviction Decision and the Sentencing Decision.

The Appeals Chamber notes that under regulation 86(8) of the Regulations of the Court, "*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*". The Appeals Chamber notes that the accused was convicted on all charges brought against him and that his appeal against the Conviction Decision is directed against the entirety of the decision. Therefore, the Appeals Chamber finds that the 120 victims who participated in the trial proceedings and whose right to participate in the proceedings was not withdrawn may participate in the appeal proceedings against the Conviction Decision, as their personal interests are affected by the appeal in the same way as during trial. For the same reason, the 120 victims who participated in the sentencing proceedings may participate in the appeal proceedings against the Sentencing Decision.

> See No. ICC-01/04-01/06-2951 A4 A5 A6, Appeals Chamber, 13 December 2012, paras. 1, and paras. 2-3 of the Reasons.

Under article 82(4) of the Statute, appeals against an order for reparations may be brought by "*a Legal Representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75*". The Appeals Chamber notes that the convicted person right to appeal the Impugned Decision has been challenged on the ground that the decision did not order him to make reparations and therefore did not negatively affect him. Further, the right of several groups of victims to appeal has been challenged by the convicted person and by the Prosecutor respectively.

As to the appeal brought by the convicted person, the Appeals Chamber notes that article 82(4) of the Statute gives the convicted person the right to appeal orders for reparations. Furthermore, the Appeals Chamber does not have to determine, in the present case, whether an appeal by the convicted person is inadmissible if he or she is not adversely affected by an impugned decision. This is because, at this stage and for the purposes of the admissibility of his appeal, it appears possible that the convicted person is adversely affected by the Impugned Decision. The Impugned Decision is intrinsically linked to his conviction, with the Trial Chamber finding that reparations should be awarded for the crimes for which the accused was convicted in the case brought against him. The Appeals Chamber does not agree with the submissions that monetary contributions to reparations awards by the convicted person are the only basis for determining whether or not that individual is affected by an order for reparations. Consequently, the Appeals Chamber considers that the convicted person is entitled to appeal the Impugned Decision under article 82(4) of the Statute.

As to the appeals brought by the Legal Representatives of victims and by the OPCV, the Appeals Chamber notes at the outset that, under article 82(4) of the Statute, victims are entitled to bring an appeal. They are therefore parties to the proceedings and not, as is the case at other stages of the proceedings, participants who, under article 68(3) of the Statute, may present their views and concerns where their personal interests are affected. Furthermore, the Appeals Chamber notes that the right to appeal lies with the victims, not with the Legal Representatives of victims. In this regard, article 82(4) of the Statute provides that victims may only appeal with the assistance of a Legal Representative, as is the case in these appeals.

The Appeals Chamber observes that the Legal Representatives of Victims V01 and Victims V02, as well as the OPCV, are appealing on behalf of those individuals whom they represented in the reparations proceedings before the Trial Chamber. This includes individuals who participated in the trial as victims and requested reparations under rule 94 of the Rules of Procedure and Evidence (including some whose right to participate was later withdrawn by the Trial Chamber), as well as individuals whose application for participation in the trial had been rejected, but who nevertheless requested reparations. It also includes individuals who participated in the trial, but did not apply for reparations. Furthermore, the OPCV states that, in addition to individuals who have applied for reparations, it also brings its appeal on behalf of "*victims who have not submitted applications for reparations but who might be affected by collective reparations*".

The question before the Appeals Chamber is therefore whether all those individuals are victims for the purpose of article 82(4) of the Statute. The Appeals Chamber considers that the term "*victim*" in article 82(4) of the Statute has to be understood in its context – it allows individuals to appeal an order for reparations rendered by a Trial Chamber as a result of the reparations proceedings. In this respect, the Appeals Chamber agrees with the OPCV that the term "*victim*" is not defined as those victims who were granted the right to participate in the proceedings in relation to the accused person's guilt or innocence or the sentence. The Appeals Chamber finds that this term may also include individuals who did not participate in those proceedings, but who claim to have suffered harm as a result of the crimes in relation to which the accused was convicted and who request reparations. This is because a request for reparations pursuant to rule 94 of the Rules of Procedure and Evidence is not dependent upon either the filing of an application for participation pursuant to rule 89 of the Rules of Procedure and Evidence or being granted the right to participate in the proceedings in relation to the accused person's guilt or innocence or the sentence.

The Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber decided not to consider the individual applications for reparations that it had received but instead decided to refer them to the Trust Fund. Whether this decision of the Trial Chamber was correct may have to be determined on the merits of the appeals, but it follows that those individuals who requested reparations and who now seek to appeal the Impugned

Decision are entitled to do so, because the Impugned Decision contained a ruling that affected them. The same ruling affected those claimants for reparations whose request for participation in the proceedings in relation to the accused person's guilt or innocence or the sentence was rejected or whose right to participate was withdrawn in the Conviction Decision. This is because the reparations proceedings are a distinct stage of the proceedings and it is conceivable that different evidentiary standards and procedural rules apply to the question of who is a victim for the purposes of those proceedings. Further, in the reparations proceedings, the Trial Chamber invited submissions from victims who did not request reparations, even though they participated in the proceedings in relation to the accused's guilt or innocence. Thus, the Trial Chamber accorded to those victims a role in the reparations proceedings, which the victims accepted by making submissions. This also demonstrates their interest in the reparations proceedings. For these reasons, the Appeals Chamber finds that it is possible that they are affected by the Impugned Decision, in particular because the Impugned Decision was the result of reparations proceedings in which they participated and made submissions.

See No. ICC-01/04-01/06-2953 A A2 A3 OA21, Appeals Chamber, 14 December 2012, paras. 65-71.

Under article 68(3) of the Statute, the Court shall permit victims to present their views and concerns where their personal interests 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*".

The Appeals Chamber notes that under regulation 86(8) of the Regulations of the Court, "[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*". The Appeals Chamber notes that the accused was acquitted of all the charges brought against him and that the appeal proceedings against the Acquittal Decision affect victims' personal interests in the same way as during the trial. Therefore, the Appeals Chamber finds that the victims who participated in the trial and whose victim status was not revoked, may participate in the present appeal, which concerns the merits of the case and is brought under article 81(1)(a) of the Statute

For the sake of clarity, the Appeals Chamber orders the Registrar to file a list of those victims who participated at trial and whose victim status was not revoked. This list shall indicate the number of each individual victim and such identifying information as may be divulged to the accused and the Prosecutor in accordance with the protective measures ordered by Pre-Trial Chamber I and Trial Chamber II, the legal representative of each victim, as well as the date on which the victim was granted the right to participate in the proceedings.

See No. ICC-01/04-02/12-30 A, Appeals Chamber, 6 March 2013, paras. 2-4.

The Appeals Chamber is not persuaded by the arguments of the Prosecutor and of the accused person that participation of the applicants is not appropriate and that the rights of the accused would be necessarily infringed upon by allowing any additional victims to make observations at this stage of the appeal proceedings. Should the Appeals Chamber allow any of the 32 applicants to participate in the proceedings, they may still be able to exercise several rights in respect of these appeals, including by being notified of documents, being given the opportunity to make additional submissions, and being heard at an oral hearing, if any. In this regard, it is recalled that the Appeals Chamber has not yet decided on the further conduct of the proceedings. Furthermore, the Appeals Chamber considers that only 32 applications will need to be assessed. The Appeals Chamber, however, points out that it will have to decide pursuant to rule 89(1) and (2) of the Rules of Procedure and Evidence if and how the victims may participate in the appeal proceedings.

See No. ICC-01/04-01/06-3026 A4 A5 A6, Appeals Chamber, 6 May 2013, para. 6.

The Appeals Chamber recalls that the 32 applications to be assessed in the present decision were either submitted or completed with supplementary information during the trial phase of proceedings, yet, through no fault of the applicants, were never transmitted to the Trial Chamber. Under these specific circumstances, the Appeals Chamber considered that it would be in the interests of the proper administration of justice to conduct an assessment of the applications for participation during the appeal phase of the present proceedings.

In determining its approach to the assessment of the 32 applications for participation, the Appeals Chamber has considered the general criteria established by the Trial Chamber in the "Decision on victims' participation", as confirmed, amended or reversed in relevant part by the Appeals Chamber, as well as the practical assessment of applications for participation undertaken by the Trial Chamber.

The Appeals Chamber notes that the decisions of the Trial Chamber admitting victims to participate in the proceedings were not the subject of an appeal. However, in order to ensure that there is no prejudice to the 32 applicants whose applications were submitted, but not assessed during the trial phase, the Appeals Chamber has, for the purposes of the present decision, followed the assessment criteria set out by the Trial Chamber in its decisions on victims' applications for participation.

1. Standard of proof

With regard to the applicable standard of proof, the Appeals Chamber notes that the Trial Chamber carried out di *prima facie* analysis of the victims' applications to ensure that they fulfilled the criteria of a victim under rule 85(a) of the Rules of Procedure and Evidence and indicated that, in carrying out its assessment, it would "*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" through assessing the information included in a victim's application form and his or her statements (if available).

2. Whether the applicant's identity has been established

In reaching this determination, the Trial Chamber sought to achieve "*a balance between the need to establish an applicant's identity with certainty, on the one hand, and the applicant's personal circumstances, on the other*".

[…]

3. Whether the applicant has suffered personal harm as a result of the commission of crimes included in the charges against the accused

The Trial Chamber, in assessing whether the harm suffered by applicants was linked to the charges confirmed against the accused, defined the charges against the convicted person as "*the alleged conscription and/or enlistment and/or use of children under the age of 15 to participate actively in hostilities, between September 2002 and 13 August 2003*". In its "Judgment pursuant to Article 74 of the Statute" […] the Trial Chamber convicted the accused of the "*crimes of conscripting and enlisting children under the age of fifteen years into the Force Patriotique pour la Libération du Congo (FPLC) and using them to participate actively in hostilities* […] *from early September 2002 to 13 August 2003*".

As the accused was convicted of all charges against him and his appeal is directed against the entirety of the Conviction Decision, the Appeals Chamber will follow the approach of the Trial Chamber and assess whether the victims' applications establish, *prima facie*, grounds to believe that the applicant suffered harm that is linked to the charges against the convicted person, namely "*the alleged conscription and/or enlistment and/or use of children under the age of 15 to participate actively in hostilities, between September 2002 and 13 August 2003*".

See No. ICC-01/04-01/06-3045-Red2 A4 A5 A6, Appeals Chamber, 27 August 2013, paras. 13-19. See also, No. ICC-01/04-01/06-3052-Red A4 A5 A6, Appeals Chamber, 3 October 2013, para. 8.

Regarding the Victims' personal interests, the Appeals Chamber recalls that "*any determination of whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis*". Furthermore, the Appeals Chamber has emphasised that "[i]*n seeking to demonstrate that their personal interests are affected, victims should generally ensure,* inter alia*, that express reference is made to the specific facts behind their individual applications, and the precise manner in which those facts are said to fall within the issue under consideration on appeal*". The Appeals Chamber considers that the Victims have fulfilled these criteria in the present appeal by reference to potential security concerns that may arise in relation to participating victims in the event that the suspect is released, coupled with the submission that, if he is released and subsequently fails to appear for his trial, they will lose their opportunity to present their views.

More broadly, the Appeals Chamber has previously held that where the underlying issue on appeal was whether the accused should be granted interim release, the issue affects a victim's personal interests. Since the present appeal concerns the ongoing detention of the suspect, the Appeals Chamber considers the Victims' personal interests are affected.

See No. ICC-02/11-01/11-491 OA4, Appeals Chamber, 27 August 2013, paras. 11 and 12.

The Appeals Chamber reiterates that, with respect to victims' participation in appeals brought under article 82(1)(d) of the Statute, the following four cumulative criteria enumerated in article 68(3) of the Statute must be fulfilled: (i) the individuals seeking participation must be victims in the case; (ii) their personal interests must be affected by the issues on appeal; (iii) their participation must be at an appropriate stage of the proceedings; and (iv) the manner of participation should neither cause prejudice to nor be inconsistent with the rights of the accused and a fair and impartial trial.

In respect of the Victims' Application, all four criteria for victim participation are fulfilled. As to the first criterion, the Victims indicate by reference to the relevant decisions of the Pre-Trial Chamber that each of them has been authorised to participate in the pre-trial proceedings.

As to the personal interests of the Victims, the Appeals Chamber recalls that "*any determination of whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis*". The Victims submit that the "*extension of the standard of proof to the* 'incidents' *underlying the contextual elements will affect the likelihood of having the charges confirmed and thereby have a direct impact on the possibility for victims to continue participating in the proceedings and to eventually get reparations for the damage, loss and injury they suffered as a consequence of the crimes alleged by the Prosecutor against Mr Gbagbo*". The Appeals Chamber is persuaded by these arguments of the Victims and holds that the personal interests of the Victims are affected by this appeal.

See No. ICC-02/11-01/11-492 OA5, Appeals Chamber, 29 August 2013, paras. 8-10.

The Appeals Chamber recalls that article 68(1) of the Statute provides that the "*Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims* […]. *These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*". Thus, while the

safety and security of victims is a key responsibility of the Court, when protecting victims the Court must ensure that the rights of the defence are respected and that the trial remains fair.

The Appeals Chamber notes that in the case at hand Trial Chamber II, following the approach adopted by Trial Chamber I, authorised the participation of victims whose identities were unknown to the parties on the basis that they would have to relinquish their anonymity should they be called to appear as a witness. Thus the need to disclose a victim's identity was contingent upon his/her modality of participation in the proceedings.

Turning to the participation of anonymous victims at the appellate stage of the proceedings, the Appeals Chamber recalls that the modalities of victim participation in the appeal is limited to victims filing observations on the Document in Support of the Appeal and the response to the Document in Support of the Appeal. In this regard it is noted that in the "Corrigendum aux Observations relatives au document déposé par le Procureur à l'appui de son appel et au mémoire en réponse de la Défense", the legal representative has made observations on the issues in the appeal in general and collectively, on behalf of all the victims, including the two anonymous victims, with no differentiation between individual victims' views and concerns. Thus, the Defence's argument that wholly anonymous participation constitutes an "*anonymous accusation*" which he is unable to fully defend himself against, is unpersuasive in the circumstances. Victims' a/0390/09 and a/0452/09 have not submitted individual observations to which the person concerned is required to respond. Given this limited form of participation and the legal representative's submissions on the vulnerability of victims a/0390/09 and a/0452/09, the Appeals Chamber finds that the protective measure of anonymity does not violate the right to a fair trial. However, should the anonymous victims wish to participate as individuals at a hearing or to make individual observations they would have to disclose their identities to the parties. Nevertheless, the Appeals Chamber considers it expedient to order the legal representative of Victim Group II to make contact with victims a/0390/09 and a/0452/09 and to enquire into their willingness to have their anonymity lifted vis-à-vis the parties and to inform the Appeals Chamber thereon.

See No. ICC-01/04-02/12-140 A, Appeals Chamber, 23 September 2013, paras. 16-20.

The Appeals Chamber observes that in the present case. Trial Chamber II has maintained the victims, who died before the conclusion of the trial, on the list of participating victims with the aim of allowing close relatives of the deceased victims to resume participation on their behalf. In this regard, the Appeals Chamber notes that while the Defence does not per se object to the resumption of participation of deceased victims, it does however object to the "*excessive*" delay in resuming participation on behalf of certain victims who have long since died. He therefore submits that not only should deceased victims for whom resumption of participation is still pending be removed from the List, but that a time bar be put in place beyond which resumption of participation should not be permitted.

The Appeals Chamber considers that the issue for determination is whether victims who died prior to the conclusion of the proceedings may be maintained on the List of participating victims in the appeal. First and foremost, the Appeals Chamber notes that the purpose of the List provided by the Registry is to reflect the details of all victims who are participating in the appellate proceedings. Victims who are deceased can no longer be said to be participating and they should therefore be removed from the List. However, this is not to say that the views and concerns expressed by the victims prior to their death are now disregarded. On the contrary, the Appeals Chamber acknowledges that prior to their deaths the victims concerned actively participated in the trial by expressing their views and concerns which were ultimately considered by the Trial Chamber in its Decision on Acquittal. These views and concerns remain a part of the case record under review even if the deceased victim is no longer participating.

In so far as the requirements of article 68(3) mandate that victim participation be based on their personal interests that are affected and since the views and concerns of deceased victims continue to be considered in the appellate proceedings as part of the case record under review, the Appeals Chamber considers that resumption of a deceased victim's participation by an heir/successor is not deemed appropriate. Accordingly, the Appeals Chamber directs the Registrar to file an updated List of participating victims that excludes deceased victims, as well as any other deceased victim and persons who have been authorised to resume participation on behalf of deceased victims.

See No. ICC-01/04-02/12-140 A, Appeals Chamber, 23 September 2013, paras. 24-26.

6.8. Participation in reparations proceedings

All victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings. Notwithstanding the submissions of the defence and the Legal Representatives of victims, it would be inappropriate to limit reparations to the relatively small group of victims that participated in the trial and those who applied for reparations.

The victims of the present crimes, as defined in rule 85 of the Rules, are to enjoy equal access to any information relating to their right to reparations and to assistance from the Court, as part of their entitlement to fair and equal treatment throughout the proceedings.

[…]

In the reparations proceedings, victims may use official or unofficial identification documents, or any other means of demonstrating their identities that are recognized by the Chamber. In the absence of acceptable documentation, the Court may accept a statement signed by two credible witnesses establishing the identity of the applicant and describing the relationship between the victim and any individual acting on his or her behalf.

When the applicant is an organization or institution, the Chamber will recognize any credible document that constituted the body in order to establish its identity.

[…]

A gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations, ensuring that they are accessible to all victims in their implementation. Accordingly, gender parity in all aspects of reparations is an important goal of the Court.

The victims of the crimes, together with their families and communities should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective.

Reparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, including participation in any reparations programme.

Outreach activities, which include, firstly, gender- and ethnic-inclusive programmes and, secondly, communication between the Court and the affected individuals and their communities are essential to ensure that reparations have broad and real significance.

The Court should consult with victims on issues relating, *inter alia*, to the identity of the beneficiaries, their priorities and the obstacles they have encountered in their attempts to secure reparations.

[…]

Reparations proceedings shall be transparent and measures should be adopted to ensure that all victims within the jurisdiction of the Court have detailed and timely notice of these proceedings and access to any awards.

As already indicated, the reparations phase is an integral part of the trial proceedings, but unlike the article 74 or the sentencing stages when the principal focus is on the defence and the prosecution, the Court is mainly concerned at this juncture with the victims, even though the prosecution and the defence are also parties to the reparations proceedings.

The Registry shall decide, in accordance with its powers under article 43(1) of the Statute, the most appropriate manner in which the current victims participating in the proceedings, along with the broader group of victims who may ultimately benefit from a reparations plan, are to be represented in order to express their views and concerns. […].

In light of the above, the Chamber considers that the individual application forms for reparations received thus far by the Registry should be transmitted to the TFV. If the TFV considers it appropriate, victims who have applied for reparations could be included in any reparations programme that is to be implemented by the TFV.

See No. ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012, paras. 187-188, 198-199, 202-206, 259, 267-268, and 284.

[…] The Appeals Chamber notes that, at the time of making applications for reparations, the victims either applied for individual awards or applied for a collective award, without knowledge of the kind of a collective programme that would be ultimately adopted. The Appeals Chamber therefore finds that it is necessary to seek the victims' consent when a collective award is made, consistent with the principle, identified by the Trial Chamber, that "[r]*eparations are entirely voluntary*".

Furthermore, in its direction to the Registrar to transmit all applications to the Trust Fund, the Trial Chamber did not include any clause regarding confidentiality, which is contrary to regulation 118(2) of the Regulations of the Registry.

The Appeals Chamber therefore considers it appropriate to include in the order for reparations an instruction to the Registrar to consult, through their Legal Representatives, with the victims who submitted requests for reparations in this case, in order to seek their consent to disclosure of confidential information to the Trust Fund for purposes of participation in the eventual collective programme(s) that are to be designed by the Trust Fund. The Trust Fund is instructed to refrain from further reviewing these requests until such consent is received and to permanently remove any confidential information it may have stored electronically or elsewhere in the event that consent is not granted. When the collective reparation awards contained in the draft implementation plan have been approved, the Trust Fund is directed to seek consent to participate therein from the victims whose applications are forwarded to it.

See No. ICC-01/04-01/06-3129 A A2 A3, Appeals Chamber, 3 March 2015, paras. 160-162.

1. Beneficiaries of reparations

[…]

It is to be recognised that the concept of "*family*" may have many cultural variations, and the Court ought to have regard to the applicable social and familial structures. In this context, the Court should take into account the widely accepted presumption that an individual is succeeded by his or her spouse and children.

Reparations can also be granted to legal entities, as laid down in rule 85(b) of the Rules of Procedure and Evidence. These may include, *inter alia*, nongovernmental, charitable and non-profit organisations, statutory bodies including government departments, public schools, hospitals, private educational institutes (primary and secondary schools or training colleges), companies, telecommunication firms, institutions that benefit members of the community (such as cooperative and building societies, or bodies that deal with micro finance), and other partnerships.

[…]

2. Harm

The concept of "*harm*", while not defined in the Statute or the Rules of Procedure and Evidence, denotes "*hurt, injury and damage*". The harm does not necessarily need to have been direct, but it must have been personal to the victim. Harm may be material, physical and psychological.

3. Causation

Reparation is to be awarded based on the harm suffered as a result of the commission of any crime within the jurisdiction of the Court. The causal link between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of a case.

4. Dignity, non-discrimination and non-stigmatisation

[…] Priority may need to be given to certain victims, who are in a particularly vulnerable situation or who require urgent assistance. The Court may adopt, therefore, measures that constitute affirmative action in order to guarantee equal, effective and safe access to reparations for particularly vulnerable victims.

[…]

6. Standard and burden of proof

In the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. Given the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the prosecution must establish the relevant facts to the standard of "*beyond a reasonable doubt*", should apply. In determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.

7. Child victims

One of the relevant factors to be considered in reparation proceedings is the age of the victims, in accordance with article 68(1) of the Statute. The Court shall take account of the age-related harm experienced by the victims and of their needs, pursuant to rule 86 of the Rules of Procedure and Evidence. Furthermore, any differential impact of these crimes on boys and girls is to be taken into account.

[…]

8. Accessibility and consultation with victims

The victims of the crimes, together with those members of their families and communities who meet the criteria of eligibility for reparations, should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective.

Reparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, including participation in any reparations programme.

Outreach activities, which include, firstly, gender- and ethnic-inclusive programmes and, secondly, communication between the Court and the affected individuals and their communities are essential to ensure that reparations have broad and real significance.

The Court should consult with victims on issues relating, *inter alia*, to the identity of the beneficiaries and their priorities.

See No. ICC-01/04-01/06-3129-AnxA A A2 A3, Appeals Chamber, 3 March 2015, paras. 7-8, 10-11, 19, 22-23, and 29-32.

The Chamber underlines that rule 94 of the Rules [of Procedure and Evidence] requires a certain number of particulars to be submitted to it. It also notes that this rule does not require the applicant's signature. It further notes that the purpose of the form developed by the Registry, pursuant to regulation 88 of the Regulations of the Court, is "*for victims to present their requests for reparations*" and the form must, "*to the extent possible*", be used by victims to present their requests for reparations.

With regard to the 305 applicants whom the Registry was able to interview in the presence of their Legal Representative, the Chamber notes that it possesses the necessary information, as set forth in rule 94 of the Rules, for these requests to be considered. The Chamber emphasises, however, that – where possible – it is up to the Legal Representative, in consultation with the Registry, to append to the request for reparations initially presented (whether it was filed together with a request to participate in the proceedings or in a separate form), or to the request for participation initially presented, any supporting documentation within the meaning of rule(94)(1)(g) of the Rules, attesting, in particular, to the extent of the harm suffered and the causal link between the alleged harm and the crime committed.

[…]

With regard to victims admitted to participate in the proceedings whom it was not possible to meet during the consultation with the Registry in the presence of the Legal Representative, the Chamber notes that the Registry's Report contains a proposal for opening a period, not exceeding six months, for submitting new requests for reparations. […] In the view of the Chamber, it is up to the Legal Representative, in consultation with the Registry, to submit any request for reparations or any other information required to complete the requests for reparations presented by the victims. Any such requests for reparations submitted must be accompanied – where possible – by supporting documentation attesting to the extent of the harm suffered and the causal link between the alleged harm and the crime committed.

Lastly, the Chamber believes that a period should be opened for the submission of any other request for reparations in this case made by victims yet to make themselves known. Such requests must also be accompanied – where possible – by supporting documentation attesting to the extent of the harm suffered and the causal link between the alleged harm and the crime committed.

See No. ICC-01/04-01/07-3546-tENG, Trial Chamber II, 8 May 2015, paras. 16-19.

On 7 September 2015, the Legal Representative filed a request for assistance from the Victims and Witnesses Unit (VWU) in identifying new categories of victims, namely children who were present at the Bogoro attack of 23 February 2003 ("the Attack") and who, owing to the trauma caused by the Attack, are unable to pursue "[TRANSLATION] *a satisfying social and professional life*"; children born after the Attack and suffering from a specific type of trauma called "[TRANSLATION] *transgenerational*" trauma; and parents having "[TRANSLATION] *voluntarily or involuntarily concealed*" their trauma until now. The Legal Representative submitted that he required VWU's assistance in assessing the "[TRANSLATION] *prevalence*" of the trauma suffered by these new categories of victims in Bogoro, in identifying all victims suffering from said trauma and in determining "[TRANSLATION] *under what conditions they may be individually interviewed*".

[…]

The Chamber takes note of the Legal Representative's concerns, in particular as regards the need to identify any and all potential victims, ensure victims' psychological well-being and address individual victims' specific needs in interviews with them.

The Chamber also notes, however, that VWU's functions are limited by rule 17 of the Rules of Procedure and Evidence and that the assistance sought by the Legal Representative is outside VWU's mandate. The Chamber therefore rejects the Request and invites the Legal Representative to file an application with the Registry for the support of a professional in accordance with regulation 83(3) of the Regulations of the Court.

Finally, the Chamber deems it necessary to recall that any new application for reparations must be accompanied – where possible – by supporting documents attesting to the extent of the harm suffered by the victim and the causal link between the alleged harm and the crimes of which Germain Katanga has been convicted.

See No. ICC-01/04-01/07-3608-tENG, Trial Chamber II, 9 October 2015, paras. 2, and 9-11.

[T]he Chamber will not be able to rule on the monetary amount of [the convicted person's] liability until the potential victims have been identified and it has examined both their status as victims eligible to benefit from the reparations and the extent of the harm they have suffered. In this context, the Chamber recalls that it is responsible for deciding on the status of eligible victims once the Defence has had the opportunity to submit its observations on the eligibility of each victim.

[T]he Chamber instructs the TFV to begin the process of locating and identifying victims potentially eligible to benefit from the reparations and transmit the results of this process to the Chamber […].

[…]

The Chamber instructs the TFV to prepare a file for each potential victim, with a copy of the identification documents or other means of identification presented, the interviews and the TFV's conclusions with regard to the victim's status and the extent of the harm he or she has suffered, as well as any other relevant information the TFV has taken into account in reaching its conclusions. To that end, the TFV must seek to obtain the potential victims' written consent to transmit this information to the Defence, *i.e.* their identity, their status as direct or indirect victims and the description of the factual allegations, including the harm suffered.

See No. ICC-01/04-01/06-3198-tENG, Trial Chamber II, 9 February 2016, paras. 14-15, and 17.

The Chamber confirms that it will not rule on the participation of applicants in the reparation proceedings and that applicants participate in the proceedings simply by virtue of filing their request for reparations. Once the Chamber has received all of the requests for reparations, it will rule on their merits.

See No. ICC-01/04-01/07-3653-Corr-tENG, Trial Chamber II, 16 February 2016, para. 12.

Relevant decisions regarding victims' participation in the proceedings

Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp (Pre-Trial Chamber I), No. ICC-01/04-73, 21 July 2005

Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006

Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo (Pre-Trial Chamber I), No. ICC-01/04-01/06-172-tEN, 29 June 2006

Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the Case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo (Pre-Trial Chamber I), No. ICC-01/04-01/06-228-tEN, 28 July 2006

Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the Case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo (Pre-Trial Chamber I), No. ICC-01/04-177-tENG, 31 July 2006

Decision on the Application for Participation of Victims a/0001/06 to a/0003/06 in the Status Conference of 24 August 2006 (Pre-Trial Chamber I), No. ICC-01/04-01/06-335-tENG, 17 August 2006

Decision on the application for participation of victims a/0001/06 to a/0003/06 in the status conference of 5 September 2006 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-380-tEN, 4 September 2006

Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing (Pre-Trial Chamber I), No. ICC-01/04-01/06-462-tEN, 22 September 2006

Decision on the Applications for Participation 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 in the Case of The Prosecutor v. Thomas Lubanga Dyilo (Pre-Trial Chamber I), No. ICC-01/04-01/06-601-tEN, 20 October 2006

Decision on "Prosecutor's Application to attend 12 February hearing" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-155, 9 February 2007

Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo" (Appeals Chamber), No. ICC-01/04-01/06-824 OA7, 13 February 2007

Decision on the OPCV's "Request to access documents and material" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-222, 16 March 2007

Decision authorising the filing of observations on applications for participation in the proceedings (Pre-Trial Chamber I), No. ICC-01/04-329-tEN, 23 May 2007

Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning "directions and Decision of the Appeals Chamber" (Appeals Chamber), No. ICC-01/04-01/06-925 OA8, 13 June 2007

Decision on matters of confidentiality and the Request for extension of the page limit (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-342-tEN, 19 June 2007

Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga (Pre-Trial Chamber I), No. ICC-01/04-01/07-4, 6 July 2007

Order to the Prosecutor and the Victims and Witnesses Unit to submit observations on the unsealing of certain documents in the record both of the situation and of the case (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-98-tENG, 12 July 2007

Decision authorising the filing of observations on applications for participation in the proceedings (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-358-tENG, 17 July 2007

Decision on victims' application for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-101, 10 August 2007

Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-252, 10 August 2007

Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation (Pre-Trial Chamber I), No. ICC-01/04-374, 17 August 2007

Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5) (Trial Chamber I), No. ICC-01/04-01/06-1022, 9 November 2007

Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-110, 3 December 2007

Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-417, 7 December 2007

Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-111-Corr, 14 December 2007

Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II), No. ICC-02/04-112, 19 December 2007

Decision on victims' participation (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008

Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor" (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-118, 23 January 2008

Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-438, 23 January 2008

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" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-423-Corr-tENG, 31 January 2008

Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-121, 6 February 2008

Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-444, 6 February 2008

Decision of the Appeals Chamber on the OPCV's request for clarification and the Legal Representatives' request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor (Appeals Chamber), No. ICC-01/04-450 OA4, 13 February 2008

Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor (Appeals Chamber), No. ICC-01/04-480 OA5, 29 February 2008

Decision of the Appeals Chamber on the OPCV's request for clarification And Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor (Appeals Chamber), No. ICC-02/05-129 OA, 29 February 2008

Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-125, 14 March 2008

Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06,a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06,a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06,a/0121/06 and a/0123/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-282, 14 March 2008

Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification (Pre-Trial Chamber II), No. ICC-02/04-126, 19 March 2008

Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification (Pre-Trial Chamber II), No. ICC-02/04-01/05-283, 19 March 2008

Order of the Appeals Chamber on the date of filing of applications for participation by victims and on the time of the filing of the responses thereto by the Prosecutor and the Defence (Appeals Chamber), No. ICC-01/04-01/06-1239 OA9 OA10, 20 March 2008

Decision on the Application for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08 (Pre-Trial Chamber II), No. ICC-01/04-01/07-357, 2 April 2008

Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witnesses 166 and 233 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-361, 3 April 2008

Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08 (Trial Chamber I), No. ICC-01/04-01/06-1308, 6 May 2008

Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008

Decision, in limine, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation" (Appeals Chamber), No. ICC-01/04-01/06-1335 OA9 OA10, 16 May 2008

Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-537, 30 May 2008

Decision on the Legal Representative's request for clarification of the Trial Chamber's 18 January 2008 "Decision on victims' participation" (Trial Chamber I), No. ICC-01/04-01/06-1368, 2 June 2008

Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-579, 10 June 2008

Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007 (Appeals Chamber), No. ICC-02/05-138 OA OA2 OA3, 18 June 2008

Decision on Victims' Requests for Anonymity at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-628, 23 June 2008

Decision on the Application for Participation of Witness 166 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-632, 23 June 2008

Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007 (Appeals Chamber), No. ICC-01/04-503 OA4 OA5 OA6, 30 June 2008

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/0233/03, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-505, 3 July 2008

Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (Appeals Chamber), No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008

Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-01/04-01/06-1452 OA12, 6 August 2008

Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-01/04-01/06-1453 OA13, 6 August 2008

Decision on Victim Participation (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-103-tENG-Corr, 12 September 2008

Decision on legal representation, appointment of counsel for the defence, criteria for redactions of applications for participation, and submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07 (Pre-Trial Chamber II, Single Judge), No. ICC-02/0401/05-312, 17 September 2008

Second Decision on the question of victims' participation requesting observations from the parties (Pre-Trial Chamber III), No. ICC-01/05-01/08-184, 23 October 2008

Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-02/04-01/05-324 OA2, 27 October 2008

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Fourth Decision on Victims' Participation (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-320, 12 December 2008

Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-322, 16 December 2008

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Sixth Decision on Victims' Participation Relating to Certain Questions Raised by the Office of Public Counsel for Victims (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-349, 8 January 2009

Corrigendum to "Decision on the applications by victims to participate in the proceedings" (Trial Chamber I), No. ICC-01/04-01/06-1556-Corr-Anx1, 13 January 2009

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Decision on victims' applications for participation a/0192/07 to a/0194/07, a/0196/07, a/0200/07, a/0204/07, a/0206/07, a/0209/07, a/0212/07, a/0216/07, a/0217/07, a/0219/07 to a/0221/07, a/02228/07 to a/0230/07, a/0234/07, a/0235/07, a/0237/07, a/0324/07 and a/0326/07 under rule 89 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-180, 10 March 2009

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Decision Inviting the Parties to submit their Observations on Applications for Participation (Rule 89(1) of the Rules of Procedure and Evidence) (Trial Chamber II), No. ICC-01/04-01/07-1094-tENG, 4 May 2009

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Deuxième décision invitant les parties à présenter leurs observations relatives aux demandes de participation (règle 89-1 du Règlement de procédure et de preuve) (Trial Chamber II), No. ICC-01/04-01/07-1129-tENG, 12 May 2009

Third Decision Inviting the Parties to submit their Observations on Applications for Participation (Rule 89(1) of the Rules of Procedure and Evidence) (Trial Chamber II), No. ICC-01/04-01/07-1151-tENG, 19 May 2009

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Decision on issues relating to victims' applications in the Case (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-02/09-20, 12 June 2009

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Decision on the "Legal Representative's Request to Expedite the Consideration of Applications for Victim Status" (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-01/09-36-RSC, 27 August 2009

Decision on the Participation of Victims in the Appeal against the "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"(Appeals Chamber), No. ICC-01/05-01/08-500 OA2, 3 September 2009

Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by the Victims (Trial Chamber II), No. ICC-01/04-01/07-1491-Red-tENG, 23 September 2009

Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-02/09-121, 25 September 2009

Public Redacted Version of "Decision on the 52 Applications for Participation at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-02/09-147-Red, 9 October 2009

Decision on the "Request in respect of Information relevant to Victim Participation on the basis of the Decision on 52 Applications for Participation at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-02/09-169, 14 October 2009

Reasons for the "Decision on the Participation of Victims in the Appeal against the 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'" (Appeals Chamber), No. ICC-01/05-01/08-566 OA2, 20 October 2009

Decision on the participation of victims in the appeals (Appeals Chamber), No. ICC-01/04-01/06-2168 OA15 OA16, 20 October 2009

Decision On the Applications by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" and on the Request for an Extension of Time (Appeals Chamber), No. ICC-02/05-01/09-48 OA, 23 October 2009

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Dispositif de la deuxième décision relative aux demandes de participation de victimes à la procédure (Trial Chamber II), No. ICC-01/04-01/07-1669, 23 November 2009

Decision on the Participation of Victims in the Appeal against the "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa" – Dissenting Opinion of Judge Sang-Hyun Song (Appeals Chamber), No. ICC-01/05-01/08-623 OA2, 27 November 2009

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Order to the Victims Participation and Reparations Section Conceming Victims' Representations Pursuant to Article 15(3) of the Statute (Pre-Trial Chamber II), No. ICC-01/09-4, 10 December 2009

Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure (Trial Chamber II), No. ICC-01/04-01/07-1737, 22 December 2009

Decision on the Modalities of Victim Participation at Trial (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010

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 (Trial Chamber III), No. ICC-01/05-01/08-699, 22 February 2010

Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims (Trial Chamber II), No. ICC-01/04-01/07-1491-Red-tENG, 10 March 2010

Decision on the defence observations regarding the right of the Legal Representatives of victims to question defence witnesses and on the notion of personal interest -and- Decision on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses (Trial Chamber I), No. ICC-01/04-01/06-2340, 11 March 2010

Motifs de la troisième décision relative à 8 demandes de participation de victimes à la procédure (Trial Chamber II), No. ICC-01/04-01/07-1967, 16 March 2010

Decision on Applications a/0655/09, a/0656/09, a/0736/09 to a/0747/09, and a/0750/09 to a/0755/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-02/09-255, 19 March 2010

Decision on the Participation of Victims in the Appeal of Mr Katanga Against the "Decision on the Modalities of Victim Participation at Trial" (Appeals Chamber), No. ICC-01/04-01/07-2124 OA11, 24 May 2010

Redacted Decision on Intermediaries (Trial Chamber I), No. ICC-01/04-01/06-2434-Red2, 31 May 2010

Decision on 8 Applications for Victims' Participation in the Proceedings (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-01/09-93, 9 July 2010

Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 12 July 2010

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Decision on the Participation of Victims in the Appeal against the "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence" of Trial Chamber III (Appeals Chamber), No. ICC-01/05-01/08-857, 18 August 2010

Decision on the Participation of Victims in the Appeal against Trial Chamber I'sDecision to Stay the Proceedings (Appeals Chamber), No. ICC-01/04-01/06-2556, 18 August 2010

Decision on Victims' Participation at the Hearing on the Confirmation of the Charges (Pre-Trial Chamber I), No. ICC-02/05-03/09-89, 29 October 2010

Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya (Pre-Trial Chamber II), No. ICC-01/09-24, 3 November 2010

Fourth decision on two applications for victims' participation in the proceedings (Trial Chamber II), No. ICC-01/04-01/07-2516-tENG, 8 November 2010

Decision authorising the appearence of Victims a/0381/09, a/0018/09,a/0191/08 and pan/0363/09 acting on behalf of a/0363/09 (Trial Chamber II), No. ICC-01/04-01/07-2517-tENG, 9 November 2010

Decision on Victims' Participation in Proceedings Related to the Situation in the Central African Republic (Pre-Trial Chamber II), No. ICC-01/05-31, 11 November 2010

Decision on issues related to the hearing on the confirmation of charges (Pre-Trial Chamber I), No. ICC-02/05-03/09-103, 17 November 2010

Decision on 772 applications by victims to participate in the proceedings (Trial Chamber III), No. ICC-01/05-01/08-1017, 18 November 2010

Decision on 653 applications by victims to participate in the proceedings (Trial Chamber III), No. ICC-01/05-01/08-1091, 23 December 2010

Redacted Decision on the disclosure of information from victims' application forms (a/0225/06, a/0229/06 and a/0270/07) (Trial Chamber I), No. ICC-01/04-01/06-2586-Red, 4 February 2011

Redacted version of the Corrigendum of Decision on the applications by 15 victims to participate in the proceedings (Trial Chamber I), No. ICC-01/04-01/06-2659-Corr-Red, 8 February 2011

First Decision on Victims' Participation in the Case (Pre-Trial Chamber II), No. ICC-01/09-01/11-17, 30 March 2011

First Decision on Victims' Participation in the Case (Pre-Trial Chamber II), No. ICC-01/09-02/11-23, 30 March 2011

Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute (Pre-Trial Chamber II), No. ICC-01/09-01/11-31, 4 April 2011

Second Decision on the Motion of Legal Representative of Victim Applicants to Participate in Initial Appearance proceedings and Article 19 Admissibility Proceedings (Pre-Trial Chamber II), No. ICC-01/09-01/11-40, 6 April 2011

Decision on victims' participation in proceedings relating to the situation in the Democratic Republic of the Congo (Pre-Trial Chamber I), No. ICC-01/04-593, 11 April 2011

Decision requesting observations on the place of the proceedings for the purposes of the Confirmation of the Charges Hearing (Pre-Trial Chamber II), No. ICC-01/09-01/11-106, 3 June 2011

Decision requesting observations on the place of the proceedings for the purposes of the Confirmation of the Charges Hearing (Pre-Trial Chamber II), No. ICC-01/09-02/11-102, 3 June 2011

Decision on the "Proposal on victim participation in the confirmation hearing" (Pre-Trial Chamber I), No. ICC-01/04-01/10-229, 10 June 2011

Decision on the applications to resume action submitted by the family members of deceased Victims a/0025/08, a/0051/08, a/0197/08 and a/0311/09 (Trial Chamber II), No. ICC-01/04-01/07-3018-tENG, 14 June 2011

Decision on the Registrar's "Request for instructions on the processing of victims' applications" (Pre-Trial Chamber II), No. ICC-01/09-01/11-147, 28 June 2011

Decision on the "OPCV's Request for Leave to Respond to 'Defence Observations on 4 Applications for Victim Participation in the Proceedings'" (Pre-Trial Chamber II), No. ICC-01/09-02/11-147, 1 July 2011

Order to the Victims Participation Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute (Pre-Trial Chamber III), No. ICC-02/11-6, 6 July 2011

Decision on the maintenance of participating victim status of Victims a/0381/09 and a/0363/09 and on Mr Nsita Luvengika's request for leave to terminate his mandate as said victims' Legal Representative (Trial Chamber II), No. ICC-01/04-01/07-3064-tENG, 7 July 2011

Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case (Pre-Trial Chamber II), No. ICC-01/09-01/11-169, 8 July 2011

Decision on 401 Applications by victims to participate in the proceedings (Trial Chamber III), No. ICC-01/05-01/08-1590-Corr, 21 July 2011

Redacted version of the Decision on the applications by 7 victims to participate in the proceedings (Trial Chamber I), No. ICC-01/04-01/06-2764-Red, 25 July 2011

Decision on Victims' Participation at the Confirmation of the Charges Hearing and in the Related Proceedings (Pre-Trial Chamber II), No. ICC-01/09-01/11-249, 5 August 2011

Decision on 138 applications for victims' participation in the proceedings (Pre-Trial Chamber I), No. ICC-01/04-01/10-351, 11 August 2011

Decision requesting observations on the "Defence Challenge to the jurisdiction of the Court" (Pre-Trial Chamber I), No. ICC-01/04-01/10-377, 16 August 2011

Redacted version of the Decision on 13 applications for victims' participation in proceedings related to the situation in the Democratic Republic of the Congo (Pre-Trial Chamber I), No. ICC-01/04-597-Red, 18 August 2011

Decision on Victims' Participation at the Confirmation of the Charges Hearing and in the Related Proceedings (Pre-Trial Chamber II), No. ICC-01/09-02/11-267, 26 August 2011

Decision setting a timeline for the filing of observations on pending victims' applications (Trial Chamber III), No. ICC-01/05-01/08-1726, 9 September 2011

Decision on the applications for participation of victim applicants a/2176/11 and a/2195/11 (Pre-Trial Chamber I), No. ICC-01/04-01/10-441, 26 September 2011

Decision on the Registry Report on six applications to participate in the proceedings (Trial Chamber IV), No. ICC-02/05-03/09-231-Corr, 17 October 2011

Decision on 270 Applications by victims to participate in the proceedings (Trial Chamber III), No. ICC-01/05-01/08-1862, 25 October 2011

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Decision on 418 Applications by victims to participate in the proceedings (Trial Chamber III), No. ICC-01/05-01/08-2011, 15 December 2011

Decision on Victim's Participation in Proceedings Related to the Situation in Libya (Pre-Trial Chamber I), No. ICC-01/11-18, 24 January 2012

Reasons for "Decision on the appeal of the Prosecutor of 19 December 2011 against the 'Decision on the confirmation of the charges' and in the alternative, against the 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana' and on the victims' request for participation of 20 December 2011" (Appeals Chamber), No. ICC-01/04-01/10-483 OA3, 24 January 2012

Order on the applications by victims to participate and for reparations (Trial Chamber I), No. ICC-01/04-01/06-2838, 27 January 2012

Decision on issues related to the victims' application process (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-33, 6 February 2012

Judgment pursuant to Article 74 of the Statute (Trial Chamber I), No. ICC-01/04-01/06-2842, 14 March 2012

Scheduling order concerning timetable for sentencing and reparations (Trial Chamber I), No. ICC-01/04-01/06-2844, 14 March 2012

Order refusing a request for reconsideration (Trial Chamber I), No. ICC-01/04-01/06-2846, 27 March 2012

Decision on the "Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)" (Appeals Chamber), No. ICC-01/04-01/10-509 OA4, 2 April 2012

Second Decision on issues related to the victims' application process (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-86, 5 April 2012

Order fixing the date for the sentencing hearing (Trial Chamber I), No. ICC-01/04-01/06-2871, 24 April 2012

Order concerning the "Requête de la Défense aux fins de juger que seuls le Procureur et la Défense peuvent présenter des observations sur la peine à prononcer à l'encontre de M. Thomas Lubanga" (Trial Chamber I), No. ICC-01/04-01/06-2875, 9 May 2012

Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in Related Proceedings (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012

Order on the scheduling of a hearing and status conferences on 11 July 2012 (Trial Chamber IV), No. ICC-02/05-03/09-366, 6 July 2012

Decision on Sentence pursuant to Article 76 of the Statute (Trial Chamber I), No. ICC-01/04-01/06-2901, 10 July 2012

Public redacted version of "Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings" (Trial Chamber III), No. ICC-01/05-01/08-2247-Red, 19 July 2012

Decision establishing the principles and procedures to be applied to reparations (Trial Chamber I), No. ICC-01/04-01/06-2904, 7 August 2012

Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations (Trial Chamber I), No. ICC-01/04-01/06-2911, 29 August 2012

Directions on the conduct of the appeal proceedings (Appeals Chamber), No. ICC-01/04-01/06-2923 A A2 A3 OA21, 17 September 2012

Decision on victims' representation and participation (Trial Chamber V), No. ICC-01/09-01/11-460, 3 October 2012

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Decision on the participation of victims in the appeals against Trial Chamber's I conviction and sentencing decisions (Appeals Chamber), No. ICC-01/04-01/06-2951 A4 A5 A6, 13 December 2012

Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of the proceedings (Appeals Chamber), No. ICC-01/04-01/06-2953 A A2 A3 OA21, 14 December 2012

Decision on the application of victims to participate in the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court (Appeals Chamber), No. ICC-01/04-01/07-3346 OA13, 17 January 2013

Second decision on victims' participation at the confirmation of charges hearing and in the related proceedings (Pre-Trial Chamber I), No. ICC-02/11-01/11-384, 6 February 2013

Order on the filing of submissions on new applications to participate as victims in the proceedings (Appeals Chamber), No. ICC-01/04-01/06-2978 A4 A5 A6, 14 February 2013

Decision on the OPCV's "Request to access documents related to the 'Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut" filed by the Defence on 15 February 2013" (Pre-Trial Chamber I), No. ICC-02/11-01/11-406, 18 February 2013

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Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-02/05-03/09-470 OA4, 6 May 2013

Separate Opinion of Judge Sang-Hyun Song (Appeals Chamber), No. ICC-02/05-03/09-470-Anx OA4, 6 May 2013

Decision on the request of the Registrar relating to the transmission of applications for participation in the appeal proceedings and on related issues (Appeals Chamber), No. ICC-01/04-01/06-3026 A4 A5 A6, 6 May 2013

Decision on the application to resume action, submitted by a family member of deceased Victim a/0253/09 (Trial Chamber II), No. ICC-01/04-01/07-3383-tENG, 10 June 2013

Decision on 32 applications to participate in the proceedings (Appeals Chamber), No. ICC-01/04-01/06-3045-Red2 A4 A5 A6, 27 August 2013

Decision on the application by victims for participation in the appeal (Appeals Chamber), No. ICC-02/11-01/11-491 OA4, 27 August 2013

Decision on the participation of victims in the Prosecutor's appeal against the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute" (Appeals Chamber), No. ICC-02/11-01/11-492 OA5, 29 August 2013

Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims (Appeals Chamber), No. ICC-01/04-02/12-140 A, 23 September 2013

Decision on a/2922/11's application to participate in the appeals proceedings (Appeals Chamber), No. ICC-01/04-01/06-3052-Red A4 A5 A6, 3 October 2013

Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings (Pre-Trial Chamber II), No. ICC-01/04-02/06-211, 15 January 2014

Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings With two confidential ex parte annexes (Pre-Trial Chamber II), No. ICC-01/04-02/06-251, 7 February 2014

Decision on the participation of victims in the trial proceedings (Trial Chamber IV), No. ICC-02/05-03/09-545, 20 March 2014

Decision on the OPCV's "Request for re-classification and extension of time to file the final written submissions" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-639, 24 March 2014

Further order regarding the conduct of the hearing of the Appeals Chamber (Appeals Chamber), No. ICC-01/04-01/06-3068 A4 A5 A6, 25 March 2014

Scheduling order and decision in relation to the conduct of the hearing before the Appeals Chamber (Appeals Chamber), No. ICC-01/04-01/06-3083 A4 A5 A6, 30 April 2014

Decision on victims' participation in the pre-trial proceedings and related issues (Pre-Trial Chamber I), No. ICC-02/11-02/11-83, 11 June 2014

Second Decision on victims' participation in the pre-trial proceedings and related issues (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-111, 1 August 2014

Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters (Trial Chamber V(b)), No. ICC-01/09-02/11-954, 19 September 2014

Decision on Defence request for excusal from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014 (Trial Chamber V(b)) and Partially Dissenting Opinion of Judge Kuniko Ozaki, No. ICC-01/09-02/11-960, 30 September 2014

Seventh decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute (Trial Chamber I), No. ICC-02/11-01/11-718-Red, 11 November 2014

Decision on victims' participation in trial proceedings (Trial Chamber VI), No. ICC-01/04-02/06-449, 6 February 2015

Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2 (Appeals Chamber), No. ICC-01/04-01/06-3129 A A2 A3, 3 March 2015

Decision Establishing Principles on the Victims' Application Process (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-205, 4 March 2015

Decision on the "Demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve" and future stages of the proceedings (Trial Chamber II), No. ICC-01/04-01/07-3546-tENG, 8 May 2015

Decision on the applications for resumption of action submitted by the family members of deceased victims a/0170/08 and a/0294/09 (Trial Chamber II), No. ICC-01/04-01/07-3547-tENG, 11 May 2015

Decision on the "Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo's detention (ICC-02/11-01/15-134-Red3)" (Appeals Chamber), No. ICC-02/11-01/15-158 OA6, 22 July 2015

Decision on the "Prosecution's Request to be Provided with Unredacted Copies of Victims' Applications Submitted in the Situation in Uganda and the Case of The Prosecutor v. Joseph Kony et al". (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-280, 29 July 2015

Reasons for the "Decisionon the Request for the recognition of the right ofvictims authorized toparticipate in the case to automatically participate in anyinterlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on MrGbagbo's detention (ICC-02/11-01/15-134-Red3)'" (Appeals Chamber), No. ICC-02/11-01/15-172 OA6, 31 July 2015

Decision on the "Defence Request for the Disclosure of Unredacted or Less Redacted Victim Applications" (Trial Chamber II), No. ICC-01/04-01/07-3583-tENG, 1 September 2015

Decision on the Legal Representative of Victims' requests to maintain redactions to information relating to certain intermediaries (Trial Chamber I), No. ICC-02/11-01/15-202, 2 September 2015

Decision concerning the procedure for admission of victims to participate in the proceedings in the present case (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-299, 3 September 2015

Decision setting time limits for submissions on Victims' Applications (Trial Chamber I), No. ICC-02/11-01/15-276, 7 October 2015

Decision on the request of the common legal representative of victims for assistance from the Victims and Witnesses Unit (Trial Chamber II), No. ICC-01/04-01/07-3608-tENG, 9 October 2015

Decision on contested victims' applications for participation, legal representation of victims and their procedural rights (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015

Decision on victims' participation status (Trial Chamber I), No. ICC-02/11-01/15-379, 7 January 2016

Order instructing the Trust Fund for Victims to supplement the draft implementation plan (Trial Chamber II), No. ICC-01/04-01/06-3198-tENG, 9 February 2016

Corrigendum to the "Order relating to the submission of the Legal Representative of Victims" (Trial Chamber II), No. ICC-01/04-01/07-3653-Corr-tENG, 16 February 2016

Decision on "Requête relative à la reprise des actions introduites devant la Cour par des victimes décédées" (Trial Chamber III), No. ICC-01/05-01/08-3346, 24 March 2016

Decision on the submission of observations on the requests for reparations and the applications to resume action (Trial Chamber II), No. ICC-01/04-01/07-3682-tENG, 14 April 2016

Decision on Prosecutor's requests for lifting of certain redactions in victim application forms (ICC-02/11-01/15-465 and ICC-02/11-01/15-493) (Trial Chamber I), No. ICC-02/11-01/15-506, 9 May 2016

Decision on the applications for resumption of action lodged by the family members of deceased victims a/0015/09, a/0032/08, a/0057/08, a/0166/09, a/0192/08, a/0225/09, a/0281/08, a/0282/09, a/0286/09, a/0298/09, a/0354/09, a/0361/09, a/0391/09, a/2743/10 and a/30490/15 (Trial Chamber II), No. ICC-01/04-01/07-3691-tENG, 20 May 2016

Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims' (Trial Chamber VIII), No. ICC-01/12-01/15-97-Red, 8 June 2016

Decision on Disclosure of Victims' Identities (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-471, 17 June 2016

Public redacted version of 'Second Decision on Victim Participation at Trial', 12 August 2016 (Trial Chamber VIII), No. ICC-01/12-01/15-156-Red, 12 August 2016

Decision on the Application for Resumption of Action Submitted by a Relative of Deceased Victim a/0265/09 and the Appointment of a New Representative for Victim A/0071/08 (Trial Chamber II), No. ICC-01/04-01/07-3721-tENG, 12 December 2016

Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to The Defence Team of Thomas Lubanga Dyilo (Trial Chamber II), No. ICC-01/04-01/06-3275-tENG, 22 February 2017

Decision on LRV Request for Resumption of Action for Deceased Victim a/35084/16 (Trial Chamber VIII, Single Judge), No. ICC-01/12-01/15-223, 2 June 2017

Decision on the Application of the Defence for Thomas Lubanga Dyilo of 24 April 2017 concerning Redactions in some of the Files of Potentially Eligible Victims (Trial Chamber II), No. ICC-01/04-01/06-3328-tENG, 5 June 2017

Decision on Prosecution's Request to Disclose Lesser Redacted Versions of 43 Victims' Applications (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-907, 6 July 2017

Decision on the Motion of the Office of Public Counsel for Victims for Reconsideration of the Decision of 6 April 2017 (Trial Chamber II), No. ICC-01/04-01/06-3338-tENG, 13 July 2017

Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016 (Appeals Chamber), No. ICC-02/11-01/15-915-Red OA9, 31 July 2017

Second decision on applications for resumption of actions initiated by deceased victims (Trial Chamber III), No. ICC-01/05-01/08-3558, 29 August 2017

Decision on LRV Request Concerning the Deaths of Participating Victims (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-962, 30 August 2017

Decision on the resumption of action applications (Trial Chamber I), No. ICC-02/11-01/15-1052, 11 October 2017

Corrected Version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" (Trial Chamber II), No. ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017

Public Redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute" (Appeals Chamber), No. ICC-01/04-01/07-3778-Red A3 A4 A5, 8 March 2018

Public redacted version of "Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations", 12 July 2018 (Trial Chamber VIII), No. ICC-01/12-01/15-273-Red, 12 July 2018

Decision on TFV Request for Clarification Regarding Individual Reparations for Economic Harm (Trial Chamber VIII), No. ICC-01/12-01/15-280, 31 August 2018

2. Modalities of victims' participation in the proceedings

Articles 15(3), 19(3), 68(1) and (2), 68(3), 75(3), 87(4), 93(1)(j) of the Rome Statute

Rules 16, 69, 70 to 73, 87 to 91, 94, 95, 97 to 99, 101, 132(2), 136, 139, 143, 144(1) and (2), 145, 191, 217 and 221 of the Rules of Procedure and Evidence

Regulations 21(8), 24(2), 28(1) and (2), 31(1) and (2), 54, 79(2) and (3), 86(1) and (2), 86, 88 and 117(c) of the Regulations of the Court

Regulations 64(4), 66(4), 99(2) and (4) and 109(3) of the Regulations of the Registry

1. Modalities of participation in general

Pursuant to article 68(3) of the Statute, the Chamber considers that victims may present their views and concerns at the investigation stage of the situation in the Democratic Republic of the Congo once the Chamber grants them victim status.

See No. ICC-01/04-164-tENG, Pre-Trial Chamber I, 7 July 2006, p. 3.

Article 68(3) of the Rome Statute grants discretion to the Chamber to determine the modalities of participation which are attached to such procedural status. The Chamber must exercise its discretion to delineate the modalities of participation in a manner which is not prejudicial to or inconsistent with the rights of the accused.

See No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, para. 5.

The Single Judge embraces a systematic approach which consists of a clear determination of the set of procedural rights that those granted the procedural status of victims in the pre-trial stage of the case may exercise.

[…]

By adopting a systematic approach the Single Judge aims to ensure that the rule attributed to those granted the procedural status of victim at the pre-trial stage of a case before the Court is: […] (iv) meaningful – and not purely symbolic – as would be the case if victims were required to ask for the leave of the competent Chamber to perform the most simple procedural activity, such as responding to the submissions of a party.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 49 and 51.

The Single Judge wishes to point out that, in the 5 August 2011 Decision, it was held that the Legal Representative of victims may be authorised by the Chamber to make written submissions on specific issues of law and/or fact if: (i) the Legal Representative of victims proves, by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake; and (ii) the Chamber deems such submissions appropriate, in light of, *inter alia*, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings.

The Single Judge also stresses that the assessment of applications pursuant to article 68(3) of the Statute cannot be conducted *in abstracto*, but, conversely, shall be performed on a case-by-case basis, upon specific and motivated request submitted by the Legal Representative of victims.

The Single Judge acknowledges the well-established rights of victims and the mandate of their Legal Representative to bring to the attention of the Chamber any views and concerns of victims in relation to issues which affect their interests. Consequently, the fact that the Legal Representative was only able to consult the victims on the issues included in the Application after the end of the confirmation of charges hearing, does not in principle preclude these views and concerns to be brought before the Chamber through the Legal Representative. This, however, must be subject to the conditions laid down in article 68(3) of the Statute and elaborated in the 5 August 2011 Decision.

The Single Judge recalls that the functions and powers of the Pre-Trial Chamber are clearly determined under article 57 of the Statute. Thus, the power to conduct investigations concerning the commission of crimes and/or to direct the Prosecutor to investigate certain offences or persons do not fall among the prerogatives of the Pre-Trial Chamber as reflected in the said provision of the Statute. Pursuant to the law the power of the Pre-Trial Chamber is to evaluate, in light of the standards of proof envisaged in the Statute, the results of such investigations, namely the evidence collected and placed before the Chamber.

Hence, article 54 of the Statute vests the Prosecutor with autonomous and independent investigative powers, which poses on him more concretely the obligation to: ensure effective investigation and Prosecution; cover all facts and relevant evidence, in particular investigate incriminating and exonerating circumstances equally; respect the interests of victims and witnesses; and to fully respect the rights of persons arising under the Statute. Accordingly, in the view of the Single Judge and provided the legal framework under consideration, the appropriate addressee of the victims' concerns about the alleged flaws in the investigations in the present case as described in the Legal Representative's request, should be the Prosecutor.

See No. ICC-01/09-01/11-371, Pre-Trial Chamber II, 9 December 2011, paras. 11-17.

The OPCV requests the Single Judge to order the parties to file suitable redacted versions of their respective submissions in the case record and to evaluate whether certain parts of the Hearing might be held in public sessions with the attendance of the Common Legal Representative.

[…]

Single Judge considers the request admissible, in spite of the Defence objections. As the Defence noted correctly, the OPCV may make written submissions only with leave of the Chamber. However, considering its substance, the filing in question must be seen as a request for participation in relation to the specific matter and, as such, must be considered as properly filed and the submissions therein considered on the merits.

See No. ICC-02/11-01/11-249, Pre-Trial Chamber I (Single Judge), 20 September 2012, paras. 25 and 30.

Victims who do not wish to present their views and concerns individually and directly to the Chamber, but rather to express those views and concerns solely through common legal representation, will not be required to submit an application under rule 89(1) of the Rules. However, these victims may, if they so wish, register with the Registry, indicating their names, contact details as well as information as to the harm suffered. The Registry shall enter these victim registrations into a database, which it will administer and make accessible to the Common Legal Representative.

The purpose of this registration is threefold: first, to provide victims with a channel through which they can formalise their claim of victimhood; second, to establish a personal connection between the victim and the Common Legal Representative, enabling victims to provide their input and allowing the Common Legal Representative to give relevant feedback to the victims; third, to assist the Court in communicating with the victims and in preparing the periodic reports.

Victims wishing to present their views individually by appearing directly before the Chamber, in person or via video-link, may be allowed to do so at various stages of the trial and in a manner to be determined by the Chamber. The Common Legal Representative shall submit a request on behalf of these individuals, explaining why they are considered to be best placed to reflect the interests of the victims, together with a detailed summary of the aspects that will be addressed by each victim if authorised to present his or her views and concerns. For the purpose of the preparation of this filing, the Common Legal Representative may seek the assistance of the OPCV, as required.

See No. ICC-01/09-01/11-460, Trial Chamber V, 3 October 2012, paras. 49-50, and 56; and No. ICC-01/09-02/11-498, Trial Chamber V, 3 October 2012, paras. 48-49, and 55.

In accordance with regulation 24 of the Regulations of the Court, the victims' legal representatives are also entitled to file written motions, responses and replies in relation to all matters for which the Statute and the Rules does not exclude their intervention and for which the Chamber has not limited their participation either *proprio motu* or at the request of the parties, the Registry or any other participants.

Accordingly, the Single Judge considers that the Common Legal Representative of the victims admitted to participate by the present decision may be authorised by the Chamber to make written submissions on specific issues of law and/or fact. This right may be exercised upon the conditions that (i) the legal representative proves, by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake; and (ii) the Chamber deems it appropriate, in light of, *inter alia*, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, paras. 58-59.

IX. Participatory rights

Turning to the participatory rights, the Single Judge recalls that under the Statute and the Rules, victims participating in the proceedings are entitled *expressis verbis* to a number of specific procedural rights, which they can exercise through their legal representative. Alongside these specific rights conferred to the victims ex lege, other rights may be granted by the Chamber either upon specific request by the legal representative or *proprio motu*, in accordance with article 68(3) of the Statute.

According to this provision, victims may 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*". The Single Judge recalls that, in accordance with article 68(3) of the Statute, the right to express their views and concerns may be granted upon specific request by the common legal representative of victims justifying why their personal interests are affected by the issue at stake. Such assessment may not be conducted in the abstract but on a case-by-case basis, depending on the issue(s) concerned and on the justification given by the legal representative in support of his or her request.

Furthermore, the Single Judge must take into account whether the exercise of any specific right by the common legal representative of victims will be prejudicial to or inconsistent with the rights of the suspect.

[…]

4. Filing of written submissions

The Single Judge considers it appropriate and consistent with her previous holdings, to grant the right to CLR1 and CLR2 to make written submissions on specific issues of law and/or fact. In order for the Single Judge to grant this right, CLR1 and/or CLR2 must submit a specific request to this effect in compliance with the requirements of article 68(3) of the Statute, as recalled in paragraphs 82-83 above.

See No. ICC-01/04-02/06-211, Pre-Trial Chamber II, 15 January 2014, paras. 81-83 and 96.

ii. Victims' participatory rights

Article 68(3) of the Statute provides that:

> [w]*here 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 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.*

As stated by the Appeals Chamber, the participation of victims within the meaning of article 68(3) of the Statute "*can take place only within the context of judicial proceedings*". An assessment thereof cannot thus be conducted in the abstract, but should be performed on a case-by-case basis, upon specific and motivated request submitted by the legal representative of victims. The language of article 68(3) of the Statute further vests the Chamber with discretion in determining the modalities of victims' participation in the proceedings, which should not result in any prejudice to the rights of the suspect and to a fair and impartial trial.

The Single Judge also observes that, alongside article 68(3) of the Statute, a number of other provisions explicitly grant certain rights to victims that they can exercise through their legal representative, at the confirmation of charges hearing and in the related proceedings. The Single Judge will hereunder enumerate these procedural rights, in line with the two decisions on victims' participation in the *Gbagbo* Case. This is, however, without prejudice to any other rights that the Chamber may grant to them in the course of the proceedings either propio motu or upon specific and motivated request submitted by their legal representative.

[…]

c. Filing of written submissions

In accordance with regulation 24 of the Regulations, the victims' legal representatives are also entitled to file written motions, responses and replies in relation to all matters for which the Statute and the Rules do not exclude their intervention and for which the Chamber has not limited their participation either *propio motu* or at the request of a party, the Registrar or any other participant.

Accordingly, the Single Judge considers that the Common Legal Representative of the victims admitted to participate by the present decision may be authorised by the Chamber to make written submissions on specific issues of law and/or fact. This right may be exercised upon the conditions that (i) the legal representative proves, by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake; and (ii) the Chamber deems it appropriate, in light of, *inter alia*, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspect and the principle of fairness and expeditiousness of the proceedings.

See No. ICC-02/11-02/11-83, Pre-Trial Chamber I, 11 June 2014, paras. 26-27, and 37-38.

The Chamber considers that the victims have standing to submit observations pursuant to article 68(3) of the Statute. This article provides that, '*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 determined to be appropriate by the Court*'. Furthermore, the Chamber is of the view that rule 93 of the Rules gives it discretion to accept observations presented by victims on any issue and at any stage of the proceedings, wherever the Chamber finds it appropriate. The Chamber considers that the victims' personal interests are affected by the Request in view of the fact that their applications are linked to, *inter alia*, alleged deportations from Myanmar to Bangladesh in August 2017. In addition, since their observations concern the specific legal question arising from the Request, the Chamber finds it appropriate, in these particular circumstances, to hear from the victims at this stage.

See No. ICC-RoC46(3)-01/18-37, Pre-Trial Chamber I, 6 September 2018, para. 21.

2. Modalities of participation at the investigation stage

In the light of the core content of the right to be heard set out in article 68(3) of the Statute, persons accorded the status of victims will be authorised, notwithstanding any specific proceedings being conducted in the framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in the DRC.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, para. 71.

In exercising their procedural rights pursuant to article 68(3) of the Rome Statute, victims may, before the Pre-Trial Chamber and in connection with the investigation:

(a) Present their views and concerns;

(b) File documents;

(c) Request the Pre-Trial Chamber to order specific measures.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, p. 42.

The Single Judge recalls that a) the investigation stage of a situation and the pre-trial stage of a case are appropriate stages of the proceedings for victim participation as provided for in article 68(3) of the Statute; and that b) it is therefore possible to have the status of victim authorised to participate in situation and case-related proceedings before the Pre-trial Chamber. Furthermore, the Chamber also held that a) article 68(3) of the Statute grants discretion to the Chamber to determine the modalities of participation which are attached to such status; and b) that the Chamber must exercise its discretion to delineate the modalities of participation "*in a manner which is not prejudicial to or inconsistent with the rights of the accused*".

See No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, para. 5. See also No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, para. 2; No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, para. 8; and No. ICC-01/04-417, Pre-Trial Chamber I (Single Judge), 7 December 2007, para. 2.

The notion of procedural status of victims is nowhere defined, and it is difficult to attach a specific meaning to it. Are there other forms of victim status? Is the term "*procedural status of victim*" used in order to distinguish such status from the status of a victim having a right to participate in concrete judicial proceedings? Moreover, is there a substantive victim status in contrast to a procedural one?

The term "*procedural status of victim*" is not a phrase with a distinct meaning or a word coined as a term of art. The word "*procedural*" indicates something pertaining to procedure. Procedure is the code regulating the exercise of judicial power, known as adjectival law. It is contrasted to substantive law, definitive of the rights, duties and obligations of a person. The word "*status*" signifies a person's legal condition, whether personal or proprietary. Procedure is not of itself determinative of the status of any person.

The article of the Statute that confers power upon a victim to participate in any proceedings is article 68(3). What emerges from the case law of the Appeals Chamber is that participation can take place only within the context of judicial proceedings. Article 68(3) of the Statute correlates victim participation to "*proceedings*", a term denoting a judicial cause pending before a Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible. The modalities of participation under article 68(3) of the Statute must be specified by the Chamber in a manner not prejudicial to the rights of the person under investigation or the accused, and in a way non-antagonistic to a fair and impartial trial. A person has the right to participate in proceedings if (a) he/she qualifies as a victim under the definition of this term provided by rule 85 of the Rules, and (b) his/her personal interests are affected by the proceedings in hand in, *i.e.* by the issues, legal or factual, raised therein.

Rules 89, 91 and 92 of the Rules relied upon by the Pre-Trial Chamber as supporting the position that victims can participate at the investigation stage of a situation outside the framework of judicial proceedings, far from supporting the position adopted, contradict it. Rule 89 of the Rules is specifically fashioned to the provisions of article 68 of the Statute and aims to regulate the steps that must be taken in order for a victim to participate in judicial proceedings. Rule 91 of the Rules acknowledges that victims may participate through a Legal Representative whereas rule 92 of the Rules adverts to notification of judicial proceedings to victims and their Legal Representatives in which they may have an interest to seek participation and decisions which may affect them. The class of victims to whom notification must be given is also specified.

Rule 92 of the Rules has one other aspect that merits reference to. It exempts from its provisions proceedings under Part 2 of the Statute (see rule 92(1) of the Rules). Articles 15(3) and 19(3) do belong to that Part of the Statute. They make provision, the former for representations by victims in relation to the authorisation of an investigation, and the latter for the submission of observations by victims with regard to the jurisdiction of the Court to take cognisance of a case or its admissibility. Rules 50 and 59 of the Rules regulate, respectively, the procedure applicable to a) victims' representations, and b) the submission of victims' observations.

Rule 93 confers power upon a Chamber to seek the views of victims or their Legal Representatives on any matter arising in the course of proceedings before it, including issues referred to it pursuant to rules 107, 109, 125, 128, 136, 139, and 199 of the Rules. The views of victims may be solicited independently of whether they participate or not in any given proceedings before the Court. Initiative for soliciting the views of victims under this rule rests entirely with a Chamber. Victims may express their views on any given subject identified by the Chamber. Here again, the process is distinguished from victim participation under article 68(3) of the Statute.

Regulation 86(6) of the Regulations of the Court does not envisage participation outside the confines of rule 89 of the Rules. It merely regulates victim participation under article 68(3) of the Statute.

There is yet another species of proceedings that must be distinguished from participation under article 68(3) of the Statute. These are proceedings which the victims may initiate themselves under statutory provisions. Pursuant to the provisions of article 75 of the Statute and rule 94 of the Rules, they may make a request for reparations against the convicted person in the manner envisaged by the aforesaid rule. Furthermore, victims as well as witnesses may move the Court to take protective measures for their safety, physical and psychological

well-being, dignity and privacy as foreseen *inter alia* in article 68(1) and (2) of the Statute and rules 87 and 88 of the Rules. The protection of victims and witnesses and that of members of their families may justify the nondisclosure of their identity prior to the trial, as provided in rule 81 of the Rules.

The initial appraisal of a referral of a situation by a State Party, in which one or more crimes within the jurisdiction of the Court appear to have been committed as well as the assessment of information reaching the Prosecutor and in relation to that the initiation by the Prosecutor of investigations *proprio motu* are the exclusive province of the Prosecutor (see, *inter alia*, articles 14, 15, 53, and 54 of the Statute).

The domain and powers of the Prosecutor are outlined in article 42 of the Statute, paragraph 1 of which reads: The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not see or act on instructions from any external source. Manifestly, authority for the conduct of investigations vests in the Prosecutor. Acknowledgment by the Pre-Trial Chamber of a right to victims to participate in the investigation would necessarily contravene the Statute by reading into it a power outside its ambit and remit.

[…]

Participation pursuant to article 68(3) of the Statute is confined to proceedings before the Court, and aims to afford victims an opportunity to voice their views and concerns on matters affecting their personal interests. This does not equate them, as the case law of the Appeals Chamber conclusively establishes, to parties to the proceedings before a Chamber, restricting their participation to issues arising therein touching upon their personal interests, and then at stages and in a manner not inconsistent with the rights of the accused and a fair and impartial trial.

The Pre-Trial Chamber also acknowledges in its decision that article 68(3) of the Statute is the provision that confers a right upon victims to participate in any proceedings before a Chamber. Nevertheless, the Pre-Trial Chamber adopts the position that the provision could be extended beyond its self-evident confines, to areas outside its ambit. Article 68(3) of the Statute is treated as a hybrid provision, allowing the participation of victims in any matter dealt with by the Statute, including investigations. This is a position that can find no justification under the Statute, the Rules of Procedure and Evidence or the Regulations of the Court. On the other hand, it must be clarified that victims are not precluded from seeking participation in any judicial proceedings, including proceedings affecting investigations, provided their personal interests are affected by the issues arising for resolution.

Having determined that the Pre-Trial Chamber cannot grant the procedural status of victim entailing a general right to participate in the investigation, the Appeals Chamber is not in a position to advise the Pre-Trial Chamber as to how applications for participation in judicial proceedings at the investigation stage of a situation should generally be dealt with in the future, in the absence of specific facts. It is for the Pre-Trial Chamber to determine how best to rule upon applications for participation, in compliance with the relevant provisions of the Court's texts. The Pre-Trial Chamber must do so bearing in mind that participatory rights can only be granted under article 68(3) of the Statute once the requirements of that provision have been fulfilled.

Having determined that victims cannot be granted procedural status of victim entitling them to participate generally in the investigation, leading to the collapse of the foundation of the decisions of the Single Judge, the particulars to be provided for a person to qualify as a victim on grounds of moral harm becomes a theoretical one and need not be answered.

In the result, the decisions of the Pre-Trial Chamber acknowledging procedural status to victims, entitling them to participate generally in the investigation of a situation are ill-founded and must be set aside. The reversal of the Impugned Decisions is the unavoidable outcome of these proceedings.

See No. ICC-01/04-556 OA4 OA5 OA6, Appeals Chamber, 19 December 2008, paras. 43-52 and 55-59. See also No. ICC-02/05-177 OA OA2 OA3, Appeals Chamber, 2 February 2009, paras. 43-51 and 55-59.

The Chamber wishes to highlight that the statutory documents of the Court do not envisage a pre-preliminary examination stage. A plain reading of article 15, in particular paragraphs (1), (2) and (6), in conjunction with rule 48 of the Rules reveals that the preliminary examination is the pre-investigative assessment through which the Prosecutor analyses the seriousness of the information '*received*' or '*made available*' to her against the factors set out in article 53(1)(a)-(c) of the Statute. […] The language of article 15(6) of the Statute does not leave room for any other interpretation".

[…]

The Chamber recalls at this juncture Pre-Trial Chamber III's pronouncement that '*the preliminary examination of a situation pursuant to article 53(1) of the Statute and rule 104 of the Rules must be completed within reasonable time* […] *regardless of its complexity*'. If the Prosecutor reaches a positive determination according to the '*reasonable basis*' standard under articles 15(3) and 53(1) of the Statute, she '*shall submit*' to the Chamber a request for authorization of the investigation. As held by this Chamber in another composition, '*the presumption of article 53(1) of the Statute, as reflected by the use of the word* 'shall' *in the chapeau of that article, and of common sense,*

is that the Prosecutor investigates in order to be able to properly assess the relevant facts'. It follows that a prolongation of a preliminary examination beyond that point is, in principle, unwarranted.

[…]

In addition, an investigation should in general be initiated without delay and be concluded efficiently in order for it to be effective, since '[w]*ith the lapse of time, memories of witness fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and thus the prospects that any effective investigation can be undertaken will increasingly diminish*'. Even Trial Chambers at the Court have noted the profound impact and detrimental effect that the length of time between the occurrence of the crimes and the moment in which evidence is presented at trial can have on the reliability of evidence presented before a Chamber. In particular, with the passage of time, victims '*who suffered trauma, may have had particular difficulty in providing a coherent, complete and logical account*'.

Lastly, the Chamber recalls that the Appeals Chamber's statement in the context of article 21(3) of the Statute that, '*the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court*'. The preliminary examination is no exception to this fundamental principle and this concerns not only its result but also its conduct.

This means that the Prosecutor is mandated to respect the internationally recognized human rights of victims with regard to the conduct and result of her preliminary examination, especially the rights of victims to know the truth, to have access to justice and to request reparations, as already established in the jurisprudence of the Court. […] Within the Court's framework, the victims' rights both to participate in the proceedings and to claim reparations are entirely dependent upon the Prosecutor starting an investigation or requesting authorization to do so. The process of reparations is intrinsically linked to criminal proceedings, as established in article 75 of the Statute, and any delay in the start of the investigation is a delay for the victims to be in a position to claim reparations for the harm suffered as a result of the commission of the crimes within the jurisdiction of this Court.

See No. ICC-RoC46(3)-01/18-37, Pre-Trial Chamber I, 6 September 2018, paras. 82, 84, and 86-88.

Furthermore, the Chamber is of the view that the Prosecutor is mandated to respect the rights of both the referring entity, here a State Party, and the victims during the conduct of a preliminary examination, including the reconsideration provided for in article 53(3)(a) of the Statute. With regard to the right of the referring State Party, Pre-Trial Chamber III stated that '*in the view of the Chamber, the preliminary examination of a situation pursuant to article 53(1) of the Statute and rule 104 of the Rules must be completed within a reasonable time from the reception of a referral by a State Party under articles 13(a) and 14 of the Statute, regardless of its complexity*'. With regard to the rights of victims, the Chamber recently stated that '*the Prosecutor is mandated to respect the internationally recognized human rights of victims with regard to the conduct and result of her preliminary examination, especially the rights of victims to know the truth, to have access to justice and to request reparations*'; it is therefore necessary for the victims to be informed promptly as to whether or not they will be in a position to exercise their rights before this Court, as a matter which depends entirely on the Prosecutor's decision of whether to open an investigation. Extended preliminary examinations affect the rights of victims and maintain them in a state of uncertainty which is prejudicial.

See No. ICC-01/13-68, Pre-Trial Chamber I, 15 November 2018, para. 120.

3. Modalities of participation at the pre-trial stage

Although the Statute and Rules provide an indication on some of the procedural rights that the Chamber could attach to the procedural status of victim at the pre-trial stage of a case, they do not pre-establish *per se* any specific procedural right apart from the general right to file requests with the competent Chamber.

[…]

The discretion granted to the Chamber in the determination of the role of victims in the pre-trial stage of a case before the Court must be exercised by applying, in addition to the general principle of interpretation set out in article 21(3) of the Statute, the interpretative criteria provided for in article 31(1) of the Vienna Convention on the Laws of Treaties, according to which "*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose*".

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 56 and 78.

V.l.4.2. Specific Procedural Rights

The Single Judge observes that the differences between the procedural framework of the pre-trial stage of a case in those national systems that provide for a procedural status of victim at such stage, and the procedural framework embraced by the Statute and the Rules, are important.

As a result of these differences, the set of procedural rights that could be attached to the procedural status of victim at the pre-trial stage of a case before the Court cannot be as broad as it is in some of the above-mentioned national systems, particularly in light of the limitations referred to in the previous sections concerning the

prohibition to extend the factual and evidentiary basis of the confirmation hearing, as well as the limited content of the record of the case.

The question then arises as to which specific procedural rights are consistent with the procedural framework provided for by the Statute and the Rules for the pre-trial stage of a case before the Court and could therefore be attached to the procedural status of victim pursuant to article 68(3) of the Statute and rules 91 and 92 of the Rules.

In the view of the Single Judge, these specific procedural rights can be divided into six groups. The first group is comprised of the right to have access, prior to and during the confirmation hearing, to the record of the case kept by the Registry, including to the evidence filed by the Prosecution and the Defence pursuant to rule 121 of the Rules.

The Single Judge considers that this right includes the right to have access to all filings and decisions contained in the record of the case regardless of whether they are classified as public or as confidential. It does not, however, include the right to access those filings and decisions classified as "*ex parte*" and only available to the Prosecution, the Defence, a different participant, the Registry or a combination thereof.

In the view of the Single Judge, this first group also includes the right to be notified on the same basis as the Prosecution and the Defence of all decisions, requests, motions, responses and other procedural documents which are filed in the record of the case and are not classified "*ex parte*" and only available to the Prosecution, the Defence, a different participant, the Registry or a combination thereof.

Furthermore, the right to have access to the transcripts of hearings contained in the record of the case regardless of whether such hearings were held in public or in closed session also falls within this first group. The same cannot be stated, however, for the right to access the transcripts of those hearings held on an *ex parte* basis with the Prosecution, the Defence, a different participant, the Registry or a combination thereof.

In the view of the Single Judge, this first group also includes the right to be notified on the same basis as the Prosecution and the Defence of all proceedings before the Court, including public and closed session hearings (including those held *ex parte*) and any postponements thereof, and the date of delivery of decisions.

Furthermore, the right to have access to the evidence proposed by the Prosecution and the Defence and contained in the record of the case also falls within this first group. However, this right to have access to the evidence is limited to the format (unredacted versions, redacted versions or summaries, as well as electronic versions with the data required by the e-Court Protocol) in which the evidence is made available to the party which has not proposed it.

Finally, the Single Judge underlines that the right to have access to non-public filings and decisions included in the Registry's record of the situation to which the relevant case is related falls outside this first group of rights. In this regard, the Single Judge recalls that such non-public filings and decisions concern the Prosecution investigation of other aspects of the relevant situation, and that a copy of all those materials included in the record of a situation which are relevant for a given case are incorporated into the record of such a case when it arises.

The second group is comprised of the rights (i) to make submissions on all issues relating to the admissibility and probative value of the evidence on which the Prosecution and the Defence intend to rely at the confirmation hearing; and (ii) to examine such evidence at the confirmation hearing.

The third group relates to the examination of witnesses. In this regard, the Single Judge recalls that the Chamber, in its 7 November 2006 Decision on the Practices of Witness Familiarization and Witness Proofing in the *Lubanga* Case, made the following finding:

> […] *rule 140 of the Rules does not use the expressions* "examination-in-chief", "cross-examination" *and* "re-examination"*, which have a very technical and specific meaning in a number of national jurisdictions, and instead uses expressions such as* "question the witness" *or* "examine the witness"*. Therefore, within the process of witness familiarisation, the VWU shall inform the witness of the process of its examination by the Prosecution and the Defence, as opposed to the process of* "examination-in-chief", "cross-examination" *and* "re-examination" *referred to by the Prosecution in paragraph 16 (vi) of the Prosecution Information.*

The Single Judge observes that this finding was made against the backdrop of the limited procedural rights attached to the procedural status of victim when victims are granted anonymity throughout the pre-trial stage of a case, including the fact that they are not entitled to examine witnesses pursuant to the procedure provided for in rule 91(3) of the Rules.

In the view of the Single Judge, when the limitations deriving from the principle of prohibiting anonymous accusations are not applicable, this third group includes the right to examine, at the confirmation hearing, any witness proposed by the Prosecution and the Defence, as this is part of the evidentiary debate that takes place at the confirmation hearing.

The Single Judge considers that the examination of witnesses by those granted the procedural status of victim should take place after their examination by the Prosecution and within the amount of time allocated by the Chamber. Moreover, those granted the procedural status of victim, like the Prosecution and the Defence, should not have to file the list of questions that they intend to pose to the relevant witnesses prior to the examination

of the witnesses. In this regard, the Single Judge notes that the Prosecution, the Defence and those granted the procedural status of victim can always, after a question is posed and before it is answered by the witness, make an oral motion requesting the Chamber not to admit the relevant question or to request the examining party to reformulate it.

Finally, the examination of witnesses by those granted the procedural status of victim should take place subject to any other direction that the Chamber may give prior to, or during, the said examination.

The fourth group is comprised of the right to attend all public and closed session hearings convened in the proceedings leading to the confirmation hearing, as well as in all public and closed sessions of the confirmation hearing. However, it does not include the right to attend those hearings held on an *ex parte* basis with the Prosecution, the Defence, a different participant, the Registry or a combination thereof.

The fifth group includes the right to participate by way of oral motions, responses and submissions in:

(i) all those hearings in which those granted the procedural status of victim have the right to attend; and

(ii) in relation to all matters other than those in which their intervention has been excluded by the Statute and the Rules – for instance, matters relating to the inter partes disclosure process or any discussion of the evidence which aims at extending the factual basis contained in the Prosecution [Amended] Charging Document.

The sixth and last group is comprised of the right to file written motions, responses and replies in accordance with regulation 24 of the Regulations, in relation to all matters other than those in which the victim's intervention has been excluded by the Statute and the Rules.

In the view of the Single Judge, the fifth and the sixth groups of rights also include the right to (i) file, in accordance with rule 121(7) of the Rules, written submissions with the Pre-Trial Chamber on evidentiary and legal issues to be discussed at the confirmation hearing; (ii) make opening and closing statements at the confirmation hearing as provided for in rule 89(1) of the Rules; and (iii) raise objections or make observations concerning issues related to the proper conduct of the proceedings prior to the confirmation hearing in accordance with rule 122(3) of the Rules.

Nevertheless, the Single Judge considers that the right to resort to certain procedural remedies that, according to the Statute and the Rules, can only be exercised by Prosecution, Defence and/or other participants, falls outside of these last o groups of rights. This is the case, *inter alia,* for the right to make challenges to, or raise issues relating to, the jurisdiction of the Court or the admissibility of a case pursuant to article 19(2) and (3) of the Statute and rule 122(2) of the Rules.

Furthermore, the Single Judge would like to highlight that any procedural rights attached to the procedural status of victim at the pre-trial stage of the case cannot be exercised retroactively. Moreover, unless otherwise provided by the Chamber in any future decision granting the procedural status of victim in the pre-trial Proceedings of the present case, the set of specific procedural rights embraced in the present decision shall also belong to all natural and legal persons to whom such status shall be granted by the Chamber.

V.l.4.3. Limitations to the Specific Procedural Rights

In the view of the Single Judge, the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules requires that the set of procedural rights referred to in the previous subsection can be subject to limitations under certain conditions.

In this regard, the Single Judge considers that the set of procedural rights referred to in the previous subsection – and in particular the right to access confidential filings, decisions and transcripts contained in the record of the case, as well as the right to attend and participate in closed session hearings – can be limited by the Chamber *proprio motu*, or at the request of the parties, the Registry or any other participant, if it is shown that the relevant limitation is necessary to safeguard another competing interest protected by the Statute and the Rules – such as national security, the physical or psychological well-being of victims and witnesses, or the Prosecution's investigations.

Furthermore, in the view of the Single Judge, the scope of any such limitation shall be carefully delimited on the basis of the principle of proportionality.

As a result, the Single Judge would like to highlight that she agrees with the Trial Chamber in that the victim's right to access the record of the case and to participate in the evidentiary debate at the confirmation hearing can be limited for reasons relating, *inter alia*, to "*national security, protection of witnesses and victims, and Prosecution's investigations*".

Nevertheless, the Single Judge considers that, according to the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules, preventing victims, when victims are not granted anonymity, from accessing confidential materials is the exception and not the general rule – at least in relation to the pre-trial proceedings of a case, where the record of the case is certainly limited.

In this regard, the Single Judge notes that in the *Lubanga* Case, as well as in the present case, the bulk of the evidence filed by the Prosecution and the Defence in the record of the respective cases has been classified as confidential. Therefore, if victims were to be denied access to confidential filings, they would essentially be prevented from effectively participating in the evidentiary debate held at the confirmation hearing.

Furthermore, the Single Judge also observes that, in principle, those filings, decisions and transcripts included in the record of the case that could contain information affecting, *inter alia*, national security, the protection of witnesses and victims and the Prosecution's investigations (such as rules 81(2) and (4) requests for redactions, reports on the status of requests for admission into the Court's Witness Protection Programme or unredacted versions of statements which are only disclosed to the Defence in a redacted format) are classified *ex parte*, and therefore they cannot be accessible to victims.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 124-152.

4. Modalities of participation at the confirmation of charges hearing

Subject to their intervention being restricted to the scope determined by the charges brought against Thomas Lubanga Dyilo, the victims may participate in the confirmation hearing by presenting their views and concerns in order to help contribute to the prosecution of the crimes from which they allegedly have suffered and to, where relevant, subsequently be able to obtain reparations for the harm suffered;

[…]

In principle, the anonymous participation of the said victims at this stage in proceedings should be limited to: i) access to the public documents only; and ii) presence at the public hearings only; but that the Chamber retains the option to make an exception to this principle in the event of exceptional circumstances […].

[…]

The Victims' Representatives may:

a. make opening and closing statements at the confirmation hearing;

b. request leave to intervene during the public sessions of the confirmation hearing, but will not be able to add any point of fact or any evidence. Victims' representatives will not be able to question the witnesses.

See No. ICC-01/04-01/06-462-tEN, Pre-Trial Chamber I, 22 September 2006, pp. 5-8. See also No. ICC-01/05-01/08-320, Pre-Trial Chamber III (Single Judge), 12 December 2008, paras. 101-108.

In their opening and closing statements, the Legal Representatives may, *inter alia*, address any point of law, including the legal characterisation of the modes of liability with which the Prosecutor has charged the suspect under article 25 of the Statute.

See No. ICC-01/04-01/06-678, Pre-Trial Chamber I (Single Judge), 7 November 2006, p. 7.

1. Public hearing on the confirmation of charges

The Single Judge considers that Legal Representatives of victims recognised as participants in the present proceedings have the right to attend the public parts of the hearing on the confirmation of charges against the suspect. In case the Chamber decides to hold parts of the hearing *in camera* or *ex parte*, the Chamber reserves its position on whether to grant Legal Representatives of victims the right to attend those sessions.

The Single Judge holds that pursuant to rule 89(1) of the Rules, Legal Representatives of victims recognised as participants in the present proceedings are granted the right to explain the reasons for their participation in a brief opening statement (20 minutes in total) at the confirmation hearing. They will also be allowed to make a closing statement.

2. Access to public decisions and documents

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*.

3. Access to public evidence

With a view to their proper preparation for the confirmation hearing and possible claim of reparations at a later stage, the Single Judge is of the view that victims should have access also to evidence adduced by the parties. Therefore, the Single Judge holds that Legal Representatives of victims recognised as participants in the present proceedings must have access to all public evidence disclosed by the Prosecutor and the Defence

which is contained in the record of the case effective as of the date of their recognition to participate in the present proceedings. The right of access to evidence does not include the right of access to evidence filed on a confidential basis.

4. Access to transcripts

The Single Judge further considers that due to their presence in court, Legal Representatives of victims recognised as participants in the present proceedings must have access to the transcripts of the public part of the hearing on the confirmation of charges as well as previously held public hearings and status conferences. In case the Chamber decides to hold parts of the hearing *in camera* or *ex parte*, the Chamber reserves its position on whether to grant Legal Representatives of victims the right to access those transcripts.

5. Notifications

The Single Judge holds that pursuant to rule 92(6) of the Rules Legal Representatives of victims recognised as participants in the present proceedings must be notified of all public decisions and filings filed effective as of the date of their recognition to participate in the present proceedings. However, if a party or participant wishes to notify Legal Representatives of victims of a confidential document, this filing shall include the names of the Legal Representatives of the victims and be notified by the Registrar accordingly.

Further, this right includes that Legal Representatives of victims recognised as participants in the present proceedings be notified in a timely manner of the confirmation hearing and any postponement thereof as well as the date of delivery of the decision in accordance with rule 92(5) of the Rules.

[…]

8. Written submissions

The Single Judge is of the view that Legal Representatives of victims recognized as participants in the present proceedings have a right to make succinct written submissions to specific issues of law and fact if (i) victims prove first by way of application that their interests are affected by the issue under examination and (ii) it is deemed appropriate by the Chamber.

See No. ICC-01/05-01/08-320, Pre-Trial Chamber III (Single Judge), 12 December 2008, paras. 101-107 and 110. See also No. ICC-02/05-02/09-136, Pre-Trial Chamber I, 6 October 2009, paras. 11-20, and 25; No. ICC-02/05-03/09-89, Pre-Trial Chamber I, 29 October 2010, paras. 58-68; No. ICC-02/05-03/09-103, Pre-Trial Chamber I, 17 November 2010, para. 8 and No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, paras. 49-60.

Any victim's right to participate in the evidentiary debate held at the confirmation hearing must be subject to an absolute prohibition to extend the factual basis contained in the Prosecution Charging Document.

The same limitation does not apply in relation to the legal characterization of the facts contained in the Prosecution Charging Document, insofar as the Chamber can always, pursuant to article 61(7) of the Statute, adjourn the hearing and request the Prosecution to consider amending the legal characterization of such facts if it considers that the evidence submitted appears to establish a different crime.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 122-123.

The Prosecution has informed the Defence and the Chamber of its intention to call three witnesses to testify at the confirmation hearing. The Defence, according to its List of Evidence, also intends to call a witness to testify at the confirmation hearing.

At the outset, the Chamber wishes to recall that, bearing in mind the principle of prohibiting anonymous accusations, the victims who are granted anonymity throughout the pre-trial stage of a case, are not entitled to examine witnesses pursuant to the procedure provided for in rule 91(3) of the Rules.

However, when the identities of the victims are disclosed to the parties, the Chamber considers that the aforementioned limitation may not be applicable. Thus, pursuant to rule 91(3) of the Rules, if any of the victims' Legal Representatives wish to question any of the witnesses called to testify at the confirmation hearing, they must make an application to the Chamber.

If a request is made in that sense, the Chamber will decide, at that time, on the procedure that must be followed, taking into account, among other factors, the stage of the proceedings, the rights of the suspect, the interests of the witnesses, the need for a fair, impartial and expeditious trial and the requirements under article 68(3) of the Statute.

See No. ICC-02/05-02/09-136, Pre-Trial Chamber I, 6 October 2009, paras. 21-24.

The Single Judge recalls that, in accordance with rule 91(2) of the Rules, the Legal Representative of victims has the right to participate in the proceedings. With respect to this case, the Single Judge considers that Legal Representative of victims has the right to attend all public sessions of the confirmation hearing as well as all public hearings convened in the related proceedings. In the event that the Chamber decides to hold *in camera* or *ex parte* hearings, it retains the option to decide, on a case-by-case basis, upon motivated request, whether to authorise the Legal Representative of victims to attend those in camera hearing convened in the confirmation of

charges hearing according to rule 91(2) of the Rules. The same applies to any other *ex parte* or *in camera* hearing convened in the present case.

Turning to the matter of participation at the hearings, the Single Judge notes that the provision of rule 91(2) of the Rules specifies that the rights of the Legal Representatives of victims "*shall include participation in hearings, unless, in the circumstances of the case, the Chamber is of the view that the representatives' intervention should be confined to written observations or submissions*".

In the present case, the Single Judge considers that victims' Legal Representative may, upon motivated request specifying why and how the victims' personal interests are affected by the issues concerned, be authorized to make oral submissions during the confirmation of charges hearing, subject to any direction of the Chamber. In its determination, the Chamber will, *inter alia*, take due account of the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings.

Finally, the Single Judge recalls the provision of rule 89(1) according to which participation in the proceedings may include making opening and closing statements. Consequently, the Single Judge considers that the victims' Legal Representative shall be entitled to make a brief opening statement at the confirmation of charges hearing as well as a brief closing statement at the end of the hearing. The said rights shall be exercised in accordance with the schedule of the confirmation of charges hearing which will be issued in due course.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 86-89. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, paras. 103-106.

The Single Judge takes note of the provision of rule 91(3) of the Rules, which, in principle, allows victims' Legal Representatives to question witnesses and experts called to testify before the Chamber. The very same provision, however, clarifies that the questioning of witnesses by the victims' Legal Representative can take place only pursuant to an authorisation of the Chamber and subject to a number of restrictions. Therefore, if the Legal Representative of victims wishes to question witnesses called to testify at the confirmation of charges hearing, she must make an application to the Chamber, which shall include demonstration of personal interests that are affected by the issue(s) under consideration. In this regard, rule 91(3)(a) of the Rules entrusts the Chamber with the authority to request the Legal Representative to provide, together with the request to question a witness, a written note of the questions, which shall be communicated to the Prosecutor and, if appropriate, to the Defence, in order for them to make observations thereto. The Chamber will then decide on the application, taking into account, as provided for by 91(3)(b) of the Rules, *inter alia*, the stage of the proceedings, the rights of the suspects, the interests of the witness and the principle of fairness and expeditiousness of the proceedings. If a request to question a witness is granted, the Chamber, in accordance with rule 91(3)(b) of the Rules, will also decide at that point of time on the procedure to be followed.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 99 and 100. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, paras. 116-117.

The Single Judge considers that the Legal Representative of the victims admitted to participate in the present proceedings may be authorised by the Chamber to make written submissions on specific issues of law and/or fact. This right may be employed if the Legal Representative proves, by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake and the Chamber deems it appropriate, in light of, *inter alia*, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, para. 101. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, para. 118.

The Single Judge, in considering the rights of participation to be granted to those victims' recognised as participants in the present proceedings, takes note of rules 91, 92 and 121(10) of the Rules. The Single Judge is, thus, of the view that it is appropriate that the Legal Representatives of the victims authorised to participate in the proceedings relating to the pre-trial stage of the case, be granted the following rights:

1. To be notified, on the same basis as the Prosecution and the Defence, of all public proceedings before the Court, including the date of hearings and any postponements thereof, and the date of the delivery of the decision;
2. To be notified, on the same basis as the Prosecution and the Defence, of all public requests, submissions, motions and other public documents filed in the record of the present case;
3. To be notified of all public decisions of the Chamber in the relevant proceedings;
4. To have access to all public filings, public decisions and public documents, contained in the record of the present case;
5. To have access to transcripts of hearings, including status conference hearings, held in public sessions throughout the course of the proceedings in the present case;

6. To have access to all public evidence, provided and disclosed by the Prosecution and the Defence pursuant to rule 121 of the Rules and contained in the record of the present case, in the same format (redacted, unredacted or summary, as well as electronic versions with the data required by the E-Court Protocol) in which it has been made available to the party which has not proposed it;

7. To make an opening statement at the commencement of the Confirmation Hearing and a closing statement at the end of the Confirmation Hearing, in accordance with the schedule of the Confirmation Hearing which will be issued in early course;

8. To attend and participate by way of oral submissions, in accordance with rule 91(2) of the Rules, in all hearings held in public in the course of the pre-trial Proceedings, as well as public sessions of the Confirmation Hearing, subject to the instructions of and in accordance with the schedule of the Confirmation Hearing, unless, in the circumstances of the case, the Chamber is of the view that the Legal Representatives' intervention should be confined to written observations or submissions. In the event that parts of hearings are held *in camera* or *ex parte*, the Single Judge will determine on a case-by-case basis whether victims' legal representatives will be granted authorisation to attend those sessions, upon request; and

9. To file written motions, responses and replies, in accordance with regulation 24 of the Regulations of the Court, in relation to all matters for which the Statute and the Rules does not exclude their intervention and for which the Chamber has not limited their participation either *proprio motu* or at the request of the parties, the Registry or any other participants.

The Single Judge wishes to point out that a party or participant may notify a confidential document to the Legal Representatives of victims, if he/she so wishes, by including the name(s) of the Legal Representative(s) to whom it is to be notified in the document in question. With respect to filings, documents and decisions filed on a confidential basis or under seal and/or *ex parte*, the Chamber may determine on a case-by case basis and upon receipt of a specific and motivated request whether victims' Legal Representatives will be granted access to such documents. In the same vein, the Single Judge will decide on a case-by-case basis whether transcripts of hearings held in camera or *ex parte* will be made available to victims' Legal Representatives

See No. ICC-01/04-01/10-351, Pre-Trial Chamber I (Single Judge), 11 August 2011, paras. 41-43.

The Chamber received the Request, in which the victims' Legal Representative seeks leave to make written submissions on article 61(7)(c)(ii) of the Rome Statute, with a view to suggesting that the charges brought by the Prosecutor against the Suspects should reflect acts of destruction of property, looting and infliction of physical injuries and that "*the Chamber should exercise its power* […] *under* [said provision] *to request the Prosecutor to consider amending the charges:*

a. by expressly specifying that Count 5 and Count 6 encompass additionally acts of destruction of property, and looting, and the infliction of physical injuries; and

b. by adding counts of the crime against humanity or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health (Article 7(1)(k) of the Statute), in relation to the acts of destruction of property, and looting, and the infliction of physical injuries".

The Single Judge notes articles 21(1)(a), (3) and 68(3) of the Statute.

In the 5 August 2011 Decision, the Single Judge held that the Legal Representative of victims may be authorised by the Chamber to make written submissions on specific issues of law and/or fact if: (i) the Legal Representative of victims proves, by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake; and (ii) the Chamber deems it appropriate, in light of, *inter alia*, the stage of the proceedings, the nature of the issue(s) concemed, the rights of the suspects and the principle of fairness and the expeditiousness of the proceedings. The Single Judge also stressed that the assessment of applications pursuant to article 68(3) of the Statute cannot be conducted *in abstracto*, but, conversely, shall be performed on a case-by-case basis, upon specific and motivated request submitted by the Legal Representative of victims.

Having considered the submissions of the Legal Representative of victims, the Single Judge is of the view that the personal interests of the victims in the present case are indeed affected by the issue raised during the confirmation of charges hearing and reiterated in the Request. The Single Judge also considers that no prejudice would be caused to the rights of the suspects and to the fairness and expeditiousness of the proceedings if the victims' Legal Representative was authorised to make written submissions on the issue outlined in the Request. However, the Single Judge wishes to point out that this is without prejudice to the final determination by the Chamber on the subject-matter of the proposed submissions. Accordingly, the Request may be granted to the extent that the victims' Legal Representative is authorised to include in her final written submissions, which are due on 30 September 2011, observations on the issue(s) proposed in the Request.

See No. ICC-01/09-01/11-338, Pre-Trial Chamber II (Single Judge), 22 September 2011, paras. 5-12.

The Single Judge further finds, in accordance with article 68(3) of the Statute, that the Legal Representative of victims may be authorised by the Chamber to make written submissions on specific issues "*upon the conditions that (i) the Legal Representative proves, by way of an application to that effect, that the victims' personal interests*

are affected by the issue(s) at stake; and (ii) the Chamber deems it appropriate, in light of, inter alia, *the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings*".

See No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, para. 60. See also No. ICC-02/11-01/11-211, Pre-Trial Chamber I (Single Judge), 15 August 2012, para. 12.

The Common Legal Representative of the victims authorised to participate at the pre-trial stage of the present case has the right, during the confirmation hearing and in the related proceedings, to:

(i) have access to all public filings and public decisions contained in the record of the case;

(ii) be notified on the same basis as the Prosecutor and the Defence of all public requests, submissions, motions, responses and other procedural documents which are filed as public in the record of the case;

(iii) be notified of the decisions of the Chamber in the proceedings;

(iv) have access to the transcripts of hearings held in public sessions;

(v) be notified on the same basis as the Prosecutor and the Defence of all public proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision; and

(vi) have access to the public evidence filed by the Prosecutor and the Defence pursuant to rule 121 of the Rules and contained in the record of the case. Such right is, however, subject to the format (*i.e.* unredacted versions, redacted versions or summaries, as well as electronic versions with the metadata required by the e-Court Protocol) in which such evidence has been made available to either party.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, para. 54.

1. Attendance and participation at the confirmation of charges hearing

According to rule 91(2) of the Rules, the legal representative of victims shall be entitled to attend and participate in the proceedings. With regard to the attendance at the hearing, by virtue of the above provision, CLR1 and CLR2 have the right to attend all public sessions of the confirmation of charges hearing and any hearings that may take place in the related proceedings. Should one or more sessions of the confirmation of charges hearing as well as of any other hearing convened in the present case take place *in camera* or *ex parte*, the Chamber retains the option to decide on a case-by-case basis, upon specific request submitted by the legal representative(s) pursuant to article 68(3) of the Statute or *proprio motu*, whether they will be authorized to attend these sessions.

As for the right to participate in the hearing, the Single Judge notes that rule 91(2) of the Rules states that the right to be exercised by the legal representative of victims "*shall include participation in the hearings, unless, in the circumstances of the case, the Chamber is of the view that the representative's intervention should be confined to written observations or submissions*". On the basis of this provision, the Single Judge considers that CLR1 and CLR2 may, upon motivated request specifying the reasons why the victims' personal interests are affected by the issues concerned, be authorized to make oral submissions in the course of the confirmation of charges hearing or in any other hearing convened, subject to the directions of the Chamber. […].

Lastly, the Single Judge observes that rule 89(1) of the Rules provides that victims' participation in the proceedings may include making opening and closing statements. Consequently, the Single Judge considers that CLR1 and CLR2 are entitled to make an opening statement at the beginning of the confirmation of charges hearing and a closing statement at the end of the hearing, in accordance with the schedule thereof and the directions to be issued by the Chamber in due course.

See No. ICC-01/04-02/06-211, Pre-Trial Chamber II, 15 January 2014, paras. 85-87.

a. Attendance and participation at the confirmation of charges hearing

Pursuant to rule 91(2) of the Rules, the Common Legal Representative of victims has the right to attend all public sessions of the confirmation of charges hearing as well as all public hearing convened in the related proceedings. The Common Legal Representative shall also be entitled to have access to the transcripts of any such hearings.

In the event that the Chamber decides to hold parts of the confirmation hearing *in camera* or *ex parte*, it retains the option to decide, on a case-by-case basis, whether to authorise, *propio motu* or upon a motivated request, the Common Legal Representative to attend those sessions. The same applies to any other *ex parte* or *in camera* hearing convened in the present case. Likewise, the Common Legal Representative shall also be given access to the transcripts of any such hearings to which she has been authorised to attend.

In addition, pursuant to rule 89(1) of the Rules, the Common Legal Representative is entitled to make opening and closing statements at the confirmation of charges hearing in compliance with the schedule to be issued by the Single Judge in due course.

The Single Judge further considers that upon a motivated request specifying why and how the victims' personal interests are affected by the issues concerned, the Common Legal Representative may be authorised to make oral submissions during the confirmation of charges hearing, subject to any direction given by the Chamber.

In its determination, the Chamber will take into consideration; *inter alia*, the stage of the proceedings, the nature of the issue(s) at stake, the rights of the suspect and the principle of fairness and expeditiousness of the proceedings.

See No. ICC-02/11-02/11-83, Pre-Trial Chamber I, 11 June 2014, paras. 28-31.

ii. Victims' participatory rights

In the First Decision on Victims, the Single Judge conferred a series of rights to the victims participating in the present proceedings, pursuant to article 68(3) of the Rome Statute, which provides that: "[w]*here 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 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*".

The Single Judge also recalls that, alongside article 68(3) of the Rome Statute, other provisions explicitly grant certain rights to victims that they can exercise through their legal representative, at the confirmation of charges hearing and in the related proceedings. The Single Judge will hereunder briefly recall these procedural rights, in line with the First Decision on Victims. This is, however, without prejudice to any other rights that the Chamber may grant to them in the course of the proceedings either *proprio motu* or upon specific request submitted by their legal representative.

a. Attendance and participation at the confirmation of charges hearing

Pursuant to rule 91(2) of the Rules of Procedure and Evidence, the common legal representative of victims has the right to attend all public sessions of the confirmation of charges hearing as well as all public hearing convened in the related proceedings. The common legal representative shall also be entitled to have access to the transcripts of any such hearings. In the event that the Chamber decides to hold parts of the confirmation hearing *in camera* or *ex parte*, it retains the option to decide, on a case-by-case basis, whether to authorise, *proprio motu* or upon request, the common legal representative to attend those sessions. The same applies to any other *ex parte* or *in camera* hearing convened in the present case. Likewise, the common legal representative shall also be given access to the transcripts of any such hearings to which she has been authorised to attend.

In addition, pursuant to rule 89(1) of the Rules, the common legal representative is entitled to make opening and closing statements at the confirmation of charges hearing in compliance with the schedule to be issued by the Single Judge before the commencement of such hearing.

The Single Judge further considers that upon request specifying why and how the victims' personal interests are affected by the issues concerned, the common legal representative may be authorised to make oral submissions during the confirmation of charges hearing, subject to any direction given by the Chamber. In its determination, the Chamber will take into consideration, *inter alia*, the stage of the proceedings, the nature of the issue(s) at stake, the rights of the suspect and the principle of fairness and expeditiousness of the proceedings.

b. Access to the public record of the case

Rule 121(10) of the Rules states that victims or their legal representative may, subject to any restrictions concerning confidentiality and the protection of national security information, consult the record of all proceedings before the Chamber as created and maintained by the Registrar. Furthermore, according to rule 92(5) and (6) of the Rules, victims' legal representatives shall be notified of the proceedings before the Chamber.

Accordingly, the common legal representative of the victims authorised to participate at the pre-trial stage of the present case has the right, during the confirmation hearing and in the related proceedings, to:

(i) have access to all public filings and public decisions contained in the record of the case;

(ii) be notified on the same basis as the Prosecutor and the Defence of all public requests, submissions, motions, responses and other procedural documents which are filed as public in the record of the case;

(iii) be notified of the decisions of the Chamber in the proceedings;

(iv) have access to the transcripts of hearings held in public sessions;

(v) be notified on the same basis as the Prosecutor and the Defence of all public proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision; and

(vi) have access to the public evidence filed by the Prosecutor and the Defence pursuant to rule 121 of the Rules and contained in the record of the case. Such right is, however, subject to the format (*i.e.* unredacted versions, redacted versions or summaries, as well as electronic versions with the metadata required by the e-Court Protocol) in which such evidence has been made available to either party.

The Single Judge recalls, however, that if a party to or a participant in the present proceedings wishes to notify their own filing classified as confidential to the common legal representative, it may do so by including in the said document the name of the common legal representative to be notified. The Registrar shall notify the parties and the participants accordingly.

In relation to those filings that are marked confidential and are not notified to the common legal representative under the conditions set forth in the previous paragraph, the Chamber retains the option to decide on a case-by-case basis, either *proprio motu* or upon specific request, whether to grant the common legal representative access thereto.

Finally, the Single Judge decides that, in order for the common legal representative to discharge her duties, she shall be granted access to the redacted and unredacted copies of the applications for participation submitted by the victims hereby admitted to participate at the confirmation of charges hearing and in the related proceedings.

c. Filing of written submissions

In accordance with regulation 24 of the Regulations of the Court, the victims' legal representatives are also entitled to file written motions, responses and replies in relation to all matters for which the Statute and the Rules do not exclude their intervention and for which the Chamber has not limited their participation either *proprio motu* or at the request of a party, the Registrar or any other participant.

Accordingly, the Single Judge considers that the common legal representative of the victims admitted to participate by the present decision may be authorised by the Chamber to make written submissions on specific issues of law and/or fact. This right may be exercised upon the conditions that (i) the legal representative proves, by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake; and (ii) the Chamber deems it appropriate, in light of, *inter alia*, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspect and the principle of fairness and expeditiousness of the proceedings.

See No. ICC-02/11-02/11-111, Pre-Trial Chamber I (Single Judge), 1 August 2014, paras. 16-28.

3) Procedural rights accorded to the victims in the present case

Following the admission procedure, the victims admitted to participate in the proceedings are admitted in the case, at [the confirmation of charges hearing] and any subsequent stages, unless their participation is at any point terminated.

As provided for by rule 89(1) of the Rules, the Single Judge shall specify "*the proceedings and manner in which participation is considered appropriate*". Rule 91 of the Rules states that "[a] *legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof*".

The present decision seeks to establish the general participatory rights of the legal representatives of the participating victims, which, unless modified under rule 91(1) of the Rules, apply at this and any further stages of proceedings in the present case. In due course, the Single Judge will specify the rights of the legal representatives at the confirmation of charges hearing. The Single Judge may also accord to the victims additional rights, either on application or *proprio motu*.

The Single Judge notes that some of the rights hereunder enumerated are provided for *expressis verbis* in the legal instruments of the Court, while others are accorded to the legal representatives of the participating victims by the Single Judge under the general provisions of article 68(3) of the Statute and rule 89(1) of the Rules. In the consideration of the matter, the Single Judge has aimed, on the one hand, to give to the participating victims meaningful and, indeed, the greatest possible rights, and, on the other hand, to avoid prejudice to the rights of [the suspect] or to the fair and impartial conduct of the proceedings, as mandated by article 68(3) of the Statute.

First, the legal representatives shall have the general right to consult the record of the case, including decisions of the Chamber, submissions of the parties, participants and the Registrar, transcripts and evidence disclosed by the parties and communicated to the Chamber, and shall receive notification of documents filed. This right shall extend to public as well as confidential documents or evidence in the record of the case. Notification of documents or access to evidence communicated to the Chamber shall only be withheld from the legal representatives of victims if there are specific reasons warranting this measure. Documents filed in the record of the case which cannot be notified to the legal representatives of the victims must be marked "*confidential, Prosecutor and Defence*" or more restrictively if appropriate. The mark "*confidential*" shall in general include the legal representatives of victims.

To this end, the Single Judge considers it necessary to order the parties and the Registrar to review their confidential filings already in the record of the case and identify those for which there are specific reasons why they cannot be notified to the legal representatives of victims. The parties shall also review the evidence that they have thus far communicated to the Chamber. Following the receipt of these submissions, the Single Judge will order notification to the legal representatives of victims of all documents and evidence for which no good reason has been shown to withhold them from the legal representatives. The legal representatives shall in any case immediately be provided with access to the applications of their clients.

The Single Judge notes that there may, in certain circumstances, be tension between the legal representatives' duty to respect the confidentiality of certain documents or information in the record of the case, and their duty to inform their clients of the developments in the proceedings, including in order to obtain instructions. Indeed, for various reasons the participating victims may not be in position always to recognise and to respect the requirements of confidentiality. Still, the Single Judge considers that it would be disproportionate and

inconsistent with effective victim participation to order the legal representatives not to disclose to their clients any confidential document or information. Rather, the Single Judge considers that the legal representatives should be permitted and, indeed, required to divulge to the victims confidential information when necessary, provided that they act prudently and take measures not to cause prejudice to the reasons warranting confidentiality of certain documents or information. In particular, the Single Judge expects the legal representatives not to disseminate physical or electronic copies of confidential documents, but to inform their clients orally, or to show to them a copy of the document while retaining its possession. The legal representatives must also inform their clients of the confidential nature of the document/information and that as such it cannot be shared with third persons. The Single Judge also considers it appropriate to order the legal representatives to maintain a log of the disclosure of confidential documents or information to their clients, which should record, at least: (i) the document/information disclosed; (ii) the clients to whom the information is disclosed; (iii) the mode of disclosure; (iv) confirmation whether the clients were informed of the confidential nature of the document/information and that as such it cannot be shared with third persons; (v) the date of disclosure; and (vi) the place of disclosure. In case of a (suspected) breach of confidentiality, the Single Judge may order that the record be submitted to the Chamber.

Second, the legal representatives of the participating victims shall have the general right to attend all public and non-public hearings in the case.

Third, the legal representatives shall have the right to make written submissions to the Chamber, and the right of response as provided for in regulation 24(2) of the Regulations of the Court. As decided at the status conference of 19 May 2015 (ICC-02/04-01/15-T-6-ENG, page 19, lines 1-5), any response must be filed within five days of notification of the document to which the legal representative is responding. The Single Judge notes that the Prosecutor and the Defence have the right of reply, *inter alia*, to any written observation by the legal representative(s), as provided for in rule 91(2) of the Rules. This right can generally be exercised under regulation 24(1) of the Regulations of the Court, within five days of notification of the document as previously ordered. In addition, to allow for the expeditious conduct of the proceedings, the Single Judge considers it appropriate to set a short general time limit of three days for the Prosecutor and the Defence to reply to any response within the meaning of regulation 24(2) of the Regulations of the Court by the legal representative(s). This time limit applies also when the replying party is not the source of the submission to which the legal representative responded.

Fourth, the Single Judge considers it appropriate to accord to the legal representatives the right to lodge written submissions on points of fact and on law, no later than three days before the date of the confirmation of charges hearing, parallel to the right of the Prosecutor and the Defence under rule 121(9) of the Rules.

See No. ICC-02/04-01/15-350, Pre-Trial Chamber II (Single Judge), 27 November 2015, paras. 25-35.

5. Modalities of participation at the trial stage

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.

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.

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.

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.

Victims' right to participate in hearings/status conferences and during the trial, and to file written submissions

[…]

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.

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

[…]

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. The Trial Chamber will consider in due course the request of some victims to make one-hour opening and closing statements during the trial.

> See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 108-111, 113-114, and 117. See also No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 72-78, 81-84, and 104; No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 29-40; No. ICC-01/04-01/07-2288 OA11, Appeals Chamber, 16 July 2010, paras. 37-40; No. ICC-01/05-01/08-2138, Trial Chamber III, 22 February 2012, para. 18 and No. ICC-01/04-01/07-1665-Corr, Trial Chamber II, 20 November 2009, p. 9.

The three participating victims wish to address the court on four discrete issues, by way of presenting their views and concerns or by giving evidence:

i. their individual histories, within the context of the charges faced by the accused;

ii. the harm they individually experienced;

iii. the approach to be taken to reparations, focussing particularly on any relevant facts not canvassed thus far during the trial (in accordance with article 68(3) of the Statute); and

iv. the issue, including the extent, of child recruitment in the region;

It will be necessary to determine in this Decision whether these issues properly arise for consideration in the context of this trial, and, if so, how each is to be presented by these participating victims, but first it is convenient to set out the principles that are to be applied to applications of this kind.

As rehearsed above, article 68(3) establishes the unequivocal statutory right for victims to present their views and concerns in person when their personal interests are affected, although the opportunity is expressly created for their Legal Representatives to undertake this task on their behalf, if the Court considers that course appropriate. However, any intervention by victims must be in a manner which is not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial. Accordingly, the content and the circumstances of their participation must not undermine the integrity of these criminal proceedings.

[…]

Finally, it needs to be stressed that the process of victims "*expressing their views and concerns*" is not the same as "*giving evidence*". The former is, in essence, the equivalent of presenting submissions, and although any views and concerns of the victims may assist the Chamber in its approach to the evidence in the case, these statements by victims (made personally or advanced by their Legal Representatives) will not form part of the trial evidence. In order for participating victims to contribute to the evidence in the trial, it is necessary for them to give evidence under oath from the witness box. There is, therefore, a critical distinction between these two possible means of placing material before the Chamber.

In the result, careful decisions will need to be made by victims as to whether to give evidence under oath, or to present their views and concerns, or both. If they wish to express their views and concerns, they will need to determine whether they are best placed to undertake this exercise or whether the relevant matters would be more effectively introduced by their Legal Representatives. Furthermore, the Chamber will need to ensure that issues and facts are not unnecessarily repeated (*e.g.* first in a victims' personal presentation of his or her views and concerns, then repeated by them in evidence and finally addressed on a third occasion by the Legal Representatives in submissions). Although evidence can be commented upon in submissions or during the process of presenting views and concerns, overall this exercise must be proportionate and consistent with a fair trial.

[…]

It would be undesirable – indeed impossible – for the Chamber to describe in greater detail the circumstances in which the personal intervention by victims in order to express their views and concerns will be appropriate. Fact-specific decisions will be required, taking into account the circumstances of the trial as a whole. For instance, the personal contributions of a few victims are unlikely have the same impact on the proceedings as when a large number of victims individually wish to express their views and concerns. To take an extreme example, if all the participating victims in this case (94) sought to present their views and concerns, depending always on the circumstances of their discrete interventions, that course may be antithetical to the fair trial of the accused. Accordingly, it will be necessary for the Chamber to consider these applications on their individual merits, balancing a wide variety of factors that will include the requirements and circumstances of the trial as a whole. This is an area in which the Legal Representatives have a crucial role to play: it is of undoubted importance that the participating victims receive careful and comprehensive advice as to the most appropriate form of participation by them in this trial.

Turning, first, to the merits of the requests to give evidence, written applications have been submitted and notified to the parties. Therefore, the first two requirements, as approved by the Appeals Chamber, have been satisfied.

As to whether the personal interests of the victims are affected and whether their testimony may be relevant to the charges against the accused, the issue of child recruitment in the region, and its extent, are of *prima facie* relevance to the suggested use, recruitment or enlistment of child soldiers during the relevant period by the accused. Moreover, this evidence may assist the Chamber in its consideration of reparations for certain victims, if these arise later in the proceedings. The region is a relevant area in the Democratic Republic of Congo ("DRC"), falling potentially under the alleged control or influence of the accused during the timeframe of the charges, and this evidence may therefore assist the Chamber in its determination of the truth.

[…]

In all the circumstances, these applicants have each demonstrated that the evidence they seek to present affects their personal interests and, in each instance, it is directly related to the charges brought against the accused. Therefore, they may give evidence.

Once the three participating victims have completed their evidence, they will be in the best position, at that stage, to determine whether they wish to express their views and concerns personally. As set out above, the Chamber expects the Legal Representatives to give detailed and careful advice on this issue, and it will entertain oral submissions at the relevant time. Although as a matter of principle it is open to these participating victims to request an opportunity to present their views and concerns personally on issues such as the harm they individually experienced and the approach to be taken to reparations, if they have chosen to give evidence on all relevant matters within their knowledge and experience, it may be more appropriate for any additional submissions (which may involve complex legal issues) to be advanced by their Legal Representatives. However, the Chamber will deal with the position of each victim following their evidence, once the individual circumstances of, and the detail of the requests from, each of these three participating victims are clear. At that stage the Chamber will determine, if relevant, when and by whom any views and concerns are to be presented, bearing in mind the situation of the victims and the need to ensure that the trial of the accused is fair.

See No. ICC-01/04-01/06-2032-Anx, Trial Chamber I, 9 July 2009, paras. 15-17, 25-29, and 39-40. See also No. ICC-01/04-01/06-1432 OA9 OA10, Appeals Chamber, 11 July 2008, paras. 4 and 104.

The questioning of witnesses by the victims' Legal Representatives pursuant to rule 91(3) of the Rules is one example of the ways in which victims may participate in the proceedings. However, this rule only describes the procedure that the Legal Representatives are to follow in order to apply for leave to ask questions. In the absence of any relevant provisions in the Rome Statute framework, the manner of questioning falls to be determined by the Chamber.

The terms "*examination-in-chief*", "*cross-examination*" and "*re-examination*", which are used in common law and Romano Germanic legal systems, do not appear in the Statute. However, as set out in the procedural history above, these expressions have been used as terms of convenience by the parties and the participants when addressing the issue of how witnesses are to be questioned during their evidence before the Trial Chamber.

The purpose of the "*examination-in-chief*" is "*to adduce by the putting of proper questions relevant and admissible evidence which supports the contentions of the party who calls the witness*". It follows from this purpose that the manner of such questioning is neutral and that leading questions (*i.e.* questions framed in a manner suggestive of the answers required) are not appropriate. However, it needs to be stressed that there are undoubted exceptions to this approach, for instance when leading questions are not opposed. In contrast, the purpose of "*cross-examination*" is to raise relevant or pertinent questions on the matter at issue or to attack the credibility of the witness. In this context, it is legitimate that the manner of questioning differs, and that counsel are permitted to ask closed, leading or challenging questions, where appropriate.

The victims' Legal Representatives, however, fall into a category that is distinct and separate from the parties, and in this regard a description of the manner of questioning by the victims' Legal Representatives that uses the concepts of "*examination in chief*", "*cross-examination*" and "*re-examination*" is not necessarily helpful. This

particular aspect of the proceedings at trial – the manner of questioning by the victims' Legal Representatives – is an example of the novel nature of the Statute, which is not the product of either the Romano Germanic or the common law legal systems. As participants in the proceedings, rather than parties, the victims' Legal Representatives have a unique and separate role which calls for a bespoke approach to the manner in which they ask questions.

By article 66(2) of the Statute, one of the prosecution's primary functions is to prove the guilt of the accused: the "*onus is on the prosecutor to prove the guilt of the accused*". However, the Appeals Chamber has held that this responsibility on the part of the prosecution does not "*preclude the possibility for victims to lead evidence pertaining to the guilt of the accused*". It follows that, depending on the circumstances, the alleged guilt of the accused may be a subject that substantively affects the personal interests of the victims, and the Appeals Chamber has determined that the Trial Chamber may authorise the victims' Legal Representatives to question witnesses on subjects that relate to this issue:

> *In addition the Trial Chamber finds support for this approach in the provision under rule 91(3) of the Rules. Under this rule the Trial Chamber may authorise, upon request, the Legal Representatives of victims to question witnesses or to produce documents in the restricted manner ordered. The Appeals Chamber considers that it cannot be ruled out that such questions or documents may pertain to the guilt or innocence of the accused and may go towards challenging the admissibility or relevance of evidence in so far as it may affect their interests earlier identified and subject to the confines of their right to participate.*

It follows that the victims' Legal Representatives may, for instance, question witnesses on areas relevant to the interests of the victims in order to clarify the details of their evidence and to elicit additional facts, notwithstanding its relevance to the guilt or innocence of the accused.

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*". 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.*

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.

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.

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.

> See No. ICC-01/04-01/06-2127, Trial Chamber I, 16 September 2009, paras. 21-30. See also No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 38-40.

Victims may under certain circumstances be allowed to participate in the proceedings by way of giving oral testimony. This possibility is subject to authorisation by the Chamber.

1. Conditions

As a general principle, the Chamber will only grant applications on behalf of victims whose testimony can make a genuine contribution to the ascertainment of the truth. It is therefore important that the Legal Representative clearly explains the relevance of the proposed testimony of the victim in relation to the issues of the case and in what way it may help the Chamber to have a better understanding of the facts.

In determining whether and how the Legal Representatives are allowed to call victims they represent to testify, the Chamber will be guided by the overriding concern that this takes place in an expeditious manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Accordingly, the possibility for the Legal Representatives to call victims who participate in the proceedings to testify in person, is subject to three important limitations:

a. The Chamber may not allow the participation by victims to infringe on the right of the accused to be tried without undue delay, in accordance with article 67(1)(c).

b. The Chamber will only allow Victims' Legal Representatives to call witnesses to the extent that this does not in effect transform them into auxiliary prosecutors.

c. Under no circumstances the Chamber will allow victims to testify anonymously *vis-à-vis* the Defence.

Furthermore, the Chamber must ensure that the Defence have adequate time to prepare, which implies that the participation by a victim may not be the cause of unfair surprise for the Defence, to which it is not able to respond adequately.

Bearing in mind these important pre-conditions, the Chamber may authorise the Legal Representatives of the victims to call one or more of their clients in order to testify in person before the Court and give evidence under oath. The Chamber will only allow this after the Prosecution has concluded its case and insofar as it does not undermine the integrity of the proceedings.

2. Application for calling a victim to testify

When a victim wishes to testify at trial, his or her Legal Representative must file a written application to the Chamber before the completion of the Prosecution case.

The application must be accompanied by a signed statement by the victim, containing a comprehensive summary of the testimony that is to be given by the victim. If the Chamber grants the application, the attached statement shall count as disclosure in accordance with regulation 54(f) of the Regulations of the Court.

The Chamber urges the Legal Representatives to avoid the need for unnecessary redactions in the said statement. However, if it is necessary to protect the safety, physical or psychological well-being of the victims or third persons who are implicated by the participation of a victim, the Chamber may authorise redactions. Under no circumstances may the Legal Representatives apply redactions without prior authorisation by the Chamber.

The application and the statement must be notified to the parties, who will have seven days to make observations. The Chamber will rule on the application and determine the appropriate moment for the victim to testify.

In the event the Chamber authorises the application, the Legal Representative must enter into contact with the Victims and Witnesses Unit in order to make all necessary arrangements and discuss any possible security concerns.

3. Criteria for evaluating applications for giving testimony by victims

In evaluating applications for participation through oral testimony by victims, the Chamber may take into consideration, among others, the following factors:

a. Whether the proposed testimony relates to matters that were already addressed by the Prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties.

b. Whether the topic(s) on which the victim proposes to testify is sufficiently closely related to issues which the Chamber must consider in its assessment of the charges brought against the accused.

c. Whether the proposed testimony is typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify, or whether the victim is uniquely apt to give evidence about a particular matter.

d. Whether the testimony will likely bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges.

See No. ICC-01/04-01/07-1665-Corr, Trial Chamber II, 20 November 2009, paras. 19-30; see also No. ICC-01/05-01/08-2138, Trial Chamber III, 22 February 2012, paras. 23-25.

As a matter of principle, Victims' Legal Representatives will not be able to call witnesses other than the victims they represent. However, in case the Legal Representatives have identified persons other than participating victims, who may be able to give evidence to the Chamber about issues that concern the victims' interests, they may take the initiative to bring this to the attention of the Chamber.

If the Chamber considers that the proposed witness may indeed provide the Chamber with important information, that was not hitherto included in the evidence called by the parties, it may decide to call the witness on its own motion, in accordance with articles 64(6)(b),(d) and 69(3) of the Statute.

As a general rule, the Chamber will only call witnesses whose testimony can make a genuine contribution to the ascertainment of the truth. It is therefore important that the Legal Representatives clearly explain the relevance of the proposed testimony in relation to the contentious issues of the case.

When the Chamber has called a witness on the suggestion of one of a Legal Representative, it may allow that Representative to question the witness, either before or after the Chamber examines him or her. The remainder of the examination will follow the same order as for witnesses called by the Chamber *proprio motu*.

See No. ICC-01/04-01/07-1665-Corr, Trial Chamber II, 20 November 2009, paras. 45-48.

As a matter of general principle, questioning by the Legal Representatives on behalf of victims who participate in the proceedings must have as its main aim the ascertainment of the truth. The victims are not parties to the trial and certainly have no role to support the case of the Prosecution. Nevertheless, their participation may be an important factor in helping the Chamber to better understand the contentious issues of the case in light of their local knowledge and socio-cultural background.

The following rules apply to questioning by victims' Legal Representatives of witnesses called by other parties, participants or the Chamber.

1. Procedure for authorising questions by victims' Legal Representatives

a) Questions under article 75

When a Vctims' Legal Representative wants to question a witness in relation to matters that pertain to a potential order on reparations in accordance with article 75 of the Statute, the Legal Representative shall make a written application to that effect, which shall be notified to the parties. The application shall provide a written note of the questions, in accordance with rule 91(3)(a). The filing shall further explain the precise purpose and scope of the questions and include any relevant documents that will be used for questioning. Finally, the application shall indicate on behalf of which (group of) victim(s) the questions are being put.

The application shall be filed as early as possible in order to allow the Chamber to determine whether it is appropriate for the Defence to make observations. Under normal circumstances the Chamber will only consider applications that were received at least seven days before the witness' first appearance.

In case the Chamber grants the application, it will make a ruling under regulation 56 of the Regulations of the Court, determining whether and to what extent rule 91(4) of the Rules will apply.

b) Anticipated questions by the Legal Representatives

When the Victims' Legal Representatives know in advance that they have certain specific questions for a particular witness, expert or the accused, which do not relate to issues of reparation, they shall notify the Chamber and the Prosecution about this in a written application, at least seven days before the witness appears for the first time. The application shall indicate which questions the Legal Representative proposes to ask and explain how they relate to the interests of the victims represented. If the Chamber considers that the application must be submitted to the Defence for observations, in accordance with rule 91(3)(a), it may decide to reclassify the application so as to allow the notification thereof to the Defence. In that case, the Defence will have three days to formulate its observations.

If, after examination-in-chief by the party calling the witness, the Chamber is of the view that the matters raised in the proposed question(s) of the victims have not been sufficiently addressed by the witness, it may authorise the Legal Representative to put the question(s) before cross-examination commences. In deciding whether it is appropriate to grant such authorisation, the Chamber will take into consideration the rights of the accused, the interests of the witness, the need for a fair, impartial and expeditious trial and the need to give effect to article 68(3) of the Statute, in accordance with rule 91(3)(b) of the Rules. The Chamber recalls, in this regard, that this provision also authorises it to put the question to the witness, expert or accused on behalf of the Victims' Legal Representative.

c) Unanticipated questions by the Legal Representatives

When the Victims' Legal Representatives did not anticipate putting questions to a particular witness, but during examination-in-chief by the party calling the witness, an unforeseen issue arises that directly pertains to the interests of the victims, the victims' Legal Representatives may submit a question to the Chamber, which may decide to put it to the witness, if it considers this necessary for the ascertainment of the truth or to clarify the testimony of the witness.

2. Scope of questioning

In principle, questioning by Victims' Legal Representatives should be limited to questions that have as their purpose to clarify or complement previous evidence given by the witness. Nevertheless, victims' Legal Representatives may be allowed to ask questions of fact that go beyond matters raised during examination-in-chief, subject to the following conditions:

a) Questions may not be duplicative or repetitive to what was already asked by the parties.

b) Questions must be limited to matters that are in controversy between the parties, unless the victims' Legal Representative can demonstrate that they are directly relevant to the interests of the victims represented.

c) In principle, victims' Legal Representatives will not be allowed to ask questions pertaining to the credibility and/or accuracy of the witness' testimony, unless the victims' legal representative can demonstrate that the witness gave evidence that goes directly against the interests of the victims represented.

d) Unless the Chamber specifically gave authorisation under regulation 56 of the Regulations of the Court, Victims' Legal Representatives are not allowed to put questions pertaining to possible reparations for specific individuals or groups of individuals.

3. Mode of questioning

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.

See No. ICC-01/04-01/07-1665-Corr, Trial Chamber II, 20 November 2009, paras. 82-91. See also, No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras 108-111, and No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 30-40.

The Chamber will grant the Legal Representatives the opportunity to call one or more victims to give evidence under oath at trial. In its view, the most appropriate stage, having regard to the rights of the accused, to hear any victims called by the Legal Representatives is directly after the Prosecution has presented its case. Since the persons concerned will give evidence about the crimes with which the accused have been charged, and about any part played therein by the accused, the Defence should be given the opportunity to present its case once all victims of the crimes to which the accused must answer have given their evidence, including any victims called by the Legal Representatives.

Again, any application for this purpose must state the relevance of the testimony to the issues of the case and how it may help the Chamber to gain a better understanding of the facts.

[…]

Regarding the question whether their status as participating victims in the proceedings might preclude them from giving evidence under oath, the Chamber concurs with Trial Chamber I that the possibility of their giving evidence cannot be totally excluded. Furthermore, that Chamber authorized three of the victims participating in the *Lubanga* case to come to give evidence under oath after the conclusion of the Prosecution case. Indeed, it would be contrary to the Chamber's obligation to establish the truth if it were to exclude highly relevant and probative testimony of witnesses for the sole reason that they have also been authorised to participate in the proceedings as victims. Nevertheless, the Chamber is aware of the objections raised by the Defence in this regard. It is further mindful of the fact that, in those legal systems which attribute an active role to victims in criminal proceedings, such victims are usually not authorised to testify under oath. However, the Chamber notes that the fact that a victim gives evidence under oath – which in itself gives him or her the status of a witness – allows the Defence to cross-examine him or her, which acts as a safeguard and makes the said victim liable to prosecution under article 70(1)(a) of the Statute if he or she gives false testimony.

Furthermore, it should be noted that, if the victim were authorised merely to make a written statement, that could not be taken into account in the final judgment, which would be contrary to the objective of contributing to the determination of the truth that justifies intervention by victims.

It is therefore incumbent upon the Chamber, when determining whether it is appropriate to allow a particular victim to testify in person, to satisfy itself that his or her dual status as victim and witness does not compromise the probative value of the testimony. Prior to ruling on such a request, the Chamber may ask for the observations of the parties.

The Chamber recalls, in this respect, that the participation of victims in the fact-finding process of the Court is conditional upon their making a real contribution to the search for the truth. Consequently, if there are potential doubts as to the reliability of a victim's testimony, the Chamber may decide not to authorise the victim to testify under oath. This decision is entirely independent of the Chamber's discretion under article 69 of the Statute to determine the relevance and admissibility of the evidence the victim may give during his or her testimony.

The Chamber emphasises that it will not authorise testimony from any victims who wish to remain anonymous to the Defence. On this point, it recalls that, in its decisions of 6 and 18 November 2009, it ordered the disclosure of the identity of the majority of the victims who did not oppose such disclosure. Lastly, it points out that some victims have yet to specify whether or not they agree to their identity being disclosed to the parties.

Nevertheless, the Chamber does not rule out the possibility of anonymous victims participating in the proceedings. In the event that they are called to appear as witnesses in accordance with this Decision, they must relinquish their anonymity. […].

The Chamber considers that the aforementioned provisions of the Statute do not preclude the Legal Representatives from asking it to decide whether it should order that certain documentary evidence be tendered. Again, the Chamber considers this a means for the victims to express their "*views and concerns*" within the meaning of article 68(3) of the Statute. In the Chamber's view, making it possible for the Legal Representatives of the victims to propose the presentation of documentary evidence would indeed assist it in its implementation of article 69(3) of the Statute, and by the same token in its search for the truth.

Accordingly, the Chamber will allow the Legal Representatives this possibility, provided that they comply with the following procedure. They must make a written application to the Chamber showing how the documents they intend to present are relevant and how they may contribute to the determination of the truth. This application, along with the evidence they wish to present, must be notified to the parties and other participants for their observations.

If the evidence which the Legal Representatives wish to tender is closely linked to the testimony of a named witness, the application must be submitted in sufficient time prior to said witness's testimony to allow the Chamber and the parties to take proper note of the application's content. In any other circumstance, which in principle should not arise until the close of the Defence case, the application must be filed as soon as possible.

It should be recalled that the Chamber will only authorise the presentation of such evidence provided that it is not prejudicial to the Defence or to the fairness and impartiality of the trial. It will assess the evidence thus tendered pursuant to its power to "*rule on the admissibility or relevance of evidence*" under article 64(9) of the Statute.

See No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 86-93 and 98-101.

The Appeals Chamber underscores that the Statute and the Rules of Procedure and Evidence provide that disclosure by the Prosecutor should, in principle, take place prior to the commencement of trial. Pursuant to article 61(3) of the Statute and rules 121(3) and (5) of the Rules of Procedure and Evidence, the Prosecutor must disclose all of the evidence intended for use at the confirmation hearing prior to that hearing. After the confirmation hearing, pursuant to article 64(3)(c) of the Statute, the Trial Chamber shall "*provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial*". The Statute, Rules of Procedure and Evidence and Regulations of the Court also emphasise the duty of the Chamber to ensure that the Prosecutor discloses, prior to the commencement of trial, any evidence not previously disclosed during the pre-trial phase of the case.

However, the possibility of the Trial Chamber requesting victims to submit evidence is contingent on (i) the victims fulfilling the requirements of article 68(3) of the Statute, and (ii) the Trial Chamber deciding to exercise its authority under article 69(3) of the Statute. The submission of such evidence therefore falls within the regime provided for the Trial Chamber to exercise its authority to request the submission of "*evidence that it considers necessary for the determination of the truth*". Since the Trial Chamber may not know in advance of the trial which evidence will be necessary for the determination of the truth and, as far as evidence submitted by victims is concerned, whether the victims' personal interests are affected, the Trial Chamber has the power to order the production of such evidence during the course of the trial. Thus, article 64(6)(d) of the Statute provides that "*in performing its functions* […] *during the course of a trial, the Trial Chamber may, as necessary:* […] *(d) Order the production of evidence in addition to that already* […] *presented during the trial by the parties*". Because article 64(6)(d) of the Statute specifically refers to evidence in addition to that which has been presented during the trial by the parties, it is clear that it is intended to give effect to the power of the Trial Chamber under the second sentence of article 69(3) of the Statute.

In light of the above, the necessary implication is that there may be circumstances under which evidence called by the Trial Chamber may not be communicated to the accused before the commencement of the trial. Insisting otherwise would deprive the Trial Chamber of its ability to make its assessment as to what is necessary for the determination of the truth after having heard the evidence presented by the parties. Thus, while it is correct that the Statute emphasizes disclosure of evidence by the Prosecutor prior to the commencement of the trial, this does not apply to evidence submitted at the request of the Trial Chamber under article 69(3) of the Statute.

The Appeals Chamber underlines once again that victims do not have the right to present evidence during the trial; the possibility of victims being requested to submit evidence is contingent on them fulfilling numerous conditions. Firstly, their participation is always subject to article 68(3) of the Statute, which requires that they demonstrate that their personal interests are affected by the evidence they request to submit. Secondly, when requesting victims to submit evidence, the Trial Chamber must ensure that the request does not exceed the scope of the Trial Chamber's power under article 69(3) of the Statute. In addition, the Trial Chamber will "*ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the so accused*", which includes the right to "*have adequate time and facilities for the preparation of the defence*".

[…]

As recalled by the Trial Chamber and conceded by the accused neither the Statute nor the Rules of Procedure and Evidence expressly oblige the Victims to disclose exculpatory evidence to the accused. Rather, article 67(2) of the Statute provides that the Prosecutor is responsible for disclosure of exculpatory evidence. In addition, rule 77 of the Rules of Procedure and Evidence provides that the Prosecutor shall disclose evidence which is material for the preparation of the defence, and evidence which will be used at trial.

The Appeals Chamber also recalls that the drafting history of the Statute supports the notion that the Prosecutor's disclosure obligations to the accused are linked to the Prosecutor's role in conducting the investigation, and stem from the Prosecutor's obligation to investigate incriminating and exonerating circumstance equally under article 54(1)(a) of the Statute. In contrast, as explained in greater detail in the preceding section relating to the first ground of appeal, pursuant to article 68(3) of the Statute, the victims' role in the proceedings is significantly more limited. The Appeals Chamber considers that imposing a general disclosure obligation on the victims to disclose evidence to the accused would disregard the limited role of the victims of presenting their views and concerns where their personal interests are affected. Bearing in mind the differing roles of the victims *vis-à-vis* the parties, the Appeals Chamber finds that it is inappropriate simply to extend the Prosecutor's statutory obligations to victims participating in the proceedings.

[…]

The Appeals Chamber recalls that under article 54(1)(a) of the Statute, the Prosecutor has a duty to investigate exonerating and incriminating circumstances equally. Under article 54(3)(b) of the Statute, the Prosecutor may, with respect to his investigations "*request the presence of and question persons being investigated, victims and witnesses*". The Appeals Chambers therefore considers that it is reasonable that, in particular where the submissions in the victims' applications for participation indicate that victims may possess potentially exculpatory information, the Prosecutor's investigation should extend to discovering any such information in the victims' possession. Such information would then be disclosed to the accused pursuant to article 67(2) of the Statute and rule 77 of the Rules of Procedure and Evidence.

See No. ICC-01/05-01/07-2288 OA11, Appeals Chamber, 16 July 2010, paras. 43-48, 72, 75, and 81.

Where a victim wishes to testify at trial, his or her Legal Representative must file a written application to the Chamber, accompanied by a statement signed by the witness, containing only such redactions as are strictly necessary. The victim must also submit, prior to the completion of the Prosecution case, a comprehensive summary of the testimony to which the application pertains.

[…]

The Chamber notes that the Legal Representative has complied with the formal requirements set out in its Decision on Rule 140. It recalls that, in accordance with the requirements of that decision and its Decision on the Modalities of Participation, the identities of the four victims in question are known to the Defence teams. It further recalls that, by e-mail of 14 September 2010, it instructed the Legal Representative to notify the parties of the redacted version of the four victims' statements. The Chamber notes that the Legal Representative's redactions are limited in scope and were intended to ensure the safety of the four victims concerned, for whom an application for protective measures is envisaged. It further notes that the redactions are consistent with the recommendations of the Victims and Witnesses Unit ("VWU"). Moreover, out of concern to ensure the effectiveness of any protective measures considered necessary, which must be proportionate to the current circumstances of each of the four victims, the Chamber already asked the Legal Representative, by e-mail of 27 September 2010, to consult with VWU, without, of course, predetermining the outcome of the Application. Accordingly, at this stage, pursuant to articles 64(2), 64(6)(e) and 67(1) of the Statute, the Chamber authorises the temporary redactions of the statements as proposed, while leaving it for the Legal Representative to consider whether to apply for the authorised redactions to be maintained within two days of the implementation of any protective measures ordered for the victims granted leave to testify by this Decision.

[…]

The Chamber recalls that it is particularly incumbent upon it to assess whether each proposed victim testimony is related to the charges in the case and is not unnecessarily repetitive of evidence already tendered by the parties – it being noted that it is not a matter of rejecting any possible repetitions, only those which do not contribute significantly to the determination of the truth. This is how the Decision on Rule 140 must be read where it instructs a legal representative filing such an application to "*explain the relevance of the proposed testimony of the victim in relation to the issues of the case and in what way it may help the Chamber to have a better understanding of the facts*".

The evidence of Victim a/0381/09 covers, according to the Legal Representative, paragraphs 275, 277, 302, 303, 306, 307, 403, 405 and 424 of the Decision on the Confirmation of Charges. The Chamber notes that this person is a Hema civilian who was in Bogoro with her family well before the attack, and that she lived in a classroom at the Institute alongside numerous other refugees. Given her links with certain members of the Lendu community and the warnings which they had issued to her Hema husband, the Chamber is of the view that this victim could provide significant clarification about the prevailing atmosphere in Bogoro and the change in mental states prior to the attack, in particular the workings of the interethnic communication channels which might have conveyed information about an impending attack. Moreover, this victim may shed new light on the

events which took place inside the Bogoro Institute in the two days prior to the fighting and on the day of the hostilities.

As for Victim a/0018/09, whose evidence, the Legal Representative submits, covers paragraphs 275, 277, 306, 307, 322 to 325, 334 to 338, 403, 405 and 422 of the Decision on the Confirmation of Charges, the Chamber is of the view that, on account of the occupation she held in 2003, which put her in contact with the residents of Bogoro, she could provide the Chamber with a clearer picture of the existing family, ethnic and social networks there, which could explain why some civilians remained, despite the threats. Furthermore, like Victim a/0381/09, this second victim, as a survivor from the Institute, may also provide a number of further details about the atmosphere and the events of the two days leading up to the attack and the day itself. Since a/0381/09 states that she lost consciousness whilst escaping from the Institute, the Chamber considers that these two testimonies could in fact complement each other effectively. Lastly, the Chamber considers that a description of Bogoro before and after the attack of 24 February 2003 could enable it to assess its significance and impact more accurately.

The evidence of Victim a/0191/08 covers, according to the Legal Representative, paragraphs 275, 277, 306, 307, 322 to 325, 334 to 338, 405 and 424 of the Decision on the Confirmation of Charges. He states that this victim can provide the Chamber with information about "[TRANSLATION] *the methods used by the assailants during the attack*", "[TRANSLATION] *the strategy of surrounding the entire locality beyond the UPC camp*" and "[TRANSLATION] *the attacks to which the civilian population of Bogoro was subjected beyond any military objective*". The Chamber accepts that the proposed testimony supports the evidence of many Prosecution witnesses to a great extent, in particular that of P-233, P-287 and P-268. However, it notes that, having been warned by a Lendu pastor of the imminence of an attack, a/0191/08 could provide the Chamber with fresh information as to continuing solidarity between civilians belonging to different ethnic communities. Furthermore, the Chamber considers that this testimony could elucidate the circumstances in which civilian victims fled and how it was impossible for them to protect their family members and, notably, even the youngest of their children.

Lastly, the evidence of pan/0363/09 representing minor victim a/0363/09 covers, according to the Legal Representative, paragraphs 275, 277, 282, 306, 307, 322 to 325, 334 to 338 and 405 to 424 of the Decision on the Confirmation of Charges. In light of her statement, the Chamber considers that the testimony of pan/0363/09, acting as the representative of Victim a/0363/09, could provide it with new and useful information about possible methods of selecting houses to attack based on ethnicity, in particular with respect to the dwelling of an individual who was neither Hema nor Lendu.

According to the statement, all of the Hema family members of Victim a/0363/09 – whose father had previously received threats – were killed in their house at the time of the attack, whereas the neighbouring family of pan/0363/09, who herself belongs to a different ethnic group and was asked by the child's mother to look after the child, was spared. The Chamber further notes that only the minor, a/0363/09, has been granted victim status. Accordingly, the statement of the representative, pan/0363/09, should be restricted to issues concerning the personal interest of the child being represented.

Nevertheless, in light of the relevant information she may provide, which could contribute significantly to the determination of the truth, the Chamber intends now to call her as a witness of the Chamber regarding any issue extending beyond the personal interest of Victim a/0363/09, to avoid having to recall her.

Accordingly, the Chamber is of the view that the appearance of Victims a/0381/09, a/0018/09 and a/0191/08 and Witness pan/0363/09 would contribute significantly and effectively to the search for the truth and the process of establishing the facts. It notes further that these victims' testimonies may be of use in the future if it should need to assess the entirety of the harm suffered by the victims.

See No. ICC-01/04-01/07-2517-tENG, Trial Chamber II, 9 November 2010, paras. 6, 8, and 14-20.

The Chamber decides that victims may, at the end of the questioning by the prosecution, request leave to ask questions in addition to those questions filed in the application as set out in the paragraph above. Such request must explain both the nature and the details of the proposed questioning as well as specify in what way the personal interests of the victims are affected, in compliance with the conditions of rule 91 of the Rules. The Trial Chamber will determine such applications on a case-by-case basis.

With regard to the scope of questioning, the Legal Representatives are expected only to question a witness to the extent relevant to the victims' interests. The scope of questioning is therefore limited to questions that have the purpose of clarifying the witness' evidence and to elicit additional facts, notwithstanding their relevance to the guilt or innocence of the accused.

See No. ICC-01/05-01/08-1023, Trial Chamber III, 19 November 2010, paras. 19-20.

The Chamber has first one issue that can be dealt with in open session and it is related to an email received from the case manager of the Legal Representatives for victims, asking the Chamber whether requests for Legal Representatives to question witnesses should be in a specific format or whether it suffices to make such requests by email. The Chamber draws the Legal Representatives' attention to its decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings of 12 July 2010, filing 807, *corrigendum*, which explicitly says that the discrete applications to participate in the trial should be made in

writing, paragraph H of the disposition. The exact quote is, the Chamber instructs the Legal Representatives of victims who wish to participate during trial proceedings to set out in a discrete written application the nature and the detail of their proposed questions to witnesses seven days before the witness is scheduled to testify. This is the end of the quotation. In addition, the decision on common legal representation of victims for the purpose of trial is filing 1005 of 10 November 2010, paragraph 39, repeats the same language. The decision on directions for the conduct of the proceedings, filing 1023 of 19 November 2010, paragraphs 18, 19, refers back to these two decisions and sets out that the Legal Representatives who wish to participate during trial should set out the nature and detail of their proposed questions as well as specify in what way the personal interests of the victims are affected in a discrete application at least seven days before the witness is scheduled to testify.

[...]

It doesn't matter if the witness is also a victim and represented by another Legal Representative in the case. Once the clients of one of the Legal Representatives show interest in the information to be given by a given witness, the Legal Representative concerned, even if he or she is not representing the dual victim/witness concerned can ask for permission to ask questions.

See Oral decision, Trial Chamber III, No. ICC-01/05-01/08-T-45-Red2-ENG CT WT, 12 January 2011, from p. 25, line 15 to p. 26, line 11 and p. 27, lines 14-16.

However, the Chamber will not allow question 5, as proposed by the Legal Representative in its Request to be granted leave to question the witness, relating to whether or not the witness tried to resist when she was being raped. This is not acceptable since it sets a dangerous precedent for future questioning of this nature. The Chamber takes the opportunity to remind all parties and participants of the content of rule 70 of the Rules of Procedure and Evidence for guidance on the principles of evidence in cases of sexual violence.

See Oral decision, Trial Chamber III, No. ICC-01/05-01/08-T-47-Red2-ENG CT2 WT, 14 January 2011, p. 47, lines 10-16.

First, on Friday 14 January 2011, the Legal Representatives of victims made a public filing of his application to question Witness 23. Due to the fact that the filing contains the actual list of questions that the Legal Representatives request to ask the witness, and regardless of whether the information itself is sensitive, the filing should have been classified as confidential in order that the witness does not know the questions in advance and cannot prepare the answers to the questions, negating the very purpose of questioning, should the Chamber grant the application. I just like to remind Legal Representatives of victims that, in future, such application to question witnesses may be made confidentially.

See Oral decision, Trial Chamber III, No. ICC-01/05-01/08-T-48-Red2-ENG, 17 January 2011, from p. 1, line 23 to p. 2, line 10.

When the witness will be brought outside of the courtroom, having completed his testimony before the Chamber and before the hearing resumes, the witness and the Legal Representative of this dual status victim/witness may maintain contact.

See Oral decision, Trial Chamber III, No. ICC-01/05-01/08-T-54-Red-ENG CT WT, 26 January 2011, p. 48, lines 11-12.

As for the Legal Representatives of the vctims, the Chamber recalls that they may put questions to Defence's witnesses with the Chamber's leave. In this respect, it refers to the Directions for the conduct of the proceedings and testimony in accordance with rule 140 of 1 December 2009.

See No. ICC-01/04-01/07-2775-tENG, Trial Chamber II, 15 March 2011, para. 19.

The logic underlying rule 141(2) of the Rules that establishes the right of the Defence to examine witnesses last also applies to these final written submissions. The Defence is therefore entitled to file its closing submissions once the arguments of the Prosecution and the Legal Representatives have been submitted.

The page limit for each filing has been extended pursuant to regulation 37 of the Regulations of the Court and the deadlines are set out hereafter: a) The Prosecution is to file its closing submissions in the case not later than 16.00 on 1 June 2011 in a document not exceeding 250 pages. b) The Legal Representatives of victims team V0l and team V02 as well as the Office of Public Counsel for victims ("OPCV") are also to file their closing submissions in the case no later than 16.00 on 1 June 2011. The page limit is extended up to 50 pages for each team and for the OPCV. There is to be a single filing for each team. c) The Defence is to file its final submissions in the case no later than 16.00 on 15 July 2011 in a filing not exceeding 300 pages and any accompanying annex should not exceed 25 pages. Although the defence requested the same overall number of pages as the prosecution and the Legal Representatives in order to respond to the filings of each team, the Chamber considers that 300 pages will be sufficient to enable the accused to address the closing arguments of the prosecution and the Legal Representatives, some of which are likely to be repetitive. d) The Prosecution may file a reply of up to 50 pages by 16.00 on 1 August 2011. e) The Defence may file a final reply of up to 50 pages by 16.00 on 15 August 2011.

The final submissions shall address all the relevant legal and factual issues arising in the case. These should include, *inter alia*:

i) Whether there was an armed conflict in Ituri, Democratic Republic of Congo, between 1 September 2002 and 13 August 2003?

ii) If there was an armed conflict for the purposes of i) above, is there a nexus between the armed conflict and the alleged crimes?

iii) Was the armed conflict of an international character or not of an international character, for the purposes of article 8 of the Statute?

iv) If the Chamber concludes that it was not of an international character, what factors should be taken into account if the Chamber considers modifying the legal characterisation of the facts (under regulation 55 of the Regulations of the Court) for the period of early September 2002 to 2 June 2003?

v) What does the Prosecution need to establish in this case under article 25(3)(a) of the Statute?

vi) What is the meaning of the terms "*conscripting*" or "*enlisting*" children under the age of fifteen years into the national armed forces, into armed forces or armed groups or "*using them to actively participate in hostilities*", for the purposes of articles 8(2)(b)(xxvi) and 8(2)(e)(vii) and the corresponding Elements of the Crimes?

vii) What does the prosecution need to establish under article 30 of the Statute, bearing in mind article 8(2)(b)(xxvi)(3) and article 8(2)(e)(vii)(3) of the Elements of Crimes?

For the documents that have been admitted into evidence without having been introduced during the examination of a witness (*viz*. the bar table documents), as set out by the Chamber during the hearing on 1 April 2011 in their final submissions the parties and participants are to identify the documents, or parts thereof, that are relied on, and to provide a sufficient explanation of relevance. Similarly, the parts of the oral evidence relied on by the parties and participants and the documents relied on during the examination of witnesses must be clearly identified. There is a duty on the parties and participants to indicate the principal facts arising out of the oral evidence that are relied on, and to provide a sufficient explanation of relevance. The Chamber will hear public oral closing statements on Thursday 25 August 2011 and Friday 26 August 2011 (rule 141 of the Rules). The prosecution and the defence may make oral closing statements of up to 2 hours each. The two Legal Representatives' teams and the OPCV may make oral submissions of up to 40 minutes each. The order of public oral closing statements will be: the Prosecution, the participating victims and finally the Defence.

The parties and participants should be prepared to entertain questions from the Bench when their closing statements are delivered. It follows that for each team at least one counsel should be present in court with a detailed knowledge of the facts and issues in the case, having been present in court throughout the majority of proceedings (regardless of which counsel present the final closing statement).

See No. ICC-01/04-01/06-2722, Trial Chamber I, 12 April 2011, paras. 2-8.

Since there is no prejudice to the Defence, I think we should allow the Legal Representatives [in the course of its questioning of a witness and although the specific question was not anticipated by the Legal Representative and thus not included in the latter's request to the Chamber] to ask a clarification in some points that are rising from the transcript [and corresponding to information given by the witness in the course of its testimony before the Chamber before the Legal Representative took the stand].

See Oral decision, Trial Chamber III, No. ICC-01/05-01/08-T-101-ENG CT WT, 14 April 2011, p. 4, lines 20-22.

The Chamber has already informed the Defence that Legal Representatives are allowed to put questions that arise from the transcript, because they cannot preview in advance the questions to be put in relation to the real-time transcript of today.

See Oral decision, Trial Chamber III, No. ICC-01/05-01/08-T-104-Red-ENG CT WT, 4 May 2011, p. 50, lines 3-5.

Before ruling on the merits of the applications, the Chamber will address a procedural issue regarding the timing for the filing of responses to applications by Legal Representatives to question witnesses. This is governed by rule 91(3)(a) of the Rules, which allows the parties to make observations on the Legal Representatives' applications "*within a time limit set by the Chamber*". While the Chamber decided that Legal Representatives are required to file their applications to question witnesses "*at least seven days before the witness is scheduled to testify*", the Chamber has never set such a time-limit for the filing of observations thereto and considers it appropriate to do so now.

The Chamber decides that from now on, any observations on, or objections to, applications by Legal Representatives to question witnesses are to be submitted at least four days before the relevant witness is scheduled to testify. Any replies to those observations are to be filed at least two days before the witness is scheduled to testify.

[…]

The Chamber will now turn to the merits of the applications and related observations. As an initial matter, the Chamber rejects the Defence suggestion that so-called "*insider witnesses*" are "*collectively unlikely to be able to give evidence which impacts upon the personal interests of the victims*". In the view of the Chamber, the interests of victims are not limited to the physical commission of the alleged crimes under consideration. Rather, their interests extend to the question of the person or persons who should be held liable for those crimes, whether physical perpetrators or others. In this respect, victims have a general interest in the proceedings and in their outcome. As such, they have an interest in making sure that all pertinent questions are put to witnesses. This is borne out by rule 91(3) of the Rules, which provides that Legal Representatives may be permitted to question experts and the accused, as well as fact witnesses.

For the purpose of questioning Witness 33, the Chamber is of the view that both Legal Representatives have provided sufficient reasons to demonstrate that the victims they represent have a personal interest in putting questions to Witness 33. Indeed, Witness 33 is an insider witness who will testify, *inter alia*, on the alleged mode of liability of the accused and on the alleged crime of pillage in the Central African Republic, which, according to the victim application forms received by the Chamber, appears to have directly affected a significant number of victims.

For these reasons, the Chamber grants the Legal Representatives' applications to question the witness.

See No. ICC-01/05-01/08-1729, Trial Chamber III, 9 September 2011, paras. 13-17.

The Chamber developed a protocol on how to conduct a judicial site visit in the DRC as annex to the present order. The Chamber holds, among others that, (i) owing to budgetary constraints, besides the judges, the delegation shall be composed of two representatives of each party and a representative of each team of Legal Representatives; (ii) the delegation shall visit the majority of the locations and sites suggested by the parties and participants, subject to any security restrictions; (iii) the Chamber shall retain control of the conduct of the visit; (iv) parties and participants may not tender evidence; (v) parties and participants shall not be authorised to file oral or written submissions; (vi) at the request of the Chamber, the parties and participants may be requested to identify locations, sites or buildings and, if necessary, to provide any further pertinent information on the events which took place there. In the event of disagreement over identification, any challenge shall be entered in the transcript of the visit; (vii) parties and participants shall refrain from any contact with media; and (viii) during the site visit, a Court Managment Section representative shall be present in order to prepare a written report of the visit and prepare the transcripts to be produced upon completion of the visit.

See No. ICC-01/04-01/07-3203-tENG and No. ICC-01/04-01/07-3203-anxB, Trial Chamber II, 18 November 2011, pp. 7-9 and paras. 1-6.

Article 68 of the Rome Statute and rule 91 of the Rules of Procedure and Evidence permit victims, through their Legal Representatives, 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 an impartial trial*".

The Appeals Chamber, confirming the jurisprudence of the Trial Chambers, has held that the above provisions may permit Legal Representatives of victims to present evidence at trial. The presentation of evidence by Legal Representatives is not an "*unfettered right*"; it must be overseen and regulated by the Chamber, with due regard to the rights of the accused and the fairness of the trial. To the extent that Legal Representatives wish to adduce evidence, they are required to make an application to the Chamber in advance. In light of the above principles, and pursuant to articles 64(6)(d), 64(6)(f), 64(8)(b), 68(3) and 69(3) of the Rome Statute, rules 86, 89 and 91 of the Rules and regulations 43 and 54(o) of the Regulations of the Court, the Chamber hereby establishes the procedure to be followed by the Legal Representatives if they wish to seek leave to present evidence or for individual victims to present their views and concerns to the Chamber.

a. If the Legal Representatives wish to present evidence on behalf of their clients, or wish individual victims to be permitted to present their views and concerns to the Chamber, the Legal Representatives must file a written application seeking leave from the Chamber;

b. If the Legal Representatives wish to present evidence, their written applications are to explain:

   i. The nature of the proposed evidence and the manner in which it is to be presented;

   ii. The estimated time needed for the presentation of the proposed evidence;

   iii. How the personal interests of the participating victims would be affected by the presentation of the proposed evidence;

   iv. The relevance of the proposed evidence to the charges;

   v. How the presentation of the proposed evidence would assist in the Chamber's determination of the truth in this case;

   vi. Whether a victim who is proposed as a witness has relinquished his or her anonymity;

vii. Whether and how the presentation of the proposed evidence would affect the rights of the accused and the fairness of the trial, especially if a victim wishes to testify without relinquishing his or her anonymity;

viii. Any disclosure issues that need to be resolved in connection with the presentation of the proposed evidence;

ix. Whether the Legal Representatives envisage applying for protective measures, such as redactions and/or in-court protective measures;

x. Whether the proposed evidence is to be presented through persons who have been authorised to participate as victims in the trial proceedings, and if so, the application numbers under which those persons are registered.

c. If the Legal Representatives wish individual victims to present their views and concerns to the Chamber, by way of, for example, unsworn statements, the Legal Representatives' written applications are to explain:

i. The manner in which the victims' views and concerns are to be presented, *e.g.* in-person pursuant to rule 89 of the Rules or in writing;

ii. The estimated time needed for the victims to present their views and concerns;

iii. How the personal interests of the participating victims would be affected by the presentation of their views and concerns to the Chamber;

iv. Whether the victims wish their views and concerns to be presented publicly, or whether they need to be afforded in-court protective measures;

v. Whether the victims are persons authorised to participate in the trial, and if so, the application numbers under which those persons are registered;

[…]

f. To the extent that the Chamber permits the Legal Representatives to submit evidence, or authorises individual victims to present their views and concerns to the Chamber, this shall take place before the Defence begins its presentation of evidence, if any.

See No. ICC-01/05-01/08-1935, Trial Chamber III, 21 November 2011, paras. 1-3.

While it is important for the participation of victims in trial proceedings to be meaningful, such participation must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Among the accused's statutory rights is the right "*to be tried without undue delay*", the importance of which is demonstrated by the fact that the Chamber has a statutory duty to ensure that the trial proceedings are "*expeditious*". To give effect to this duty, the Chamber must seek to prevent undue delays resulting from the presentation of cumulative evidence. It is against this standard of judicial oversight that the Chamber conducts this preliminary assessment of the proposed presentation of evidence by the Legal Representatives.

[…]

The relevant Victims should be those who, in the Legal Representatives' view, are (i) best-placed to assist the Chamber in the determination of the truth in this case; (ii) able to present evidence and/or views and concerns that affect the personal interests of the greatest number of participating victims; (iii) best-placed to present testimony that will not be cumulative of that which has already been presented in this case; and (iv) willing for their identity to be disclosed to the parties in the event that they are permitted to testify and/or present their views and concerns.

After receiving the additional information and after hearing from the parties, the Chamber will make a final determination on which of the relevant Victims, if any, should be permitted to testify and/or present their views and concerns.

[…]

For each relevant Victim, the Legal Representatives shall provide a comprehensive written statement laying out the facts about which the victim proposes to testify and/or present his or her views and concerns. The statements shall be signed by the victim and shall be provided to the Chamber and the parties in one of the working languages of the Court.

[…]

In addition to the written statements described above, for each relevant Victim, the Legal Representatives shall explain (i) the estimated time needed for the presentation of the victim's testimony and/or views and concerns; (ii) whether the victim is willing for his or her identity to be disclosed to the parties in the event that he or she is permitted to testify and/or present views and concerns; (iii) how the presentation of the victim's testimony and/or views and concerns would affect the overall interests of the participating victims in this case; (iv) the relevance of the victim's testimony to the charges; (v) how the victim's testimony would assist in the Chamber's

determination of the truth in this case; and (vi) the reasons why the victim's testimony would not be cumulative of evidence that has been presented to date. These matters are to be addressed on a victim-by-victim basis.

[…]

In line with previous practice at this Court and for reasons of fairness, the Chamber will not permit victims to testify as witnesses or to present their views and concerns unless they relinquish their anonymity *vis-à-vis* the parties. However, the identity of victims need not be disclosed to the parties unless and until the Chamber grants them permission to testify and/or present their views and concerns. This approach reflects the security concerns expressed by victims and the fact that certain victims appear to have consented to their identities being disclosed only if the Chamber grants them permission to appear.

If the relevant Victims' written statements contain identifying information that should not be disclosed to the parties prior to the Chamber's ruling on the merits of their applications, the Legal Representatives are to file the victims' written statements on an *ex parte* basis, with proposed redactions to the identifying information. Subject to any changes ordered by the Chamber, the redacted versions will be notified to the parties.

Once the supplemented Applications and written statements have been filed and the Chamber has decided on any proposed redactions, the Chamber will instruct the Victims Participation and Reparations Section to provide the parties with unredacted or lesser redacted versions of the victims' application forms for the relevant Victims. In addition, the Chamber will provide the parties with the relevant portions of the *ex parte* annexes to the Chamber's victims' participation decisions in which the relevant victims were granted participating status in this case.

See No. ICC-01/05-01/08-2027, Trial Chamber III, 21 December 2011, paras. 9, 12-13, 15, 17, and 19-21.

The Chamber deems it important to underscore the differences between the presentation by individual victims of evidence and the expression of their views and concerns in person. An instructive illustration to that effect was provided by Trial Chamber I in the following terms:

> […] *the process of victims* "expressing their views and concerns" *is not the same as* "giving evidence". *The former is, in essence, the equivalent of presenting submissions, and although any views and concerns of the victims may assist the Chamber in its approach to the evidence in the case, these statements by victims (made personally or advanced by their Legal Representatives) will not form part of the trial evidence. In order for participating victims to contribute to the evidence in the trial, it is necessary for them to give evidence under oath from the witness box. There is, therefore, a critical distinction between these two possible means of placing material before the Chamber.*

In line with these differences, the presentation by individual victims of evidence on the one hand and the expression of their views and concerns on the other is governed by different requirements, which are elaborated upon below. In particular, the threshold to grant applications by victims to give evidence is significantly higher than the threshold applicable to applications by victims to express their views and concerns in person. For this reason, victims who fail to reach the threshold to be authorised to give evidence may still be permitted to express their views and concerns in person.

[…]

The imperative of expeditiousness requires the Chamber to determine which victims shall be authorised to present their views and concerns in person. In this context, the Chamber agrees with Trial Chamber I that this exercise requires "*fact-specific decisions* […] *taking into account the circumstances of the trial as a whole*". For that purpose and in the circumstances of the present case, the Chamber will consider whether the personal interests of the individual victims are affected and whether the accounts expected to be provided are representative of a larger number of victims. In particular, the assessment will take into account the nature of the harm suffered and the location of the events alleged by the victims who were proposed to express their views and concerns.

See No. ICC-01/05-01/08-2138, Trial Chamber III, 22 February 2012, paras. 19-22, and Oral Decision, No. ICC-01/05-01/08-T-227-Red-ENG, Trial Chamber III, 25 June 2012, pp. 20-21.

The Majority adopted a set of criteria, mainly established by Trial Chamber II in *The Prosecutor v. Katanga and Ngudjolo* case, in order to determine whether victims shall be authorised to present evidence. In particular, in its assessment of the applications, the Majority contemplated whether the presentation of evidence by a specific victim would "*make a genuine contribution to the ascertainment of the truth*" or "*bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges*".

I firmly disagree with the use of these criteria which are unduly and unfairly curtailing the victims' rights to present evidence. These criteria have no legal basis and cannot be deduced from the statutory framework pursuant to its literal, systematic or teleological interpretation. In my view, the adoption of these criteria by the Majority reflects a utilitarian approach to victims' rights rather than an attempt to ensure that the rights granted under the statutory provisions are exercised effectively and only within the limits specifically set out in these provisions.

It should be sufficient, in my view, to recall that the Appeals Chamber has detailed the requirements that are necessary in order to allow victims to present evidence, notably and most importantly for the purposes of my partly dissenting opinion: the demonstration of the personal interests that are affected by the specific proceedings; a determination of the appropriateness of the victim's specific participation; and the consistency

with the rights of the accused and the requirements of a fair trial. However, the Majority's decision, in which the participatory rights of the victims are arbitrarily limited to two victims allowed to give testimony, is premised on the concept that the testimonies should be "*useful*" for the Chamber, make a "*genuine contribution*" and refer extensively to the need to avoid "*undue*" delays in the proceedings, which is not, in any of the findings of the Majority's decision, justified or based on factual elements. I would have assessed the victims' applications to present evidence in light of the Appeals Chamber requirements and after having determined whether the evidence intended to be presented is relevant and carrying probative value.

Furthermore, in my view, it would have been more appropriate, if not fairer, to analyse the impact of allowing victims to present evidence, in relation to the avoidance of "*undue delays*", on the basis of what is stated in regulation 43 of the Regulations of the Court: the Presiding Judge, in consultation with the Chamber, is entitled to determine the mode and order of questioning witnesses, in order to avoid delays and ensure the effective use of time.

[…]

Pursuant to article 68(3) of the Statute, victims enjoy an unequivocal statutory right to present their views and concerns whenever their personal interests are affected. Limitations to such an autonomous statutory right shall be interpreted in a strict manner and in compliance with the statutory framework. To that effect, article 68(3) of the Statute clearly determines the boundaries of the victims' right to present their views and concerns by stating that they are to be "*considered 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*". The *ultima ratio* of this provision is not to alter victims' right to present their views and concerns, which is unequivocal and autonomous, but rather to ensure that the modalities of their participation will not negatively impact the integrity of the criminal proceedings at hand, that the stages of the proceedings in which the victims participate are appropriate, and the rights of the accused and a fair and impartial trial are not affected.

In my view, the Chamber has clearly and correctly recalled the strict limitations to the right of victims to present their views and concerns.

While I fully agree with the need to ensure the expeditiousness of the trial, in particular by limiting the number of victims authorised to present their views and concerns in person, I strongly disagree with the assessment *in fine* made by the Majority which, in my view, departs from the applicable law recalled in paragraph 21 of the Decision and reflects a utilitarian approach rather than a legal one.

In light of the circumstances of the case, I fail to understand how allowing 7 victims out of the 2287 already authorised to participate in the proceedings to express their views and concerns in person would affect the expeditiousness of the proceedings when authorising them to do so would only take approximately 80 hours (18 hearing days) at a time when 177 hearing days have already been dedicated to the prosecution's presentation of its evidence. It must be recalled that such length of time is just a very raw estimation given by Legal Representatives themselves.

To further illustrate my views, I finally refer to the precedents of the other Trial Chambers of this Court: Trial Chamber I authorised three victims to present evidence out of 129 participating victims, and Trial Chamber II had initially authorised four victims to present evidence out of 370 participating victims.

Therefore, the Majority, without any factual elements on which to base its assessment of the effect of the victims' participation on the expeditiousness of the trial, denied a number of victims their statutory rights to present their views and concerns which, depending on the modalities of participation that could be set by the Chamber at a later stage, could have been fully consistent with and not prejudicial to the rights of the accused.

See No. ICC-01/05-01/08-2140, Partly Dissenting Opinion of Judge Steiner, Trial Chamber III, 22 February 2012, paras. 13-23.

[TRANSLATION] Pursuant to rule 141 of the Rules of Procedure and Evidence, the Chamber invites the parties to make closing arguments. It considers that Legal Representatives of victims shall also be granted this possibility. The Legal Representative of the former child soldiers will have a maximum of 40 minutes and the Legal Representatives of the main group of victims will then have 1 hour and 20 minutes maximum. The Chamber reserves its right to pose questions to the Legal Representatives of victims. In order to facilitate the good conduct of the hearings, the Chamber wishes that the Legal Representatives of victims communicate the names of the persons of their teams who will take the floor during the closing statements, the main areas to be addressed and the estimated time for each intervention. As for the content of the closing statements, the Chamber instructs the parties and participants to develop in particular the issues of the case which, in light of the written submissions, appear to be the most litigated ones. In particular, the Prosecution and the Legal Representatives are requested to focus mainly on the issues addressed in the written conclusions of each defence team and which require an answer from their side. The Defence teams shall include all replies to said elements in response in their own oral submissions.

See No. ICC-01/04-01/07-3274, Trial Chamber II, 20 April 2012, paras. 4-12.

In the circumstances of the present case and pursuant to articles 64(2) and 68(3) of the Statute and Rule 89(1) of the Rules, the Majority of the Chamber, Judge Steiner dissenting, deems it appropriate to hear the views and concerns of victims a/0542/08, a/0394/08 and a/0511/08 by means of video-link technology. While the victims' views and concerns will be broadcast to the Chamber, the parties and the public via video-link, the Chamber recalls that in accordance with the 22 February 2012 Decision, the victims will not provide evidence. Therefore, any statement that they provide will not be given under oath. Further, the victims will not be questioned by the parties and their views and concerns will not form part of the evidence of the case.

The respective Legal Representative will be responsible for guiding the victim through his or her presentation of views and concerns, but shall limit the intervention to questions that would facilitate this presentation. In this respect, and in accordance with the estimation of time provided at the status conference of 27 March 2012, the Legal Representatives shall further ensure that the presentation of views and concerns does not exceed one hearing day per victim. In addition, in accordance with its responsibilities under articles 64(2) and 68(3) of the Statute and rule 89(1) of the Rules, the Chamber may address the victims at any time it deems it appropriate.

[…]

The Chamber recalls that in accordance with its Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial ("Unified Protocol"), the Unified Protocol does not apply to victims appearing before the Court to present their views and concerns.

However, in conformity with the Victims and Witnesses Unit ("VWU")'s mandate, this specialised unit of the Registry shall be responsible for arranging all logistics involved, including transportation for the victims to the location where the video-link technology will be installed, and for taking all necessary measures to ensure the victims' physical and psychological well-being. In addition, while the victims presenting views and concerns will not be subject to the formal familiarisation procedure applicable to witnesses, the VWU shall arrange for the victims to receive certain minimal guidance and explanation relating to the process of providing their views and concerns. The Legal Representatives, as deemed appropriate after consultation with the VWU, shall determine whether it is preferable to be present at either the location where the video-link will be broadcast from or in the courtroom in The Hague.

[…]

In accordance with the Chamber's previous finding that victims will not be permitted to present their views and concerns unless they relinquish their anonymity *vis-à-vis* the parties, and noting that the victims have consented to the disclosure of their identities to the parties, the present Decision now addresses the provision to the parties of the relevant information pertaining to the identities of victims a/0542/08, a/0394/08 and a/0511/08. In line with the procedure applied in the context of victims that had been authorised to give evidence, the Chamber needs to ensure that the parties are provided, for their information, with the relevant portions of the *ex parte* annexes to the Chamber's decisions on victims' applications, less redacted versions of the victims' application forms, and less redacted versions of the victims' written statements. When providing less redacted versions of the statements, the Legal Representatives shall ensure that any redactions to information pertaining to the victims' identities are lifted while any redactions to the identities of third parties and the victims' exact addresses should be maintained.

See No. ICC-01/05-01/08-2220, Trial Chamber III, 24 May 2012, paras. 7-12.

In view of the specific circumstances of the present case, and in order to ensure that the participation by victims is meaningful, the Chamber is of the view that the Common Legal Representative may have access to confidential filings, to the extent that their content is relevant to the personal interests of the victims he or she represents. It will be the responsibility of the filing party to indicate on the notification page whether the Common Legal Representative shall be notified.

In addition, given the security situation in Kenya, the Chamber considers it appropriate to restrict access to confidential documents to the Common Legal Representative and to the OPCV when acting on the Common Legal Representative's behalf. Any requests for access for individual victims shall be specifically motivated and provide detailed information about 1) the necessity of sharing the information with a particular victim or group of victims, 2) the identity of the victim(s) who would have access to the confidential material, and 3) how the Common Legal Representative would guarantee that the information would not be circulated beyond the specifically authorised victim(s).

See No. ICC-01/09-01/11-460, Trial Chamber V, 3 October 2012, paras. 67-68. See also No. ICC-01/09-02/11-498, Trial Chamber V, 3 October 2012, paras. 66-67.

When the Legal Representative wishes to examine a witness, he is directed, as general rule, to apply to the Chamber, by means of filing, notified to the parties, seven days in advance. In the event of unexpected changes to the witness schedule or unanticipated issues raised during testimony, the seven-day period can be altered as necessary.

The application of the Legal Representative should provide reasons for separate questioning apart from the questioning by the Prosecution and include an outline of areas for examination. Documents proposed to be used during the examination, or references thereto, where appropriate, should also be provided at this time, in

accordance with the regular procedure for parties discussed below. After the examination-in-chief the parties will be given an opportunity to make oral submissions, without the witness being present, and the Chamber will issue an oral ruling on the application.

If the Legal Representative seeks to present evidence, he shall provide reasons for a separate presentation of evidence apart from the case presentation by the Prosecution. If leave is granted for presentation, such evidence shall be presented at the end of the Prosecution case.

See No. ICC-01/09-01/11-847-Corr, Trial Chamber V(a), 9 August 2013, paras. 19 and 21.

(e) Requests to call witnesses

By virtue of article 69(3) of the Statute, the Chamber has the power to request the submission of all evidence that it considers necessary for the determination of the truth. As decided by the Appeals Chamber, the victims are entitled to invite the Chamber to exercise its power to make such a request. The Chamber considers that article 69(3) of the Statute does not create a systematic victim's right to give evidence or request the attendance of witnesses – it merely provides a basis for inviting the Chamber to exercise its discretion to request a victim's, or anyone else's, attendance to testify.

For each CLR's application to the Chamber to call a witness, the Chamber will consider whether the testimony: (i) affects the victim's personal interests; (ii) is relevant to the issues of the case; (iii) contributes to the determination of the truth; and (iv) whether the testimony would be consistent with the rights of the accused, in particular the right to adequate time and facilities to prepare a defence.

In accordance with the procedures suggested by the parties, the Chamber directs the CLR to file a schedule of the anticipated testimony of victims she will request the Chamber to call, detailing the likely lengths of testimony and the order in which they may appear. In the present case where a trial date has been set, the CLR should endeavour to file the schedule at the earliest opportunity, […]. Where and if necessary, the schedule shall be updated regularly to provide the Chamber with the order of testimony.

(f) Presenting evidence

The jurisprudence of the Appeals Chamber has confirmed the possibility for victims to "*bring to the Trial Chamber evidence that the Trial Chamber may consider necessary for the determination of the truth*". The Appeals Chamber has held that the exercise of a Chamber's discretionary power to request evidence is linked to the requirements of article 68(3) of the Statute such that the Chamber must be satisfied that the personal interests of the victim are affected:

[…] It is only if the Trial Chamber is persuaded that the requirements of article 68(3) have been met, and, in particular, that it has been established that the personal interests of the victims are affected, that the Chamber may decide whether to exercise its discretionary powers under the second sentence of article 69(3) of the Statute "*to request the submission of all evidence that it considers necessary for the determination of the truth*". […].

The CLR may bring evidence to the attention of the Chamber during the trial proceedings. The Chamber will make its determination on a case by case basis.

(g) Challenging the relevance or admissibility of evidence

The Chamber considers that challenges to the relevance or admissibility of evidence do not fall within the realm of article 69(3) of the Statute, a provision which relates only to the submission of evidence. Instead, the Chamber considers that the legal basis upon which a victim may challenge the relevance or admissibility of evidence extends from the combined effect of: (i) the obligation to give effect to the spirit and meaning of article 68(3) of the Statute; and (ii) the Chamber's power to make rulings on the relevance or admissibility of evidence under articles 64(9) and 69(4) of the Statute. The Appeals Chamber has expressed support for this approach:

In relation to the right afforded to victims to challenge the admissibility or relevance of evidence, the Trial Chamber relied on its general powers under article 69(4) to declare any evidence admissible or relevant. The provision is silent as to who may challenge such evidence. Under article 64(9) of the Statute, the Trial Chamber has the power to rule on the admissibility or relevance of evidence on its own motion. These provisions must be seen in light of the provisions on victims' participation, in particular article 68(3) of the Statute and rules 89 and 91 of the Rules. In light of these provisions, nothing in articles 69(4) and 64(9) excludes the possibility of a Trial Chamber ruling on the admissibility or relevance of evidence after having received submissions by the victims on said evidence. The approach of the Trial Chamber in interpreting its powers, once again does not result in an unfettered right for victims but is subject to the application of article 68(3), which is the founding provision governing victim participation in the proceedings.

Accordingly, the Chamber may permit the views and concerns of victims to be presented and considered whenever the Chamber is called to determine the relevance or admissibility of evidence under Article 69(4) or Article 64(9) of the Statute, provided that all the requirements of Article 68(3) of the Statute are met. The Chamber will request, as appropriate, the CLR to make submissions on the admissibility of evidence only if the victims' personal interests are affected.

(h) Questioning by the CLR

The Court has already developed an effective approach to dealing with victims' requests to question witnesses, as outlined by Trial Chamber III:

> *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 writing. 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. 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.*

The Chamber notes the provisions of rule 91(3) of the Rules, as well as the joint submissions of the parties on this issue, and adopts the following procedure in the present case. The CLR shall submit a written application sufficiently in advance and no later than seven days before the expected date of testimony. In addition to the criteria specified in footnote 29 above, the application shall include the areas of questioning and the questions to the extent possible, and a justification of how the questions impact the personal interests of the victims, and should enclose any list of relevant documents to be used during questioning. The parties will make their observations orally before the questioning by the CLR, unless a different time limit is set.

With regard to the mode of questioning of witnesses by the CLR, the Chamber notes the joint submissions of the parties, and concurs with the approach common to other Trial Chambers. To the extent that questioning is permitted, the CLR shall ask her questions only after the completion of the prosecution's questioning, save for the situation where the evidence has been brought to the Chamber by the participating victims and its submission has been requested by the Chamber pursuant to article 69(3) of the Statute. In this case, the CLR may ask her questions prior to those of the prosecution. In general, questioning by the CLR shall be conducted in a neutral manner, without the use of leading or closed questions, unless otherwise authorised by the Chamber.

(i) Access to confidential filings, documents and evidence

The Chamber indicated during the status conference held on 12 July 2011 that it intended to deal with the issue of access to confidential filings in a decision on modalities of participation. The Chamber notes rule 131(2) of the Rules, which provides for the right of participating victims to consult the record of proceedings subject to any restrictions concerning confidentially and national security.

In the view of the Chamber, meaningful participation by victims may require access to the confidential material in the case, relevant to their views and concerns. However, the security of individuals or organisations may be adversely affected if access to confidential material is granted and this may impact on the scope of confidential information that is provided to the participating victims. These issues are eminently case specific and should be dealt with on a case-by-case basis.

In practice, this means that the CLR may have access to confidential filings and documents, to the extent that their content is relevant to the personal interests of the victims she represents. It will be the responsibility of the filing party, including the registry, to indicate on the notification page whether the CLR shall be notified and, as the case may be, to file properly redacted versions thereof. In the event a dispute emerges, the parties and participants are free to seize the Chamber.

In relation to evidence, the CLR may have access to the confidential evidence in Ringtail. The party submitting an item to be uploaded into Ringtail shall indicate whether or not the CLR should have access to the evidence.

In turn, the CLR shall not communicate confidential information to her clients, or anyone else who is not authorised to receive it, without the permission of the Chamber.

[…]

(j) Obligations on victims to disclose exculpatory information

The Chamber concurs with the Appeals Chamber's position that "*nothing justifies a general obligation on the victims to disclose every element in their possession, whether incriminating or exculpatory*" but nonetheless, "*there may be specific instances in which a Trial Chamber may require victims to disclose exculpatory evidence in their possession to the accused, such as when a party or participant brings to the attention of the Trial Chamber that such information is available and the Trial Chamber finds that such information is necessary for the determination of the truth*".

(k) Participation in closed session and ex parte hearings

In the present case, the Chamber has already permitted the CLR to participate in a hearing conducted in closed session. The Chamber will grant permission to participate in closed session or *ex parte* hearings if the personal interests of the victims so require. Such participation may be subject to an unequivocal agreement with the CLR not to disclose to her clients any of the information that is covered by protective measures ordered by the Chamber, which may include the identities of the protected witnesses. The parties remain entitled at any stage to raise distinct concerns about the participation or presence of the CLR, or parts of her team, in specific hearings. Lastly, the Chamber may allow, *ex parte*, victims-only hearings on an exceptional basis if it finds that the victim's personal interests so justify.

See No. ICC-02/05-03/09-545, Trial Chamber IV, 20 March 2014, paras. 24-41.

With due regard to [rule 89 of the Rules] and the rest of the relevant statutory scheme and jurisprudence, the Chamber has assessed the various options for admitting victims to participate in trial proceedings. The Chamber has fully considered the specific circumstances of this case, including: (i) the large number of victims expected to express interest in participating at trial; (ii) the 2 June 2015 trial commencement date; (iii) the situation of the victims and (iv) the fact that all participants submitted in favour of a greater degree of judicial oversight in this case than that required by the Kenya Trials Approach.

For the reasons explained below, victims participating solely through the Legal Representative will be admitted to participate in this trial in accordance with the following procedure: (i) The Registry must transmit all complete applications in its possession (both the simplified form and any additional supporting materials), without redactions, to the Chamber on a rolling basis. (ii) The Registry must assess these applications on the basis of guidance provided by the Chamber in Section III(B) of the present decision. In its assessment, the Registry must separate the applicants into three groups: (a) applicants who clearly qualify as victims ('Group A'); (b) applicants who clearly do not qualify as victims ('Group B') and (c) applications for whom the Registry could not make a clear determination for any reason ('Group C'). (iii) The Registry is to follow this same procedure for victims whose applications to participate were accepted during the confirmation stage. With regard to Rule 91(1) of the Rules and Regulation 86(8) of the Regulations, the Registry should list the victims accepted during the confirmation stage under Group A unless it considers that one or more victims may no longer qualify due to the parameters of the charges confirmed in the Confirmation Decision. (iv) The Registry must prepare at least one report which lists, without need for application-by-application reasoning or analysis, the victim applications which fall into each of these three groups. The Registry must notify these reports to the Chamber, the Prosecution, the Defence and the LRV's appointed to represent participating victims. When each report is notified, the Registry is also to transmit all simplified application forms in Group C, with any necessary redactions, to the Prosecution and the Defence. (v) to ensure that all applications are processed prior to commencing the trial, the Registry must make a final transmission of simplified application forms falling under: (a) Group C to the Chamber and parties no later than 60 days prior to the trial commencement date and (b) Groups A and B to the Chamber no later than 15 days prior to the trial commencement date. The Registry's final corresponding reports must be notified by these same deadlines. No new applications may be submitted for consideration after these deadlines. (vi) Upon receipt of the Group C applications, the Prosecution and Defence are entitled to reply to them within a time limit which will be set by the Chamber at a later time. (vii) Upon receiving any submissions from the parties on the Group C applications, the Chamber will assess them individually. Barring a clear and material error apparent in the Registry's assessment, the Chamber will also ratify the assessment regarding the applications in Groups A and B. (viii) The Registry must maintain a database of information provided by victims admitted to participate in the proceedings, and must make available to each LRV in the case the data provided by the victims that he or she represents so that they know their victims constituency. (ix) Once every four months from notification of the present decision, the Victims Participation and Reparations Section ('VPRS') must periodically provide a detailed report about victims admitted to participate in the proceedings and the general situation of participating victims. The reports must be prepared in cooperation with the LRV's, who are to provide the VPRS with detailed information relating to their activities amongst the victims.

The Chamber recognises the importance of effective and meaningful victim participation in the proceedings. Achieving an efficient application process which provides applicants with a fair and timely determination of their status on the basis of straightforward criteria is an important element on giving effect to such participation. However, such a process must not negatively impact the fairness or expeditiousness of the proceedings or the rights of the accused.

[…] [I]t is recalled that chambers have only been evaluating victim applications to a *prima facie* standard for the purposes of participation; they are not making any concrete determination on the veracity of the claims therein. Unless these applications are submitted and discussed as evidence during trial, the Chamber also cannot base its trial judgment on them. The Chamber therefore considers that, notwithstanding any other purpose they may fulfil for the individuals concerned, the victim applications are primarily intended as a procedural mechanism to participate in proceedings.

[…]

As a final matter, the Chamber clarifies that the procedure for allowing any victim to testify upon request of the Legal Representative or to participate directly in proceedings will be decided upon if and when the Chamber decides to allow for this kind of participation.

As for what participating '*directly*' means, this term covers any victims who may be subsequently allowed to appear solely to present their views and concerns to the Chamber. '*Direct participation*' is not referring to participating victims who testify before the Court as witnesses called by the Prosecution ('*dual status witnesses*'). Witnesses do not ordinarily act as '*participants*' in ICC proceedings – they are persons called upon by the participants (or the Chamber) to give evidence. Because they do not become '*direct participants*' simply by testifying, dual status witnesses will have had their applications assessed through the procedure applicable to all other victims.

However, the Chamber emphasises that, above and beyond any victim admission procedure, a distinct disclosure regime applies to witnesses. For the Prosecution, this means it must obtain and provide the Defence with all the disclosable information in a dual status witness's victim application, subject to any applicable disclosure restrictions, regardless of whether the victim participates directly in proceedings.

See No. ICC-01/04-02/06-449, Trial Chamber VI, 6 February 2015, paras. 23-24, 26, 36, and 38-40.

The Legal Representatives of Victims are entitled to attend all hearings, unless the Chamber decides that a particular hearing is to be conducted *ex parte*, without participation of the LRVs.

Should a Legal Representative wish to put questions to a witness called by the Prosecution or the Defence, he or she is to file a motivated request no later than four days before the beginning of the witness's examination-in-chief. The request shall identify the specific areas that the Legal Representatives wish to explore with the witness. After the Prosecution has finished its questioning, the Legal Representative shall inform the Chamber whether he or she maintains the request to examine the witness. Objections to the request, if any, shall be made orally at that time, without the witness being present.

If permission is granted to question the witness concerned, the Legal Representative shall stay within the confines of the areas identified in the request. Unless authorised by the Chamber, the Legal Representative will not ask leading questions.

[…]

The Legal Representative shall specify in his or her request to question a witness whether he or she intends to elicit evidence pertaining to reparations under Article 75 of the Statute. The Chamber will decide on a case-by-case basis on the appropriateness of hearing such evidence pursuant to Regulation 56 of the Regulations.

Should the Legal Representative wish to show any documents or other material to the witness, he or she shall state so, identifying the material in question, in the request. If the materials are not already in evidence or discussed by one of the parties, copies shall be attached to the request.

[…]

A Legal Representative shall file any request for leave to present evidence no later than two days after the Prosecution concluded its presentation of evidence. If the request includes leave for witnesses to be called, it shall include a summary of the expected testimony and an estimate of the time needed for the examination.

Any request for admission of documentary evidence shall be filed at the same time. Such an application shall contain a short description of the content of each document, of the relevance of the document, of the evidence of the document, as well as an explanation of how it may contribute to the determination of the truth. If the documents are not already disclosed by one of the parties, copies shall be attached to the request.

See No. ICC-01/04-02/06-619, Trial Chamber VI, 2 June 2015, paras. 63-65, 67-68, and 70.

The Chamber considers that while questions by the legal representative must be carefully tailored to elicit responses on the concrete harm suffered by the witness, such questions may also extend to the harm suffered by other victims allegedly recruited under the age of 15 years by the UPC or FPLC as long as there is sufficient link with the testimony of the current witness. Therefore, the Chamber finds that the witness may be questioned on the topics identified in the amended legal representative's request to the extent that they comply with this guidance.

See No. ICC-01/04-02/06-T-48-Red-ENG, Trial Chamber VI, 12 November 2015, p. 25, lines 4-11.

A. Opening Statements

The Chamber will hear opening statements in the following order:

(i) Prosecution,

(ii) LRV,

(iii) *Gbagbo* Defence, and

(iv) *Blé Goudé* Defence.

The parties are allotted 3 hours each for opening statements; the LRV 2 hours. The parties and the LRV need not use all of their allotted time. The Defence teams may reserve all or part of their time to make their opening statements after the close of Prosecution's presentation of evidence and prior to the presentation of evidence, if any, by the Defence.

The parties and the LRV are directed to notify any material they intend to use in the course of their opening statements to the Chamber, parties and the LRV, eight days prior to the commencement of trial. Any objections to the use of such material shall be filed five days prior to the commencement of trial. The parties and the LRV will be permitted to use audio/visual material during opening statements.

B. Phases of the trial relating to the presentation of evidence

The Chamber recalls that, in accordance with Articles 64(6)(b) and 69(3) of the Statute, it may intervene at any time during the presentation of evidence and may order the production of any evidence it considers necessary for the determination of the truth. Subject to this proviso, the trial will be organised into the following phases:

(i) Presentation of evidence by the Prosecution;

(ii) Presentation of evidence by the LRV, if leave is granted;

(iii) Presentation of evidence by the *Gbagbo* Defence, if applicable,

(iv) Presentation of evidence by the *Blé Goudé* Defence, if applicable;

(v) Prosecution evidence in rebuttal, if leave is granted;

(vi) Evidence of the *Gbagbo* Defence in rejoinder, if applicable; and

(vii) Evidence of the *Blé Goudé* Defence in rejoinder, if applicable.

C. Notification by the Defence of grounds for excluding criminal responsibility and disclosure by the Defence

The Chamber recalls Rule 79 of the Rules which requires the Defence to notify the Prosecution of its intent to raise the existence of an alibi or grounds for excluding criminal responsibility sufficiently in advance to enable the Prosecution to adequately prepare and respond. The Chamber invites the Defence to provide this notification, if any, prior to the start of trial. However, the Chamber notes that Rule 79 of the Rules specifically provides that failure by the Defence to provide such notice shall not limit its right to raise such matters and to present evidence thereon.

The Chamber considers that disclosure by the Defence shall be notified to the Chamber, parties and the LRV 14 days prior to the commencement of the presentation of evidence by the Defence. Further directions on the scope of Defence disclosure will be provided in due course.

[…]

E. Scheduling of Prosecution witnesses

[…]

On a weekly basis, on each Thursday, the Prosecution shall provide via email to the Chamber, parties and LRV updated information concerning the presentation of witnesses for the following week including:

(i) The witnesses it intends to call, and the order it intends to call them;

(ii) The final estimate of the length of time for questioning of each witness on the list; and

(iii) Details of any in-court protective measures that will or have been sought, in accordance with the directions provided in section T below.

If there are any subsequent changes to the schedule or the calling order, the Prosecution shall inform the Chamber, the parties and the LRV as early as possible.

[…]

G. General issues concerning testimony

[…]

i. Testimony and/or unsworn statement by the accused

[…]

The accused also has the right to obtain the attendance and examination of witnesses on his behalf and not to be compelled to testify, pursuant to Article 67(1)(e) and (g) of the Statute. If an accused elects to give evidence on his own behalf, he will be subject to the same rules applicable to other witnesses, including the requirements to give a solemn undertaking and to be questioned by the other parties and the LRV, in accordance with the directions infra.

ii. Order of questioning

[…]

3. Victims or witnesses testifying or victims making unsworn statements at the request of LRV.

Should the LRV wish to present evidence on issues concerning the victims' interests or propose victim(s) who wish to make unsworn statements to present their '*views and concerns*', the LRV may file an application to this effect one month before the expected end of the Prosecution's presentation of evidence. Thereafter, the Chamber will decide accordingly, taking into consideration whether the request is appropriate, and bearing in mind the interests of victims and the rights of the accused persons pursuant to Article 68(3) of the Statute.

The application by the LRV shall include the name and identifying information of the witness or victim, and to the extent possible:

(i) A witness statement and/or a detailed summary of the expected testimony;

(ii) An estimate of the length of time considered necessary for questioning;

(iii) A list of any material the LRV wishes to use during questioning;

(iv) Details of any in-court protective measures that would be sought, should leave be granted; and,

(v) An averment as to why the testimony of the proposed witness(a) is relevant to the victims' personal interests, (b) is relevant to the issues of the case, (c) would contribute to the determination of the truth, and (d) would not be inconsistent with the rights of the accused and a fair and impartial trial.

If the Chamber decides to call the witness(es) proposed by the LRV, the LRV will be the first to put questions to the witness. Thereafter, the Prosecution will have an opportunity to question the witness, followed by the *Gbagbo* Defence and the *Blé Goudé* Defence.

iii. Mode and scope of questioning

All questioning shall be conducted in a focused and professional manner and shall contribute to the ascertainment of the truth. This means that the Chamber expects that the parties and the LRV will endeavour to ask questions in accordance with a logical narrative and/or in chronological order. The Chamber underlines that questioning is not to be used to obfuscate or delay the fact-finding process. In principle, the same witness should not need to be called to testify more than once. Thus, to the extent possible, and subject to the rights of the accused under Article 67(1) of the Statute, the parties and the LRV shall endeavour to avoid the re-calling of witnesses.

1. Questioning by the calling party

When the calling party is examining a witness, it shall do so with neutral questions. In exceptional circumstances, the calling party may be permitted to pose leading questions to a witness if the Chamber determines that it will contribute to the efficiency of the trial or the determination of truth.

In particular, the Chamber directs the parties to engage in inter partes consultation and, to the extent possible, agree on the non-contentious areas of questioning by the calling party for which the testimony may be expedited by use of leading questions. Should the parties reach such an agreement, this can be indicated to the Chamber in advance by way of email.

2. Questioning by the non-calling party

In accordance with Rule 140(2)(b) of the Rules, the non-calling party may question a witness concerning any relevant matters. Unless otherwise directed by the Chamber, leading questions by a non-calling party will be permissible. As a general rule, the non-calling party is expected to take no more than twice the amount of time for its questioning as the calling party took in its questioning of the witness.

3. Questioning by the LRV, if leave is granted

If leave is granted, the LRV will be permitted to question witnesses. Such questioning shall be conducted in a neutral manner, and to the extent relevant to the victims' interests. Requests by the LRV to question a witness shall be made in writing and emailed to the Chamber and the parties seven days before the witness is scheduled to appear. The application shall indicate (i) the specific topics on which the LRV proposes to ask questions, (ii) how this line of questioning is relevant to the victims' interests, and (iii) list the material the LRV wishes to use during the questioning of the witness. Any objections to the application shall be emailed to the parties, LRV and the Chamber within 3 days of receipt. In general, the Chamber will rule on the application(s) orally in Court.

4. Re-examination by the calling party, if leave is granted

In exceptional circumstances, the calling party may be permitted to re-examine its witness, but shall be limited to issues raised for the first time during questioning by the non-calling parties or the LRV. If the Chamber permits the Prosecution to re-examine its witness, the Defence teams will be permitted to ask any final questions of the witnesses in accordance with Rule 140(2) (d) of the Rules.

5. Objections concerning the mode, manner and scope of questioning

Objections by a party or participant during trial concerning the mode, manner or scope of questioning by another party or participant must be raised with the Chamber at the time the question is asked, and will be decided on a case by case basis. After having heard briefly from the parties and the LRV, the Presiding Judge, in consultation with the Chamber, will either rule immediately or, in exceptional cases, will take the matter under consideration and rule at the earliest opportunity.

iv. Hostile witnesses

In exceptional circumstances, the calling party may be permitted to pose leading questions to a witness if the Chamber determines that that the witness has become adverse and not appearing desirous of providing the expected evidence. In such circumstances, the calling party may – having provided the witness with an opportunity to explain deviations from expected testimony – make an application to declare the witness '*hostile*'.

In determining whether a witness is hostile to the calling party, the Chamber may consider, *inter alia*, whether (i) the witness has been uncooperative in his or her general demeanour; (ii) the testimony of the witness before the Court has been in whole or in part deliberately or systematically inconsistent with a prior statement; or (iii) the witness has become systematically oppositional to the calling party, not only by appearing to deliberately impugn the party's case, but in addition by appearing to systematically support the case of the opposing party.

v. Use of material during the examination of a witness

On Thursday of each week, the calling party shall provide the Chamber, other parties and the LRV with a list, via email, of any material to be used during its examination of the witnesses who will be testifying the following week. The calling party shall also indicate any portions or passages intended to be used within this material and whether the party intends to tender the material as evidence.

Any objections thereto shall be notified within two days of the expected start of the witness's testimony. If the material the calling party wishes to use during questioning was not included in its List of Evidence, the party shall apply for leave from the Chamber to add this material to its list. The Chamber will decide on the application after having heard from the other parties and the LRV.

Within 24 hours before the non-calling party questions the witness, the non-calling party shall provide a list of any material it intends to use during its questioning, via email, and if the material is not already available in E-Court, shall provide copies of it to the parties, the LRV and the Chamber. To the extent possible, the party intending to use the material shall ensure that electronic copies have been uploaded into E-Court prior to their use during trial.

Should the LRV wish to use material during the questioning of a witness, the LRV shall follow the application procedure provided in section (G)(ii)(3), above.

In principle, parties shall only use material during the questioning of a witness that has been properly disclosed. The LRV is also directed to provide to the parties any material it wishes to use in sufficient time to ensure that the fairness and expeditiousness of the proceedings is respected.

vi. Using statements to refresh a witness's memory

In principle, a witness shall testify orally to what he or she remembers having personally observed. Witnesses are not permitted to simply read from earlier statements or other documents. However, when the calling party is questioning a witness, the Chamber may allow witnesses to refer to other material in order to refresh their memories, but only insofar as:

(i) The material contains the personal recollections of the witness; and,

(ii) Copies of the material has been properly disclosed to the opposing party, who may rely on the parts referred to by the witness during cross-examination.

vii. Use of audio/visual material during the examination of a witness

Audio-visual material will not be considered for the truth unless it is admitted into evidence. If a party wishes the material to be admitted into evidence, as soon as practicable, and if the material is not already available in E-Court, the party shall provide copies of the material to the parties, the LRV and the Chamber indicating which parts of the recording will be used along with any corresponding translation. If a party wishes to present audio-visual material to a witness, it must establish that the witness has personal knowledge of the making of the recording or its contents. This may be achieved by playing a brief excerpt of the audio-visual material only to the extent strictly necessary for the witness to confirm his/her personal knowledge of it.

[…]

H. Evidence

Pursuant to Article 69 of the Statute and Rule 63(2) of the Rules, the Chamber shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility. In accordance with Rule 64(3) of the Rules, the Chamber will not admit evidence that it considers is *prima facie* without relevance or probative value. In line with Article 69(4) of the Statute, in ruling on the admissibility of evidence, the Chamber will also take into account any prejudice that such evidence may cause to a fair trial or the fair evaluation of the testimony. Likewise, the Chamber will not admit evidence where a determination has been made under Article 69(7) of the Statute. It is for the submitting party to demonstrate the admissibility of the evidence and proffer reasons why it is relevant to and probative of the facts in issue.

i. Expert witnesses

As ordered by the Chamber, on 30 June 2015, the Prosecution disclosed the names of the proposed expert witnesses it intends to call during the presentation of its evidence.The Chamber directs the parties to engage in inter partes consultations to the extent possible, jointly agree on experts. If no agreements can be reached, by 1 December 2015, each Defence team may file a notice indicating whether it (i) challenges the qualifications of the witness as an expert, and/or (ii) challenges the relevance of all, or parts of the report written by the expert, if any.

The procedure set out in section G(ii) and (iii) of this decision concerning the questioning of witnesses appearing in court shall apply *mutatis mutandis* to the testimony of expert witnesses, unless otherwise ordered.

ii. Prior recorded testimony

In respect of the admission into evidence of prior recorded testimony, the Chamber recalls the primacy of orality and the right of the accused to examine or have examined witnesses against him, in accordance with Article 67(1)(e) of the Statute.

If the witness who gave the previously recorded testimony is available and expected to testify before the Trial Chamber, the Rule 68 application shall be filed within 21 days of the date the witness is scheduled to appear, with any objections thereto filed no later than 10 days after notification.

If the witness is not available within the meaning of Rule 68 of the Rules and is therefore not expected to testify, the Rule 68 application may be filed at any time, with objections thereto filed no later than 15 days after notification.

Such application(s) shall be filed together with copies of the previously recorded testimony and shall identify precisely which passages the party wishes to tender into evidence. If these passages contain references to other material available to the calling party, without which the passages would not be understandable, these materials are to be attached to the application.

iii. Submission of evidence not through a witness

In principle, every item of evidence should be introduced through a witness.

However, should a party wish to submit evidence not through a witness, an application to do so shall include:

(i) A description of the item;

(ii) An averment as to its authenticity;

(iii) The reason the item is not introduced through a witness;

(iv) Reasons as to the item's relevance and probative value;

Should the LRV wish to make such an application, it may do so one month before the Prosecution is expected to conclude its presentation of evidence. The LRV shall provide the aforementioned information together with an averment indicating why the material proposed is relevant to the victims' interests and how its admission by the Chamber would contribute to the determination of the truth.

iv. Pattern of conduct evidence

The Chamber has taken note of the Prosecution's proposal that the Chamber set out criteria under which '*pattern of conduct*' evidence would be admissible if relevant. The Chamber decides not to set out criteria in advance. It will rule on the admissibility of such evidence on a case-by-case basis, after having heard submissions from the parties and the LRV.

v. Judicial notice

In accordance with Article 69(6) of the Statute, and as a tool for expediting the proceedings, the Chamber may raise *proprio motu* or a party may request that the Chamber take judicial notice of facts of common knowledge. Prior to rendering any decision to take judicial notice of any facts of common knowledge, the Chamber will receive submissions from the parties and the LRV.

See No. ICC-02/11-01/15-205, Trial Chamber I, 3 September 2015, paras. 9-14, 19-20, 26, 30-48, and 51-61.

The accounts of the Proposed Victims generally corroborate and/or are cumulative of other evidence and information already in the record, and upon which the Chamber reached its findings in the Judgment. In these circumstances, the Chamber considers that it is neither necessary, nor appropriate, to authorise the Proposed Victims to testify or give evidence at this stage. Nevertheless, the threshold to grant applications by victims to give evidence is significantly higher than the threshold applicable to the presentation of victims' views and concerns in person. For this reason, victims who fail to reach the threshold to be authorised to give evidence may still be permitted to express their views and concerns.

The Chamber notes the Legal Representative's submission that the views and concerns presented at trial were not taken into account for purposes of the Judgment, indicating her concern that any such views and concerns will not be taken into account in determining the sentence. In this regard, the Chamber recalls that, although they do not form part of the trial evidence, the victims' views and concerns may assist the Chamber in its approach to the evidence. Further, the Chamber, in considering the appropriate sentence pursuant to Article 76(1) of the Statute, shall take into account the relevant evidence presented and submissions made during the trial. The victims' views and concerns are equivalent to submissions. Accordingly, the Chamber will take them into account, as relevant and appropriate, in determining the sentence.

In deciding whether to hear the Proposed Victims' views and concerns, the Chamber considers whether (i) the personal interests of the individual victims are affected and (ii) the accounts expected to be provided are representative of a larger number of victims, taking into account the nature of the harm suffered and the location of the events.

[…]

Having authorised victims a/0555/08 and a/0480/08 to present their views and concerns, the Chamber decides that the procedure previously followed when hearing victims' views and concerns shall continue to apply, *mutatis mutandis*, at the sentencing hearing, subject to the following modifications. The Chamber considers that video-link is the most appropriate and expeditious manner in which to hear the victims. Each victim shall have one hour in order to present her views and concerns. The Legal Representative should limit her questions to those that would facilitate the presentation of the victims' views and concerns.

See No. ICC-01/05-01/08-3384, Trial Chamber III, 4 May 2016, paras. 33-35, and 40.

The Chamber will hear the Office of the [Prosecutor's] opening statement first, followed by opening statements from the Legal Representatives for Victims ('LRVs') and Defence. The parties will be given five hours to present their opening statements, and the LRVs will be given 2.5 hours to be divided between them as they see fit. The LRVs and Defence may make their opening statements either at the commencement of the trial or just prior to the presentation of their evidence, if any. In the interest of streamlining the presentation of these statements, an opening statement must be presented all at one time – the LRVs and Defence are not allowed to reserve unused time from their opening statements and continue them later during the trial. The LRVs and Defence are to inform the Chamber within 15 days of the commencement of trial if they do not intend to present their opening statements at the commencement of the trial.

[…]

Subject to Articles 64(6)(b) and 69(3) of the Statute, the trial will be organized into: (i) presentation of evidence by the Prosecution; (ii) any presentation of evidence by the LRVs, should leave to do so be granted, and (iii) any presentation of evidence by the Defence. The Chamber's leave must also be sought in order to present '*rebuttal*'/'*rejoinder*' evidence or non-evidentiary '*views and concerns*' of participating victims.

As to the order of questioning for Prosecution witnesses, and subject to Rule 140(2)(c) of the Rules, the Prosecution will question the witness first, followed by the LRVs and the Defence. The LRVs are not required to provide an advance written note of any questions they intend to ask – applications to question may be presented orally just prior to questioning, and the necessity or propriety of questions asked will be addressed on a case-by-case basis. Such questions may also relate to any future reparations proceedings which may occur.

[…]

Given the LRVs' more limited role in the trial proceedings, they are collectively expected to take substantially less time than a questioning party when conducting their questioning. The Chamber will be vigilant in assessing these questions on a case-by-case basis while mindful of the fair and expeditious conduct of the proceedings.

See No. ICC-02/04-01/15-497, Trial Chamber IX (Single Judge), 13 July 2016, paras. 7, 9-10, and 14.

On 13 July 2016, the Single Judge issued the 'Initial Directions on the Conduct of Proceedings' ('Directions'), whereby he ruled that, with regard to opening statements, '*the LRVs will be given 2.5 hours to be divided between them as they see fit.* […] *In the interest of streamlining the presentation of these statements, an opening statement must be presented all at one time – the LRVs and Defence are not allowed to reserve unused time from their opening statements and continue them later during the trial*'.

On 21 November 2016, in accordance with the deadline set in the Directions, the [Legal Representatives] filed a notice regarding the opening statements indicating that, although the [Common Legal Representative] wishes to open at the trial commencement, [they] intend to present their opening statements following the conclusion of the Prosecution's evidence, rather than at the commencement of trial. The [Legal Representatives] seeks clarification from the Chamber as to whether the 2.5 hours estimate applies in the case of the two victim teams opening at different times.

The Directions aim at organising the trial efficiently by, *inter alia*, receiving the opening statements of the two victims teams in a consolidated manner. In this regard, the Single Judge recalls that the victims in this case are represented by two different teams by their own choice and do not have competing interests which would require separate representation. Further, it is apparent from the plain text of the Directions that its reference to the [Legal Representatives of Victims] in the relevant paragraph indicates both [teams]. Thus, the Directions do not give the [Legal Representatives] the discretion to decide to open at two different times. On the contrary, the Presiding Judge specifically prohibited this by explicitly indicating that a participant may not reserve unused time from their opening statements and continue them later during the trial.

Accordingly, the LRs shall liaise with the CLR with a view of reaching a common position as to whether their opening statements shall be held at the start of trial or following the conclusion of the Prosecution's evidence.

See No. ICC-02/04-01/15-602, Trial Chamber IX (Single Judge), 22 November 2016, paras. 3-6.

On 22 November 2016, the Single Judge issued a decision indicating that the Directions require the CLR and LRs to open at the same time and directing them to liaise with a view to deciding whether they will do so at the beginning of the trial or after the presentation of the Prosecution's case ('22 November Decision').

On 25 November 2016, the CLR and the LRVs filed a joint motion reiterating their request to hold their opening statements at two different points in time, thus enabling them to comply with their clients' instructions ('Request').

The Single Judge considers that the Request amounts to a request for a reconsideration of the 22 November Decision. Reconsideration is exceptional and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.

The LRVs fail to satisfy this standard as they neither demonstrate that a clear error of reasoning has been made by the Single Judge in the 22 November Decision nor do they present any new argument. Accordingly, the Single Judge maintains that the LRVs shall open at the same juncture.

The Single Judge notes that the beginning of the trial constitutes a unique symbolic moment in the trial and that, in the present circumstances where the CLR and the LRs fail to reach an agreement, it appears to be the best opportunity for the victims to present their views, which – in both the LRs' and CLR's submission – they have been waiting to do for years.

Further, the Single Judge recalls that the victims in this case are represented by two different teams by their own choice and do not have competing interests which would require separate representation. Thus, having the LRs and the CLR hold their opening statements at two different points in time would inevitably lead to somewhat repetitive submissions, which would not be compatible with the principles of expeditiousness and efficiency of the proceedings.

The Single Judge finally notes the LRs' submissions that they were not yet in a position to consult with all the victims they represent. Given the large number of victims represented by the LRs, the Single Judge understands that consultation with all the victims is a challenge. However, this does not supersede the above mentioned considerations.

See No. ICC-02/04-01/15-610, Trial Chamber IX (Single Judge), 29 November 2016, paras. 5-11.

At the outset, the Chamber recalls that Article 68(3) of the Statute provides that '[w]*here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages if 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*'. The presentation of views and concerns may include the expression of views and concerns by individual victims in person.

The Chamber further recalls that, as held by the Appeals Chamber and acknowledged by other chambers of the Court, while '*the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility and relevance of the evidence*' lies primarily with the parties, victims may be authorised to present evidence in order to assist the Chamber in its determination of the truth. This conclusion is premised on Article 69(3) of the Statute, which authorises the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth, read with Article 68(3), which establishes the right of victims to participate, and Rule 91(3) of the Rules, pursuant to which a chamber leaves open the possibility for the legal representative to move the chamber to request the submission of any evidence.

The presentation by individual victims of evidence on the one hand, and the expression of their views and concerns in person on the other, is governed by different requirements. As a result, victims who are not ultimately authorised to give evidence may still be permitted to express their views and concerns. As noted above, any presentation of victims' views and concerns must occur '*in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*'. Accordingly, the duty to ensure the expeditiousness of the proceedings and thus to avoid any undue delay requires the Chamber to determine whether and when victims shall be authorised to present their views and concerns in person. In the present case, the Chamber will consider whether the personal interests of the individual victims are affected and whether the accounts expected to be provided are representative of the harm suffered by a larger group of victims. In particular the assessment will take into account the nature of the harm suffered and the location of the events alleged by the victims.

A number of requirements have been identified by other chambers for the presentation of evidence by victims. In addition to the demonstration of personal interests that are affected by the current proceedings, the Majority notes that it has been required primarily that: (i) the presentation of evidence needs to be consistent with the rights of the accused, including to a fair, expeditious and impartial trial and the right to have adequate time and facilities to prepare his or her defence; (ii) the '*hearing of the victims*' evidence must be considered appropriate, taking into account its relevance to the issues of the case and the capacity to assist the Chamber in its understanding of the case or evidence heard so far; and (iii) victims are not allowed to testify anonymously. In light of the aforementioned requirements, and of the criteria identified and followed by other chambers, the information provided by the LRV, and the submissions of the parties, the Chamber has conducted an individual analysis for each victim and/or proposed witness in order to determine which victims may be authorised to present evidence or their views and concerns in person.

See No. ICC-01/04-02/06-1780-Red, Trial Chamber VI, 15 February 2017, paras. 8-11.

With regard to the modalities for the presentation of views and concerns, I emphasise that these victims are not giving testimony, they will, therefore, not be taking the oath and not be subject to examination by the parties. The legal representative representing the victims of the attacks will be responsible for guiding the victims through the presentation of their views and concerns. The intervention of the legal representative shall be limited to questions that facilitate and streamline the presentation of the views and concerns by the victim. The Chamber nevertheless encourages the legal representative to have the victims give a narrative as much as possible. The Chamber may have some questions for the victims and will pose such questions whenever it considers it appropriate to do so. While the parties will not question the victims, they may wish to have certain matters clarified. Should this be the case, the party concerned should try and do so towards the end of the presentation. And any request for such clarification is to be directed to the Chamber, which will then decide whether such a clarification is necessary and, if so, whether it will ask the victim to elaborate on his or her presentation, or ask the legal representative to clarify the matter with the victim.

[…]

I would like to highlight the difference between testimonies of victims, which will be heard in April, and presentation of their views and concerns which, in my view, should be mainly focused on, as is even in the name of this procedural measure, views and concerns, which, in my understanding, means that obviously it's not unavoidable that during this presentation also some facts have -- have to be mentioned but, in my view, the core of such a presentation should be, if possible, focus especially on those views and concerns which normally is not part of the classical testimony. But, as I said it is understandable that we also, before listening about feelings and harms affected the victim, that we also have to hear something about the sources of this harm.

See Oral Decision No. ICC-01/04-02/06-T-198-Red-ENG, Trial Chamber VI, 1 March 2017, p. 3, lines 8-24 and p. 5, lines 7-16.

So after silent brief deliberation, our ruling is that in fact the [Legal Representative of Victims] request [to question the Accused] is at the moment granted. As to the topics, in my view, it's not so important because, as [Defence counsel] rightly pointed out, we will decide rather on single objections concerning individual or concrete, concrete questions. The general principle should be that even – you know, there is a part of jurisprudence which is still highly discussed, that the Legal Representative of Victims shouldn't be the second prosecutor. But in my view at least, it doesn't mean that he couldn't deal with some questions which even normally belong to Prosecutor if those questions were not put by Prosecutor and has impact on the interests of the victims represented by Ms Pellet, which also could mean that even acts could be part of her questioning. Those questions should take relevant, relevant facts, should also – shouldn't be repetitive. […] [I]n the light of concrete questions and concrete objections. At the moment we see time requested, three hours, as reasonable. So we even grant for the moment three hours for that examination.

See Oral Decision No. ICC-01/04-02/06-T-238-Red-ENG, Trial Chamber VI, 6 September 2017, p. 83, lines 10-25.

[Regarding an oral request to be permitted to put suggestions to the witness (in this case, the accused)]: So after silent deliberation in the courtroom, our ruling is that we will decide on those cases mentioned by [the LRV] on a case-by-case basis. We will evaluate all aspects of such a suggestion in the concrete context. She said it will be a very limited, so it should be still [*sic*] exemption from the general rule and it's always possible in all cases to grant some exemptions. So we will, as I said, deal with [*sic*] in the light of the concrete request or concrete suggestion.

See Oral Decision No. ICC-01/04-02/06-T-240-ENG, Trial Chamber VI, 8 September 2017, p. 6, lines 9-14

The Single Judge recalls the [I]nitial [D]irections on the conduct of the proceedings […] and indicates the following:

i. 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*'. As stated in the Rule 140 Decision, the [Legal Representatives of Victims] may present evidence after the Prosecution with leave from the Chamber. This said, the Chamber notes that it has already heard many victims in the course of the Prosecution's case. The [Legal Representatives] have also been permitted throughout the trial to question Prosecution witnesses on matters where victims' interests are engaged, including on matters related to any future reparations proceedings which may occur. Additional evidence above and beyond what has already been elicited in the course of the Prosecution's evidence presentation will be permitted only when it is clearly justified. Further, and noting it is for the Chamber to determine the appropriate stages of the proceedings for presenting views and concerns, the Chamber is not provisionally inclined to hear victims present unsworn, non-evidentiary '*views and concerns*' before its Judgment.

ii. The onus is on the Prosecution to prove the guilt of the accused, pursuant to Article 66(2) of the Statute. Conversely, the accused has the right to remain silent and need not present any evidence, as foreseen in Article 67(1)(g) of the Statute. The Defence has already been required to give advance notice of affirmative defences, and gave notice on 9 August 2016 of the possibility of raising an alibi for one of the charged incidents, a mental disease or defect defence, and/or a duress defence.

iii. If the [Legal Representatives] and/or Defence present evidence, the Chamber may set deadlines and request information on their presentation.

iv. The disclosure obligations of the Defence and Prosecution differ significantly, because of the particular role the two parties have at trial. This said, the Defence must permit the Prosecution to inspect any books, documents, photographs and other tangible objects in their possession or control, which are intended for use by the Defence as evidence for purposes at trial. In this regard, the Single Judge has taken note of the Defence disclosure already effectuated up until now. If permitted to present evidence, the [Legal Representatives] also will be required to disclose the evidence it intends to use and the identities of its witnesses sufficiently in advance.

v. The [Legal Representatives] have already given their opening statements, but the Defence may present an opening statement at the beginning of the Defence presentation of evidence if it so wishes.

vi. The timelines and procedures set out in the course of paragraphs 16-38 of the Rule 140 Decision, apply to all participants when presenting their evidence.

By 14 December 2017, the [Legal Representatives] and Defence must provide a preliminary list of witnesses and an estimate of how many hours of witness examination it will require. These lists are for informational purposes and may be changed up until the applicable deadlines for the final lists of witnesses. Subject to any subsequent order by the Chamber, redacting information from the other participants in these preliminary lists may also be done if strictly necessary.

The [Legal Representatives] must present its final lists of proposed witnesses and evidence by 2 February 2018. The [Legal Representatives] must also provide its justifications for why leave should be granted to present evidence. Any responses to the justifications provided must be filed within the standard time specified in Regulation 34 of the Regulations.

In what is currently expected to occur in the spring of 2018, the Prosecution's evidence presentation will be understood as having concluded by way of a formal notice filed by the Prosecution in the case record. This notice must be filed promptly after the conclusion of the Prosecution's last *viva voce* witness.

Within one week from notification of this notice, and to the extent leave to present evidence is granted, the [Legal Representatives] must: (i) confirm its final lists of evidence and witnesses; (ii) certify that all necessary witness information forms have been completed and given to the VWU; (iii) provide anticipated testimony summaries for all witnesses; (iv) complete disclosure of all items it intends to use during its evidence presentation (to the extent not already disclosed); and (v) request any protective measures or relief under Rule 68 of the Rules.

See No. ICC-02/04-01/15-1021, Trial Chamber IX (Single Judge), 13 October 2017, paras. 2-6.

The Chamber considers the Defence's arguments to be meritless. It is important for victims to have their submissions considered in order for their participation in the proceedings to be meaningful. However, sometimes the Chamber reaches its conclusions independently of these submissions and, on this occasion, the Decision's reasoning did not end up relying upon the Victims Response. Any extent to which the Chamber's actual reasoning mirrors the Victims Response is merely coincidental. For the Defence to argue in these circumstances that a lack of reply led to any error or injustice justifying reconsideration is simply untenable. For the same reasons, formally dismissing the Victims Response would serve no purpose.

As noted by the Defence, this Chamber has incorporated by reference the procedure for victim participation set out by the Pre-Trial Chamber. This procedure includes the [Legal Representatives]' '*right to make written submissions to the Chamber*', the '*right of response*', and an acknowledgement that victims could file '*submissions on points of fact and law*' in certain circumstances. The decision amending the response deadline leading up to the Decision contained no qualification as to the kinds of submissions which the [Legal Representatives] could present in response to the Request. The Chamber considers that the Victims Response was filed in conformity with the applicable procedure and Regulation 24(2) of the Regulations. Noting that this particular submission did not affect the Chamber's reasoning, the Chamber considers any further discussion of the scope of the LRVs' participatory rights to be unwarranted.

See No. ICC-02/04-01/15-1152, Trial Chamber IX, 26 January 2018, paras. 6-7.

The Chamber takes note of the prior jurisprudence of the Court in respect of the presentation of evidence by participating victims and the presentation of their views and concerns. It will first discuss the requests to present evidence, then the request for leave to present views and concerns […], and finally provide further guidelines in respect of the testimony of those witnesses for whom leave to testify has been granted.

i) Requests for leave to present evidence.

The Chamber considers it to be the established jurisprudence of this Court that Article 68(3) of the Statute, in conjunction with Article 69(3), provides an avenue for participating victims to lead previously undisclosed evidence, pertaining to the innocence or guilt of the accused, when the personal interests of the victims are affected. This must be undertaken in proceedings deemed appropriate by the Chamber and in a manner which is not prejudicial to the rights of the accused.

Recalling that, according to Article 66(2) of the Statute, the burden of proof regarding the guilt of the accused lies with the Prosecution and that therefore it is the role of the Prosecution to present, in principle, incriminating evidence, the Chamber is required to be vigilant that any presentation of evidence by the victims is in conformity with the rights of the accused.

The Chamber adopts the requirements identified by other chambers in order to determine whether leave to present evidence should be given. Namely, in addition to whether the personal interests of the victims are affected, it will assess whether: (i) the presentation is consistent with the rights of the accused; (ii) the hearing of evidence is appropriate and affects the issues in the case; and (iii) the hearing of evidence is necessary for the determination of the truth.

Further, the Chamber recalls its oral decision of 4 April 2017 on the scope of questioning by the [Legal Representatives]. The same limitations and considerations apply to the questioning of witnesses which are called upon request by the Legal Representatives.

[…]

In respect of the Defence's argument that the Requests should be dismissed because of a failure by the Legal Representatives to submit a list of evidence, the Chamber recalls the timeline set out in its Preliminary Directions. Should the Legal Representatives be allowed to present evidence, they '*will be required to disclose the evidence* [they] *intend* […] *to use and the identities of [their] witnesses sufficiently in advance*.' The Chamber understands the fact that the Legal Representatives did not submit lists of evidence on 2 February 2018 to simply mean that they do not wish to use further items beyond the witnesses' testimonies. The Chamber repeats that it will be vigilant in respect of the observance of the rights of the accused.

Concerning the Defence's observation that it has not been provided with the Acholi translations of the reports of the proposed experts and the alleged violation of the accused's right under Article 67(1)(f) of the Statute, the Chamber recalls that this right (to be provided with translations of documents in a language the accused fully understands) is not without limitation. It is limited to translations of documents which '*are necessary to meet the requirements of fairness*'. Further, the Chamber recalls that the Prosecution is obliged to prepare such translations for the statements of their witnesses. The statutory scheme does not put any specific obligation on victims' representatives to translate – or even take – statements of witnesses they intend to call. As such, it falls to the Chamber to decide on the appropriate disclosure obligations that shall be imposed when victims are permitted to call witnesses.

The Chamber finds that not every expert report for a witness proposed by the Legal Representatives is automatically a document falling under the translation requirement of Article 67(1)(f) of the Statute. It notes that not all reports from experts who already have testified were translated into Acholi, but nevertheless recognised as formally submitted in accordance with the evidentiary system set up by the Chamber.

Further, considering the limitations on questioning by the Legal Representatives, the Legal Representatives' experts will not appear to elicit evidence which aims to prove the elements of the crimes charged or [the Accused's] role in their commission. Rather, these experts are proposed for other matters which are relevant to the personal interests of the victims, including on the nature of the harms personally suffered. Moreover, and unlike the factual witnesses proposed by the Legal Representatives, the proposed expert witnesses will all speak to general matters beyond the four charged attack sites in this case (Pajule, Odek, Lukodi and Abok). These distinctions affect the role and function of the proposed evidence to the case, and the Chamber considers that an Acholi translation of these reports is not a necessary prerequisite to these experts appearing.

For these reasons, the Chamber does not consider that the requirements of fairness mandate the translation of all documents relating to testimony of these witnesses. Nevertheless, the Chamber will order Acholi translations of certain materials in order to facilitate Defence preparations.

As in previous cases, the Defence may nevertheless liaise with the Registry in order to facilitate any request regarding further translations. Should the Defence – after having received the translations and consulted with the accused – be able to substantiate that a significant new line of questioning have arisen for a witness who has already testified, it may request to have this witness recalled.

The Chamber will now turn to a case-by-case assessment of each proposed witness.

(i) Expert witnesses on issues related to children and youth – in particular former child soldiers, proposed by the Common Legal Representative of Victims ("CLRV").

The CLRV proposes to call two experts to testify about the consequences of being a child solider, being forced to participate in hostilities and the long term effects on their psychological and social well-being. The CLRV seeks leave for the two experts to testify together. […].

The Chamber finds that the proposed evidence is not repetitive, as it aims to focus on the psychological, social developmental and behavioral well-being of children under the age of 15 who were participating in hostilities from an expert's point of view. It is true that several witnesses have given first-hand accounts of their own experiences related to this topic. However, the proposed testimony is different in the sense that, since it is evidence provided by experts, a more general conclusion on the entirety of the victims falling under this category can be drawn from this testimony which surpasses the account of an individual experience.

The proposed evidence also affects the issues in the case and is necessary for the determination of the truth, since two of the confirmed charges concern the conscription of children under the age of 15 and their use to participate actively in hostilities. The personal interests of the victims are affected, since many of them were enlisted, conscripted or used to participate actively in hostilities while being under the age of 15.

The CLRV requests to call two experts on this matter, arguing that '*the expertise of these two experts is complementary*'. Since the CLRV explains that both experts have '*extensive experience in former child soldiers' issues*' and '*have experience in the field and are familiar with the Ugandan context*', the Chamber finds it suitable to allow the testimony of one of the proposed expert witnesses. This approach, in the eyes of the Chamber, appropriately balances the rights of the victims where their interests are affected along with the rights of the accused.

The Chamber leaves it up to the CLRV to decide which expert to call. Should the CLRV judge it to be beneficial that the expert report is produced jointly by both proposed experts, the Chamber does not oppose this approach.

The Chamber considers that the report which will be produced by the chosen expert, or jointly, is suitable to be introduced via Rule 68(3) of the Rules, subject to the procedural requisites of Rule 68(3) being satisfied. Considering that the report can be admitted under Rule 68(3) of the Rules, the Chamber considers 2 hours to be an appropriate length of time for the questioning by the CLRV.

(ii) Expert witness on issues related to rape and sexual and gender based crimes ('SGBC'), proposed by the CLRV

The CLRV submits that the proposed expert, Professor Daryn Reicherter, will testify about the various consequences and effects on victims of rape and SGBC. In the production of the expert report, he will be supported by another expert – who the CLRV does not intend to call.

[…]

The Chamber finds that the proposed testimony is not repetitive, since the anticipated expert evidence differs from a first-hand account by a direct victim. The anticipated expert testimony will allow the Chamber to assess the impact of rape and SGBC on the lives of the victims in a more universal manner, which includes victims who did not provide testimony before this Chamber.

The proposed testimony affects the interests of the victims, is relevant to the issues of the case and is necessary for the determination of the truth. Several charges in this case confirmed by the Pre-Trial Chamber relate to rape and SGBC.

The Chamber considers that the report which will be produced is suitable to be introduced via Rule 68(3) of the Rules, subject to the procedural requisites of Rule 68(3) being satisfied. Considering that the report will be introduced pursuant to Rule 68(3) of the Rules and taking the rights of the accused into account, the Chamber finds that 1,5 hours are appropriate for the questioning of this expert by the CLRV.

(iii) Expert witness on Acholi culture, proposed by the CLRV

The CLRV proposes to call Professor Seggane Musisi as an expert on Acholi culture, who will testify, *inter alia*, about '*the expressions and acceptance of emotions and guilt in Acholi culture*', '*the approaches to punishment and reconciliation*' and the impact of Acholi culture on '*how victims describe their past painful experiences or painful memories*'.

[…]

The Chamber finds that, while certain factual witnesses provided evidence on aspects of the topics the expert witness is supposed to testify on, the proposed testimony will allow the Chamber to receive more general evidence on these points, which go beyond the individual accounts of the factual witnesses. In respect of expert witness P-422, the Chamber notes that his testimony centred on aspects regarding the LRA, not the Acholi culture in general. The Chamber is of the view that, due to the high number of victims having an Acholi background, the personal interests of the victims are affected and that the hearing of evidence is appropriate and necessary for the determination of the truth.

Accordingly, the Chamber grants leave to hear Professor Musisi as an expert witness. It considers that the report which will be produced by the witness is suitable to be introduced via Rule 68(3) of the Rules subject to the procedural requisites of Rule 68(3) being satisfied. The Chamber finds that 3 hours are appropriate for the testimony of this expert by the CLRV.

(iv) Expert witness on trauma, proposed by the CLRV

The CLRV requests to call an expert who will testify about '*the definition and assessment of traumas and PTSD in relation to the categories of victims in this case*'. The CLRV assures that the evidence will not be duplicative of the other proposed experts, since this expert '*will concentrate his report generally on PTSD and trauma*'.

The Chamber does not consider that the calling of a general expert on trauma is necessary, considering the anticipated testimony of the other expert witnesses. It reaches this conclusion irrespective of the arguments raised by the Defence on the specific circumstances of this expert. The CLRV notes '*that expertise on traumas has been typically presented in other case before the Court*'. While this is true, it does not necessarily mean that it has been done through an expert testifying solely on the issue of trauma. For instance, one of the decisions relied

upon by the CLRV concerns an expert who was called to testify specifically on the subject of trauma and child soldiers.

The Chamber notes that the proposed expert on child soldiers is expected to testify about '*the difficulties of demobilisation and reintegration*', '*consequences suffered by former child soldiers once they have returned*' and '*the extent of mental health damage*'. The proposed expert on rape and SGBC is expected to, *inter alia*, provide evidence on '*the different types of mental health outcomes*', '*the psychological and social consequences*' and '*the extent of the mental health damage on the individual*'. The proposed expert on Acholi culture is expected to testify, *inter alia*, about '*the expression of PTSD symptoms specific to Acholi culture*'. Accordingly, the trauma expert, as indicated by the CLRV, would testify only '*generally on PTSD and trauma*'. Considering the right of the accused to a fair and expeditious trial, the Chamber finds that the hearing of this witness is not appropriate and necessary for the determination of the truth. Accordingly, the Chamber rejects the request to hear the expert on trauma.

(v) Victim a/05658/15, proposed by the Legal Representatives of Victims ("LRV")

The LRV submits that victim a/05658/15 would present evidence concerning Lukodi [REDACTED]. The witness is called to provide evidence with regard to the impact of the crimes on education. Further, the victim would provide evidence on [REDACTED].

[…]

The Chamber finds that, due to the specific position of the victim, his evidence would not be repetitive, since he can provide a broader view on the impact of the disruption of the education on the victims of abductions. This goes beyond the first-hand accounts which have been provided by Prosecution witnesses thus far.

The Chamber further finds that the personal interests of the victims are affected, since Lukodi is one of the charged locations and victims whose education was interrupted due to abductions by the LRA form part of the participating victims.

As a general matter, the Chamber is of the view that – in order to make the participation of the victims who testify as witnesses before the Chamber meaningful and for the most effective exercise of their rights prescribed by Article 68(3) of the Statute – that this testimony must be as public as possible. This does not mean that the identity of this victim has to be automatically revealed to the public. However, if the fact that a witness's identity is not revealed has the consequence that the substantial parts of the testimony must be given in private session in order to protect the witness's identity, the Chamber considers that the presentation of this evidence would be inappropriate.

With regard the victim a/05658/15, the LRV submits that '[f]*urther discussion would be necessary to determine what, if any, protective measures would be appropriate for this proposed witness*'. While this is consistent with the timeline set out in the Preliminary Directions, the Chamber sees the possibility that the core of the testimony would need to be conducted in private session, due to the very specific position of the victim and his anticipated testimony. Since protective measures have not been requested yet, the Chamber cannot say with certainty whether this will be the case. Bearing in mind the considerations set out in the previous paragraph, the Chamber allows the presentation of evidence by this victim only under the condition that any proposed protective measure will not result in the core of the testimony being provided in private session. The Chamber finds that 1,5 hours are appropriate for the questioning of this witness by the LRV.

(vi) Victim a/06342/15, proposed by the LRV

The victim was present during the attack on Lukodi IDP camp, [REDACTED] and is expected to provide evidence on the '*various and interrelated forms of harm experienced in the Lukodi community*'.

The Chamber notes that the victim has been [REDACTED]. As such, it considers him to be well-placed to provide testimony which touches upon the issues of the case and affects the witnesses' personal interests. The anticipated evidence is not repetitive in the sense that, [REDACTED], the victim can testify more broadly about the effects on the local community. Accordingly, the Chamber allows the victim to testify as a witness. The Chamber finds that 1,5 hours are appropriate for the questioning of this witness by the LRV.

(vii) victims a/05023/15, a/00688/16 and a/06686/15, proposed by the LRV

The LRV request that these three witnesses provide evidence on the issues of sexual violence against men and boys and the desecration of dead bodies.

The Chamber notes that both proposed topics (sexual violence against men and boys and the desecration of bodies) are not part of the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber. As noted by the LRV, the charges for SGBC as confirmed concern crimes against women and girls. Since the acts described by the anticipated testimony would fall under the category of sexual crimes and such acts are not mentioned in the facts confirmed by the decision on the confirmation of charges, the Chamber considers them to be beyond the scope of the charges.

The Chamber states that it is not assessing the veracity of the anticipated testimony and disagrees with the Defence's characterisation of the expected testimonies as '*highly incredulous*'. However, in view of the above and taking into account the rights of the accused, the Chamber does not consider the hearing of this evidence to be appropriate and necessary for the determination of the truth.

Accordingly, the Chamber rejects the request by the LRV to call these three witnesses.

(viii) victim a/00613/16, proposed by the LRV

The LRV submits that this victim is expected to provide evidence on the attack on Abok and the stigma experienced by returned abductees.

[…]

The Chamber finds that, while evidence on the Abok attack has indeed been provided by previous witnesses, the fact that the witness did not receive any rehabilitation after his return is sufficiently different to allow him to be called as a witness. This is also done based on the consideration that this testimony will focus on life in his community after his return.

In order to take the rights of the accused appropriately into consideration, the Chamber finds that 1,5 hours an appropriate length of questioning by the LRV.

(ix) Experts on the victimisation of the affected communities, proposed by the LRV

The LRV requests to call two expert witnesses on the victimisation in the affected communities, including the '*harm suffered in the communities affected by the crimes charged*'.

The LRV submits that their respective evidence would '*complement each other*' and argue that the anticipated evidence would not address subjects already sufficiently addressed by Prosecution witnesses.

The Chamber notes that the anticipated testimony would address the psychosocial impact of the conflict on the affected victim communities. As stated previously with the other experts, the Chamber is of the view that the general nature of the testimony is distinct from personal experiences provided by previous factual witnesses and is therefore not repetitive. The proposed testimony affects the interests and concerns of the victims and the issues in the case.

However, keeping in mind the rights of the accused, the Chamber is not convinced that the testimony of both experts is appropriate. From the LRV's submissions, the Chamber understands that both experts would produce a joint expert report. The Chamber is not opposed to receiving a joint report, but finds that it is sufficient that Ms Teddy Atim – who is also based in Uganda – provides evidence.

The Chamber considers that the report which will be produced by the expert(s) is suitable to be introduced via Rule 68(3) of the Rules, subject to the procedural requisites of Rule 68(3) being satisfied. Considering that the report can be admitted under Rule 68(3) of the Rules, the Chamber considers 1,5 hours to be an appropriate length of time for the questioning by the LRV.

ii) Request for leave to present views and concerns

The LRV requests leave for two victims to present their views and concerns. The LRV submits that the persons are two community leaders who adequately represent the diversity of their clients – one being from the Langi community and the other being from the Acholi community; and one being a man and the other being a woman.

In respect of the timing of the presentation of views and concern, the LRV argues that hearing the victims' views and concerns at this stage of the proceedings enables the judges to take them into consideration when writing the judgment, that a potential representation of views and concerns during the sentencing or reparations phase will be understood as them being of secondary importance and that – should the accused be acquitted – there would not be any possibility for such presentation.

[…]

The Chamber recalls that it indicated that it was '*not provisionally inclined*' to allow the presentation of victims' views and concerns at this stage of the proceedings. It does not agree with the LRV that there are compelling reasons to hear views and concerns at this point in time.

As pointed out by the LRV, such presentation would not be part of the evidentiary record and can therefore not be taken into account in the judgment. The Chamber does not follow the argument that this presentation may explain better which parts of the judgment might require particular attention so as to be understood by the victims' communities. The Chamber considers that, through the questioning of the Prosecution witnesses by the Legal Representatives and the upcoming testimony of the witnesses to be called by the Legal Representatives, it has sufficient information to adequately address all points of the judgment, along with the views of the victims' communities.

The Chamber disagrees that the possible acquittal of the accused is an appropriate factor to take into consideration for deciding whether to allow the victims to present their views and concerns before the judgment.

In respect of the argument that a presentation of views and concerns at a later stage in the proceedings might be perceived as '*of secondary o*[r] *subsidiary importance*', the Chamber finds that while this might be true to a certain degree, there are countervailing considerations. As prescribed by Article 68(3) of the Statute, the right to present views and concerns must be '*determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the right of the accused and a fair and impartial trial*'.

The Chamber notes that the Legal Representatives both chose to present their opening statements at the beginning of the trial and that there will be a possibility for them to make closing statements after the conclusion of the defence case and the closure of the evidence. The Chamber does not deem it appropriate to hear additional submissions, which are not related to the presentation of the evidence or subject to scrutiny through Defence questioning, at this stage of the proceedings. Accordingly, the Chamber rejects the part of the LRV Request to present views and concerns of the victims at this stage of the proceedings. This ruling is irrespective of any decision on a request to present views and concerns at a later stage of the proceedings.

[…]

IV. Implementation of the Decision

As previously indicated, and in order to protect of the rights of the accused, the Legal Representatives are required to provide within one week after the Prosecution has filed its formal notice that it concluded its evidence presentation: (i) confirmation of its final lists of evidence and witnesses; (ii) certification that all necessary witness information forms have been completed and provided to the VWU; (iii) summaries of the anticipated testimonies; (iv) disclosure of all items which are intended to be used during the evidence presentation; and (v) any request for protective measures or relief under Rule 68 of the Rules.

The Chamber notes that the above-mentioned deadline is the last point in time when these actions need to take place and encourages the Legal Representatives to undertake them as early as possible. In respect to (iii), and in order to facilitate the preparation of the Defence, the Chamber directs that Acholi translations be produced of the anticipated testimony summaries. The Chamber further specifies that the applications for victim participation need to be disclosed and – as they are the closest thing these witnesses have to a prior statement – these applications must be translated into Acholi. The Legal Representatives are instructed to liaise with the Registry as soon as possible in order to receive the translations in a timely manner.

The Legal Representatives are further directed to provide any victim applications of close relatives of the witnesses. Should the Legal Representatives consider that any redactions are necessary, these are to be implemented in accordance of the redaction protocol applicable in this case. The Chamber intends to hear the testimony of one witness per day, meaning that the other participants combined have roughly – in the majority of the cases – an equal amount of time to question as the calling Legal Representative. This division of time is done keeping in mind the purpose and modalities of the questioning of the witnesses by the Legal Representatives, […]. However, some degree of flexibly will be provided should the need to have more time for questioning arise. The Legal Representatives are to jointly agree on an order of appearances of the witnesses and to communicate this order to the parties and the Chamber on the same day […].

By the same date, the Chamber further expects the Legal Representatives to indicate the mode of testimony (at the seat of the Court, via video-link, *etc.*) for each witness. The Legal Representatives are to liaise with the Registry and make all necessary logistical arrangements sufficiently in advance in order to enable the testimony for each witness. In the interest of ensuring that the trial proceeds expeditiously and without undue delay, if these essential arrangements are not made on schedule, then the Chamber may – amongst other possible measures – require a different mode of testimony.

See No. ICC-02/04-01/15-1199-Red, Trial Chamber IX, 6 March 2018, paras. 14-18, 20-33, 35-38, 40-46, 48-60, 62-71, 73-77, and 79-83.

As previously noted by the Chamber, reconsideration is an exceptional measure which should only be done if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice. New facts and arguments arising since the issuance of the decision might be taken into consideration.

The LRV argue that the Chamber erred in finding that the issues of the Anticipated Testimony are beyond the scope of the charges. They submit that while it is true that the charges concerning sexual and gender based violence do not cover the topics of the anticipated testimonies, these acts fall under other crimes which were confirmed.

The Chamber notes that from the arguments brought forward by the LRV there seems to be a misunderstanding. The paragraph of the Decision in question provides as follows (citations removed):

The Chamber notes that both proposed topics (sexual violence against men and boys and the desecration of bodies) are not part of the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber. As noted by the LRV, the charges for SGBC as confirmed concern crimes against women and girls. Since the acts described by the anticipated testimony would fall under the category of sexual crimes and such acts are not mentioned in the facts confirmed by the decision on the confirmation of charges, the Chamber considers them to be beyond the scope of the charges.

In this passage, the Chamber considered that presenting such evidence was not sufficiently warranted because it would exceed the facts and circumstances of the sexual and gender based crimes in this case. This was consistent with the LRV's position in its request to call evidence, conceding in its submissions that '*the charges confirmed against the Accused in respect of sexual and gender-based crimes (charges 50-68) are specifically concerned with crimes against women and girls*'.

But the Chamber never indicated that the evidence proposed by the LRV was unrelated to the case entirely. Similar to what has been determined in other contexts, evidence that is not squarely part of the facts and circumstances described in the charges could still have been relevant to other parts of the case, such as other confirmed charges or the contextual elements charged.

In respect of the injustice argued by the LRV, the main concern seems to be the fear that the victims of the form of sexual and gender based violence for which the Anticipated Testimony is brought forward will be excluded from potential reparation proceedings. In this respect, the Chamber considers that the question of reparation is premature to be discussed at present, and in any event, the Decision made no pronouncement about any potential reparations phase or reparations eligibility. Accordingly, the LRV's claim of injustice is without any merit.

In respect of the argument that the lack of establishing the truth regarding the allegations contained in the Anticipated Testimonies causes an injustice which warrants a reconsideration of the Decision, the Chamber reiterates the requirements set out for granting leave to present evidence by the Victim Representatives. It also recalls, again, that the fact that it does not grant leave to call these witnesses is in no way a determination on the truthfulness of the allegations. As previously stated, the rights of the victims where their interests are affected need to be balanced with the rights of the accused.

Accordingly, the Chamber does not find that there is an injustice warranting a reconsideration of the Decision. Accordingly, the Chamber does not consider that there are exceptional circumstances justifying the reconsideration of the Decision and consequently rejects the Request.

See No. ICC-02/04-01/15-1210, Trial Chamber IX, 26 March 2018, paras. 6-13 (reclassified as public on 28 March 2018).

With the Office of the Prosecutor having provided its official notice of closure of the Prosecution evidence, the Presiding Judge considers this to be an appropriate moment to issue further instructions on the filing of closing briefs and closing statements. The directions are given at this early point in time to provide the parties and participants with the maximum amount of time to organise and plan their workload.

The closing briefs by the parties and participants, should they wish to file any, are to be filed six weeks after the declaration of the closure of the submission of evidence. The purpose of these submissions is to provide a succinct summary of their views, positions and arguments on the confirmed charges and the evidence presented during trial. They are not meant to be a discussion between the parties and participants on how they assess the evidence but simply an additional tool for the assessment by the Chamber. It is therefore not necessary to receive the closing submission of another party or participant beforehand. Accordingly, all closing briefs are to be filed on the same date.

The Presiding Judge orders that the Prosecution and Defence limit their closing briefs to 200 pages and considers the statutory page limit of 120 pages to be sufficient for the Legal Representatives for Victims.

The Presiding Judge has fully considered the rights of the accused under Article 67(1)(f) of the Statute and recalls the previous jurisprudence of the Chamber on this issue. He repeats that the right to translations is not without limitations and is confined to translations necessary to '*meet the requirements of fairness*'.

In this instance, the Presiding Judge does not consider it necessary for the fairness of trial that Acholi translations of the closing submissions must be filed. All closing briefs are independent of each other and are not reactionary to the ones made by other parties and participants. They are merely an additional assistance for the Chamber's benefit. The Presiding Judge notes that the '*pre-confirmation brief*' filed during the confirmation stage and the pre-trial brief at the trial stage were also not translated into Acholi. Furthermore, the legal nature of the closing briefs is such that they have no independent evidentiary value the Statute and Rules do not even require that a closing brief be received during trial proceedings.

As explained above, the closing briefs will merely be a summary and reiteration of the parties and participants' views and positions. They will therefore not contain anything substantially new. The accused is already aware of the case against him and all arguments raised up until this point in the proceedings. He has also heard (in Acholi) the evidence presented in court. Lastly, the legal team of the accused fully understands the language in which the closing briefs will be filed.

Should the Defence consider that certain discrete parts of the other participants' closing briefs require translation in order to prepare for the closing statements, it can liaise with the Registry accordingly. The closing statements will be held two weeks after the filing of the closing briefs. Further details will be provided at a later point in the proceedings.

See No. ICC-02/04-01/15-1226, Trial Chamber IX (Single Judge), 13 April 2018, paras. 2-8.

The Chamber is not persuaded that a delay of one month to the opening of the Legal Representatives' evidence presentation is necessary in order to ensure protection of the accused's rights under Articles 64(2), 67(1)(b) or 67(1)(e) of the Statute.

The Chamber is conscious of the Defence's duty to review comprehensively all items disclosed and subsequently confer with the accused. However, the Chamber finds that there is not an overly cumbersome burden of preparation, in the time available, upon the Defence when considering: (i) the purpose of this part of the proceedings; (ii) the restrictions on the evidence the Legal Representatives are allowed to elicit; and (iii) the quantity (as well as purpose and content) of the materials disclosed.

In general, the role of the Legal Representatives and any evidence elicited by them serves a different purpose to that of evidence presented by the Prosecution. The Chamber reiterates that the burden of proof regarding the guilt of the accused lies with the Prosecution and therefore it is the role of the Prosecution, and not the Legal Representatives, to present, in principle, incriminating evidence. […] While the Chamber will decide the issue on a case-by-case basis, the Legal Representatives should not attempt to '*elicit evidence which aims to prove the elements of the crimes charged or* [the Accused's] *role in their commission*'.

The main purpose of this particular phase of the proceedings is to allow the Legal Representatives to pose questions to witnesses regarding matters '*relevant to the personal interests of the victims*' (such as the nature of the harms suffered), or in the case of experts to elicit evidence which more broadly assists the Chamber with the determination of the truth. In this particular instance the experts will all speak to general matters unrelated to [the Accused's] individual criminal responsibility (such as victimisation of affected communities, Acholi culture, issues related to children and youth, and effects on victims of sexual/gender based crimes).

Furthermore, many of the items disclosed by the Legal Representatives only have an ancillary role in the questioning of the witnesses. This was highlighted in a recent decision ordering the CLRV to remove 13 of their 23 disclosed items from their list of evidence (totaling 759 pages, or almost 60% of all pages disclosed), confirming that these items cannot be submitted for the Chamber to consider in its judgment.

The Chamber has in the past, keeping in mind the rights of the accused, deliberately set new disclosure deadlines to allow the Defence sufficient time to prepare. Taking into account the purpose, content and quantity of the disclosed materials, the Defence has been given adequate time to prepare itself for the Legal Representatives' evidence presentation. The accused has not suffered any undue prejudice in the present case and an extension of one month is not necessary.

It should also be noted that that the Defence has been in possession of the disclosed material since 5 April 2018. Therefore, the Defence has been aware of the volume of the materials at issue for well over two weeks, and submitting this Request three working days before the start of the Legal Representatives' case is unacceptable. […].

See No. ICC-02/04-01/15-1248, Trial Chamber IX, 26 April 2018, paras. 11-17.

The procedure for the presentation of evidence by the common legal representative set forth at paragraphs 18-21 of the Directions on the Conduct of Proceedings, in particular – for documentary evidence – at paragraph 20. The Application makes reference to paragraph 20, and contains submissions on its requirements. It is therefore properly before the Chamber. The Chamber considers that the requirements of paragraph 20 of the Directions of the Conduct of the Proceedings have been met with respect to the proposed item. The common legal representative has sufficiently established that the proposed document is relevant to the victims' interests, would contribute to the determination of truth and is not repetitive of other evidence in this trial. The application to submit the document must therefore be granted.

See No. ICC-02/11-01/15-1188, Trial Chamber I, 19 June 2018, para. 9.

As regards the Defence's claim that the OPCV Response should be rejected *in limine* since it went beyond presenting the views and concerns of the victims, the Single Judge is not persuaded that this is the case, especially in light of the Defence's sweeping statement that only one paragraph of the OPCV Response actually deals with the victims' views and concerns. This is unsubstantiated and exaggerated. In the absence of any detailed submissions in this regard, the Defence's request is rejected.

See No. ICC-02/11-01/15-1212, Trial Chamber I, 21 September 2018, para. 20.

6. Modalities of participation during interlocutory appeals

It is for the Chamber to ensure that the manner in which victims present their views and concerns is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Accordingly, in ordering the manner of participation of victims to comply with the rights of future suspects or a fair and impartial trial, the Appeals Chamber will limit the victims to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal. Observations to be received by the victims must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings.

See No. ICC-02/05-138 OA OA2 OA3, Appeals Chamber, 18 June 2008, paras. 60 and 62. See also No. ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, para. 101; No. ICC-01/04-01/06-1452 OA12, Appeals Chamber, 6 August 2008, para. 12; No. ICC-01/04-01/06-1453 OA13, Appeals Chamber, 6 August 2008, para. 11; No. ICC-01/04-01/06-1335 OA9 OA10, Appeals Chamber, 16 May 2008, para. 50 and No. ICC-01/04-01/10-509 OA4, Appeals Chamber, 2 April 2012, para. 12.

In ordering the manner of participation of victims to comply with the rights of future suspects or a fair and impartial trial, the Appeals Chamber will limit the victims to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal. Observations to be received by the victims must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings.

In light of the similarities, the number and the complexities of the issues on appeal the Legal Representatives of the relevant victims are each directed to file a consolidated document pertaining to their views and concerns in respect of all three appeals.

See No. ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, paras. 101-102.

According to the Appeals Chamber's jurispmdence on the participation of victims in appeals under articles 19(6) and 82(1) (a) of the Statute, victims who made observations according to article 19(3) of the Statute and rule 59(3) of the Rules of Procedure and Evidence in the proceedings before the Pre-Trial or Trial Chamber may submit observations before the Appeals Chamber. For the purpose of regulating and expediting the conduct of the proceedings arising from this appeal, the Appeals Chamber in these Directions determines that the victims who were represented by the OPCV in proceedings on the Jurisdictional Challenge before the Pre-Trial Chamber and made observations pursuant to article 19(3) of the Statute may also submit observations on the document in support of the appeal and the response thereto.

See No. ICC-02/11-01/11-236 OA2, Appeals Chamber, 31 August 2012, para. 3.

As to the manner of participation, the Appeals Chamber considers that the Victims in the present appeal will be limited to the written presentation of their views and concerns with respect to their personal interests relating to the issues raised in this appeal. The suspect and the Prosecutor will be permitted to reply to the Victims' views and concerns, in accordance with rule 91(2) of the Rules of Procedure and Evidence. In the view of the Appeals Chamber, this manner of participation does not cause prejudice to, nor is it inconsistent with, the rights of the accused and a fair and impartial trial. The fourth criterion for victim participation under article 68(3) of the Statute is therefore satisfied.

See No. ICC-02/11-01/11-491 OA4, Appeals Chamber, 27 August 2013, para. 14.

The Appeals Chamber finds that the present appeal is a stage of the proceedings in which the participation of the Victims is appropriate in light of the potential consequences of the appeal. As to the manner of participation, the Appeals Chamber decides that the Victims may participate in the present appeal by making written submissions limited to their views and concerns with respect to their personal interests in the issues raised in this appeal. The Appeals Chamber considers that the participation of the Victims in the present appeal, in that manner, is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Furthermore, the suspect and the Prosecutor will be permitted to respond to the Victims' views and concerns, in accordance with rule 91(2) of the Rules of Procedure and Evidence.

See No. ICC-02/11-01/11-492 OA5, Appeals Chamber, 29 August 2013, para. 11.

7. Modalities of participation at the appeal stage

Pursuant to rule 91(1) of the Rules of Procedure and Evidence, and having regard to rules 91(2), 92(5) and (6) of the Rules of Procedure and Evidence, the Appeals Chamber determines that the victims may participate in the present appeals in the following manner: the Legal Representatives of Victims V01 and V02 may present the victims' views and concerns with respect to their personal interests in the issues on appeal by filing consolidated observations on the three Documents in Support of the Appeals. The convicted person and the Prosecutor may each file a consolidated response to the victims' observations. Should the need arise to specify the modalities of victims' participation in the pending appeals further, the Appeals Chamber will give supplementary directions, either upon its own motion or upon application by the Legal Representatives of Victims V0I and V02.

See No. ICC-01/04-01/06-2951 A4 A5 A6, Appeals Chamber, 13 December 2012, para. 5

Pursuant to rule 91(1) of the Rules of Procedure and Evidence, and having regard to rules 91(2), 92(5) and (6) of the Rules of Procedure and Evidence, the Appeals Chamber determines that the victims may participate in the present appeals in the following manner: the legal representatives of victims may present the victims' views and concerns with respect to their personal interests in the issues on appeal by each filing observations on the document in support of the appeal and the response to the document in support of the appeal. The accused person and the Prosecutor may each file a consolidated response to the victims' observations. Should the need arise to specify the modalities of victims' participation in the pending appeals further, the Appeals Chamber will give supplementary directions, either upon its own motion or upon application by the legal representatives of victims.

See No. ICC-01/04-02/12-30 A, Appeals Chamber, 6 March 2013, para. 5.

The Appeals Chamber recalls that the Trial Chamber should have decided these applications, latest at the sentencing stage of the proceedings. The Appeals Chamber finds that these victims would have been subject to the Decision of 13 December 2012. Therefore, the Appeals Chamber also finds it appropriate to allow the 30 victims hereby authorised to participate in the proceedings the opportunity to file observations on the three documents in support of the appeals A 4 A 5 A 6. To this end, the Legal Representatives of Victims V01 and V02 are requested to contact the victims whom they represent and who are hereby authorised to participate in order to ascertain their views and concerns with respect to their personal interests in the issues on appeal in the present proceedings. Should the 30 victims express views and concerns that are different to those that have already been submitted in the consolidated observations of the 120 participating victims, the Legal Representatives of Victims V01 and V02 are requested to file a short submission presenting these views and concerns.

See No. ICC-01/04-01/06-3045-Red2 A4 A5 A6, Appeals Chamber, 27 August 2013, para. 171. See also, No. ICC-01/04-01/06-3052-Red A4 A5 A6, Appeals Chamber, 3 October 2013, para. 10.

8. Specific issues related to the modalities of participation

8.1 Access to documents in general

Legal Representatives of victims participating in the proceedings shall not be given access to any non- public document contained in the record of the situation in the DRC.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, p. 42. See also No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, para. 6, and No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, p. 60.

If the Prosecution has no obligation to provide the Defense with full access to the Prosecution situation and case files, the Prosecution cannot be under any obligation to provide such access to those granted the procedural status of victim at the pre-trial stage of a case. In other words, the latter's access rights can by no means exceed those access rights granted by the Statute and the Rules to the Defense.

The right to have full access to the Prosecution's situation and case files cannot be part of the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case.

[…]

If the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case were to include access, prior to the confirmation hearing, to the evidence proposed by the parties, such right could be satisfied by allowing victims to consult the record of the case kept by the Registry.

[…]

If victims were to be denied access to confidential filings, they would essentially be prevented from effectively participating in the evidentiary debate held at the confirmation hearing.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 88-89, 118, and 151.

Only the Legal Representatives of non-anonymous victims shall have the rights to access the confidential part of the record of the present case and to attend closed session hearings; and that therefore non-anonymous victims shall not have access to the confidential part of the case record nor shall they attend closed session hearings.

See No. ICC-01/04-01/07-537, Pre-Trial Chamber I (Single Judge), 30 May 2008, p. 12.

The Chamber is of the view that, in order to promote effective participation of vicitms 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*.

See No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 Janaury 2010, para. 121.

The 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 it 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. Therefore, in order to guarantee the effective expression of the views and 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.

See No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, para. 47. See also No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, para. 123.

Pursuant to rule 121(10) of the Rules, victims or their Legal Representatives may consult the record of all proceedings before the Pre-Trial Chamber, created and maintained by the Registry in accordance with the said provision. However, the same provision clarifies that such right is "*subject to any restrictions concerning confidentiality and the protection of national security information*".

The Single Judge thus considers that the Legal Representative of the victims authorised to participate pursuant to the present decision has the right, during the confirmation hearing and in the related proceedings, to have access to all public filings and public decisions contained in the record of the case. The right of access to the public record of the case extends to the public evidence filed by the Prosecutor and the Defence and contained in the record of the case, in the same format (*i.e.* unredacted versions, redacted versions or summaries, as well as electronic versions with the metadata required by the e-Court Protocol) in which it has been made available to the party which has not proposed it. In relation to those decisions, filings or evidence that are classified as "*confidential*", the Chamber retains the option to decide on a case-by-case basis, either *proprio motu* or upon receipt of a specific and motivated request, whether to grant victims' Legal Representative access thereto.

Finally, in light of the presence of the victims' Legal Representative in the courtroom, the Single Judge is of the view that she should also have access to the transcripts of:

(i) The public sessions of the confirmation of charges hearing;

(ii) The sessions of the confirmation of charges hearing held *in camera* or *ex parte* which the Legal Representative was authorised by the Chamber to attend;

(iii) The other public hearings and status conferences held in the present case; and

(iv) Any other *in camera* or *ex parte* hearings which the Legal Representative will attend pursuant to the Chamber's authorisation.

The Chamber reserves its right to decide on a case-by-case basis, on its own motion or upon receipt of a specific and motivated request, whether to grant the victims' Legal Representative access to the transcripts of non-public sessions of the confirmation of charges hearing or of non-public hearings and status conferences that the Legal Representative will not have been authorised to attend as well as to the transcripts of non-public hearings or status conferences held before the issuance of the present decision. Despite the absence of any such request at this moment of time, the Single Judge is of the view that, in order for the Legal Representative of victims to duly perform her duties as well as to meaningfully exercise her rights as established in the present decision, the victims' legal representative shall be granted *proprio motu* access to the redacted and unredacted versions of the applications for participation submitted by the victims hereby admitted to participate at the confirmation of charges hearing and in the related proceedings. The Registry is thus instructed accordingly.

According to rule 92(5) and (6) of the Rules, the victims' Legal Representative shall be notified by the Registrar of all decisions and filings filed during the proceedings in which they are admitted to participate. In light of this provision and mindful of the restriction to the access to confidential information as set forth in rule 121(10), the Single Judge holds that the Legal Representative of victims is entitled to be notified, on the same basis as the Prosecutor and the Defence, of:

(i) All requests, submissions, motions, responses and other documents within the meaning of regulation 22 of the Regulations of the Court which are filed as '*public*' in the record of the case;

(ii) All the public decisions of the Chamber in the present proceedings; and

(iii) Of the confirmation of charges hearing and any postponement thereof, as well as the date of delivery of the decision in accordance with rule 92(5) of the Rules.

The Chamber, however, considers that if a party or a participant in the present proceedings wishes to notify a document classified as "*confidential*" to the victims' Legal Representative, it may do so by including in the said document the name of the Legal Representative to be notified thereof. The Registry shall then notify the Legal Representative accordingly. The Single Judge considers that, despite the classification as "*confidential*" of the annex attached to the present decision, the notification thereof to the common Legal Representative of victims is essential. The Registry is thus instructed to notify the said annex to the Legal Representative of victims.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 90-97. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, paras. 107-114.

The Single Judge is of the view that, in order for the Legal Representatives of victims to exercise the rights established in the present decision, they must be granted access the Document Containing the Charges which is currently classified as confidential.

See No. ICC-01/04-01/10-351, Pre-Trial Chamber I (Single Judge), 11 August 2011, para. 44.

NOTING the OPCV "Request to access documents in the case record in relation to the Defence Challenge to the Jurisdiction of the Court" dated 18 August 2011, wherein the OPCV requests to be notified of:

(i) Annexes B and C to the Defence Challenge, currently classified as confidential;

(ii) Annexes 1 to 5 to the "Prosecution Response to the 'Defence Request for Disclosure'" currently classified as confidential and mentioned in the "Prosecution's response to the Defence Challenge to the Jurisdiction of the Court ICC-01/04-01/10-290";

(iii) Any other relevant documents in relation to article 19 proceedings;

(iv) Unredacted version of the Document Containing the Charges; and

(v) Systematically, any document submitted by the parties, participants and/or the Democratic Republic of the Congo related to the Defence Challenge and which might be classified confidential.

NOTING articles 19(2), 19(3) of the Rome Statute, rules 58 and 59 of the Rules of Procedure and Evidence;

CONSIDERING that the participation of "*victims that have communicated with the Court*" in accordance with article 19(3) of the Statute is regulated by rule 59 of the Rules and strictly limited to the following (i) to be informed of the challenge (rule 59(1) of the Rules); (ii) to be provided, in a manner consistent with the duty of the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence, with a summary of the grounds on which the jurisdiction of the Court has been challenged (rule 59(2) of the Rules); and (iii) to make representation in writing to the competent Chamber within such time limit as it considers appropriate (rule 59(3) of the Rules).

FOR THESE REASONS

GRANTS the OPCV Request in relation to the requested notification of annexes B and C to the Defence Challenge only;

REJECTS the OPCV Request in relation to all other requested notifications;

ORDERS the Registrar to notify the OPCV and the Legal Representatives of victims of annexes B and C to the Defence Challenge, currently classified as "*Confidential*".

See No. ICC-01/04-01/10-382, Pre-Trial Chamber I, 18 August 2011, pp. 4-5.

The common Legal Representative of victims grounds his Request on three main arguments. First, he seeks access to confidential material disclosed by the Prosecutor "*on the basis that it has already been redacted in order to withhold the most sensitive material from the defendants*". Second, it is claimed that access to confidential material disclosed by the parties is necessary "*to ensure that victims' recognized interests are properly represented before the Chamber*". In this sense, it is the view of the Legal Representative that "*allowing* […] [him] *to make an opening and closing statement, but depriving him of access to the material on which the confirmation hearing is based, would be tantamount to participation by the victims in form, but not substance*". Finally, it is contended that the disclosure of all confidential material to the victims' Legal Representative favours judicial economy. To the contrary "*requiring the parties to make submissions for and/or against disclosure based upon the importance of a document to victims' interests relative to any potential sensitivity of the material would be time-consuming and require individual determination*".

At the outset, the Single Judge recalls the Decision on Victims' Participation, wherein the principle approach towards victims' procedural rights within the context of the confirmation of charges hearing and related proceedings has been established. First, the Single Judge held that a number of provisions of the applicable law *expressis verbis* confer upon victims certain rights that they could exercise *ex lege*, through their Legal Representative. Beside them, other rights may be granted to the victims, either *proprio motu* by the Chamber or "*upon specific and motivated request submitted by the Legal Representative*", and provided that the personal interests of the victims are affected by the specific issue(s) under consideration. With respect to the latter category, the Single Judge specified that determining whether or not it is appropriate to grant any specific rights to the victims is an exercise that cannot be conducted *in abstracto*, but, conversely, shall be performed on a case-by-case basis, upon specific and motivated request by the Legal Representative and "*in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*", as stipulated by article 68(3) of the Statute. With specific regard to the rights of the victims to access decisions, filings and evidence that are classified as confidential, the Single Judge has held in the Decision on Victims' Participation that "*the Chamber retains the option to decide on a case-by-case basis, either* proprio motu *or upon receipt of a specific and motivated request*" whether to grant the victims' Legal Representative access to such material.

The Single Judge wishes to stress that, in the event of requests to access material withheld to the victims pursuant to rule 121(10) of the Rules of Procedure and Evidence, as in the present case, the approach established in the Decision on Victims' Participation is designed to avoid situations in which the victims' Legal Representative aims at collecting, indiscriminately, all material on which the parties intend to rely for the purposes of the confirmation of charges hearing, irrespective of its pertinence to any issue at stake and regardless of findings as to whether victims' interests are affected by that issue. The Single Judge shares the views expressed by the Defence, according to which the Request is essentially departing from the approach towards victims' rights under article 68(3) of the Statute as well as from the Decision on Victims' Participation. The Single Judge also agrees with the submission of the Prosecutor that "*access to confidential material should not be granted except on a case-by-case basis, and only when the victims can demonstrate that the material relates to issues specific to their*

interests and the Chamber determines that the interests of the victims outweigh the need to retain the confidentiality of the information".

In the view of the Single Judge, the Request runs contrary to the principle according to which any request pursuant to article 68(3) of the Statute shall demonstrate how the personal interests of victims are affected by the specific issue(s) at stake. Absent any specific issue identified by the victims' Legal Representative in the present circumstances and having failed to show any impact thereof on the victims' personal interests, the Single Judge considers that the Request remains in the abstract and must be rejected.

See No. ICC-01/09-02/11-326, Pre-Trial Chamber II (Single Judge), 14 September 2011, paras. 7-13.

In the Request, the victims' Legal Representative submits that the issue of "*diligence and adequacy*" of the investigation carried out by the Prosecutor in the present case, as raised by the Defence teams of the Suspects, has "*a very direct bearing on the interests of the victims*". The common Legal Representative asserts that the personal interests of the victims "*would therefore clearly be directly affected if the crimes of which they were victims are not diligently and adequately investigated and prosecuted*" by the Prosecutor. It is contended that "*without access to the evidence that the Prosecutor has produced to date, the victims' representative is in no position at all to form any view on whether, as contended by the Defence, the Prosecution investigation has been wholly inadequate*".

The Single Judge notes articles 21(1)(a), (3) and 68(3) of the Statute, rule 121(3) and (10) of the Rules of Procedure and Evidence.

At the outset, the Single Judge wishes to make two clarifications. First, in the course of the confirmation of charges hearing, the victims effectively enjoyed – through their Legal Representative – the rights accorded to them, either *expressis verbis* in the Statute and the Rules or pursuant to an authorization by the Chamber. Second, the victims' Legal Representative was able to follow the presentation of the evidence, whether public or confidential, relied on by the Prosecutor and the Defence teams of the Suspects. It follows that the victims' Legal Representative is now potentially in a position to identify specific issues arising out of the confirmation of charges hearing which may affect the personal interests of the victims, so as to justify a request for access to material withheld from victims under rule 121(10) of the Rules. However, the Single Judge considers that providing the victims' Legal Representative with access to all confidential material disclosed by the Prosecutor, particularly in the absence of knowledge by the Legal Representative of the nature and content thereof, would still, in principle, violate the exceptional nature of a request to access confidential material pursuant to article 68(3) of the Statute. Such requests should be made on the basis of specifically identified material and not with a view to obtaining all material on which either party intends to rely on for the purposes of the confirmation of charges hearing, regardless of its pertinence to any issue at stake. Therefore, the Request is rejected. However, in order to identify material relevant to the issue(s) affecting the victims' interests as outlined in the Request, it is the view of the Single Judge that it might be useful for the victims' Legal Representative to have access to the list of evidence filed by the Prosecutor in accordance with rule 121(3) of the Rules and therefore the Single Judge requests the Prosecution to submit observations as to whether he objects to grant the victims' Legal Representative access to said document.

See No. ICC-01/09-01/11-337, Pre-Trial Chamber II (Single Judge), 21 September 2011, paras. 7-11.

The Single Judge observes that in the present case it appears that an issue potentially affecting the victims' interests exists. Nevertheless, the Legal Representative of victims is prevented from identifying specific documents and material related to the issue at stake, since the list of evidence is confidential. If the list of evidence was always filed confidential, the victims' Legal Representative would never be in a position – using the Prosecutor's words – to "*demonstrate that the material relates to issues specific to their interests*", even when the Legal Representative of victims has correctly identified an issue capable of affecting the victims' rights.

Thus, the Single Judge is of the view that, when an issue appears to affect the victims' rights, as asserted by the Legal Representative of victims, the list of evidence filed by the Prosecutor pursuant to rule 121(3) of the Rules would constitute a useful tool to select material of particular relevance for the issue under consideration. In conclusion, the Single Judge considers that the Request may be granted to the extent concerning access to the list of evidence of the Prosecution.

Finally, the Single Judge wishes to point out that this is without prejudice to the determination to be made by the Single Judge as to whether or not it would be appropriate to provide the Legal Representative of victims with access to any further documents she could identify upon analysis of the said list.

See No. ICC-01/09-01/11-340, Pre-Trial Chamber II (Single Judge), 23 September 2011, paras. 14-17.

The Single Judge recalls that if a party to or a participant in the present proceedings wishes to notify a document classified as confidential to the victims' Common Legal Representative, it may do so by including in the said document the name of the Common Legal Representative to be notified. The Registry shall notify the parties and the participants accordingly.

In relation to those filings that are marked confidential and are not notified to the victims' Common Legal Representative under the conditions set forth in the previous paragraph, the Chamber retains the option to decide on a case-by-case basis, either *proprio motu* or upon receipt of a specific and motivated request, whether to grant the Common Legal Representative of victims access thereto.

Finally, the Single Judge decides that, in order for the Common Legal Representative to discharge her duties, she shall be granted access to the redacted and unredacted copies of the applications for participation submitted by the victims hereby admitted to participate at the confirmation of charges hearing and in the related proceedings.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, paras. 55-57. See also No. ICC-02/11-01/11-400, Pre-Trial Chamber I (Single Judge), 13 February 2013, para. 15.

As for the request to access the list of evidence filed by the Defence pursuant to rule 121(6) of the Rules, the Single Judge underlines that, contrary to the arguments of the Defence, granting access to the Defence list of evidence does not amount to providing the Common Legal Representative with automatic access to all confidential material listed therein. Should the Common Legal Representative wish to access confidential documents in the Defence list of evidence, she will have to submit a specific and motivated request to this effect. By the same token, the Single Judge recalls that the Common Legal Representative needs the leave of the Chamber to make any oral submission during the confirmation of charges hearing, subject to the requirements of article 68(3) of the Statute. However, in light of the concerns expressed by the Defence with regard to the confidential information mentioned in the list of evidence, which are at the basis of the chosen level of classification, the Single Judge considers it is appropriate to allow the provision of the list with redaction, as proposed by both the Defence and the Common Legal Representative.

The Single Judge notes that a list of the public items contained in the Defence list of evidence has already been provided to the Common Legal Representative on 4 February 2013. However, the Single Judge considers that access to the list itself, even if in redacted form, may be of assistance to the Common Legal Representative in following the discussion on the evidence at the hearing, which may include confidential evidence. Therefore, the Single Judge considers it appropriate that the list of evidence filed by the Defence in the record of the case be communicated to the Common Legal Representative, containing such redactions to the titles of confidential items of evidence that are necessary to preserve the confidentiality of these documents.

See No. ICC-02/11-01/11-400, Pre-Trial Chamber I (Single Judge), 13 February 2013, paras. 19 and 20.

As recently held by this Chamber in another case, "*in the absence of a proper reason justifying the contrary, the OPCV should in principle be given access to the relevant material* [concerning the admissibility challenge]".

See No. ICC-02/11-01/11-406, Pre-Trial Chamber I (Single Judge), 18 February 2013, para. 9.

With reference to its Victim Representation Decision, the Chamber hereby reminds the parties of their notification obligations pursuant to that decision. Where an *ex parte* filing is deemed necessary and in addition to providing the relevant justification in accordance with Regulation 23 *bis* of the Regulations of the Court, the filing party is directed to file a redacted version concurrently. If the filing party is of the view that no confidential redacted version should be filed, it must make a specific submission to that effect to the Chamber. The parties are further reminded that the Legal Representative and OPCV are entitled to confidential documents that are relevant to the personal interests of victims. In such cases, it is the responsibility of the filing party to indicate on the notification page that the Legal Representative and OPCV are to be notified of the filing.

With respect to the request to be granted access to relevant evidence, the Chamber also reminds the parties of their obligation to provide the Legal Representative access in Ringtail to all items which are relevant to the personal interests of the victims. However, given the objections of the Defence to items which they labelled as confidential, the Chamber considers that if a party intends to use any of these items or tender one or more of them into evidence, the party concerned shall seek leave from the Chamber prior to notifying any of these items to the Legal Representative or OPCV.

The parties are primarily responsible for identifying when their filings are relevant to the victims' personal interests, and the Chamber expects the parties to notify all such filings to the Legal Representative and OPCV unless they can identify clear reasons not to do so. Accordingly, as a general rule, the Chamber considers it appropriate to grant the Legal Representative and OPCV access to filings when the parties do not object to this access being given. When objections are raised to notifying filings to the Legal Representative and OPCV, these objections will be assessed on a case by case basis.

See No. ICC-01/09-02/11-794, Trial Chamber V(b), 22 August 2013, paras. 11-13.

Rule 121(10) of the Rules provides that the legal representatives of victims may consult the record created and maintained by the Registry of all proceedings before the Chamber "*subject to any restrictions concerning confidentiality and the protection of national security information*", as applicable to the Prosecutor and the Defence.

Therefore, the Single Judge considers that CLR1 and CLR2 have the right, during the confirmation of charges hearing and the related proceedings, to have access to all public decisions and public filings in the record of the case, including public evidence filed by the Prosecutor and the Defence, in the same format as disclosed to the recipient party (*i.e.* redacted or unredacted version, summaries, audio/video, and their metadata).

In respect of those decisions, filings and evidence that are classified as "*confidential*", the Chamber will retain the option to decide on a case-by-case basis, either upon motivated request by the common legal representatives or *proprio motu*, whether or not to grant access to these documents.

With regard to the transcripts of the public sessions of the confirmation of charges hearing and the proceedings related thereto as well as *in camera* or *ex parte* sessions in which CLR1 and CLR2 could be authorised to participate, the legal representatives will have the right to access the transcripts of those sessions as well. Concerning the transcripts of sessions that took place before the issuance of the present decision or sessions in which CLR1 and CLR2 will not be authorised to participate, the Chamber retains the option to decide on a case-by-case basis, either upon motivated request by the common legal representative(s) or *proprio motu*, whether or not to grant access to these transcripts.

The Single Judge also considers that, with a view to put CLR1 and CLR2 in a position to properly prepare for the confirmation of charges hearing, they shall be granted access to the unredacted and redacted copies of the applications for participations of the victims admitted to participate in the proceedings by the present decision. The Registry is thus instructed to provide CLR1 with access to the relevant application forms of victims admitted in Group 1 and CLR2 with access to the relevant application forms of victims admitted in Group 2.

3. Notification of filings and decisions

Pursuant to rule 92(5) and (6) of the Rules, the victims' legal representative shall be notified of all filings and decisions filed in the course of the proceedings in which they are admitted to participate. By virtue of this provision and in accordance with any restriction of access to confidential information as mandated by rule 121(10) of the Rules, the Single Judge considers that CLR1 and CLR2 must be notified, on the same basis as the Prosecutor and the Defence, of: (i) all requests, submissions, motions, responses and other documents within the meaning of regulation 22 of the Regulations which are filed as "*public*" in the record of the present case; (ii) all public decisions of the Chamber in the present case; (iii) the date of the confirmation of charges hearing and any postponement thereof, as well as of the date of the delivery of the decision, in accordance with rule 92(5) of the Rules.

The Single Judge recalls that, should either party intend to notify CLR1 and CLR2 of any document that they may file as "*confidential*", they shall include the name of the common legal representative concerned in the notification page of the filing. The Registry shall accordingly notify the common legal representative(s).

See No. ICC-01/04-02/06-211, Pre-Trial Chamber II, 15 January 2014, paras. 88-94.

The Single Judge stresses that access to [said] material shall exclusively serve the purpose of properly representing the interests of the victims during the confirmation of charges hearing.

Moreover, the Single Judge notes that, in the context of the Second Request, the common legal representatives also seek access to the observations of the VWU on the security situation of the three dual status victims and witnesses as well as any request for redactions concerning them. In this respect, the Single Judge recalls that the proceedings related to the authorisation to redact information in the evidence to be disclosed to the Defence is an *ex parte* process. Prosecutor and VWU only, the latter being tasked with advising the Single Judge on the security situation of the witnesses for whom the Prosecutor requests redactions. Providing the common legal representatives with access to the entirety of this material would result in revealing several information concerning individuals who have no correlation whatsoever with the three victims a/01308/13, a/00090/13 and a/00436/13. In addition, it would reveal information that the Prosecutor sought to redact under rule 81(2) and (4) of the Rules. Accordingly, access to said documentation may not be granted as a whole. However, the Single Judge is of the view that the common legal representatives should be aware of the security situation surrounding the respective dual status victims and witnesses that they represent. With a view to provide the common legal representatives with updated information in this regard, the Single Judge orders the VWU to communicate to the respective common legal representatives updated information about the security situation of victims a/01308/13, a/00090/13 and a/00436/13 as soon as possible, in a form to be agreed upon between the common legal representatives and the VWU.

[…]

As for the access to the In-depth Analysis Chart, the Single Judge specifies that this part of the Third Request refers to the consolidated version of the In-Depth Analysis Chart, with which the Prosecutor provided the Defence and the Chamber on 20 January 2014. This document contains a "*law-driven*" analysis of incriminating evidence that "*mirrors the way in which the confirmation hearing before the Chamber will unfold*". The Single Judge observes further that the common legal representatives will be in a position to follow the presentation of the evidence at the confirmation of charges hearing, including the confidential evidence, in which regard the Chamber will decide on a case by case basis.

In light of the foregoing, the Single Judge considers that access to the consolidated version of the In-depth Analysis Chart will provide the common legal representatives with guidance as to what type of material will be used by the Prosecutor at the confirmation of charges hearing to support the charges against Mr. Ntaganda. Likewise, granting access to the consolidated version of the In-Depth Analysis Chart does not equal to disclosing to the common legal representatives the entirety of the evidence (more specifically the confidential evidence)

included by the Prosecutor in the List of Evidence, which would in principle "*violate the exceptional nature of a request to access confidential material pursuant to article 68(3) of the Statute*".

See No. ICC-01/04-02/06-237, Pre-Trial Chamber II, 29 January 2014, paras. 18-22.

(i) Access to confidential filings, documents and evidence

The Chamber indicated during the status conference held on 12 July 2011 that it intended to deal with the issue of access to confidential filings in a decision on modalities of participation. The Chamber notes rule 131(2) of the Rules, which provides for the right of participating victims to consult the record of proceedings subject to any restrictions concerning confidentially and national security.

In the view of the Chamber, meaningful participation by victims may require access to the confidential material in the case, relevant to their views and concerns. However, the security of individuals or organisations may be adversely affected if access to confidential material is granted and this may impact on the scope of confidential information that is provided to the participating victims. These issues are eminently case specific and should be dealt with on a case-by-case basis.

In practice, this means that the CLR may have access to confidential filings and documents, to the extent that their content is relevant to the personal interests of the victims she represents. It will be the responsibility of the filing party, including the registry, to indicate on the notification page whether the CLR shall be notified and, as the case may be, to file properly redacted versions thereof. In the event a dispute emerges, the parties and participants are free to seize the Chamber.

In relation to evidence, the CLR may have access to the confidential evidence in Ringtail. The party submitting an item to be uploaded into Ringtail shall indicate whether or not the CLR should have access to the evidence.

In turn, the CLR shall not communicate confidential information to her clients, or anyone else who is not authorised to receive it, without the permission of the Chamber.

See No. ICC-02/05-03/09-545, Trial Chamber IV, 20 March 2014, paras. 34-38.

As a preliminary issue, the Chamber notes that the Legal Representative of Victims and Office of Public Counsel for Victims (the "*OPCV*") are not notified of the submissions in this litigation. The *Ruto* Defence submits that the Request contains information concerning confidential defence trial strategy, but no submission is made as to why the LRV and OPCV could not be notified of the redacted version of the Request. The Sang Defence makes no submission either in this regard, and the Prosecution submits that it sees no reason why any of these filings should be withheld from the Legal Representative of Victims and the OPCV.

The Chamber is not persuaded that a generic reference to "*confidential defence trial strategy*" sufficiently justifies withholding the totality of this litigation from the Legal Representative of Victims and the OPCV. As set out in the disposition, the Chamber reclassifies and notifies the relevant filings accordingly.

Further, and bearing in mind the principle of publicity derived from articles 64(7) and 67(1) of the Rome Statute, the Chamber considers that the present decision can be publicly issued in a manner which does not defeat the confidential classifications used in this litigation.

See No. ICC-01/09-01/11-1465, Trial Chamber V(a), 25 August 2014, paras. 9-11.

The Single Judge notes article 68(3) of the Rome Statute, rule 103 of the Rules of Procedure and Evidence, and regulation 23 *bis* of the Regulations of the Court.

As regards the Defence "*Notice of Alibi*", the Single Judge agrees with the OPCV in principle that this type of notification should also be notified to the victims participating in the proceedings, but notes that no identifiable prejudice occurred to the OPCV considering that it was notified of the documents in question on 12 September 2014. No order to the Defence of the type proposed by the OPCV is therefore necessary.

Concerning the Defence list of evidence, the Single Judge notes that according to the Defence, this document is registered as "*confidential*" because "*it relates to evidence disclosed inter partes and should not be released to the public*". The Single Judge agrees with the OPCV that this in itself does not constitute a reason that the list of evidence cannot be made available to the OPCV.

Accordingly, the Single Judge deems it appropriate to require the Defence, with respect to the evidence collected in the course of its own investigations, and the Prosecutor, with respect to the evidence disclosed to the Defence under article 67(2) of the Statute and rule 77 of the Rules, to provide submissions as to whether the list of evidence can be notified to the OPCV as such, or whether certain redactions are necessary.

Finally, as concerns the access of the OPCV to the evidence on the Defence list of evidence, it appears that, despite a previous order to this effect, the OPCV currently does not have access to the public evidence on the Defence list of evidence. As a result, a specific order to the Registrar is warranted.

The Single Judge also notes that it does not appear that the Defence has, when communicating its evidence to the Chamber, assessed the question whether access to confidential evidence can be provided to the OPCV. Consequently, the Single Judge deems it appropriate to order that this review, which concerns only 29 items of evidence, be undertaken now.

Likewise, and in particular considering the fact that all evidence communicated to the Chamber by the Prosecutor has also been provided to the OPCV, it is appropriate to obtain submissions from the Prosecutor as to whether access to the evidence disclosed by her to the Defence under article 67(2) of the Statute and rule 77 of the Rules, which is now relied upon by the Defence, can be provided to the OPCV.

As concerns the Defence of Laurent Gbagbo's request under rule 103 of the Rules, the Single Judge is not satisfied that the proposed submissions are desirable for the proper determination of the matter, and instead considers that it is primarily for the Prosecutor to assess the appropriate level of classification of evidence it discloses to the Defence, and to take or request appropriate protective measures, if necessary, in light of her statutory duty to ensure confidentiality of information or protection of individuals if circumstances so require. Accordingly, it is sufficient to receive the Prosecutor's submissions on the matter. It is also not necessary to rule on the OPCV request for leave to respond to the Defence request.

See No. ICC-02/11-02/11-167, Pre-Trial Chamber I (Single Judge), 24 September 2014, paras. 9-16.

The principle of publicity is enshrined in Articles 64(7) and 67(1) of the Statute. Pursuant to Rule 137(2) of the Rules and Regulation 23 *bis* (3) of the Regulations, documents and materials on the case record shall retain their classification only so long as it is justified. Subject to such justified restrictions, Rules 121(10) and 131(2) of the Rules entitle, *inter alia*, the parties and the LRV to consult the case record. Accordingly, the Chamber has repeatedly instructed the parties and participants to notify all filings (as well as material uploaded in Ringtail) to all parties and participants, including the LRV. Any material filed as '*confidential*, *ex parte*' must be accompanied by reasons justifying that classification. Such reasons, including the factual and legal basis for the chosen classification, must be sufficiently detailed and specific in order to enable the Chamber to ensure that restrictions to access are limited to a necessary and proportional extent".

In assessing objections made by the Defence and Registry concerning access to the case record, the Single Judge has reviewed the specific documents and materials identified, related documents (in particular, those identified in Regulation 23 *bis* (2) of the Regulations) and the reasons given for a classification in both the instant submissions and the original filing.

As asserted by the Defence and Registry, documents and materials concerning medical and private information, detention conditions, the Registry's internal processes, relations between the Court and States, confidential information relating to conditional release and information which cannot be shared without consent of the source may be justifiably withheld from those parties and participants in the *Gbagbo and Blé Goudé* case that do not already have access. For these reasons, the Single Judge finds that there is no readily apparent indication that the bases for the classification and current level of access to the following documents and materials no longer exists: (i) all '*confidential*, *ex parte*' and '*under seal*' documents and materials on the *Gbagbo and Blé Goudé* case records and (ii) the documents identified in Annexes A and B to this decision.

[…]

Noting, in particular, the stage of proceedings and the potential relevance of information concerning the evidentiary record to trial preparation, the Single Judge considers that much of the information contained in these and related documents should be accessible to all parties and participants. However, in light of the general and/or contradictory submissions made and the need to ensure that access to justifiably classified material is limited to a necessary and proportional extent, the Single Judge considers it appropriate to give the filing party or participant a further opportunity to object to access. […].

Having reviewed the remainder of the '*confidential*' case record, the Single Judge considers that withholding access from any party or participant to any other document or material classified as '*confidential*' on the *Gbagbo and Blé Goudé* case records is not justified. At the same time, there is no readily apparent indication that the bases for the '*confidential*' classification of such documents and materials no longer exists. Therefore, these documents and materials (all '*confidential*' documents and materials not identified in paragraph 16 above and Annexes A, Band C to this decision) shall be transferred to the *Gbagbo and Blé Goudé* case record as '*confidential*', accessible to all parties and participants. This includes all materials uploaded in the eCourt databases of the *Gbagbo and Blé Goudé* cases, except that identified in paragraph 16 above, which shall be (i) uploaded in the *Gbagbo and Blé Goudé* case eCourt database (Ringtail) and (ii) released to all parties and the LRV, unless '*confidential*, *ex parte*' classification is demonstrably justified.

Finally, considering the stage of proceedings and the general, sometimes dated, reasons given for restricted classification of various documents and materials, the Single Judge once again emphasises that the parties and participants have an ongoing obligation, pursuant to Regulation 23 *bis* (3) of the Regulations, to request reclassification of their filings when the basis for a given classification no longer exists.

See No. ICC-02/11-01/15-101, Trial Chamber I, 24 June 2015, paras. 13-15, and 18-20.

The Single Judge also notes that the *Gbagbo* Defence attempts to re-litigate matters that have already been decided and repeatedly affirmed. Accordingly, the Single Judge has not taken into account the *Gbagbo* Defence's submissions concerning the general practice of other Chambers relating to notification, whether the status of

the LRV precludes her from a right of access to '*confidential*' material and whether notification to the LRV, in and of itself, risks a breach in confidentiality.

See No. ICC-02/11-01/15-150, Trial Chamber I (Single Judge), 21 July 2015, para. 11.

The Legal Representative of Victims (LRV) shall have the general right to: (i) consult the record of the case; (ii) attend all public and non-public hearings in the case; and (iii) make written submissions to the Chamber, and the right to response as provided for in Regulation 24(2) of the Regulations.

As for the extent to which the LRV may discuss confidential information in the case record with his clients, […] the LRV is permitted to communicate confidential information to his clients when necessary, provided that he acts prudently and takes measures not to cause prejudice to the reasons warranting confidentiality of certain information. Accordingly, the LRV should not disseminate physical or electronic copies of confidential documents but rather inform his clients orally and inform them of the confidential nature of the information communicated. Further, the LRV shall maintain a log of disclosure of confidential information to his clients.

As for consulting the case record, this extends to decisions of the Chamber, submissions of the parties, participants and the Registry, transcripts and evidence disclosed by the parties and communicated to the Chamber, and shall receive notification of documents filed. This right shall extend to public as well as confidential documents or evidence in the record of the case. Notification of documents or access to evidence communicated to the Chamber shall only be withheld from the LRV if there are specific reasons warranting this measure. Documents filed in the record of the case which cannot be notified to the LRV must be marked '*confidential*, *ex parte Prosecutor and Defence*' or more restrictively if appropriate. The mark '*confidential*' shall in general include the LRV.

See No. ICC-01/12-01/15-97-Red, Trial Chamber VIII, 8 June 2016, paras. 40-42.

8.2. Access to observations under rule 89 of the Rules of Procedure and Evidence

When confidential information concerns all applicants, this information shall not be notified to persons who are not connected to all of the applicants. The Single Judge further considers that the interest of the applicants in receiving the rule 89(1) observations should also be balanced with the further obligation of the Single Judge to ensure the expeditiousness and effectiveness of the proceedings. In particular, a system in which the Legal Representatives of the applicants receive redacted versions of the rule 89(1) observations which are specific to each applicant is not only impractical now, but will be extremely impractical as the number of applicants continues to increase.

See No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, paras. 13 and 15.

The Single Judge considers that not notifying the rule 89(1) observations does not unduly prejudice the applicants since pursuant to rule 89(2) of the Rules, applicants are entitled to submit new applications should their applications be rejected. At the same time, the Single Judge observes that the applicants are neither entitled to reply to the observations of the Prosecution and the Defence nor to request leave to appeal the decision of the Chamber on the merits of their applications. While admitting that the absence of notification of rule 89(1) observations will prevent applicants from knowing the specific challenges made in the parties' observations, the Single Judge observes that the Chamber's decision on their applications will indicate any further information required or the reasons for which the applications were rejected. In such circumstances, notification of the Chamber's decision will place applicants in a position to re-apply under rule 89(2) of the Rules to correct any deficiencies.

See No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, paras. 16-17. See, for different reasoning and on the contrary, No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, paras. 36-39.

While recognising that it may be helpful to the applicants to know the types of challenges directed at the applications, the Single Judge considers that the helpfulness of this information must also be balanced with the obligation of the Single Judge to provide, where necessary, for the protection and privacy of the victims and witnesses pursuant to article 57(3)(c) of the Statute and with the general principle prescribed in rule 86 of the Rules that the Chamber in making any order shall take into account the needs of all victims and witnesses in accordance with article 68.

See No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, para. 14.

With regard to the request to access the observations submitted by the parties pursuant to rule 89 of the Rules, the Single Judge points out that each of these observations consist of a main document, filed as "*public*" and containing the actual observations on the applications for victim participation and a confidential annex setting out these observations in a different layout, with a view to assisting the Single Judge in the assessment of each application for participation. The Single Judge therefore considers that the confidential annexes referred to by the Common Legal Representative contain information that is already reflected in the actual observations filed by the parties, which are accessible to the Common Legal Representative.

In light of the above, the Single Judge considers that the requested documents are of no relevance to the Common Legal Representative for the preparation of the confirmation of charges hearing. However, the Single Judge considers that the annexes to the Prosecutor's observations under rule 89 of the Rules may be notified to the Common Legal Representative, since the Prosecutor does not object to that.

See No. ICC-02/11-01/11-400, Pre-Trial Chamber I (Single Judge), 13 February 2013, paras. 17 and 18.

The OPCV filed the Request, requesting that the Defence Final Observations be notified to it. In support of this request, the OPCV submits that it participated throughout the sessions of the confirmation of charges hearing and that the Chamber has stated on several occasions that the final written observations of the parties and participants should be limited to issues discussed at the hearing.

Upon review of the Defence Final Observations, and considering the fact that the OPCV attended all sessions of the confirmation of charges hearing and is therefore privy to all discussions that have taken place at the hearing, the Single Judge is of the view that the Request can be granted.

See No. ICC-02/11-01/11-431, Pre-Trial Chamber I (Single Judge), 25 April 2013, paras. 2 and 5.

8.3. Access to the index of the situation and case record

Rule 131(2) of the Rules of Procedure and Evidence provides participating victims the right to consult the record of the proceedings, including the index, subject to any restrictions concerning confidentiality and the protection of national security information.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, para. 105.

Regarding the access by Legal Representatives of victims to the filings, the presumption will be the access to the public ones only. However, if confidential filings are of material relevance to the personal interests of participating victims, their Legal Representatives might have access to them, so long as it will not breach other protective measures that need to remain in place.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, para. 106. See also Oral decision, Trial Chamber II, No. ICC-01/04-01/07-T-71-Red, 1 October 2009, pp. 4-6 and No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 118-125.

At the outset, the Single Judge recalls that, as stated in the 15 January 2014 Decision, in respect of those decisions, filings and evidence that are classified as "*confidential*", the Chamber will retain the option to decide on a case-by-case basis, either upon motivated request by the common legal representatives or *proprio motu*, whether or not to grant access to these documents.

With regard to the First Request, the Single Judge recalls that in several instances confidential filings or decisions are referred to in public documents, upon the condition that these references do not undermine the interests protected by the confidential level of classification. The Single Judge is of the view that a full index of the case record to be generated by the Court Management Section (the "CMS") could represent a useful instrument for the common legal representatives to conduct a review of the case file, without providing them indiscriminately with access to confidential information contained therein absent prior authorization by the Single Judge. Such index should contain the document number, the title and the date of notification of each filing, decision and order issued so far in the case and classified as "*confidential*" only. This will put the common legal representatives in a position to identify potential documents, if any, which they seek to access, provided that these documents appear to contain information affecting the personal interests of the victims and that access thereto is not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial, as provided in article 68(3) of the Statute.

In light of the foregoing, the Single Judge does not see any prejudice for the Prosecutor and the Defence, should the common legal representatives be provided with access to the full index of the case record. Accordingly, the Single Judge orders the CMS to generate a full index of the record of the case, as specified above, and to communicate it to the common legal representatives as soon as possible.

The Single Judge underlines that access to such index is without prejudice to any further determination as to whether it is appropriate to provide the common legal representatives with access to confidential documents that could be sought as a result of the review of such index.

See No. ICC-01/04-02/06-237, Pre-Trial Chamber II, 29 January 2014, paras. 13-16.

b. Access to the public record of the case

Rule 121(10) of the Rules further states that victims or their legal representative may, subject to any restrictions concerning confidentiality and the protection of national security information, consult the record of all proceedings before the Chamber as created and maintained by the Registrar. Furthermore, according to rule 92(5) and (6) of the Rules, victims' legal representatives shall be notified of the proceedings before the Chamber.

Accordingly, the Common Legal Representative of the victims authorised to participate at the pre-trial stage of the present case has the right, during the confirmation hearing and in the related proceedings, to: (i) have access to all public filings and public decisions contained in the record of the case; (ii) be notified on the same basis as

the Prosecutor and the Defence of all public requests, submissions, motions, responses and other procedural documents which are filed as public in the record of the case; (iii) be notified of the decisions of the Chamber in the proceedings; (iv) have access to the transcripts of hearings held in public sessions; (v) be notified on the same basis as the Prosecutor and the Defence of all public proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision; and (vi) have access to the public evidence filed by the Prosecutor and the Defence pursuant to rule 121 of the Rules and contained in the record of the case. Such right is, however, subject to the format (*i.e.* unredacted versions, redacted versions or summaries, as well as electronic versions with the *metadata* required by the e-Court Protocol) in which such evidence has been made available to either party.

The Single Judge recalls, however, that if a party to or a participant in the present proceedings wishes to notify their own filing classified as confidential to the victims' Common Legal Representative, it may do so by including in the said document the name of the Common Legal Representative to be notified. The Registrar shall notify the parties and the participants accordingly.

In relation to those filings that are marked confidential and are not notified to the victims' Common Legal Representative under the conditions set forth in the previous paragraph, the Chamber retains the option to decide on a case-by-case basis, either *propio motu* or upon receipt of a specific and motivated request, whether to grant the Common Legal Representative of victims access thereto.

Finally, the Single Judge decides that, in order for the Common Legal Representative to discharge her duties, she shall be granted access to the redacted and unredacted copies of the applications for participation submitted by the victims hereby admitted to participate at the confirmation of charges haring and in the related proceedings.

See No. ICC-02/11-02/11-83, Pre-Trial Chamber I, 11 June 2014, paras. 32-36.

b. Access to the public record of the case

Rule 121(10) of the Rules of Procedure and Evidence states that victims or their legal representative may, subject to any restrictions concerning confidentiality and the protection of national security information, consult the record of all proceedings before the Chamber as created and maintained by the Registrar. Furthermore, according to rule 92(5) and (6) of the Rules, victims' legal representatives shall be notified of the proceedings before the Chamber.

Accordingly, the common legal representative of the victims authorised to participate at the pre-trial stage of the present case has the right, during the confirmation hearing and in the related proceedings, to:

(i) have access to all public filings and public decisions contained in the record of the case;

(ii) be notified on the same basis as the Prosecutor and the Defence of all public requests, submissions, motions, responses and other procedural documents which are filed as public in the record of the case;

(iii) be notified of the decisions of the Chamber in the proceedings;

(iv) have access to the transcripts of hearings held in public sessions;

(v) be notified on the same basis as the Prosecutor and the Defence of all public proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision; and

(vi) have access to the public evidence filed by the Prosecutor and the Defence pursuant to rule 121 of the Rules and contained in the record of the case. Such right is, however, subject to the format (*i.e.* unredacted versions, redacted versions or summaries, as well as electronic versions with the *metadata* required by the e-Court Protocol) in which such evidence has been made available to either party.

The Single Judge recalls, however, that if a party to or a participant in the present proceedings wishes to notify their own filing classified as confidential to the common legal representative, it may do so by including in the said document the name of the common legal representative to be notified. The Registrar shall notify the parties and the participants accordingly.

See No. ICC-02/11-02/11-111, Pre-Trial Chamber I (Single Judge), 1 August 2014, paras. 22-24.

The Single Judge recalls that in its 'Decision on Defence's requests seeking leave to appeal the "Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record' and seeking suspensive effect of it'", it indicated that the LRV's general right to have access to the confidential filings, transcripts and material does not amount to granting her with an automatic access to all documents covered by medical secrecy and privacy and that, when justified, said documents could be filed confidential and *ex parte*, thus excluding notification to the LRV. In the case at hand, the Single Judge has considered that the nature of the information to be discussed during the status conference as well as the information to be contained in the redacted version of the Registry Report was such that the LRV's presence at the status conference was not required on this occasion and that the LRV should not have access to the redacted version of the Registry Report.

See No. ICC-02/11-01/15-80, Trial Chamber I, 26 May 2015, para. 3.

The Chamber and Single Judge have repeatedly affirmed – as provided in the Court's regulatory framework,"*as initially ordered at the first status conferences held in the Gbagbo and Blé Goudé cases*" and as most recently recalled in the Impugned Decision? – that all parties and participants have a right to access the entire case record (including evidentiary material), unless' confidential, *ex parte*' classification is justified.

See No. ICC-02/11-01/15-132, Trial Chamber I, 10 July 2015, para. 4.

As for consulting the case record, this extends to decisions of the Chamber, submissions of the parties, participants and the Registry, transcripts and evidence disclosed by the parties and communicated to the Chamber, and shall receive notification of documents filed. This right shall extend to public as well as confidential documents or evidence in the record of the case. Notification of documents or access to evidence communicated to the Chamber shall only be withheld from the LRV if there are specific reasons warranting this measure. Documents filed in the record of the case which cannot be notified to the LRV must be marked '*confidential, ex parte Prosecutor and Defence*' or more restrictively if appropriate. The mark '*confidential*' shall in general include the LRV.

See No. ICC-01/12-01/15-97-Red, Trial Chamber VIII, 8 June 2016, para. 42.

8.4. Access to documents in possession or control of the Prosecution

To give effect to article 68(3) of the Rome Statute, upon request by the Legal Representatives of the victims, the prosecution shall provide individual victims with any materials within the possession of the prosecution. The conditions set by the Chamber are as following: victims asking for such materials must have been granted the right to participate in the proceedings; the material requested shall be relevant to the personal interests of the victims; the Chamber shall have permitted that the material targeted be investigated during the proceedings; and the victims shall have identified with precision in writing the materials requested.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, para. 111. See also No. ICC-01/04-01/06-1368, Trial Chamber I, 2 June 2008, paras. 27-35.

The Single Judge considers that access to material that is not included in the List of Evidence but that is merely under the control of the Prosecutor may not be granted, in so far as the Prosecutor has not chosen to include this material in her List of Evidence, thereby renouncing to rely on it at the confirmation of charges hearing.

[…]

As for the second limb of the Fourth Request, the Single Judge understands that the common legal representatives are in fact urging the Prosecutor to disclose to them all "*public evidence filed by the Prosecutor* […], *in the same format as disclosed to the recipient party* (i.e. *redacted or unredacted version, summaries, audio/video, and their metadata)*" as ordered by the Single Judge in the 15 January 2014 Decision. In this respect, the Single Judge reminds the Prosecutor that by virtue of rule 121(10) of the Rules, the common legal representatives may access the public record of the case created and maintained by the Registry, including the public evidence as referred to above. Therefore, the Single Judge orders the Prosecutor to ensure that all evidence included in the List of Evidence and which is classified as "*public*" be identified and timely communicated to the common legal representatives.

See No. ICC-01/04-02/06-237, Pre-Trial Chamber II, 29 January 2014, paras. 17 and 25.

Relevant decisions regarding the modalities of victims' participation in the proceedings

Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006

Decision on the Application by Applicants a/0001/06 to a/0003/06 for Leave to Respond to the Observations of the Prosecutor and Ad Hoc Counsel for the Defence (Pre-Trial Chamber I), No. ICC-01/04-164-tENG, 7 July 2006

Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing (Pre-Trial Chamber I), No. ICC-01/04-01/06-462-tEN, 22 September 2006

Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo (Pre-Trial Chamber I), No. ICC-01/04-01/06-601-tEN, 20 October 2006

Decision on the Schedule and Conduct of the Confirmation Hearing (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-678, 7 November 2006

Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-110, 3 December 2007

Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-417, 7 December 2007

Decision on the Requests of the OPCV (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-418, 10 December 2007

Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-111-Corr, 14 December 2007

Decision on victim's participation (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008

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" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-423-Corr-tENG, 31 January 2008

Decision on the role of the Office of Public Counsel for Victims and its request to access to documents (Trial Chamber I), No. ICC-01/04-01/06-1211, 6 March 2008

Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008

Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-537, 30 May 2008

Decision on the Legal Representative's request for clarification of the Trial Chamber's 18 January 2008 "Decision on victims' participation" (Trial Chamber I), No. ICC-01/04-01/06-1368, 2 June 2008

Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre Trial Chamber I's Decision of 6 December 2007 and Partly dissenting opinion of Judge Sang-Hyun Song (Appeals Chamber), No. ICC-02/05-138 OA OA2 OA3, 18 June 2008

Decision on Victims' Requests for Anonymity at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-628, 23 June 2008

Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007 (Appeals Chamber), No. ICC-01/04-503 OA4 OA5 OA6, 30 June 2008

Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (Appeals Chamber), No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008

Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-01/04-01/06-1452 OA12, 6 August 2008

Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-01/04-01/06-1453 OA13, 6 August 2008

Fourth Decision on Victims' Participation (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-320, 12 December 2008

Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007 (Appeals Chamber), No. ICC-01/04-556 OA4 OA5 OA6, 19 December 2008

Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007 (Appeals Chamber), No. ICC-02/05-177 OA OA2 OA3, 2 February 2009

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 (Trial Chamber I), No. ICC-01/04-01/06-2032 and its Annex, No. ICC-01/04-01/06-2032-Anx, 9 July 2009

Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims (Trial Chamber I), No. ICC-01/04-01/06-2127, 16 September 2009

Decision on victims' modalities of participation at the Pre-Trial Stage of the Case (Pre-Trial Chamber I), No. ICC-02/05-02/09-136, 6 October 2009

Directions for the conduct of the proceedings and testimony in accordance with rule 140 (Trial Chamber II), No. ICC-01/04-01/07-1665-Corr, 20 November 2009

Decision on the Modalities of Victim Participation at Trial (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010

Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 12 July 2010

Instructions on the submissions of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence (Appeals Chamber), No. ICC-01/05-01/08-818-tENG OA3, 12 July 2010

Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial" (Appeals Chamber), No. ICC-01/04-01/07-2288 OA11, 16 July 2010

Decision on the request of the Legal Representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed (Pre-Trial Chamber I), No. ICC-01/04-582, 25 October 2010

Decision on Victims' Participation at the Hearing on the Confirmation of the Charges (Pre-Trial Chamber I), No. ICC-02/05-03/09-89, 29 October 2010

Decision authorising the appearence of Victims a/0381/09, a/0018/09,a/0191/08 and pan/0363/09 acting on behalf of de a/0363/09 (Trial Chamber II), No. ICC-01/04-01/07-2517-tENG, 9 November 2010

Decision on the legal representation of victim applicants at trial (Trial Chamber III), No. ICC-01/05-01/08-1020, 19 November 2010

Decision on the arrangements for contact between represented victims and the parties (Trial Chamber II), No. ICC-01/04-01/07-2571-tENG, 23 November 2010

Order determining the mode and order of examination for the witnesses called by the Defence teams (regulation 43 and 54 of the Regulations of the Court) (Trial Chamber II), No. ICC-01/04-01/07-2775-tENG, 15 March 2011

Order on the timetable for closing submissions (Trial Chamber I), No. ICC-01/04-01/06-2722, 12 April 2011

Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence (Appeals Chamber), No. ICC-01/09-01/11-123 OA, 13 June 2011

Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence (Appeals Chamber), No. ICC-01/09-02/11-116 OA, 13 June 2011

Decision on Victims´ Participation at the Confirmation of the Charges Hearing and in the Related Proceedings (Pre-Trial Chamber II), No. ICC-01/09-01/11-249, 5 August 2011

Decision on 138 applications for victims´ participation in the proceedings (Pre-Trial Chamber I), No. ICC-01/04-01/10-351, 11 August 2011

Decision on the Office of Public Counsel for Victims´ "Request to access documents in the case record in relation to the Defence Challenge to the Jurisdiction of the Court" (Pre-Trial Chamber I), No. ICC-01/04-01/10-382, 18 August 2011

Decision on the "Request by the Victims´ Representative for an authorization by the Chamber to make written submissions on specific issues of law and/or fact (Pre-Trial Chamber II), No. ICC-01/09-01/11-274, 19 August 2011

Decision on Victims´ Participation at the Confirmation of the Charges Hearing and in the Related Proceedings (Pre-Trial Chamber II), No. ICC-01/09-02/11-267, 26 August 2011

Decision (i) ruling on Legal Representatives´ application to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses (Trial Chamber III), No. ICC-01/05-01/08-1729, 9 September 2011

Decision on the Request for Access to Confidential Inter Partes Material (Pre-Trial Chamber II), No. ICC-01/09-02/11-326, 14 September 2011

Decision on the "Request by Victims´ Representative for access to confidential materials" and Requesting Observations from the Prosecutor (Pre-Trial Chamber II), No. ICC-01/09-01/11-337, 21 September 2011

Decision on the "Renewed Request by the Victims´ Representative for an authorization by the Chamber to make written submissions on specific issues of law and/or fact (Pre-Trial Chamber II), No. ICC-01/09-01/11-338, 22 September 2011

Second Decision on the "Request by Victims´ Representative for access to confidential materials" (Pre-Trial Chamber II), No. ICC-01/09-01/11-340, 23 September 2011

Decision on a judicial sie visit to the Democratic Republic of Congo (Trial Chamber II), No. ICC-01/04-01/07-3203-tENG, 18 November 2011

Order regarding applications by victims to present their views and concerns or to present evidence (Trial Chamber III), No. ICC-01/05-01/08-1935, 21 November 2011

Decision on a judicial site visit to the Democratic Republic of Congo (Trial Chamber II), No. ICC-01/04-01/07-3213-tENG, 1 December 2011

Decision on the "Request by the Victims´ Representative for authorisation to make a further written submission on the views and concerns of the victims" (Pre-Trial Chamber II), No. ICC-01/09-01/11-371, 9 December 2011

Order on the arrangements for the submissions of the written and oral closing statements (regulation 54 of the Regulations of the Court) (Trial Chamber II), No. ICC-01/04-01/07-3218-tENG, 15 December 2011

Second order regarding the applications of the Legal Representatives of victims to present evidence and views and concerns of victims (Trial Chamber III), No. ICC-01/05-01/08-2027, 21 December 2011

Decision on "Application of Legal Representative of Victims Mr Zarambaud Assingambi for leave to participate in the appeals proceedings following the Defence appeal of 9 January 2012 and addendum of 10 January 2012" (Appeals Chamber), No. ICC-01/05-01/08-2098 OA10, 1 February 2012

Decision on the nature of the "Procès-verbal de l'opération de transport judiciaire en République démocratique du Congo" (Trial Chamber II), No. ICC-01/04-01/07-3240-tENG, 14 February 2012

Decision on the supplemented applications by the Legal Representatives of victims to present evidence and the views and concerns of victims (Trial Chamber III), No. ICC-01/05-01/08-2138, 22 February 2012

Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the Legal Representatives of victims to present evidence and the views and concerns of victims No. ICC-01/05-01/08-2138 (Trial Chamber III), No. ICC-01/05-01/08-2140, 22 February 2012

Decision on the application for an extension of time for the filing of the final submissions of the common legal representative of the main group of victims (Trial Chamber II), No. ICC-01/04-01/07-3256-tENG, 5 March 2012

Decision on the "Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)" (Appeals Chamber), No. ICC-01/04-01/10-509 OA4, 2 April 2012

Ordonnance relative aux modalités de présentation des conclusions orales (Trial Chamber II), No. ICC-01/04-01/07-3274, 20 April 2012

Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08 (Trial Chamber III), No. ICC-01/05-01/08-2220, 24 May 2012

Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings With confidential annex (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012

Oral Decision (Trial Chamber III), No. ICC-01/05-01/08-T-227-Red-ENG, 25 June 2012

Decision on the OPCV's "Request for leave to submit observations and Request to access the Expert Reports" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-211, 15 August 2012

Directions on the submissions of observations (Appeals Chamber), No. ICC-02/11-01/11-236 OA2, 31 August 2012

Decision on issues related to the hearing on Mr Gbagbo's fitness to take part in the proceedings against him, No. ICC-02/11-01/11-249 (Pre-Trial Chamber I, Single Judge), 20 September 2012

Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court (Trial Chamber III), No. ICC-01/05-01/08-2324, 21 September 2012

Decision on victims' representation and participation (Trial Chamber V), No. ICC-01/09-01/11-460, 3 October 2012

Decision on victims' representation and participation (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012

Decision on the participation of victims in the appeals against Trial Chamber's I conviction and sentencing decisions (Appeals Chamber), No. ICC-01/04-01/06-2951 A4 A5 A6, 13 December 2012

Second decision on victims' participation at the confirmation of charges hearing and in the related proceedings (Pre-Trial Chamber I), No. ICC-02/11-01/11-384, 6 February 2013

Decision on the OPCV's "Requests to receive information and access document for the effective participation of victims at the confirmation of charges hearing" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-400, 13 February 2013

Decision on the OPCV's "Request to access documents related to the 'Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut' filed by the Defence on 15 February 2013" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-406, 18 February 2013

Decision on the participation of victims in the appeal against Trial Chamber II's "Jugement rendu en application de l'article 74 de Statut" (Appeals Chamber), No. ICC-01/04-02/12-30 A, 6 March 2013

Decision on the OPCV's "Demande de notification au Représentant légal commun des observations déposées par la Défense sur les questions abordées lors de l'audience de confirmation des charges" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-431, 25 April 2013

Decision on the Conduct of Trial Proceedings (General Directions) (Trial Chamber V(a)), No. ICC-01/09-01/11-847-Corr, 9 August 2013

Decision on the Legal Representative's request for access to confidential filings (Trial Chamber V(b)), No. ICC-01/09-02/11-794, 22 August 2013

Decision on the application by victims for participation in the appeal (Appeals Chamber), No. ICC-02/11-01/11-491 OA4, 27 August 2013

Decision on the participation of victims in the Prosecutor's appeal against the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute" (Appeals Chamber), No. ICC-02/11-01/11-492 OA5, 29 August 2013

Decision on a/2922/11's application to participate in the appeals proceedings (Appeals Chamber), No. ICC-01/04-01/06-3052-Red A4 A5 A6, 3 October 2013

Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings (Pre-Trial Chamber II), No. ICC-01/04-02/06-211, 15 January 2014

Decision on the "Joint Request to attend the Status Conference to be held on 27 January 2014" (Pre-Trial Chamber II), No. ICC-01/04-02/06-230, 27 January 2014

Decision on the "Joint Request of the Common Legal Representatives to access documents in the Bosco Ntaganda case record" (Pre-Trial Chamber II), No. ICC-01/04-02/06-237, 29 January 2014

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Decision on the common legal representative of victims' application to submit one item of documentary evidence (Trial Chamber I), No. ICC-02/11-01/15-1188, and Dissenting Opinion of Judge Geoffrey Henderson, No. ICC-02/11-01/15-1188-Anx , 19 June 2018

Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" (Pre-Trial Chamber I), No. ICC-RoC46(3)-01/18-37, and Partially Dissenting Opinion of Judge Marc Perrin De Brichambaut, No. ICC-RoC46(3)-01/18-37-Anx, 6 September 2018

Decision on Defence requests relating to the Prosecutor's response to the Defence motions for acquittal and to the scheduling of the hearing to be held on 1 October 2018 (filings no. 1208 and 1211) (Trial Chamber I), No. ICC-02/11-01/15-1212, 21 September 2018

Decision on the "Application for Judicial Review by the Government of the Union of the Comoros" (Pre-Trial Chamber I), No. ICC-01/13-68, and Partly Dissenting Opinion of Judge Péter Kovács, No. ICC-01/13-68-Anx, 15 November 2018

3. Legal representation

Rules 90, 91 of the Rules of Procedure and Evidence
Regulations 67-76, 79-80 and 83-85 of the Regulations of the Court
Regulations 122-134 and 140-142 of the Regulations of the Registry

1. Legal representation in general

Pursuant to regulation 80 of the Regulations, members of the OPCV may be appointed as legal representatives of victims by the Chamber.

The Chamber notes that the above mentioned rules and regulations refer to persons who have been accorded the procedural status of victims to participate in the investigative stage of a situation.

However, the Chamber observes that of the persons applying at the investigative stage of the situation, a large number of those applicants may be without legal representation prior to a decision of the Chamber on whether to grant them victim status. Moreover, considering that under regulation 86(4) of the Regulations, the Registry will automatically request additional information for all incomplete Applications, the Chamber deems it appropriate to appoint the OPCV to provide support and assistance to the unrepresented applicants. Thus/ pursuant to regulation 116 of the RoR, the Registry shall automatically transfer to the OPCV all information regarding unrepresented applicants simultaneously with the notification of the Applications to other participants.

The OPCV should therefore be available to provide support and assistance to applicants until such time as the procedural status of victim is granted to them and a legal representative is chosen by him or her or appointed by the Court.

[…]

The Chamber recalls that a legal representative is entitled to participate in the proceedings in accordance with the terms set by the Chamber and considers that anonymity is incompatible with the functions to be preformed by a legal representative.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, paras 41-44, and 48.

The Single Judge considers that while a victim's participation in the proceedings is not conditional upon him or her being assisted by a Legal Representative, even after his or her application has been granted, it appears to be in the interests of justice to provide the victims with a Legal Representative, pending the appointment of a common Legal Representative in order to effectively enable them to exercise their right to file a response to the Application for Leave to Appeal filed by the Prosecution.

See No. ICC-02/04-105, Pre-Trial Chamber II (Single Judge), 28 August 2007, pp. 4-5.

Prior to the Applications being forwarded to the Prosecutor and the defence in accordance with rule 89, sub-rule 1, of the Rules of Procedure and Evidence, there is a need to determine whether the applicants are entitled to rely on a Legal Representative during the time between the filing of the application and the Chamber's assessment of its merits, or whether the decision on the assignment of legal representation should be deferred until a determination on the merits of the applications has been rendered. The statutory instruments of the Court fail to address this issue specifically; accordingly, the solution to this issue requires a general assessment of the system of victim participation in the proceedings.

The statutory framework provides several elements supporting the view that a victim whose application has been granted by the Court may participate in proceedings with or without the assistance of a Legal Representative. This seems to flow first and foremost from article 68, paragraph 3, of the Statute, which provides that "*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 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*". This provision also states that such views and concerns "*may be presented by the Legal Representatives of the victims when the Court considers it appropriate*". Two elements are relevant in this context. First, the choice of the term "*may*", when referring to the role of the Legal Representative, entails that a victim's right to present his or her "*views and concerns*" is independent from that victim being or not being able to rely on a Legal Representative. Second, the very role of the Legal Representative, far from being presented as mandatory and inevitable, is made conditional upon a determination of its appropriateness, which determination is entrusted to the Court. The view that legal representation is per se not necessary in order for victims to participate in Court's proceedings appears further supported by the Rules of Procedure and Evidence. Rule 89, sub-rule 1, refers to the application filed by the victim and the decision by the Chamber rejecting or granting the application and, in the latter case, specifying the proceedings and manner of participation ("*which may include opening and closing statement*"), without mentioning a Legal Representative.

As a result, it seems that participation (at least) in the form of "*opening and closing statements*" can be granted to a victim whether or not that victim is assisted by a Legal Representative. Similarly, rule 89, sub-rule 2, refers to the right of the victim whose application has been rejected by the Chamber to file a new application, again without mentioning a Legal Representative.

Equally significant *indicia* are to be found in the rules specifically devoted to the legal representation of victims. Rule 90, sub-rule 1, refers to the victim being "*free*" to choose a Legal Representative. While the provision seems to imply a right of every victim to choose his or her own Legal Representative, it does not go so far as to make it compulsory for the victim to make such a choice.

Moreover, despite the heading of rule 90, sub-rules 2, 3, 4 and 5 make no mention of *individual* Legal Representative(s) and focus instead on the issue of common Legal Representative(s). In this respect, it appears relevant that the Chamber retains the option (and is not under an obligation) to request the victims or particular groups of victims to choose a *Common* Legal Representative or representatives, "*where there are a number of victims*" and "*for the purposes of ensuring the effectiveness of the proceedings*" (rule 90, sub-rule 2).

Rule 90, sub-rule 3, clarifies that a power to *impose* legal representation, whenever the victims are unable to make the choice, is bestowed on the Chamber in respect of a common Legal Representative. *A contrario*, as regards an individual Legal Representative, no such power seems vested in the Chamber under this provision. Accordingly, a victim's "*freedom*" to choose a Legal Representative includes the right not to proceed to such a choice and to exercise his or her right to participate on his or her own.

The optional nature of the role of the Legal Representative (whether individual or common) is also apparent in light of rule 91, which specifically addresses the methods of participation by Legal Representatives of victims. According to this rule, only victims assisted by Legal Representatives may be allowed to participate in the proceedings in a way which includes attending and participating in hearings and, subject to the Chamber's decision, may go so far as to entail the right to question a witness, an expert or the accused. Unlike other provisions, which envisage an alternative between the act being performed by the victim or by his or her Legal Representative, rule 91 states that acts such as the participation in hearings and the questioning of a party or witness shall be performed only by a Legal Representative. Therefore, victims acting on their own are precluded from performing those acts. As a result, it may be argued that, whilst victims as such are entitled to participate in the proceedings before the Court, "*enhanced*" rights of participation are vested exclusively in victims acting via Legal Representatives.

Pursuant to rule 90, sub-rule 6, victims' Legal Representatives "*shall have the qualifications set forth in rule 22, sub-rule 1*", *i.e.* the qualifications required for counsel for the defence [*i.e.* notably ten years of experience as mentioned in regulation 67 of the Regulations of the Court]. This makes it clear that the Legal Representative can only be a person with satisfactory legal knowledge and background, with a view to shielding the Chamber from the risk that such participation might result in excessively disruptive effects on the overall conduct of proceedings. According to some commentators, the provision mirrors the need to create "*incentives*" for victims' participation via legal representation.

Finally, the idea of victims being able to participate either with or without a Legal Representative further emerges from rules 92 and 93. In its relevant part, rule 92, sub-rule 2, provides for notification of relevant decisions or documents to either victims or their Legal Representatives. Similarly, rule 93 enables the Chamber to seek the views of either victims or their Legal Representative.

In light of the above, the following twofold conclusion seems warranted: (i) first, a victim's participation in the proceedings is not conditional upon him or her being assisted by a Legal Representative, even after his or her application has been granted; (ii) second, there are at least two categories of victims entitled to some forms of participation in Court's proceedings: a. victims admitted to the proceedings and assisted by a Legal Representative, enjoying "*enhanced*" procedural rights under rule 91; b. victims admitted to the proceedings but not assisted by a Legal Representative, enjoying more limited rights of participation, in any event entitled to present their "*views and concerns*", possibly in the form of "*opening and closing statements*". Since the role of the Legal Representative is optional even after a decision allowing a victim to participate in the proceedings has been rendered, it appears *a fortiori* that applicant victims cannot claim to have an absolute and unconditional right to be provided with the assistance of a Legal Representative in respect of the phase preceding the Chamber's decision on the merits of the application.

Determining that the appointment of a Legal Representative is *per se* not necessary for a victim to be able to participate in the proceedings or, prior thereto, for that victim's application to be considered by the Chamber, is not tantamount to saying that the Chamber may never make such an appointment. Regulation 80, sub-regulation 1, of the Regulations of the Court allows the Chamber to appoint a Legal Representative of victims where "*the interests of justice so require*". Whilst not mandated *per se*, the appointment of a Legal Representative may thus be required, under this regulation, by considerations of "*the interests of justice*". In light of the general terms in which regulation 80, sub-regulation 1, is formulated, the Single Judge acknowledges that the "*interests of justice*" may recur also in the phase between the filing of the application and the decision on its merits.

See No. ICC-02/04-01/05-134, Pre-Trial Chamber II (Single Judge), 1 February 2007, paras. 2-12.

Pursuant to rule 90(1) of the Rules, a victim shall be free to choose his or her Legal Representative and there is no provision in the Rules that, in principle, prohibits a victim from choosing the Legal Representative of a victim in another case.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, para. 7.

Legal Representatives of non-anonymous victims shall be prohibited from transmitting to their clients copies of any document or evidence included in the confidential part of the case record, as well as any transcript of hearings held in closed session.

The above limitations shall not extend to a general prohibition on the Legal Representatives of non-anonymous victims from discussing with their clients the information and evidence to which they are privy through accessing the confidential part of the case record and attending closed session hearings; and the Legal Representatives of non-anonymous victims shall only be prohibited from discussing with their clients the above-mentioned information and evidence insofar as it would allow the non-anonymous victims that they represent to identify the specific witnesses in the confirmation hearing of the present case.

See No. ICC-01/04-01/07-537, Pre-Trial Chamber I (Single Judge), 30 May 2008, pp. 12-13.

In order to ensure the rights of the Defence, protect the interests of the victims and preserve the integrity of the proceedings, the Chamber is of the view the provisional separation of the Legal Representative from his functions as Legal Representative of victims is necessary as a precautionary measure until the issue of an apparent conflict of interest is resolved.

See No. ICC-01/04-01/07-660, Pre-Trial Chamber I, 3 July 2008, p. 9.

The presence of the representatives of participating victims during the evidence of defence witnesses when the court is sitting in closed session is an essential part of their right to participate in the proceedings, unless it is demonstrated that this will be inconsistent with the rights of the accused and a fair and expeditious trial. The Chamber notes that on 11 February 2010, it ruled that the Legal Representatives could remain in the courtroom during the examination of the defence witness when the issue of the possible exclusion of the representatives was raised by the defence in relation to this witness. The absence of the Legal Representatives from the Chamber could markedly undermine their ability to discharge their professional obligations to their clients because they would be unaware of potentially important evidence given during closed-session hearings. The restrictions, set out above, on the dissemination of any information that may reveal the identity of protected individuals means that the concerns of the defence in this regard are met. Nonetheless, the parties and participants are entitled to raise discrete concerns that may result from the participation or presence of particular Legal Representatives at any stage.

See No. ICC-01/04-01/06-2340, Trial Chamber I, 11 March 2010, para. 39.

While it has issued on 18 November 2010 a decision on six sets of applications for participation, a decision of the Chamber on the seventh and eighth sets is still pending. The decision on the remaining two sets will not be issued prior to the opening of the trial on 22 November 2010, pending the filing by the defence of its observations thereon. The Chamber notes that the defence observations in relation to the seventh and eighth sets of applications are to be submitted by 26 November 2010 and 8 December 2010, respectively.

[…]

The Chamber nevertheless underlines that the applications for participation contained in the seventh and eighth sets have been received within the time limit set in the 7 September 2010 Decision. Thus, as the trial is scheduled to start on 22 November 2010 and in order not to prejudice these applicants ("the Applicants"), among whom some may later be granted participating status, it is appropriate, under such exceptional circumstances, to allow the Applicants to be represented at the commencement of the trial pending a decision on their application to participate in the proceedings, and to make opening statements, if they so wish.

[…]

The Chamber recalls that such opening statements, if any, are not considered as evidence for the purposes of the trial. The Chamber further underlines that their representation at this stage does not extend to the right to be allowed to put questions to witnesses. Accordingly, the Chamber is of the view that allowing Applicants whose applications have been already filed to be represented at the commencement of the trial and to make opening statements is not prejudicial to, or inconsistent, with the rights of the accused.

[…]

Although the Chamber acknowledges the time constraints thereby imposed on the OPCV, it is of the view that the OPCV, which already represents a vast majority of the Applicants, and which used to represent a number of the victims who have now been granted participating status, is in a better position to effectively express the Applicants views and concerns at the opening of the trial and until such time as the Chamber reaches a decision on their applications to participate.

See No. ICC-01/05-01/08-1020, Trial Chamber III, 19 November 2010, paras 21-23, and 26.

Firstly, the Chamber notes that article 1 of the Code of Conduct provides: "*This Code shall apply to defence counsel, counsel acting for States, amici curiae and counsel or legal representatives for victims and witnesses practising at the International Criminal Court, hereinafter referred to as* 'counsel'". In the Chamber's view, the provisions of the code, which set forth a series of obligations binding on all counsel practising at the Court, apply both to Defence counsel and the Legal Representatives.

Under article 28 of the Code of Conduct, "[c]*ounsel shall not address directly the client of another counsel except through or with the permission of that counsel*". Such obligation, which has been stated by the Chamber on several occasions, allows the victim to receive all useful information from the legal representative defending his or her interests, and allows the legal representative fully to exercise his or her representation mandate.

Under article 15(1) of the Code of Conduct, "[c]*ounsel shall provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation*". In this respect, the Chamber emphasises that the duty to assist and advise is not restricted to submitting applications for reparations for harm suffered, as the Defence maintains; it may be exercised at all stages of the proceedings. With respect to the concern raised by the Defence, the Chamber must emphasise that, in exercising their mandate, legal representatives – and all members of their team – are bound to comply with the obligations of the Code of Conduct and must not adopt any attitude which would be prejudicial to the determination of the truth.

The Chamber nevertheless recognises the specific nature of the counsel-client relationship in the particular context of the legal representation of victims before the Court. It also acknowledges that the Code of Conduct must be interpreted in light of the provisions of the Statute and the Rules governing the participation of victims in the proceedings through legal representatives, while emphasising that such participation must not be "*prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*".

The Chamber is nevertheless alive to the Defence's argument that the application of the provisions of the Code of Conduct and, in particular, the relationship between legal representatives and their clients must not prejudice the fair conduct of the trial and hence the rights of the Accused, including their right to silence and the opportunity they should be afforded to conduct investigations in conditions respecting the equality of arms.

Furthermore, whilst mindful of the specific nature of the situation of victims represented by counsel, the Chamber finds that it must refer to its Decision 1134 of 14 May 2009 governing, *inter alia*, contact between witnesses called by another party who are not covered by the Court's protection programme, and to the relevant decisions rendered by the Trial Chamber I in *Lubanga*.

As to the presence of a legal representative of a victim when the victim is interviewed by a party, the Chamber emphasises that it is for the victim to decide whether he or she wishes to be assisted by his or her counsel. The legal representative and the party in question must comply with the victim's decision. As regards the Legal Representatives' proposal that, in certain cases, the entire content of the interview or any document obtained from the victim should be disclosed to them, the Chamber is of the view that such an obligation to disclose the results of investigations, including incriminating evidence in some instances, could be detrimental to the Defence team's investigations and, consequently, the efficient preparation of the Defence itself. It recalls that the only disclosure obligations the Chamber has placed on the Defence are those set out in Decision 2388 of 14 September 2010.

In this respect, the Chamber considers that, in principle, the party conducting the interview, having previously discharged its obligation to inform the legal representative in advance, is in no way obligated to disclose a statement or any other document prepared during the interview with the victim concerned. Either the legal representative will have had an opportunity to be present at the interview or, if absent, will have an opportunity to ask the client subsequently to provide him or her with any relevant information on the content of the interview. In the event that a party omits to inform the legal representative of the victim concerned in advance and thereby fails to satisfy the obligation to inform, it must not only notify the legal representative as soon as practicable that the interview was held but must also, where applicable, provide him or her with certain information, specified below, pertaining to how it progressed.

Accordingly, the Chamber wishes the victims participating in the proceedings to be afforded effective legal representation without the rights of the Accused being prejudiced. In order to reconcile these dual requirements and the circumstances specific to this case, the Chamber has carefully balanced the rights of the Accused with the interests of the victims in deciding on the guidelines below.

See No. ICC-01/04-01/07-2571-tENG, Pre-Trial Chamber II, 23 November 2010, paras. 18-21, and 23-27.

In view of the large number of victims granted authorisation to participate in the present proceedings, the Single Judge, mindful of the need to ensure the fairness and expeditiousness of the proceedings, while also providing for the meaningful participation of victims, deems it necessary that common legal representation be provided for the victims hereby authorised to participate.

The Single Judge notes the observations of the Registry that, due to the prevailing security situation in the Kivus, practical challenges would be encountered if consultation with the victims in question, with a view to organizing common legal representation, were attempted, particularly if such a process were attempted within a short-time frame. In view of these practical difficulties, as well as the proximity of the commencement of the

Confirmation Hearing, the Single Judge deems it appropriate that representation of the unrepresented victims, who have been granted authorization to participate by the present decision, be taken up by one or more of the hereinbefore mentioned Legal Representatives for the purposes of the participation of these victims in the proceedings related to the Confirmation Hearing. For that purpose, the Single Judge instructs the Registry to assign one or more groups of unrepresented victims to one or more Legal Representatives hereby recognized.

See No. ICC-01/04-01/10-351, Pre-Trial Chamber I (Single Judge), 11 August 2011, paras. 46-48.

The duration and eventual termination of the representation agreement is governed by article 17(1) of the Code of Professional Conduct for Counsel (entitled "Duration of the representation agreement"), which stipulates as follows:

Counsel shall advise and represent a client until:

(a) The case before the Court has been finally determined, including all appeals;

(b) Counsel has withdrawn from the agreement in accordance with article 16 or 18 of this Code; or

(c) A counsel assigned by the Court has been withdrawn.

The Appeals Chamber notes that this provision ensures that there are no gaps in the legal representation of a client, even if a case continues before the Appeals Chamber. The application of article 17(1) of the Code to the case at hand leads to a practical result: it ensures that the Victims remain represented unless and until the case is concluded, the Legal Representative withdraws, or is withdrawn by the Pre-Trial Chamber, the Trial Chamber or indeed the Appeals Chamber. In contrast, limiting the legal representation from the outset to the proceedings before the Pre- Trial Chamber would have led to a situation in which, as soon as the case moves to the Trial Chamber, as well as in respect of all proceedings before the Appeals Chamber, the Victims would be without legal representation. In such a situation, the Trial or Appeals Chamber would not even have an interlocutor with whom to address the arrangements for the participation of the Victims.

See No. ICC-01/09-02/11-416 OA4, Appeals Chamber, 23 April 2012, paras. 16-17.

The Single Judge considers that, at this stage, legal representation of applicants is not required. This stance of the Single Judge is vindicated by her belief that for the limited purpose of the application process the assistance and support to be provided by the VPRS is sufficient to duly guarantee the applicants' right to apply for participation. However, the Single Judge stresses that, should any issue arise which warrants submissions by the applicants, their legal representation will be promptly organized, unless some of the applicants are assisted by a lawyer of their own choice.

With regard to the legal representation of unrepresented applicants who might be admitted as participants in the case, the Single Judge considers that this will be subject to the wishes of the applicants, the potential conflicts of interests among groups of applicants, as well as the Chamber's discretion depending on the circumstances of the case. In this context, the Single Judge considers it necessary that the Registry begins organizing the legal representation pursuant to rules 16(1)(b) and 90 of the Rules. Accordingly, the Registry is instructed to consult with applicants as to their preferences for legal representation and to assess whether or not they could be represented by a common legal representative(s), including by the OPCV.

See No. ICC-01/04-02/06-67, Pre-Trial Chamber II (Single Judge), 28 May 2013, paras. 45-46.

As provided by rule 90(1) of the Rules of Procedure and Evidence ("Rules"), a victim is in principle free to choose a legal representative. Thus, on the condition that an applicant is admitted to participate, a counsel they have provided with a valid power of attorney may represent them and, to the contrary of what appears to be the understanding of the Registrar, no "*appointment*" by the Chamber is necessary. This is, however, without prejudice to the organisation of common legal representation under rule 90(3) and (4) or the appointment of a legal representative by a Chamber when the interests of justice so require, under regulation 80 of the Regulations of the Court.

The procedure applicable in the present situation is that provided for in regulation 123(1) of the Regulations of the Registry, which specifies that the Registrar shall acknowledge the issuance of power of attorney and shall notify the acknowledgement to the person who has chosen the counsel, to the counsel, to the Chamber and to the competent authority exercising regulatory and disciplinary powers over counsel in the national order. This procedure of acknowledgment necessarily includes a confirmation by the Registrar that the power of attorney is valid.

The Single Judge notes that 198 applicants whose applications were transmitted on 18 September 2015 and were not opposed by either party were automatically admitted to participate in the proceedings upon expiration of time limit for parties' objections, *i.e.* on 5 October 2015 (see ICC-02/04-01/15299, ICC-02/04-01/15-309 and ICC-02/04-01/15-312-Conf). Any powers of attorney given by these victims admitted to participate in the proceedings must immediately be verified and, if appropriate, acknowledged. Furthermore, the acknowledgement must be notified to the Chamber. Simply informing the Chamber that the Registrar has received powers of attorney is inadequate and causes delay in the effective participation of victims in the proceedings.

In addition, in order to enable the Single Judge to take any necessary decisions in relation to the organisation of legal representation of victims in the record of the case, it is appropriate to order the Registrar to verify the powers of attorney received from any persons whose applications for participation are pending and confirm whether, if the person is admitted, the Registrar will be able to acknowledge the issuance of the power of attorney. Indeed, only when being informed of which victims have validly chosen legal representatives, and which legal representatives they have chosen, can the Single Judge consider questions such as common legal representation or the need for appointment of a legal representative in the interests of justice.

See No. ICC-02/04-01/15-331, Pre-Trial Chamber II (Single Judge), 29 December 2015, paras. 4-7.

Pursuant to Rule 90(1) of the Rules, '[a] *victim shall be free to choose a legal representative*'. However, the Chamber is of the view that the remainder of Rule 90 of the Rules makes it clear that this right is not absolute and that, '*where there are a number of victims*' and '*for the purposes of ensuring the effectiveness of the proceedings*', a legal representative can be chosen by the Court, taking into consideration the distinct interests of the victims and avoiding any conflict of interest.

See No. ICC-01/12-01/15-97-Red, Trial Chamber VIII, 8 June 2016, para. 36.

Pursuant to Rule 90(1) of the Rules, '[a] *victim shall be free to choose a legal representative*'. However, under Rule 90(2)-(3) of the Rules and Regulation 80 of the Regulations, '*where there are a number of victims*', '*for the purposes of ensuring the effectiveness of the proceedings*', and '[i]*f the victims are unable to choose a common legal representative or representatives*', a Chamber may appoint a legal representative, taking into consideration the distinct interests of the victims and avoiding any conflict of interest.

The LRVs and OPCV both submit that the victims are generally satisfied with their current representation. The current system is supported by the Defence and, according to the OPCV, efficient and effective. The Single Judge notes that many of the difficulties alleged by the LRVs are phrased as hypotheticals or future possibilities. The LRVs do not specify the measures they took to address these alleged difficulties. They do not indicate that they first sought to address most of these matters inter partes, for example, with the OPCV or Registry.

Concerning different representation among family members, the LRVs and OPCV have apparently agreed on a course of action. The Single Judge commends this initiative, but notes that no relief is requested. Generally, the parties and participants must exhaust other available and reasonable measures before seizing the Chamber, particularly in matters of representation, which are best addressed, whenever possible, by counsel, their clients, and the Registry.

Accordingly, the Single Judge considers that there is no indication that the current system of representation is ineffective. Any judicial intervention in the organisation of victim representation is therefore not warranted at this stage.

Finally, the Single Judge considers that the procedural rights accorded to participating victims by the Pre-Trial Chamber continue to apply *mutatis mutandis*. The Single Judge notes that the interests of the two groups of victims represented by the LRVs and OPCV are not distinct, nor are there any irreconcilable conflicts apparent within each group. Further, according to the Registry, the victims themselves do not object to the possibility of a single counsel or team representing all participating victims in the case. In these circumstances, the Single Judge considers that the LRVs and OPCV must consult, cooperate and, whenever possible, act jointly. This promotes the fair and expeditious conduct of the proceedings and the rights of the accused.

See No. ICC-02/04-01/15-476, Trial Chamber IX (Single Judge), 17 June 2016, paras. 7-11.

The Appeals Chamber notes that, generally, it is not only in the interests of victims, but also in the interests of the efficient conduct of the proceedings, that victims are legally represented during the reparations phase. Indeed, rule 90 of the Rules concerns the legal representation of victims, with sub-rules 2 to 5 providing for the appointment of a common legal representative "[f]*or the purposes of ensuring the effectiveness of the proceedings*". In addition, regulation 80(1) of the Regulations of the Court provides that "[a] *Chamber, following consultation with the Registrar and, when appropriate, after hearing from the victim or victims concerned, may appoint a legal representative of victims where the interests of justice so require*". In the view of the Appeals Chamber, legal representation of victims is a means to make their participation substantive and effective and to ensure that they have adequate support. The Appeals Chamber notes, however, that the Court's legal texts do not expressly provide that victims must be represented by counsel at all times before a trial chamber and the Appeals Chamber therefore rejects the OPCV's argument that representation of victims must be continuous.

See No. ICC-01/04-01/07-3778-Red A3 A4 A5, Appeals Chamber, 8 March 2018, para. 216.

For the reasons set out by the VPRS, the Chamber sees no reason to organise a new system of representation. The currently appointed counsel is and shall remain the representative of current and new applicants. The latter would be informed that they will be represented by the currently appointed counsel at the latest when submitting their application, and before to the extent possible. Alternative representation will be organised only if the need arises. As suggested by the VPRS, the Chamber must be informed by the VPRS and Legal Representative of Victims when such a need arises.

See No. ICC-01/12-01/15-273-Red, Trial Chamber VIII, 12 July 2018, para. 28.

2. Common legal representation

It is the view of the Single Judge that the appointment of a legal representative at this stage, albeit not compulsory, might nevertheless be appropriate, as it will prevent an adverse impact on the expeditiousness of the proceedings. Since the statements of these two victims present numerous similarities as regards the type of crimes involved, the appointment of a common legal representative appears also appropriate, with the view of ensuring the effectiveness of the proceedings pursuant to rule 90, paragraph 2 of the Rules.

See No. ICC-02/04-01/05-252, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 80 and 162. See also No. ICC-02/04-125 and No. ICC-02/04-01/05-282, Pre-Trial Chamber II (Single Judge), 14 March 2008, para. 192.

Rule 90(4) of the Rules provides that in the process of the selection of common Legal Representatives, the Chamber and the Registry shall take "[a]*ll reasonable steps to ensure that* […] *the distinct interests of the victims* […] *are represented and that any conflict of interest is avoided*". In order to protect these individual interests effectively, it is necessary to apply a flexible approach to the question of the appropriateness of common legal representation, and the appointment of any particular common Legal Representative. As a result, detailed criteria cannot be laid down in advance. However, the Chamber envisages that considerations such as the language spoken by the victims (and any proposed representative), links between them provided by time, place and circumstance and the specific crimes of which they are alleged to be victims will all be potentially of relevance. In order to assist it in the consideration of this issue, the Trial Chamber directs the Victims Participation and Representation Section to make recommendations on common legal representation in its reports to the Chamber.

The Chamber agrees with the Legal Representatives of victims that the approach to decisions under rule 90 of the Rules should not be rigid, and instead will depend on whether at a certain phase in the proceedings or throughout the case a group or groups of victims have common interests which necessitate joint representation. The Chamber accepts the defence submission that this approach should promote clarity, efficiency and equality in the proceedings.

The Chamber will take into consideration the views of victims under article 68(3) of the Statute, along with the need to ensure that the accused's right to a fair and expeditious trial under article 67 of the Statute is not undermined.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 124-126.

Appointing a common Legal Representative for the victims in the case and a common Legal Representative for the victims in the context of the situation is deemed necessary at this stage to ensure the effectiveness of the proceedings. Where an applicant is granted the status of victim both in the context of the Situation and in the Case, the appointment of a Legal Representative entrusted with the task of representing and protecting the victim's interests both in the Situation and in the Case appears appropriate, in order to provide the victim with one interlocutor only and secure his or her uniform representation.

See No. ICC-02/04-117, Pre-Trial Chamber II (Single Judge), 15 February 2008, p. 5.

The Single Judge is of the view that, in application of rule 90(2) of the Rules, and considering the number of victims recognised as participants in the present case, a presentation of their views and concerns by a single common Legal Representative is deemed appropriate in order to ensure effectiveness of pre-trial proceedings.

The Single Judge is aware that in the selection of common Legal Representatives, following rule 90(4) of the Rules, the distinct interests of the victims participating in the present proceedings must be taken into consideration and that any conflict of interest should be avoided.

In order to appoint a common Legal Representative, criteria adapted to the circumstances of the case in question may be envisaged, such as (i) the language spoken by victims, (ii) links between them provided by time, place and circumstances, (iii) the specific crimes of which they allege to be victims, (iv) the views of victims, and (v) respect of local traditions.

To this end, the Single Judge notes that victims recognised as participants to participate in the present case allege to have suffered of mainly similar crimes, which occurred on the territory of the Central African Republic (the "CAR") and were allegedly committed by the same group of perpetrators. Under these circumstances the Single Judge holds that one common Legal Representative, preferably from the CAR, should be chosen by all victims recognised as participants in the present case with the assistance of the Registry pursuant to rule 90(2) of the Rules.

In case the victims participating in the present case are unable to choose a common Legal Representative, the Single Judge requests, pursuant to rule 90(3) of the Rules, the Registrar to choose one common Legal Representative from the CAR.

In case some of the victims participating in the present case object to being represented by the common Legal Representative appointed by the Registrar, or a conflict of interest is shown by the common Legal Representative, the Single Judge wishes to appoint the Office of Public Counsel for Victims (the "OPCV") as Legal Representative of those victims not represented by the common Legal Representative, if need be.

Concerning the role of OPCV, the Single Judge notes that this office is established for the main purpose of providing assistance and support to victims and their Legal Representatives in proceedings before this Court pursuant to regulation 81(4) of the Regulations, which includes (a) legal research and advice, and (b) appearing before a Chamber in respect of specific issues. In addition, counsel of this office may act as Legal Representative of victims pursuant to regulation 80(2) of the Regulations.

In the present case the OPCV has been appointed by the Chamber as Legal Representative for those victims "*where no Legal Representative has been appointed by the victims*". Thus, the Single Judge wishes to point out that the OPCV had been appointed by the Chamber only in case and for the time where victims could not organise their timely legal representation. The Single Judge finds it appropriate that at this stage of proceedings, where victims have been recognised to participate in the present case, be represented by a counsel from their country, unless those victims object to such legal representation.

In case all victims participating in the present case agree to be represented by one common Legal Representative from the CAR, the OPCV will fulfil its mandate as provided in regulation 81 of the Regulations of the Court. In case, one or more victims object to being represented by a counsel from the CAR, the OPCV will continue to act as Legal Representative for those victims, in addition to its mandate pursuant to regulation 81 of the Regulations.

See No. ICC-01/05-01/08-322, Pre-Trial Chamber III (Single Judge), 16 December 2008, paras. 7-15.

In formulating the following guidelines, the Chamber was guided by three overriding concerns:

a. First, the Chamber attaches the greatest importance to the requirement that the participation of victims, through their Legal Representatives, must be as meaningful as possible as opposed to being purely symbolic. To that end, the Chamber considers it of utmost importance that there is a steady and reliable flow of information about the proceedings to the victims and that there is real involvement by the victims in terms of instructing the Legal Representatives on how their interests should be represented.

b. Second, the Chamber is duty-bound to ensure that the proceedings are conducted efficiently and with the appropriate celerity. The Chamber must therefore guard against any unnecessary repetition or multiplication of similar arguments and submissions. This requirement also implies that victims' legal representatives must always be available to participate fully, even on short notice, in all stages of the proceedings when their clients' interests are engaged. This further requires that Legal Representatives who appear before it are completely familiar with all legal and factual aspects of the case.

c. Third, the Chamber is of the view that its obligation under article 68(3) of the Statute to ensure that victims' participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, extends to the organisation of the legal representation of victims. It is important, in this respect, that the participation of victims does not impose too heavy a burden upon the Defence.

Furthermore, the Chamber emphasises that, although victims are free to choose a Legal Representative this right is subject to the important practical, financial, infrastructural and logistical constraints faced by the Court. Common legal representation is the primary procedural mechanism for reconciling the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible. The Chamber considers, therefore, that the freedom to choose a personal Legal Representative, set out in rule 90(1) is qualified by rule 90(2) and subject to the inherent and express powers of the Chamber to take all measures necessary if the interests of justice so require.

The Chamber analysed all applications for participation in light of the above and noted that:

a. The number of applications is so large that, taking into consideration that (1) the Chamber has already authorised 57 victims who participated in the confirmation proceedings to continue participating in the trial proceedings and (2) that the Chamber will soon issue its decision on the new applications, which will multiply the number of participating victims, it would be entirely unfeasible for each of them to be represented individually.

b. Apart from a limited number of applicants, all victims allege to have suffered harm as a consequence of the attack on Bogoro on 24 February 2003. There do not seem to be tensions between them in terms of ethnicity, age, gender or the type of crimes they were allegedly the victim of.

c. Falling outside of this large group, there is a small number of applicants who are former child soldiers, who allege to have participated in the attack of 24 February 2003. They may thus have perpetrated some of the crimes that victimised the other applicants. Moreover, these applicants have a different ethnic background to that of the other applicants.

d. Apart from the applicants mentioned in (c), immediately above, a large proportion of victims allege to have been the victims of more than one of the crimes charged and to have suffered different types of harm. It is thus not possible to group the victims in entirely separate categories, as there are a number of victims who fall in more than one category.

e. Most applicants are still living in the area in which the attack took place.

Given these factors, the Chamber considers it both necessary and appropriate to group all victims who have been admitted to participate in this case, with the exception of the victims mentioned in paragraph 12.c, into one group represented by one common Legal Representative. The common Legal Representative shall be responsible for both representing the common interests of the victims during the proceedings and for acting on behalf of specific victims when their individual interests are at stake. The common Legal Representative shall be accountable to the victims as a group, who may petition the Registry in case of significant problems with the representative function of the common Legal Representative. If the problem cannot be resolved by the Registry, the latter shall inform the Chamber.

As the Chamber noted earlier, it is vital that the common Legal Representative must be fully available throughout the entire duration of the proceedings. The Chamber is of the view that the quality of the legal representation of victims may not suffer as a result of other competing engagements of the (common) Legal Representatives. Before accepting his or her mandate, a (common) Legal Representative must give reasonable assurance that he or she will be available at the seat of the Court for the entirety of the expected duration of the hearings on the merits and the subsequent reparations phase. It would therefore be preferable for the common Legal Representative not to be involved in more than one case before this Court at once. At the same time, the Chamber considers that it would be desirable if the common Legal Representative (or at least one member of his or her team) 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.

In case the common Legal Representative receives conflicting instructions from one or more groups of victims, he or she shall endeavour to represent both positions fairly and equally before the Chamber. In case the conflicting instructions are irreconcilable with representation by one common Legal Representative, and thus amount to a conflict of interest, the common Legal Representative shall inform the Chamber immediately, who will take appropriate measures and may, for example, appoint the Office of Public Counsel for the Victims to represent one group of victims with regard to the specific issue which gives rise to the conflict of interest. The Chamber notes that nothing in the paragraph predetermines the modalities of participation which the Chamber will determine in a separate decision.

In order to allow the common Legal Representative to perform his or her duties efficiently, the Registry, in consultation with the common Legal Representative, shall propose a suitable support structure, in order to provide the common Legal Representative with the necessary legal and administrative support, both at the seat of the Court and in the field. This support structure must, to the extent possible and within the limits of the available legal aid structure, allow the common Legal Representative to:

a. Keep his or her clients informed about the progress of the proceedings and any relevant legal or factual issues that may concern them, in accordance with article 15 of the Code of Conduct for Counsel. The support structure should also allow the common Legal Representative to respond to a reasonable number of specific legal inquiries from individual victims.

b. Receive general guidelines or instructions from his or her clients as a group and particular requests rom individual victims.

c. Maintain up to date files of all participating victims and their whereabouts.

d. Obtain qualified legal support on a need basis.

e. Store and process any confidential filings or other information, including the identity of his or her clients, in a safe and secure manner.

f. Communicate with victims in a language they understand.

To the extent that this is reconcilable with the Registry's mandate and neutrality, and insofar as this does not affect the independence of the common Legal Representative, the support structure may rely on resources available to the Registry at the seat of the Court or in the field *(e.g.* facilities or support staff available in a field office). If the Registry seconds one or more members of its personnel to the support structure of the common Legal Representative, these persons, although belonging to the Registry for administrative purposes, shall operate under the instruction of the common Legal Representative.

See No. ICC-01/04-01/07-1328, Trial Chamber II, 22 July 2009, paras. 10-18.

The Single Judge, heedful of the number of victims admitted as participants in the present proceedings and with the view to ensuring meaningful victims' participation as well as fairness and expeditiousness of the proceedings, is of the opinion that common legal representation should be provided for the victims hereby admitted as participants and that all of them should be represented by a single common Legal Representative. In this respect, the Single Judge takes due consideration of the conclusion of the Registrar to the effect that in the present case no "*distinct interests of the victims*" have arisen and that no conflict of interest has been reported to date. Accordingly, there are no reasons for dividing the victims into different groups and appointing more than one common Legal Representative. The Single Judge recalls that she already instructed the VPRS "*to take appropriate steps with a view to organizing common legal representation for the purposes of the confirmation of charges hearing, in accordance with rule 16(1)(b) and 90(2) of the Rules*". Accordingly, the Registrar submitted to the

Chamber the Proposal on Common Legal Representation, on which the Single Judge will now resort to address the matter under consideration.

The Single Judge endorses the view of the Registrar that, although "*it is usually preferable to have continuity of legal representation*", "*prior representation of applicants in a case is not of itself a determinative factor in choosing a common Legal Representative*". Accordingly, the continuity of legal representation of victims is to be considered only as one of the criteria that are of relevance for the purposes of selecting a common Legal Representative of victims. This entails that other counsel may be eligible to be appointed as common Legal Representatives, regardless of their previous involvement in the present case. In this respect, the Single Judge has thoroughly considered all the criteria identified by the Registry for the selection of suitable candidates to recommend to be appointed by the Chamber as common Legal Representative.

These criteria, which have to be adjusted to the particularities of a given case, go beyond the *minimum* requirements for counsel set out in the Court's legal texts and are based on the Court's jurisprudence and on the experience of the Registry to date.

First, the candidate "*should demonstrate an established relationship of trust with the victims or the ability to establish such a relationship*". In considering this criterion, the Registry has taken into account whether a candidate: (i) already represents the victims in the case or in the situation at stake; (ii) has an engagement with victims in other *fora*; (iii) is known to the victims as a human rights advocate or a community leader; (iv) shares cultural, ethnic, linguistic heritage with all victims, or part of them; and (v) will enable victims to speak frankly about the crimes experienced. Second, the candidates "*should demonstrate an ability and willingness to take a victim-centred approach to their work*". According to this criterion, preference may be given to candidates who have experience in working with victims or vulnerable groups. The third criterion identified by the Registry is the familiarity of the candidate with the country where the crimes in connection to which the victims are admitted to participate in the proceedings have been allegedly committed. Such familiarity may originate from the fact that the candidate is from that country, or it may be the result of professional or personal experience that the candidate could have gained. Fourth, the candidate should have relevant expertise and experience, demonstrated by: (i) previous experience in criminal trials, at the national or international level, either before the Court or before other international tribunals; (ii) experience representing large groups of victims; and (iii) specialized study in relevant academic fields. Fifth, the candidate needs to be ready to commit a significant time: (i) to maintain contact with a large number of clients; (ii) to follow developments in Court's proceedings; (iii) to take any appropriate steps in the proceedings; and (iv) to maintain adequate contact with the Court. Lastly, the candidate must demonstrate a *minimum* level of knowledge in information technology.

The Single Judge endorses such criteria as identified by the Registrar, as well as the conclusions of the Registrar that, in light of the said criteria, "*the benefits of continuity of representation are minimal in respect of the existing private Legal Representatives in the present case*", since the Registrar is not convinced either (i) that "*the current Legal Representatives have established meaningful relationships of trust with significant number of their clients*" or (ii) that "*counsels' representation to date in this case indicates a particular familiarity with ICC proceedings*". Hence, the Registrar is of the view that "*the involvement to date of victims' current counsel has not provided them with any material advantage over other candidates in terms of the selection criteria*".

The Single Judge recalls that, on the basis of the said criteria and in light of the Single Judge's order to properly organize the common legal representation of victims, the Registrar conducted an appropriate selection process in several steps, comprising of: (i) a request for expression of interest sent to the lawyers on the Registry's list of counsel; (ii) an initial review of the candidates who provided the information requested; (iii) an evaluation of written answers to questions on the proposed approach towards legal representation of victims; and (iv) a telephone interview. Upon the said selection process, the Registrar proposes a counsel for the position of common Legal Representative in the present case. Taking into account the criteria identified by the Registrar and the proposal to discontinue the current legal representation of victims and upon evaluation of the personal information and professional skills of the proposed candidate, the Single Judge hereby decides to appoint said counsel as common Legal Representative of all the victims admitted to participate by the present decision.

The Single Judge concurs with other Chambers of the Court with respect to the necessity that an appropriate legal and administrative support be provided to the common Legal Representative in order to perform her duties in an efficient and expeditious manner. In this respect, the Single Judge adopts such approach as also reiterated by the Registrar in her Proposal on Common Legal Representation, according to which a support structure to be proposed by the Registrar would allow the common Legal Representative to:

a. Keep his or her clients informed about the progress of the proceedings and any relevant legal or factual issues that may concern them, in accordance with article 15 of the Code of Professional Conduct for Counsel. The support structure should also allow the common Legal Representative to respond to a reasonable number of specific legal inquiries from individual victims.

b. Receive general guidelines or instructions from his or her clients as a group and particular requests from individual victims.

c. Maintain up to date files of all participating victims and their whereabouts.

d. Obtain qualified legal support on a need basis.

e. Store and process any confidential filings or other information, including the identity of his or her clients, in a safe and secure manner.

f. Communicate with victims in a language they understand.

The Single Judge notes that, according to the Registrar, the common Legal Representative will presumably rely on the Court's legal aid scheme under rule 90(5) of the Rules, and, therefore, that the size and nature of the legal team to support the common Legal Representative "*will largely depend on the resources made available for that purpose by the Registry*". In light of the peculiarities of the case – including the number of victims admitted to participate, the geographical and linguistic difficulties in establishing contact with the victims and the legal and factual complexity of the present case – the Registrar proposes, for the pre-trial proceedings, to finance "*to a reasonable level*" the assistance of: (i) a legal assistant; (ii) a qualified case manager; and (iii) two field assistants. The Single Judge, mindful that the effectiveness of common legal representation depends, *inter alia*, on the assistance, in terms of financial and human resources, provided to the common Legal Representative, considers the Registry's proposal appropriate and thus endorses it.

Turning to the matter of the transitional phase from the previous representation to the newly appointed common legal representation, the Single Judge recalls that, pursuant to articles 15(2) and 18(5) of the Code of Professional Conduct for Counsel, all counsel previously representing the victims admitted to participate by the present decision shall convey to the common Legal Representative "*any communication that counsel received relating to the representation*", as well as "*the entire case file, including any material or document relating to it*". In this respect, the Single Judge is of the view that the Registrar shall supervise the said transitional phase, including by way of holding meetings with the victims in order to explain the reasons and the process of appointment of the common Legal Representative.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 65-81. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, paras. 77-95.

The Single Judge is compelled to recall what has been recently stated in the "Decision on the 'Defence Request for Leave to Appeal the 'Urgent Decision on the 'Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence' (ICC-01/09-01/11-260)'", in which the Single Judge rejected the approach of reconsidering previous rulings, particularly "*in instances where a Chamber has ruled on the issue* sub judice *in good faith and considering the information available to it as correct and reliable*". In the case of the 5 August 2011 Decision, the ruling on common legal representation was taken on the basis, *inter alia*, of information provided by the Registry as the relevant neutral body of the Court. Accordingly, the Single Judge sees no reason to depart from her previous position and considers that the Request for Reconsideration must be rejected.

Nevertheless, taking into account the sensitivity of matters concerning victims, the Single Judge deems it appropriate to make some considerations and clarifications on the arguments advanced by the Applicants. As regards to what the Applicants inconsistently refer to as "*right to appeal*", "*possibility of appeal or redress*" or "*possibility to seek revision*" under regulation 79(3) of the Regulations of the Court, the Single Judge recalls that the said regulation provides that "*victims may request the relevant Chamber to review the Registrar's choice of a common Legal Representative under rule 90, sub-rule 3, within 30 days of notification of the Registrar's decision*". From this provision, it follows that victims may request the Chamber to review the Registrar's choice concerning common legal representation only when the candidate is decided upon by the Registrar and within 30 days "*of notification of the Registrar's decision*".

Contrary to the procedure foreseen in regulation 79(3) of the Regulations, in the 5 August 2011 Decision the Single Judge decided to appoint a common Legal Representative for the 327 admitted victims pursuant to regulation 80(1) of the Regulations of the Court, which states that "*a Chamber, following consultation with the Registrar, may appoint a Legal Representative of victims where the interests of justice so require*". In appointing the current Legal Representative, the Single Judge availed herself of the Proposal on Common Legal Representation that the Registrar submitted pursuant to rule 16(1)(b) and 90(2) of the Rules. According to the latter provision, the Registrar "*in facilitating the coordination of victim representation* […] *may provide assistance*, inter alia*, by* […] *suggesting one or more common Legal Representatives*". Under those circumstances, it is the view of the Single Judge that no possibility of seeking review of the Registrar's decision under regulation 79(3) of the Regulations was possible, since no decision pursuant to that regulation was taken by the Registrar. Consequently, there has been no violation of the right to seek revision and the right to representation pursuant to regulation 79(3) of the Regulations of the Court.

See No. ICC-01/09-01/11-330, Pre-Trial Chamber II (Single Judge), 9 September 2011, paras. 11-15.

Victims themselves may have to choose one or more common Legal Representatives (rule 90(2)), this necessarily implies limitation on their right to legal representation. Further, in the event that the victims are unable, within a certain time indicated by the Chamber, to choose their common counsel, the Chamber may request the Registrar to choose one on their behalf (rule 90(3)). The victims' freedom to choose a Legal Representative is even more reduced in the framework of this last option. Indeed, the common Legal Representative will not be chosen by the victims, who were unable to do so within the established deadlines, but by the Registrar. According to the applicable Rules and Regulations, in selecting the common Legal Representative the Chamber

and the Registry shall take reasonable steps to ensure that the victims' interests are appropriately represented and conflicts of interest are avoided.

Once the Registrar acts under rule 90(3), the common Legal Representative is not chosen by the victims but by the Registrar. The Registry and the Chamber should apply the "*guidelines*" provided under rule 90(4) and regulation 79 of the Regulations of the Court. In particular, consideration should be given to the specificity of each group of victims; their distinct or conflicting interests, if any; their views; their local traditions and any other factors that may be appropriate. From the wording of rule 90(4) of the Rules ("*shall take all reasonable steps*"), it is understood that these factors are to be interpreted as "*guidelines*" considered on a case by case basis.

Here, in the context of the Request for Review under regulation 79(3) of the Regulations, the issue before the Chamber is whether the Appointed Legal Representatives have been selected by the Registrar in accordance with rule 90(4) of the Rules referring to article 68(1) of the Statute, and with regulation 79(2) of the Regulations. In other words, the Chamber will review whether the Registry has taken "*all reasonable steps to ensure that the distinct interests of the victims are represented and any conflict of interest is avoided*", bearing in mind the effectiveness of the proceedings and of the legal representation of all victims in this case. The Chamber further notes that, pursuant to rule 90(4), the criteria warranting the implementation of a common legal representation system, namely the distinct interests of victims being represented and the absence of conflict of interest, are cumulative.

See No. ICC-02/05-03/09-337, Trial Chamber IV, 25 May 2012, paras. 12-15.

With regard to the issue of conflict of interest, although no definition of a conflict of interest is provided under the Code of Conduct applicable to the Legal Representatives of victims, the approach so far adopted before this Court is that "*in case the common Legal Representative receives conflicting instructions from one or more groups of victims, he or she shall endeavour to represent both positions fairly and equally before the Chamber. In case the conflicting instructions are irreconcilable with representation by one common Legal Representative, and thus amount to a conflict of interest, the common Legal Representative shall inform the Chamber immediately, who will take appropriate measures* […]". Similarly, this Chamber is of the view that a conflict of interest may arise when the situation or the specificity of the victims is so different that their interests are irreconcilable.

See No. ICC-02/05-03/09-337, Trial Chamber IV, 25 May 2012, para. 42 and No. ICC-01/04-01/07-1328, Trial Chamber II, 22 July 2009, para. 16.

The procedure for victim participation will be based on common legal representation, which will include both an appointed common Legal Representative of victims ("Common Legal Representative") and the Office of Public Counsel for victims ("OPCV") acting on the Common Legal Representative's behalf. The Common Legal Representative will have primary responsibility for being the point of contact for the victims whom he/she represents, to formulate their views and concerns and to appear on their behalf at critical junctures of the trial.

The OPCV's primary responsibility will be to act as the interface between the Common Legal Representative and the Chamber in day-to-day proceedings. To that end, the OPCV will be allowed to attend hearings on behalf of the Common Legal Representative, during which it may be permitted to intervene and question witnesses. The OPCV shall also assist the Common Legal Representative in preparing relevant written submissions. The representation in the courtroom through the OPCV will allow the victims to benefit from the experience and expertise of the OPCV and thereby maximise the efficiency of their legal assistance. Involvement of the OPCV will also ensure that confidential information is handled safely and securely.

The Chamber believes that greater geographic proximity between victims and the Common Legal Representative is important to ensure that victims can communicate easily and personally with their representative and thus ensure meaningful representation. In order to ensure that the Common Legal Representative is fully informed of the day-to-day developments in the proceedings, the OPCV will, as stated above, be permitted to attend all hearings in which victims are allowed to participate. It will be the responsibility of the OPCV to communicate with the Common Legal Representative, who will instruct the OPCV to make submissions on his or her behalf.

See No. ICC-01/09-01/11-460, Trial Chamber V, 3 October 2012, paras. 41-43, and 60. See also No. ICC-01/09-02/11-498, Trial Chamber V, 3 October 2012, paras. 40-42, and 59.

I disagree with the Chamber's decision that relieves from retainer counsel that has been representing victims all along and who has indicated a continuing interest so to do. And not to be ignored is that counsel's Kenyan nationality and her familiarity with the country. In the decision of 3 October 2012, the Chamber had expressed the view that in the present case certain indicated objectives '*may best be achieved with a Common Legal Representative based in Kenya*.' But that was not an isolated pronouncement. Rather, the Chamber had, in that connection, pointed to a '*balance*' that the Chamber '*must find*' among a number of objectives. Those objectives '*include*' the following in particular: '*(a) the need to ensure that the participation of victims, through their Legal Representative, is as meaningful as possible, as opposed to purely symbolic; (b) the purpose of common legal representation, which is not only to represent the views and concerns of the victims, but also to allow victims to follow and understand the development of the trial; (c) the Chamber's duty to ensure that the proceedings are conducted efficiently and with the appropriate celerity, and (d) the Chamber's obligation under article 68(3) of the Statute to ensure that the manner in which victims participate is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*'.

In my view, it is very sensible to say that the balancing of these objectives: – that the Chamber '*must find*' – 'may best be achieved' if the victims' representative is based in Kenya. But aside from those particular objectives and their balancing, it is a matter of eminent common sense to prompt a public functionary, who is assigning counsel to clients on legal aid, to consider that it may be best for lawyers to be based in a location that makes them more easily accessible to the clients they represent. This, of course, is without prejudice to the right of a fee-paying client to prefer, for whatever reason, that her lawyer be located as far away from her as possible. I do not, however, consider that the Chamber's statement that the indicated objectives '*may best be achieved*' if the victims' counsel is based in Kenya should now be applied as a peremptory edict that overrides all other considerations.

There may be circumstances in which the termination of victims' counsel's retainer, as was done in the Chamber's decision, on grounds of failure or inability to commit to full-time location in Kenya at all times "*may*" not be the "*best*" thing that is required by the objectives indicated by the Chamber in the decision of 3 October 2012. Hence, one other important factor that must then be given its due weight is longstanding familiarity with the case as it has thus far been litigated at the Court.

Longstanding familiarity becomes particularly important given the history of the case, the case file and records thus far generated and the date set for the commencement of trial. In those circumstances, one could readily see how most if not all of the objectives indicated by the Chamber in the 3 October 2012 decision are better achieved by assignment of counsel who have longstanding familiarity with the case and are able to maintain an otherwise sufficiently effective presence in Kenya, though not able to be based there on a full-time basis and at all times. In my view, that factor of longstanding familiarity with the case was not given its due weight in the decision of the Chamber, given the availability and continuing interest of the long-serving victims' counsel whose retainer the Chamber has now terminated. I further note, as indicated earlier, that the counsel in question is a citizen of Kenya and is familiar with it, though she is now based in the UK on a full-time bases. Although unwilling to commit to be based in Kenya on a full-time basis and at all times, it is my view that her shared nationality with the victims and her familiarity with the country are factors that particularly enhance her already important advantage of longstanding familiarity with the case. They ought to have been weighed by the Chamber in favour of her continued representation of the victims.

See also, No. ICC-01/09-01/11-479, Dissenting Opinion of Judge Eboe-Osuji, Trial Chamber V, 23 November 2012, paras. 2-7.

In the Decision on Victims' Representation and Participation, the Chamber held that "[t]*he procedure for victim participation will be based on common legal representation*", which will include both the Legal Representative and the OPCV acting on the Legal Representative's behalf. The OPCV's primary responsibility will be to act as the interface between the Common Legal Representative and the Chamber in day-to-day proceedings, and, to that end, it will be allowed to attend hearings on behalf of the Legal Representative, during which it may be permitted to intervene and question witnesses. According to the decision, at critical junctures involving victims interests, notably opening and closing statements, the Legal Representative may make representations in person. The Chamber specified that in other moments at trial, the Legal Representative is required to request participation by filing with the Chamber.

[…]

The Chamber takes note of the Legal Representative's submissions, particularly his efforts to ascertain when his attendance would be significant to his representation of the victims. The Chamber considers that it is not possible at this stage to define exhaustively the notion of "*critical junctures*" by providing a comprehensive set of specific criteria. But, "*critical junctures*" will include the following: (i) the opening statements, (ii) the testimony of the witnesses who are also victims represented by the Legal Representative, (iii) if any, the presentation of views and concerns by victims in person, (iv) oral submissions regarding an application for a ruling on no case to answer, (v) closing statements, and (vi) any hearing on reparations to victims.

The Chamber invites the Legal Representative to seek the Chamber's leave to attend other hearings if necessary.

See No. ICC-01/09-01/11-900, Trial Chamber V(a), 3 September 2013, paras. 29 and 31.

With regard to the legal representation of a/35008/16, the Single Judge has noted his/her '*preference*' to be represented by the OPCV, as detailed in the memorandum of the OPCV. […] The OPCV's previous relationship with this applicant does not, without more, constitute '*compelling reasons*' – […]. The Single Judge does not find that a separate legal representative needs to be appointed solely for a/35008/16, noting further that this victim's interests appear to be identical in nature to that of the victims already admitted to participate in the proceedings.

See No. ICC-01/12-01/15-156-Red, Trial Chamber VIII, 12 August 2016, para. 11.

3. Ad hoc Counsel

Following an order by the Chamber, the Registrar shall appoint an *ad hoc* counsel to represent the general interests of the defence for the purpose of the forensic examinations.

See No. ICC-01/04-21, Pre-Trial Chamber I, 26 April 2005, p. 4.

Following an order by the Chamber, the Registrar shall appoint an *ad hoc* Counsel for the Defence to represent and protect the general interests of the Defence in the Situation in Darfur, Sudan, during the proceedings pursuant to rule 103 of the Rules of Procedure and Evidence.

See No. ICC-02/05-10, Pre-Trial Chamber I, 24 July 2006, p. 6. See also No. ICC-02/05-47, Pre-Trial Chamber I, 2 February 2007, p. 5.

Regulation 76, sub-regulation 1, of the Regulations of the Court provides that "*a Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require*". Considering that none of the warrants of arrest issued in the situation has yet been executed, the appointment of a counsel for the defence is required for the purpose of allowing the proper development of the procedure enshrined in rule 89, paragraph 1 of the Rules and preserving the overall fairness of the proceedings. Since the same individuals are applying to be recognised as victims participating in the preliminary examination, pre-trial, trial and appeals stages, the Single Judge deems it appropriate that one counsel for the defence be appointed and entrusted with responsibility for all aspects relating to the Applications. Given the purpose of this appointment, the functions and powers of the appointed counsel will be restricted to those which may be necessary and appropriate within the context of the proceedings relating to the Applications, including in particular the right to receive a copy of the Applications and to submit observations thereon within the time-limit indicated by the Single Judge.

See No. ICC-02/04-01/05-134, Pre-Trial Chamber II (Single Judge), 1 February 2007, para. 15.

4. Duty Counsel

Pursuant to regulation 73(2) of the Regulations of the Court, if any person requires urgent legal assistance and has not yet secured legal assistance, or where his or her counsel is unavailable, the Registrar may appoint duty counsel, taking into account the wishes of the person, and the geographical proximity of, and the languages spoken by, the counsel.

See No. ICC-01/04-01/07-52, Pre-Trial Chamber I, 5 November 2007, p. 4.

Pending appointment of a Counsel chosen by the person concerned and considering that proceedings should be conduct expeditiously and without undue delays, the Chamber orders the Registrar to appoint a Duty Counsel pursuant to regulation 73(2) of the Regulations of the Court, and decides that her/his mandate shall be limited to the sole purpose of a responding to a defined procedural act.

See No. ICC-01/04-01/06-870, Pre-Trial Chamber I, 19 April 2007, pp. 3-4. See also No. ICC-01/04-01/06-881, Registrar, 4 May 2007, pp. 3-4.

5. Legal assistance paid by the Court

The Appeals Chamber underlines that the question of whether the Legal Representative continues to represent the Victims must be distinguished from the scope of legal assistance paid by the Court.

See No. ICC-01/09-02/11-416 OA4, Appeals Chamber, 23 April 2012, para. 20.

The Chamber is seized of a request by the Legal Representative of the principal group of victims to review an administrative decision by the Registrar concerning the attribution of legal aid for a field mission. The Chamber considers that the Request is admissible and falls within scope of regulation 83(4) of the Regulations of the Court since it pertains to the scope of legal assistance to be paid by the Court. The Chamber notes that there appears to be some ambiguity about the applicable standard of review under regulation 83(4) of the Regulations. As regulation 83(4) of the Regulations does not specify a standard of review, the Chamber must clarify this before considering the actual decision under review. The Presidency's standard of review of Registrar's decisions is inapplicable since the Presidency does not review decisions on the scope of legal aid paid by the Court. The Chamber is therefore not bound to apply the same standard of review. Instead, the Chamber is of the view that a more flexible standard is appropriate, given that the impact and importance of the Registrar's decisions in relation to the scope of legal aid varies so broadly. For example, when Chambers are asked to review crucial decisions affecting the composition of defence teams at a given procedural stage, it is fitting for a Chamber to review the merits of the Registrar's decision more thoroughly in light of the fairness of proceedings and the need to ensure that suspects and accused persons have adequate legal representation. However, when the Registrar makes decisions in relation to the day-to-day operating of defence counsel or Legal Representatives and their teams, the Chamber's intervention is more limited. This is so because the Chamber is not supposed

to micromanage the Registrar in this regard and because it is the Registrar's responsibility to administer the available legal aid budget. It is not disputed that the Registrar has a relatively wide margin of discretion in this area and therefore the Chamber should only interfere with the Registrar's discretion when there are compelling reasons for doing so. In practical terms, this means that: (i) in reviewing such decisions, the Chamber must not consider whether it would have made the same decision as the Registrar; (ii) instead, the Chamber must assess (a) whether the Registrar has abused her discretion; (b) whether the Registrar's decision is affected by a material error of law or fact; and (c) whether the Registrar's decision is manifestly unreasonable. The Chamber adds that it will only intervene if counsel can show that the Registrar's decision meets one or more of these criteria. Moreover, the Chamber clarifies that its role under regulation 83(4) of the Regulations of the Court is limited to reviewing decisions by the Registrar on the scope of legal aid and the Chamber cannot substitute its own decision for one still to be made by the Registrar, as this would usurp the latter's discretion.

See No. ICC-01/04-01/07-3277, Trial Chamber II, 23 April 2012, paras. 1, 7-9, and 23.

Turning to the review of the Registrar's decision on the scope of legal assistance paid by the Court, as set out in the Conclusion Letter, the Appeals Chamber underlines that the question of whether the Legal Representative continues to represent the Victims must be distinguished from the scope of legal assistance paid by the Court. While the former is governed by the Code, the latter is governed primarily by regulations 83 *et seq*., of the Regulations of the Court. In the Conclusion Letter, the Registrar informed the Legal Representative that because of the end of the pre-trial phase, the level of legal assistance paid by the Court during that phase of the proceedings would be discontinued. Nevertheless, the Conclusion Letter does not rule out that future activities of the Legal Representative may be remunerated through the Court's legal aid scheme. However, in order to receive payment, such activities must be authorised beforehand by the Registry. Thus, the Appeals Chamber has to review whether, at this stage of the proceedings, remuneration only of pre-authorised activities of the Legal Representative is adequate.

See No. ICC-01/09-01/11-409 OA3 OA4, Appeals Chamber, 23 April 2012, para. 22.

The Registry informed the Single Judge that it will acknowledge the appointment of [two counsel] as legal representatives of 249 victims participating in the proceedings […]. As the Registry reports that it has validated the powers of attorney, there appears to the Single Judge no reason for the Registrar to further delay the acknowledgment of the appointment pursuant to rule 90(1) of the Rules and regulation 123(1) of the Regulations of the Registry, as this is an essential condition for the appointed legal representatives to have standing in the present proceedings. Considering that by virtue of the present decision also applicants a/05029/15 and a/05226/15 are admitted to participate in the proceedings, the Registry should also complete in their regard as soon as possible the procedure under regulation 123 of the Regulations of the Registry.

Under rule 90(1) of the Rules, victims are generally free to choose a legal representative. It is only for reasons of practicality that the Single Judge may disturb this freedom, as regulated in paragraphs 2 and 3 of the same rule. However, considering that, as explained below, common legal representation can be organised for all victims who have not chosen [said two counsel], the Single Judge considers that there are no practical reasons that would make it necessary to trump the choice made by some victims.

At the same time, prompted by certain information provided by the Registry […], the Single Judge wishes to make the following observation. Rule 90(5) states that "[a] *victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance*". Counsel chosen by victims under rule 90(1) of the Rules is not a common legal representative within the meaning of rule 90, and not chosen by the Court. Therefore, the victims that have chosen to appoint [the two counsel] as their legal representatives, even if they lack the means to pay, do not qualify for financial assistance by the Court. Considering that it appears from the information provided by the Registry that counsel appointed by the victims have informed their clients that their representation would be free of charge as the associated costs could be borne by the Court and that a substantial number of victims even signed powers of attorney indicating that the lawyers would represent them on a pro bono basis, it is imperative that the appointed counsel inform their clients that they presently do not qualify for financial assistance by the Court but may, if they so wish, benefit from legal representation free of charge by the common legal representative appointed by the Single Judge.

Turning to the issue of the legal representation of the remaining 294 victims participating in the proceedings who are currently unrepresented, the Single Judge considers the best course of action to be the appointment of counsel from the Office of Public Counsel for Victims (OPCV) as common legal representative, under regulation 80(1) of the Regulations of the Court. In this regard, the Single Judge does not identify, at the present time, any conflict of interest which would require the separation of these victims into groups with separate legal representation.

The Single Judge considers that the possibility of appointing [the two chosen counsel] as common legal representatives is not appropriate in the present circumstances, considering that they have not been selected pursuant to a transparent and competitive procedure organised by the Registry, considering the reasons identified below which speak in favour of appointment of counsel from the OPCV, and also considering that

appointment of external counsel would bring a disproportionate and unjustified burden to the Court's legal aid budget.

According to regulation 81 of the Regulations of the Court, the OPCV is an independent office, of which the task is, *inter alia*, to represent victims throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interests of justice. Regulation 80 of the Regulations of the Court, which gives the Chamber the power to appoint a legal representative of victims where the interests of justice so require, explicitly mentions the possibility of appointing counsel from the OPCV. Regulation 113(2) of the Regulations of the Registry also refers to the "*possibility of asking the Office of Public Counsel for Victims to act*" as a way of reducing the cost of legal representation of victims borne by the Court's budget.

The Single Judge also notes that counsel from the OPCV currently represent certain victims participating in the case against Joseph Kony and Vincent Otti and in the situation in Uganda, of which the applications for participation have also been transmitted by the Registry in the present case […]. While these applications are currently pending, there is a realistic possibility that some, if not all, will be admitted. Appointment of the same counsel to represent the victims in the present case therefore also has the benefit of ensuring continuity of legal representation and of preventing the unnecessary fragmentation of victims into disparate groups.

The Single Judge notes that the Registry has provided information as to the participating victims' preferences with regard to legal representation. In particular, the Registry reports that the victims whose applications were transmitted generally agree that one legal representative could represent all the victims participating in the case, and that they would like to be represented by someone from the Acholi region or who speaks Acholi, who will be able to communicate with the victims, and who possesses positive professional and human qualities such as ethical integrity, competence, kindness and sense of caring for the victims. For this reason, the Single Judge expects counsel from the OPCV to follow the approach taken in a recent case where she was appointed as common legal representative of the victims, which is to include in her team one or more assistants based in Uganda and who possess good knowledge of the social context of the case, if necessary to be financed through the Court's legal aid budget. If this measure is taken, the Single Judge is confident that counsel from the OPCV will be able to satisfy the expectations of the victims.

The Single Judge believes that this course of action combines optimally the OPCV's knowledge and experience in the procedure before the Court, which is markedly distinct from national procedures, and the knowledge of the local circumstances and culture of the communities where the participating victims reside, providing for the best possible legal representation of the participating victims, which is in the interests of justice.

See No. ICC-02/04-01/15-350, Pre-Trial Chamber II (Single Judge), 27 November 2015, paras. 16-24.

The relevant provision underlying the issue under consideration is Rule 90 of the Rules, according to which '[a] *victim shall be free to choose a legal representative*' (sub-rule (1)), subject to the possibility for a Chamber, '[w]*here there are a number of victims*' and '*for the purposes of ensuring the effectiveness of the proceedings*', to organize common legal representation (sub-rules (2) to (4)). Rule 90(5) of the Rules is the legal basis for the provision of legal aid to victims participating in the proceedings. It states that '[a] *victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance*'.

Having considered the arguments put forward by the [Legal Representatives] in the Request, the Single Judge sees no reason to depart from the determination of the [Pre-Trial Chamber] Single Judge. The fact that victims who individually choose their legal representatives before the Court do not qualify for financial assistance by the Court (contrary to those victims for whom a common legal representative is appointed by the Court) stems from the plain language of Rule 90(5) of the Rules. Any attempt to qualify this provision as '*permissive*' rather than '*limiting*' is unpersuasive. Indeed, should the LRVs' interpretation of Rule 90(5) be upheld, the qualifier that such provision is only applicable with respect to '*a victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court*' would be deprived of any meaning.

Also, the Single Judge does not consider it relevant that Regulation 83(2) of the Regulations of the Court contains no indication that legal aid funds are only available to pay for common legal representatives chosen by the Court. Apart from the fact that the Regulations of the Court are in any case subject to the Rules, Regulation 83(2) does not in itself provide any right, but merely states that the scope of legal assistance paid by the Court regarding victims is determined by the Registrar in consultation with the Chamber. The applicability of such provision is therefore dependent on a right to access legal aid grounded on the relevant legal basis, namely Rule 90(5) of the Rules. The same considerations apply with respect to the absence of an explicit indication in Regulation 113 of the Regulations of the Registry and in the '*Registry's single policy document on the Court's legal aid system*' that legal representatives appointed under Rule 90(1) are ineligible for legal aid.

Equally unpersuasive is the LRVs' reliance on Rule 21(1) of the Rules and the argument that this provision makes it clear that financial assistance to victims is not made subject to any other provisions in the Rules, including Rule 90(5). In this regard, it suffices to observe that Rule 21 of the Rules – together with Rules 20 and 22 – exclusively concern counsel for the defence rather than legal representative(s) of victims. Indeed, these situations are treated differently, as a suspect/accused, if indigent, qualifies for financial assistance also to pay

a counsel of his or her own choice. Rule 90 of the Rules results from a different legislative choice made with respect to legal representation of victims.

In this regard, the Single Judge notes the LRVs' argument in support of their Request that '[i]*nternational standard and comparative experience support the provision of legal aid to victims who participate in criminal proceedings*'. However, the matter under consideration does not concern the availability of a mechanism by which participating victims who lack sufficient resources may benefit from legal aid before the Court. Indeed, this mechanism is provided for in Rule 90(5) of the Rules, and the PTC Single Judge stated precisely so when he requested the LRVs to inform their clients that they may benefit from legal representation free of charge by the common legal representative appointed by the Court. Therefore, in proceedings before the Court, including in the present case, victims who lack sufficient financial means do have access to legal aid for legal representation. Nonetheless, such representation is offered free of charge only in relation to the common legal representative(s) which the Court appoints. When, instead, victims elect to appoint a legal representative of their own choice – which, subject to a Chamber's power to trump such choice for the purposes of ensuring the effectiveness of the proceedings, is otherwise legitimate and provided for under Rule 90(1) of the Rules – they shall cover the related expenses.

The Single Judge clarifies that it is not in discussion in the present decision whether the Rules could have made a different choice and provided for financial assistance also for all victims who individually select their own legal representative(s). However, this is not the case under the scheme of Rule 90 of the Rules and the Single Judge does not consider that the '*policy*' considerations advanced by the LRVs justify a different reading of this provision. The mere fact that a different legislative choice could have been made as concerns legal aid to victims does not mean that such alternative choice should be judicially adopted in light of certain '*policy*' reasons. Indeed, different policy considerations underlie the scheme established by Rule 90 of the Rules which is intended to provide a balance between the victims' right to choose their own legal representative(s), on the one hand, and the effectiveness of the proceedings and cost containment, while preserving victims' participatory rights before the Court, on the other hand. To accept the LRVs' interpretation would prejudice this balance and result in an inevitably unwieldy system whereby the Court, when upholding the right of victims to appoint counsel of their own choice, would also be obligated to provide financial assistance to any legal representative appointed by any victims' group, even if this results in dozens of such representatives being part of the legal aid scheme for a single case.

In conclusion, in light of the above considerations, the Single Judge rejects the Request and confirms that: (i) the legal representation provided by the LRVs, as they are not common legal representatives chosen by the Court, is not eligible for being covered by legal aid funds; and (ii) participating victims who lack the necessary financial means may benefit from legal representation free of charge by Paolina Massidda from the OPCV as the common legal representative of victims appointed by the Court in the present case.

See No. ICC-02/04-01/15-445, Trial Chamber IX (Single Judge), 26 May 2016, paras. 7-13.

The Single Judge is seized with a request whereby the Registry seeks '*the guidance of the Chamber on the issue of eligibility*' for legal aid for the legal representation provided by [the Legal Representatives of Victims] to a number of victims participating in the present case. The Registry also notifies the Chamber that it is its intention to decide '*subject to any guidance received from the Chamber*' on a renewed application for legal assistance paid by the Court which was submitted by the LRVs on 10 October 2016.

The Single Judge recalls that, on 26 May 2016, prompted by a request by the LRVs, he determined that '*the legal representation provided by the LRVs* […] *is not eligible for being covered by legal aid funds*'. This determination was made on the grounds that: (i) as a matter of fact, the LRVs were individually chosen by the victims concerned in the exercise of their rights under Rule 90(1) to choose their legal representative, and were not common legal representatives chosen by the Court within the meaning of Rule 90(5) of the Rules; (ii) as a matter of law, the plain contextual and teleological interpretation of Rule 90(5) makes it clear that victims who individually choose their own legal representatives do not qualify for financial assistance as a matter of right from the Court; and (iii) to accept that all Rule 90(1) legal representatives be given legal assistance would result in '*an inevitably unwieldy system*' whereby the Court, when upholding the right of victims to appoint counsel of their own choice, would also be obligated to provide financial assistance to any legal representative appointed by any victims' group, even if this results in dozens of such representatives being part of the legal aid scheme for a single case. At the same time, the Single Judge does not consider that a new or amended guidance on the matter be given by the Chamber if the Registry deems it necessary to decide on its own the LRVs' further request for legal assistance paid by the Court according to Regulation 85(1) of the Regulations. The LRVs may seize the Presidency for review as provided for in Regulation 85(3) of the Regulations.

See No. ICC-02/04-01/15-591, Trial Chamber IX (Single Judge), 14 November 2016, paras. 1-3.

5.1 Indigence

A statement of indigence shall normally be accompanied by a signed declaration certifying the correctness of the information provided and authorising the Registrar to take all necessary steps to decide on the eligibility for legal assistance paid by the Court. It shall also contain the engagement from the person to communicate to

the Registry any change in his or her financial situation. Considering, however, that the Legal Representative of the person has certified, on behalf of his client, the correctness of the information provided as well as taken the engagement to communicate to the Registry any change in the client's financial situation, exceptionally the Registrar considers that this is sufficient for the purposes of starting the financial investigation necessary for deciding on the eligibility for legal assistance paid by the Court, and pending receipt of the declarations signed by the person concerned.

See No. ICC-01/04-490-tENG, Registrar, 26 March 2008, pp. 3-4.

Pending the outcome of the financial investigation deciding on the eligibility for legal assistance paid by the Court, considering that the persons requesting legal assistance have been granted the status of victims in the situation, the status of the procedures pending at the appeals stage, and the issues affecting victims' interests, the Registrar provisionally considers the persons concerned totally indigent and grants payment of legal assistance in accordance with regulation 85(1) of the Regulations of the Court.

See No. ICC-01/04-490-tENG, Registrar, 26 March 2008, pp. 4-5. The same principles have also been applied by the Registrar when provisionally granting legal assistance paid by the Court to a suspect/accused: see No. ICC-01/04-01/06-63-tEN, Registrar, 31 March 2006; No. ICC-01/04-01/07-79, Registrar, 23 November 2007 and No. ICC-01/04-01/07-298, Registrar, 22 February 2008. See also No. ICC-01/04-01/07-562-tENG, Registrar, 9 June 2008 and No. ICC-01/04-01/07-563-tENG, Registrar, 9 June 2008.

5.2 Additional means

The considerable amount of material contained in different Prosecution's requests pursuant to rule 81 of the Rules of Procedure and Evidence, justifies the granting of additional means requested by the Counsel of the Defence in the form of an additional Legal Assistant at the P-2 Level.

See No. ICC-01/04-01/06-460, Pre-Trial Chamber I, 22 September 2006, pp. 2-3.

On 7 September 2015, the Legal Representative filed a request for assistance from the Victims and Witnesses Unit (VWU) in identifying new categories of victims, namely children who were present at the Bogoro attack of 23 February 2003 ("the Attack") and who, owing to the trauma caused by the Attack, are unable to pursue "[TRANSLATION] *a satisfying social and professional life*"; children born after the Attack and suffering from a specific type of trauma called "[TRANSLATION] *transgenerational*" trauma; and parents having "[TRANSLATION] *voluntarily or involuntarily concealed*" their trauma until now. The Legal Representative submitted that he required VWU's assistance in assessing the "[TRANSLATION] *prevalence*" of the trauma suffered by these new categories of victims in Bogoro, in identifying all victims suffering from said trauma and in determining "[TRANSLATION] *under what conditions they may be individually interviewed*".

[…]

The Chamber takes note of the Legal Representative's concerns, in particular as regards the need to identify any and all potential victims, ensure victims' psychological well-being and address individual victims' specific needs in interviews with them.

The Chamber also notes, however, that VWU's functions are limited by rule 17 of the Rules of Procedure and Evidence and that the assistance sought by the Legal Representative is outside VWU's mandate. The Chamber therefore rejects the Request and invites the Legal Representative to file an application with the Registry for the support of a professional in accordance with regulation 83(3) of the Regulations of the Court.

See No. ICC-01/04-01/07-3608-tENG, Trial Chamber II, 9 October 2015, paras. 2, and 9-10.

5.3 Payment of fees

Having found that the *ad hoc* counsel has been acting beyond the scope of his mandate, the Chamber is of the view that he is in no position to demand any payment of fees for the vexatious and frivolous claims.

See No. ICC-02/05-66, Pre-Trial Chamber I, 15 March 2007, p. 7. See also No. ICC-02/05-100, Pre-Trial Chamber I, 18 September 2007, p. 8.

In accordance with regulation 135(1) of the Regulations of the Registry, disputes relating to the payment of counsel fees shall be addressed to the Registrar.

See No. ICC-02/05-66, Pre-Trial Chamber I, 15 March 2007, p. 5.

6. Role and mandate of the Office of Public Counsel for Victims

Regulations 80 and 81 of the Regulations of the Court
Regulations 114-117 of the Regulations of the Registry

6.1. Role of the Office in general

The mandate vested in the OPCV by the Regulations of the Court encompasses forms and methods of assistance to victims which fall short of legal representation. Under the present circumstances, whereby none of the Applicants can rely on a legal representative, considerations of fairness make it appropriate for the victims to benefit from the support and assistance which may be offered by the OPCV. Accordingly, the Single Judge instructs the Registrar to transmit the Applications to the OPCV, with a view to allowing it to provide the Applicants with any support and assistance which may be necessary or appropriate at this stage of the proceedings.

See No. ICC-02/04-01/05-134, Pre-Trial Chamber II (Single Judge), 1 February 2007, para. 13.

For the purpose of the tasks entrusted to the OPCV in the Decision [of 1st February 2007] it appears indeed necessary for the OPCV to have access to the unredacted version of the Warrants [of arrest], in particular with a view to it being apprised of the specific scope and the factual features of the charges brought against the persons whose arrest is sought by the Court.

See No. ICC-02/04-01/05-152, Pre-Trial Chamber II (Single Judge), 7 February 2007, p. 3.

It is the task of the OPCV, as the Office entrusted with providing victims applying to participate with any support and assistance which may be appropriate at the stage of the proceedings which precede a determination on their status, to inform victims having communicated with the Court of their rights and prerogatives in relation to article 53 of the Rome Statute.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 95, 101, and 103. See also No. ICC-02/04-125 Pre-Trial Chamber II (Single Judge), 14 March 2008, para. 194, as well as the operative part of the decision.

Consistent with the object and purpose of the application process, the OPCV's role was limited to providing support and assistance in few instances in which the Registry automatically requests additional information for any incomplete applications.

See No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, para. 10. See also No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, para. 34.

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.

[…]

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.

[…]

The Office is not of itself a party or a participant in a case. Therefore the opportunity for the Office to appear before the Chamber in respect of specific issues can be initiated by :

- the Chamber (this will usually relate to issues of general importance and applicability) ;
- a victim or his or her representative, who has asked for its support and assistance;
- the Office, if it is representing one or more victims; or the Office, following an application to address the Chamber on specific issues, notwithstanding the fact that it has not been requested to do so by the representatives of victims or any individual victims (this will usually relate to issues of general importance and applicability).

[…]

The Trial Chamber considers that the Office of Public Counsel for Victims in its capacity as Legal Representative of particular victim applicants should be granted the same access as that granted to any other Legal Representative of a victim applicant.

[…]

The right of the Office of Public Counsel for Victims to gain access to the index of the case record (and other documents that are not publicly available) depends on its role in the case. If the Office is representing individual victims who have been allowed to participate in the case, it will have the same rights as any other Legal Representative discharging that function for the particular victims concerned.

See No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, paras. 30-31, 35, 37, and 40.

Concerning more generally the procedure to be followed, the Chamber shall, in accordance with rule 58(3) of the Rules allow the Prosecutor and the suspects to submit written observations on the Application within a time period determined by the Chamber. In addition, the Chamber is of the view that the victims who have communicated with the Court namely, those who submitted applications to participate in the proceedings in the present case, shall be allowed, in accordance with article 19(3) of the Statute and rule 59(3) of the Rules, to submit written observations on the Application within a time period determined by the Chamber. In order to ensure the proper and expeditious conduct of the article 19 proceedings and taking into consideration that no victim has been recognized yet in the present case, the Chamber is of the view that it is in the interest of justice to appoint the Office of Public Counsel for Victims (the "OPCV") to represent all those victims who have submitted applications to participate in the proceedings in the present case.

Although the Chamber has already stated in its "First Decision on Victims' Participation in the Case" that victims who have no legal representation shall be assisted by the OPCV for the purpose of participation in the proceedings, this does not deny the fact that the article 19 procedure is of a specific and limited nature and governed by *lex specialis* provisions, such as rule 59 of the Rules, which provides the Chamber with the discretion to organize the proceedings in a way that best guarantees its expeditiousness. Thus, it is the Chamber's view that for the purpose of the article 19 proceedings, the OPCV may still serve the common interest of victims who have communicated with the Court even if in the meantime they are represented by their Legal Representatives. The Victims Participation and Reparations Section is instructed to that effect to provide all victims applications related to this case to the OPCV and to provide it with any necessary assistance to contact the victim applicants expeditiously.

See No. ICC-01/09-01/11-31, Pre-Trial Chamber II, 4 April 2011, paras. 12 and 13. See also, No. ICC-01/09-02 /11-40, Pre-Trial Chamber II, 4 April 2011, paras. 12 and 13.

The Chamber notes articles 3(1), (3) and 4(2) of the Rome Statute, rule 100 of the Rules of Procedure and Evidence and regulations 80 and 81 of the Regulations of the Court. The Chamber further notes that although article 3(1) of the Statute states that the "*seat of the Court shall be established at The Hague in the Netherlands*", paragraph 3 of the same provision makes clear that the Court "*may sit elsewhere, whenever it considers it desirable, as provided in this Statute*". Moreover, according to rule 100(1) of the Rules, the Court "*may decide to sit in a State other than the host State, in a particular case, where [it] considers that it would be in the interests of justice*".

In this regard, the Chamber underlines that it is in the process of assessing the desirability and feasibility of conducting the confirmation of charges hearing on the territory of the Republic of Kenya. Accordingly, the Chamber deems it valuable, for a proper assessment of the interests of justice in the present case, to receive observations from the Prosecutor, the Defence and the victims who have applied for participation, on such possibility. Therefore, the Chamber decides to appoint the Office of Public Council for Victims to submit observations on behalf of the victims who applied for participation.

See No. ICC-01/09-01/11-106, Pre-Trial Chamber II, 3 June 2011, paras. 4-6. See also, No. ICC-01/09-02/11-102, Pre-Trial Chamber II, 3 June 2011, paras. 4-6.

The Chamber decides that only for the purposes of their participation in the current article 19 proceedings, the OPCV shall represent unrepresented applicants and instructs the Victims Participation and Reparations Section to provide the OPCV with all the applications of unrepresented applicants and to provide it with any necessary assistance to contact applicants expeditiously.

See No. ICC-01/04-01/10-377, Pre-Trial Chamber I, 16 August 2011, p. 4.

As to the procedure to be adopted to hear the victims, the Chamber recalls that pursuant to regulation 81(4)(a) of the Regulations of the Court, the Legal Representatives may seek support and assistance from the Office of Public Counsel for Victims.

See No. ICC-01/05-01/08-2158, Trial Chamber III, 6 March 2012, para. 4.

Following the admissibility challenge filed by the Government of Libya, the Chamber has granted leave under rule 103 of the Rules of Procedure and Evidence to Lawyers for Justice in Libya and the Redress Trust for the purposes of submitting *amicus curiae* observations, among others, on the experiences of victims of crimes within the jurisdiction of the ICC in obtaining justice in Libya's domestic criminal jurisdictions and other fora, and the relationship between victims' rights and issues of admissibility under article 17 of the Rome Statute. This includes the capacity of the Libyan judiciary to afford justice to victims of serious international crimes, taking into account both tested capacity and plans for future prosecutions. The OPCV requested the Chamber to allow the Principal Counsel, should she deem it necessary for the protection of the interests of her clients, to submit observations on the *amicus curiae* observations to be filed by Lawyers for Justice in Libya and the Redress Trust.

The Chamber notes rule 103 of the Rules, which gives it discretion to invite or grant leave for amicus curiae observations on any issue deemed appropriate. As concerns the involvement of parties, rule 103(2) of the Rules provides that the parties shall have the opportunity to respond to any *amicus curiae* observations. However, while this provision establishes the minimum rights that the Chamber must accord to the parties, it does not prevent as a matter of principle responses from other participants. Taking into account also the purpose of rule 103 of the Rules, the Chamber is of the view that it has the discretionary power to invite or grant leave to participants in proceedings before it to submit responses to *amicus curiae* observations whenever appropriate in the particular circumstances. Having reviewed the OPCV's request, and considering the issues for which leave to submit *amicus curiae* observations has been granted to Lawyers for Justice in Libya and the Redress Trust, the Chamber is of the view that it is appropriate in the present circumstances to accord the OPCV the opportunity to submit a response to the *amicus curiae* observations.

FOR THESE REASONS, the Chamber AUTHORISES the OPCV to file a response to the *amicus curiae* observations by Lawyers for Justice in Libya and the Redress Trust.

See No. ICC-01/11-01/11-168, Pre-Trial Chamber I, 5 June 2012, paras. 3-6.

The Appeals Chamber determines that, in the circumstances of the present case, the OPCV is entitled to bring an appeal with regard to those individuals in respect of whom it was appointed as a Legal Representative. However, the Appeals Chamber considers that the unidentified individuals who have not submitted applications but who may benefit from an award for collective reparations, pursuant to rules 97 and 98 of the Rules cannot have a right of appeal because at this stage of the proceedings it is impossible to discern who would belong to this group as no concrete criteria exist. Accordingly, to the extent that the OPCV has appealed the Impugned Decision on behalf of those unidentified individuals, the appeal must be rejected as inadmissible. This is without prejudice to the OPCV potentially being invited to make submissions on behalf of such individuals at a later stage in the proceedings.

See No. ICC-01/04-01/06-2953 A A2 A3 OA21, Appeals Chamber, 14 December 2012, para. 72.

In order to conduct the proceedings following the Admissibility Challenge efficiently and expeditiously, the Chamber considers it appropriate to appoint, under regulation 80 of the Regulations of the Court, the Principal Counsel from the OPCV to represent, in the proceedings following the Admissibility Challenge, the victims who have communicated with the Court in relation to the case. Accordingly, the Registrar is hereby instructed to provide the OPCV with information about victims who have communicated with the Court, as well as with any necessary assistance to contact them as soon as possible.

See. No. ICC-01/11-01/11-325, Pre-Trail Chamber I, 26 April 2013, para. 13.

The Single Judge recalls the model inaugurated in the case of the *Prosecutor v. Laurent Gbagbo*, whereby the OPCV's lead counsel was appointed as common legal representative of all admitted victims and was assisted by a team member based in the field, "*with wide knowledge of the context*" and "*to be paid by the Court's legal aid budget*". Taking note of said experience, and should the involvement of the OPCV as common legal representative become an option, the Single Judge believes that in the current case such a person in the field could have the role of an "*assistant to counsel*" as provided for in regulation 81(3) of the Regulations of the Court. Thus, in order to ensure the expeditiousness of the proceedings, the Single Judge considers that the Registry should start as soon as possible to identify an appropriate "*assistant to counsel*" who meets the requirements set forth in regulation 124 of the Regulations of the Registry and should report to the Single Judge accordingly. Mindful of the fact that the assistant counsel would perform service to the OPCV, the latter should either be involved in the selection process or at least consulted on the person to be selected.

See No. ICC-01/04-02/06-67, Pre-Trial Chamber II (Single Judge), 28 May 2013, para. 47.

Finally, in accordance with Regulation 81(4)(a) of the Regulations of the Court, if so requested, the Office of Public Counsel for Victims should provide general support and assistance to the LRV.

See No. ICC-01/12-01/15-97-Red, Trial Chamber VIII, 8 June 2016, para. 39.

6.2. The provision of support and assistance to the victims applying to participate

The Office shall provide support and assistance to victims applying to participate in the situation in Uganda and in the case of *The Prosecutor v. Joseph Kony* et al. when necessary and appropriate at the stage of the proceedings which precedes a decision by the Chamber on their status.

See No. ICC-02/04-01/05-134, Pre-Trial Chamber II (Single Judge), 1 February 2007, para. 13, as well as the operative part of the decision. See also No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, para. 164, as well as the operative part of the decision and No. ICC-02/04-125 Pre-Trial Chamber II (Single Judge), 14 March 2008, para. 194, as well as the operative part of the decision.

6.3. The legal representation of victims applying to participate

The Chamber observes that of the persons applying at the investigative stage of the situation, a large number of those applicants may be without legal representation prior to a decision of the Chamber on whether to grant them victim status. Moreover, considering that under regulation 86(4) of the Regulations, the Registry will automatically request additional information for all incomplete Applications, the Chamber deems it appropriate to appoint the OPCV to provide support and assistance to the unrepresented applicants. Thus pursuant to regulation 116 of the Regulations of the Registry, the Registry shall automatically transfer to the OPCV all information regarding unrepresented applicants simultaneously with the notification of the Applications to other participants.

The OPCV should therefore be available to provide support and assistance to applicants until such time as the procedural status of victim is granted to them and a Legal Representative is chosen by him or her or appointed by the Court.

[…]

The Chamber considers that the OPCV should be available to provide support and assistance to the applicants for whom powers of attorney have not been submitted, until such time as the proper documents are received by the VPRS or that applicants are granted victim status and a Legal Representative is chosen or appointed by the Court.

> See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, paras. 41, 43-44, and 49-50, as well as the operative part of the decision. See also No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, para. 34, No. ICC-01/04-395, Pre-Trial Chamber I (Single Judge), 17 September 2007, pp. 3-4, and No. ICC-01/05-01/08-699, Trial Chamber III, 22 February 2010, para. 23.

Since applications for participation are complete, there is no need for the OPCV to be appointed to assist any of the applicants in providing additional information in relation to their applications.

> See No. ICC-01/04-01/07-182, Pre-Trial Chamber I (Single Judge), 7 February 2008, p. 2.

Although a literal reading of regulation 81(4) of the Regulations of the Court would suggest that it concerns only persons who have been granted victim status within the meaning of rule 85 of the Rules, three Chambers of the Court have thus far deemed it necessary to request the Registry to appoint the Office of Public Counsel for Victims as the Legal Representative of the victims, pending a decision of the Chamber on their victim status, or until a Legal Representative is appointed.

The Chamber also adopts this position, while stressing that the appointment of the Office of Public Counsel for Victims is in this instance provisional, and that it does not prejudge any subsequent granting of victim status by the Chamber.

> See No. ICC-01/04-01/07-933-tENG, Trial Chamber II, 26 February 2009, paras. 44-45. See also No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, paras. 43-44; No. ICC-01/04-01/06-1308, Trial Chamber I, 6 May 2008, para. 18; No. ICC-01/05-01/08-103, Pre-Trial Chamber III, 12 September 2008, para. 10; No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, paras. 30-31, and 34; and No. ICC-01/05-01/08-651, Trial Chamber III, 9 December 2009, paras. 9 and 18 (reclassified as public on 28 January 2010).

Where no Legal Representative has been appointed by a victim applicant, the Office of Public Counsel for Victims shall act as Legal Representative from the time the victim applicant submits his or her application for participation until a Legal Representative is chosen by the victim or is appointed by the Chamber. The VPRS shall transmit to the OPCV the applications for participation from unrepresented victim applicants so that the OPCV can exercise its role as Legal Representative, if necessary.

> See No. ICC-01/09-01/11-17, Pre-Trial Chamber II (Single Judge), 30 March 2011, para. 23. See also No. ICC-01/09-02/11-23, Pre-Trial Chamber II (Single Judge), 30 March 2011, para. 23.

The Chamber further considers that the Registrar should appoint the Office of Public Counsel for Victims as the Legal Representative of applicants without legal representation, pending a decision of the Chamber on their application.

> See No. ICC-02/05-03/09-231-Corr, Trial Chamber IV, 17 October 2011, para. 28.

The OPCV may fulfil a wide variety of functions during the trial, including the reparations phase. However, the role of the OPCV must be delineated by the Chamber in order to ensure the fair and expeditious conduct of proceedings.

During the trial the OPCV represented victims who had applied to participate in the proceedings, and on occasion it acted on their behalf until the Registrar arranged a Legal Representative. The Registry has informed the Chamber that of the 85 applications for reparations received thus far, 4 applicants are currently represented by the OPCV and 35 are unrepresented. As stated above, the Registry recommends that the OPCV is appointed as representative of these applicants and any additional applicants who apply.

The Registry also recommends that a Legal Representative is appointed to represent "*the interests of other victims who have not submitted applications for reparation but, who, as noted, may still be considered by the Chamber within the scope of any reparations award*". The OPCV applies to introduce written submissions "*to represent the general interest of victims, on the issues related to reparations proceedings*".

Pursuant to rule 97(1) of the Rules, the Court may award reparations on an individual or collective basis. Furthermore, in accordance with rule 98(3) of the Rules, the Court may order that a collective award for reparations is made through the Trust Fund for Victims. Consequently, victims who may benefit from an award for collective reparations will not necessarily participate in the proceedings, either in person or through their Legal Representatives.

The Chamber considers that the expertise of the OPCV will be useful, particularly in order to safeguard the rights of these potential beneficiaries of an award for collective reparations.

In all the circumstances, the OPCV may:

a. act as the Legal Representative of unrepresented applicants for reparations until their status is determined or until the Registrar arranges a Legal Representative to act on their behalf; and

b. represent the interests of victims who have not submitted applications but who may benefit from an award for collective reparations, pursuant to rules 97 and 98 of the Rules.

Accordingly, the Chamber:

a. Instructs the Registry to appoint the OPCV as the Legal Representative for any unrepresented applicants and to provide the OPCV with the applications for reparations that have been received thus far, as well as any future applications from unrepresented victims; and

b. Instructs the OPCV to file submissions on the principles to be applied by the Chamber with regard to reparations and the procedure to be followed by the Chamber on behalf of those victims who have not submitted applications but who may fall within the scope of an order for collective reparations.

See No. ICC-01/04-01/06-2858, Trial Chamber I, 5 April 2012, paras. 7-13.

6.4. The legal representation of victims allowed to participate in the proceedings

Counsel from the Office may be appointed, pending the appointment of a common Legal Representative, to exercise the rights of victims allowed to participate in the proceedings.

See No. ICC-02/04-105, Pre-Trial Chamber II, 28 August 2007 (Single Judge), p. 5. See also No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I, 31 January 2008, in the operative part of the decision; No. ICC-02/04-01/05-267 and No. ICC-02/04-117, Pre-Trial Chamber II (Single Judge), 15 February 2008, pp. 4-6; and No. ICC-02/04-125, Pre-Trial Chamber II, 14 March 2008 (Single Judge), para. 194, as well as the operative part of the decision.

The Office of Public Counsel for Victims shall provide support and assistance to victims allowed to participate in the proceedings until such victims choose a Legal Representative or a Legal Representative is appointed by the Court.

See No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, p. 59.

In regards to an apparent conflict of interest of victims' legal counsel, the Pre-Trial Chamber directed the Registry to evaluate the existence and consequences of the apparent conflict of interest and pending the resolution of the issue the legal counsel was provisionally separated from his functions as Legal Representative of the victims and the victims were exceptionally and provisionally represented by the OPCV.

See No. ICC-01/04/01/07-660, Pre-Trial Chamber I, 3 July 2008, p. 9-10.

In case some of the victims participating in the present case object to being represented by the common Legal Representative appointed by the Registrar, or a conflict of interest is shown by the common Legal Representative, the Single Judge wishes to appoint the Office of Public Counsel for Victims (the "OPCV") as Legal Representative of those victims not represented by the common Legal Representative, if need be.

Concerning the role of OPCV, the Single Judge notes that this office is established for the main purpose of providing assistance and support to victims and their Legal Representatives in proceedings before this Court pursuant to regulation 81(4) of the Regulations of the Court, which includes (a) legal research and advice, and (b) appearing before a Chamber in respect of specific issues. In addition, counsel of this office may act as Legal Representative of victims pursuant to regulation 80(2) of the Regulations of the Court.

In the present case the OPCV has been appointed by the Chamber as Legal Representative for those victims "*where no Legal Representative has been appointed by the victims*". Thus, the Single Judge wishes to point out that the OPCV had been appointed by the Chamber only in case and for the time where victims could not organise their timely legal representation. The Single Judge finds it appropriate that at this stage of proceedings, where victims have been recognised to participate in the present case, be represented by a counsel from their country, unless those victims object to such legal representation.

In case all victims participating in the present case agree to be represented by one common Legal Representative from the CAR, the OPCV will fulfil its mandate as provided in regulation 81 of the Regulations of the Court. In case, one or more victims object to being represented by a counsel from the CAR, the OPCV will continue to act as Legal Representative for those victims, in addition to its mandate pursuant to regulation 81 of the Regulations.

See No. ICC-01/05-01/08-322, Pre-Trial Chamber III (Single Judge), 16 December 2008, paras. 12-15.

The Single Judge is of the view that a Counsel from the OPCV should be appointed as the lead Counsel within the common legal representation team for the victims authorised to participate in the present case and that such Counsel should be assisted by a team member with wide knowledge of the context and based in Cote d'Ivoire to be paid by the Court's legal aid budget.

The Single Judge believes that this is the most appropriate and cost effective system at this stage as it would enable to combine understanding of the local context with experience and expertise of proceedings before the Court, without causing undue delay in the case at hand. This system may be revisited at a later stage in light of the views expressed by the victims.

See No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, paras. 44-45.

In accordance with article 19(3) of the Statute and rule 59(3) of the Rules, the victims who have communicated with the Court in relation to the case – *i.e.* the victims admitted to participate in the proceedings related to the confirmation of charges hearing and those who submitted applications that have not yet been assessed by the Chamber – shall be allowed to submit written observations on the Challenge to jurisdiction within a time period determined by the Chamber. For the purposes of ensuring the proper and expeditious conduct of the article 19 proceedings and taking into account that the OPCV has already been appointed as the Common Legal Representative of victims admitted to participate in the present case, the Chamber is of the view that it is in the interest of justice to appoint the OPCV to also represent those victims who have submitted applications to participate in the proceedings in the present case and whose applications have not yet been assessed by the Chamber.

See No. ICC-02/11-01/11-153, Pre-Trial Chamber I (Single Judge), 15 June 2012, para. 7.

The procedure for victim participation will be based on common legal representation, which will include both an appointed common Legal Representative of victims ("Common Legal Representative") and the Office of Public Counsel for victims ("OPCV") acting on the Common Legal Representative's behalf. The OPCV's primary responsibility will be to act as the interface between the Common Legal Representative and the Chamber in day-to-day proceedings. To that end, the OPCV will be allowed to attend hearings on behalf of the Common Legal Representative, during which it may be permitted to intervene and question witnesses. The OPCV shall also assist the Common Legal Representative in preparing relevant written submissions. The representation in the courtroom through the OPCV will allow the victims to benefit from the experience and expertise of the OPCV and thereby maximise the efficiency of their legal assistance. Involvement of the OPCV will also ensure that confidential information is handled safely and securely.

See No. ICC-01/09-01/11-460, Trial Chamber V, 3 October 2012, para. 41 and 43. See also No. ICC-01/09-02/11-498, Trial Chamber V, 3 October 2012, paras. 40-42.

With respect to the assistance to be provided by the OPCV to the common Legal Representative, it is the Chamber's view that victims should benefit from the highest quality representation that is possible in the circumstances – both generally and in the courtroom. It is that consideration that primarily guides the Chamber's appointment of common Legal Representative for victims. It is neither the Chamber's desire nor intent to appoint such counsel and yet prevent him or her from representing victims in the manner warranted by their best interests, including making such appearances in the courtroom that are necessary in the circumstances. But the representation of the best interest of the victims will in many cases require that the common Legal Representative be in the field attending to the best interests of victims, while court proceedings are in progress. In such situations, it will be necessary for the common Legal Representative to be represented by members of the OPCV. The Chamber observes that the Registry appears to have interpreted the Decision to require the OPCV to provide staff fulfilling the qualifications of "*counsel*" within the meaning of regulation 67 of the Regulations. The Chamber notes that, according to the Decision, the OPCV "*will be acting on behalf of the Common Legal Representative when appearing before the Chamber*". Equally, the Chamber recalls that the Decision provides for the common Legal Representative to appear in person upon request and at critical junctures involving victims' interests. As such, the Chamber is of the view that although the representative or representatives of the OPCV acting on behalf of the common Legal Representative in Court should have significant relevant courtroom experience, the representative or representatives of the OPCV need not fulfil the requirements of "*counsel*" within the meaning of regulation 67 of the Regulations. Instead, at a minimum, they should fulfil the requirements for assistant counsel under regulation 68 of the Regulations and regulation 124 of the Regulations of the Registry. In such instances, the rule of 10-year post qualification standing prescribed in regulation 67 should not operate to prevent any OPCV staff member from appearing on behalf of the common

Legal Representative any more than the 10-year rule stands in the way of any counsel appearing to represent the Prosecutor or the lead Defence Counsel in a case.

See No. ICC-01/09-02/11-537, Trial Chamber V, 20 November 2012, para. 7. See also No. ICC-01/09-01/11-479, Trial Chamber V, 23 November 2012, para. 8.

In the First Decision on Victims' Participation, the Single Judge held that:

A Counsel from the OPCV should be appointed as the lead Counsel within the common legal representation team for the victims authorised to participate in the present case and that such Counsel should be assisted by a team member with wide knowledge of the context and based in Côte d'Ivoire to be paid by the Court's legal aid budget.

At the time of the appointment of a Counsel from the OPCV as common legal representative of the victims admitted to participate, the Single Judge considered that this was "*the most appropriate and cost-effective system* […] *to combine understanding of the local context with experience and expertise of proceedings before the Court, without causing undue delay in the case at hand*". The Single Judge also considered that such system could be revisited at a later stage in light of the views expressed by the victims.

The Single Judge notes that there are no indications that the current scheme of legal representation of victims in the case should be modified. Thus, taking into consideration the upcoming confirmation of charges hearing and with a view to ensuring uniformity and continuity in the legal representation of the victims admitted to participate in the present case, the Single Judge is of the view that the current system of common legal representation can be maintained. Therefore, all victims admitted to participate by the present decision shall be represented in the course of the confirmation of charges hearing and in the related proceedings by a Counsel from the OPCV.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, paras. 44-46.

The Single Judge considers that there are good reasons, as underlined by the OPCV, for the team currently representing victims in the *Gbagbo* Case to also represent victims granted status in the case at hand. In the view of the Single Judge, the appointment of a counsel from the OPCV assisted by a team member with a wide knowledge of the context and based in Côte d'Ivoire is still "*the most appropriate and cost-effective system* […] *to combine understanding of the local context with experience and expertise of proceedings before the Court, without causing undue delay*".

Subject to any further modification, the Single Judge decides to appoint the OPCV to represent the applicants granted victim's status by the present decision. It also endorses the team structure proposed by the Registrar which is comprised of: (i) a principal counsel; (ii) a team member based in the field; and (iii) a case manager.

See No. ICC-02/11-02/11-83, Pre-Trial Chamber I, 11 June 2014, paras. 24-25.

i. Common legal representation of victims admitted in the present case

In the First Decision on Victims, the Single Judge appointed the OPCV as common legal representative of the 199 victims admitted, based on considerations of efficiency and expertise that the OPCV can offer in the representation of victims at this stage of the proceedings.

With a view to ensuring the meaningful and efficient participation of the victims admitted by the present decision, the Single Judge considers it appropriate to extend the mandate of the OPCV as common legal representative of the victims hereby admitted to participate in the confirmation of charges hearing and the related proceedings in the present case.

See No. ICC-02/11-02/11-111, Pre-Trial Chamber I (Single Judge), 1 August 2014, paras. 14-15.

L. Legal Representation

Concerning the legal representation of victims, the Chamber recalls that it received the Registry Report and the related LRV Submissions.

Pursuant to relevant decisions by the Single Judge of Pre-Trial Chamber I, the LRV team has been headed by, Ms Paolina Massidda, Principal Counsel of the OPCV, and assisted by a team member in Côte d'Ivoire. This team has been representing victims in the *Gbagbo* case since June 2012, and in the *Blé Goudé* case since June 2014, and is familiar with the record of the case and the procedural history.

The Chamber also notes the Registry's recommendation to maintain the current system of legal representation during the trial proceedings, which is based on the outcome of a survey conducted amongst a group of victims. The vast majority (91%) of the victims consulted expressed their wish to retain the current LRV. The Chamber also notes the LRV Submissions – that the composition of the team including a person who is located in Côte d'Ivoire and that the Principal Counsel herself travels frequently to Côte d'Ivoire – ensures effective and regular contact with the victims.

Under these circumstances, the Chamber finds that the current system meets all of the requirements for effective and fair representation of victims, and decides that it should be maintained during trial proceedings.

See No. ICC-02/11-01/15-205, Trial Chamber I, 3 September 2015, paras. 67-70.

Turning to the issue of the legal representation of the remaining 294 victims participating in the proceedings who are currently unrepresented, the Single Judge considers the best course of action to be the appointment of counsel from the Office of Public Counsel for Victims (OPCV) as common legal representative, under regulation 80(1) of the Regulations of the Court. In this regard, the Single Judge does not identify, at the present time, any conflict of interest which would require the separation of these victims into groups with separate legal representation.

The Single Judge considers that the possibility of appointing [two counsel] as common legal representatives is not appropriate in the present circumstances, considering that they have not been selected pursuant to a transparent and competitive procedure organised by the Registry, considering the reasons identified below which speak in favour of appointment of counsel from the OPCV, and also considering that appointment of external counsel would bring a disproportionate and unjustified burden to the Court's legal aid budget.

According to regulation 81 of the Regulations of the Court, the OPCV is an independent office, of which the task is, *inter alia*, to represent victims throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interests of justice. Regulation 80 of the Regulations of the Court, which gives the Chamber the power to appoint a legal representative of victims where the interests of justice so require, explicitly mentions the possibility of appointing counsel from the OPCV. Regulation 113(2) of the Regulations of the Registry also refers to the "*possibility of asking the Office of Public Counsel for Victims to act*" as a way of reducing the cost of legal representation of victims borne by the Court's budget.

The Single Judge also notes that counsel from the OPCV currently represent certain victims participating in the case against Joseph Kony and Vincent Otti and in the situation in Uganda, of which the applications for participation have also been transmitted by the Registry in the present case (see ICC-02/04-01/15-344, para. 5). While these applications are currently pending, there is a realistic possibility that some, if not all, will be admitted. Appointment of the same counsel to represent the victims in the present case therefore also has the benefit of ensuring continuity of legal representation and of preventing the unnecessary fragmentation of victims into disparate groups.

The Single Judge notes that the Registry has provided information as to the participating victims' preferences with regard to legal representation. In particular, the Registry reports that the victims whose applications were transmitted generally agree that one legal representative could represent all the victims participating in the case, and that they would like to be represented by someone from the Acholi region or who speaks Acholi, who will be able to communicate with the victims, and who possesses positive professional and human qualities such as ethical integrity, competence, kindness and sense of caring for the victims. For this reason, the Single Judge expects counsel from the OPCV to follow the approach taken in a recent case where she was appointed as common legal representative of the victims, which is to include in her team one or more assistants based in Uganda and who possess good knowledge of the social context of the case, if necessary to be financed through the Court's legal aid budget. If this measure is taken, the Single Judge is confident that counsel from the OPCV will be able to satisfy the expectations of the victims.

The Single Judge believes that this course of action combines optimally the OPCV's knowledge and experience in the procedure before the Court, which is markedly distinct from national procedures, and the knowledge of the local circumstances and culture of the communities where the participating victims reside, providing for the best possible legal representation of the participating victims, which is in the interests of justice.

See No. ICC-02/04-01/15-350, Pre-Trial Chamber II (Single Judge), 27 November 2015, paras. 19-24.

The Chamber recalls that, in its [previous] Decision, it accorded the termination of the representation agreement for some applicants for reparations and some participating victims in [the accused]'s trial ("Applicants"), and stated that it would rule on the merits of their application in its Order for Reparations pursuant to article 75 of the Statute.

The Chamber recalls that, on 24 March 2017, it will hold a hearing to pronounce said Order for Reparations. The Chamber further recalls that, under article 82(4) of the Statute, the Legal Representative may appeal against the Order.

Mindful of the foregoing, and given that these applicants currently have no legal representation, the Chamber deems it opportune to appoint, under regulations 80 and 81 of the Regulations of the Court, the Office of Public Counsel for Victims ("OPCV") as the Legal Representative in the appeals phase, if the need arises. The applicants are as follows: […].

See No. ICC-01/04-01/07-3727-tENG, Trial Chamber II, 15 March 2017, paras. 12-14.

6.5. The appearance before a Chamber in respect of specific issues

The opportunity for the Office to appear before the Chamber in respect of specific issues can be initiated by:

- the Chamber (this will usually relate to issues of general importance and applicability);
- a victim or his or her representative, who has asked for its support and assistance;
- the Office, if it is representing one or more victims; or

- the Office, following an application to address the Chamber on specific issues, notwithstanding the fact that it has not been requested to do so by the representatives of victims or any individual victims (this will usually relate to issues of general importance and applicability).

See No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, para. 35.

The OPCV had been requested to submit observations in accordance with regulation 81(4)(b) of the Regulations of the Court. Although the OPCV was not acting as a Legal Representative for any of these applicants, it had been asked to submit observations in order to provide support and assistance to them on the specific issue of whether they come within the category of indirect victims.

The Chamber notes that neither the Statute nor the Rules provide for the participation of the OPCV in the proceedings. This office was established by the Regulations of the Court with a mandate to provide support and assistance to the Legal Representatives and the victims after the adoption of the Statute and the Rules. In the judgment of the court, the circumstances of the creation of the OPCV should not have the consequence of diminishing the rights of the defence.

In the circumstances, the Chamber determines that whenever the OPCV is performing the functions of, or is acting akin to, a Legal Representative of a victim – not least to protect the accused – the Rome Statute framework shall be applied as if it is an "*ordinary*" Legal Representative. It follows that these observations, in the view of the Chamber, are to be treated as if they were made by a Legal Representative under rule 91(2) of the Rules.

See No. ICC-01/04-01/06-1813, Trial Chamber I, 8 April 2009, paras. 37-39.

Relevant decisions regarding legal representation

Decision on Prosecutor Request for Measures under Article 56 (Pre-Trial Chamber I), No. ICC-01/04-21, 26 April 2005

Registrar's Decision on Mr Thomas Lubanga Dyilo's Application for Legal Assistance Paid by the Court (Registrar), No. ICC-01/04-01/06-63-tEN, 31 March 2006

Decision Inviting Observations in Applications of Rule 103 of the Rules of Procedure and Evidence (Pre-Trial Chamber I), No. ICC-02/05-10, 24 July 2006

Decision on Defence Request pursuant to Regulation 83(4) (Pre-Trial Chamber I), No. ICC-01/04-01/06-460, 22 September 2006

Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-134, 1 February 2007

Decision on the Ad hoc Counsel for the Defence Request of 18 December 2006 (Pre-Trial Chamber I), No. ICC-02/05-47, 2 February 2007

Decision on "Request to access documents and material", and to hold a hearing in camera and ex parte (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-152, 7 February 2007

Decision on the Request for Review of the Registry's Decision of 13 February 2007 (Pre-Trial Chamber I), No. ICC-02/05-66, 15 March 2007

Decision on the OPCV's observations on victims' applications and on the Prosecution's objection thereto (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-243, 16 April 2007

Appointment of Duty Counsel (Pre-Trial Chamber I), No. ICC-01/04-01/06-870, 19 April 2007

Désignation de Maître Emmanuel Altit comme conseil de permanence conformément à la Décision de la Chambre Préliminaire I du 19 avril 2007 (Registrar), No. ICC-01/04-01/06-881, 4 May 2007

Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-101, 10 August 2007

Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation (Pre-Trial Chamber I), No. ICC-01/04-374, 17 August 2007

Decision on legal representation of Victims a/0101/06 and a/0119/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-105, 28 August 2007

Order on the request by the OPCV for access to certain documents regarding applications a/0026/06, a/0145/06, a/0203/06 and a/0220/06 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-395, 17 September 2007

Decision on the Request for Review Pursuant to Regulation 135(2) of the Regulations of the Registry Submitted by the Former Ad hoc Counsel for the Defence on 27 July 2007 (Pre-Trial Chamber I), No. ICC-02/05-100, 18 September 2007

Decision on the appointment of a duty counsel (Pre-Trial Chamber I), No. ICC-01/04-01/07-52, 5 November 2007

Decision Appointing Mr Jean Pierre Fofé as Duty Counsel for Mr Germain Katanga (Registrar), No. ICC-01/04-01/07-75-tEN, 13 November 2007

Decision of the Registrar on the applications for legal assistance paid by the Court filed by Mr Germain Katanga (Registrar), No. ICC-01/04-01/07-79-tENG, 23 November 2007

Order on the Office of Public Counsel for Victims' request filed on 21 November 2007 (Trial Chamber I), No. ICC-01/04-01/06-1046, 27 November 2007

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" (Pre-Trial Chamber I), No. ICC-01/04-423-Corr-tENG, 31 January 2008

Decision authorising the filing of observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-182, 7 February 2008

Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-267 and No. ICC-02/04-117, 15 February 2008

Décision du Greffier sur la demande d'aide judiciaire aux frais de la Cour déposée par M. Mathieu Ngudgolo Chui (Registrar), No. ICC-01/04-01/07-298, 22 February 2008

Decision on the role of the Office of Public Counsel for Victims and its request for access to documents (Trial Chamber I), No. ICC-01/04-01/06-1211, 6 March 2008

Decision on victim's application for participation a/0010/06, a/0064/06 to a/0/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0101/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-125 and No. ICC-02/04-01/05-282, 14 March 2008

Registrar's Decision on the Indigence of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 (Registrar), No. ICC-01/04-490-tENG, 26 March 2008

Decision on the OPCV's Requests for leave to file a response to the Defence's Application dated 25 March 2008 and to file observations on the Prosecution's Response to such Application (Pre-Trial Chamber II), No. ICC-02/04-132 and No. ICC-02/04-01/05-290, 4 April 2008

Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08 (Trial Chamber I), No. ICC-01/04-01/06-1308, 6 May 2008

Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008

Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-537, 30 May 2008

Registrar's Decision on the Indigence of Victim a/0333/07 (Registrar), No. ICC-01/04-01/07-562-tENG, 9 June 2008

Registrar's Decision on the Indigence of Victims a/0327/07, a/0330/07 and a/0331/07 (Registrar), No. ICC-01/04-01/07-563-tENG, 9 June 2008

Decision on the provisional separation of Legal Representative of Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08 (Pre-Trial Chamber I), No. ICC-01/04-01/07-660, 3 July 2008

Decision on the Apparent Conflict of Interest in relation to the Legal Representative of Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08 (Pre-Trial Chamber I), No. ICC-01/04-01/07-683, 16 July 2008

Decision on Victim Participation (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-103-tENG-Corr, 12 September 2008

Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-322, 16 December 2008

Decision on the treatment of applications for participation (Trial Chamber II), No. ICC-01/04-01/07-933-tENG, 26 February 2009

Redacted version of "Decision on ‹indirect victims'" (Trial Chamber I), No. ICC-01/04-01/06-1813, 8 April 2009

Order on the organisation of common legal representation of victims (Trial Chamber II), No. ICC-01/04-01/07-1328, 22 July 2009

Decision on the Observations on legal representation of unrepresented applicants (Trial Chamber III), No. ICC-01/05-01/08-651, 9 December 2009 (reclassified as public on 28 January 2010)

Decision on the defence observations regarding the right of the Legal Representatives of victims to question defence witnesses and on the notion of personal interest and Decision on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses (Trial Chamber I), No. ICC-01/04-01/06-2340, 11 March 2010

Decision on common legal representation of victims for the purpose of trial (Trial Chamber III), No. ICC-01/05-01/08-1005, 10 November 2010

Decision on common legal representation of victims for the purpose of trial (Trial Chamber), No. ICC-01/05-01/08-1020, 19 November 2010

First Decision on Victims' Participation in the Case (Pre-Trial Chamber II), No. ICC-01/09-01/11-17, 30 March 2011

First Decision on Victims' Participation in the Case (Pre-Trial Chamber II), No. ICC-01/09-02/11-23, 30 March 2011

Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute (Pre-Trial Chamber II), No. ICC-01/09-01/11-31 and No. ICC-01/09-02/11-40, 4 April 2011

Decision requesting observations on the place of the proceedings for the purposes of the Confirmation of the Charges Hearing (Pre-Trial Chamber II), No. ICC-01/09-01/11-106, 3 June 2011

Decision requesting observations on the place of the proceedings for the purposes of the Confirmation of the Charges Hearing (Pre-Trial Chamber II), No. ICC-01/09-02/11-102, 3 June 2011

Decision on the "Proposal on victim participation in the confirmation hearing" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/10-229, 10 June 2011

Decision on Victims' Participation at the Confirmation of the Charges Hearing and in the Related Proceedings (Pre-Trial Chamber II), No. ICC-01/09-01/11-249, 5 August 2011

Decision on 138 applications for victims' participation in the proceedings (Pre-Trial Chamber I), No. ICC-01/04-01/10-351, 11 August 2011

Decision requesting observations on the "Defence Challenge to the jurisdiction of the Court" (Pre-Trial Chamber I), No. ICC-01/04-01/10-377, 16 August 2011

Decision on Victims' Participation at the Confirmation of the Charges Hearing and in the Related Proceedings (Pre-Trial Chamber II), No. ICC-01/09-02/11-267, 26 August 2011

Order inviting the Registrar to appoint a common Legal Representative (Trial Chamber IV), No. ICC-02/05-03/09-209, 7 September 2011

Decision on the "Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta Chana for All Victims" (Pre-Trial Chamber II), No. ICC-01/09-01/11-330, 9 September 2011

Decision on the Registry Report on six applications to participate in the proceedings (Trial Chamber IV), No. ICC-02/05-03/09-231-Corr, 17 October 2011

Order on the implementation of Decision on the supplemented applications by the Legal Representatives of victims to present evidence and the views and concerns of victims (Trial Chamber III), No. ICC-01/05-01/08-2158, 6 March 2012

Decision on the OPCV's request to participate in the reparations proceedings (Trial Chamber I), No. ICC-01/04-01/06-2858, 5 April 2012

Decision on the Urgent Requests by the Legal Representative of Victims for Review of Registrar's Decision of 3 April 2012 regarding Legal Aid (Trial Chamber II), No. ICC-01/04-01/07-3277, 23 April 2012

Decision on the "Application of the Victims' Representative pursuant to Article 83 of the Regulations" (Appeals Chamber), No. ICC-01/09-01/11-409 OA3 OA4, 23 April 2012

Decision on the "Notification regarding the Legal Representation of Participating Victims in the Appeal Proceedings" (Appeals Chamber), No. ICC-01/09-02/11-416 OA4, 23 April 2012

Decision on the defence request for leave to appeal (Trial Chamber I), No. ICC-01/04-01/06-2874, 3 May 2012

Decision on common legal representation (Trial Chamber IV), No. ICC-02/05-03/09-337, 25 May 2012

Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012

Decision on the "Request related to the filing of observations by the Amicus Curiae" (Pre-Trial Chamber I), No. ICC-01/11-01/11-168, 5 June 2012

Decision on the conduct of the proceedings following the Defence challenge to the jurisdiction of the Court pursuant to article 19 of the Rome Statute (Pre-Trial Chamber I), No. ICC-02/11-01/11-153, 15 June 2012

Decision on issues related to the hearing on Mr Gbagbo's fitness to take part in the proceedings against him (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-249, 20 September 2012

Decision on victims' representation and participation (Trial Chamber V), No. ICC-01/09-01/11-460, 3 October 2012

Decision on victims' representation and participation (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012

Decision appointing a common Legal Representative of victims (Trial Chamber V), No. ICC-01/09-02/11-537, 21 November 2012

Decision appointing a common Legal Representative of victims (Trial Chamber V), No. ICC-01/09-01/11-479, 23 November 2012

Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of the proceedings (Appeals Chamber), No. ICC-01/04-01/06-2953 A A2 A3 OA21, 14 December 2012

Second decision on victims' participation at the confirmation of charges hearing and in the related proceedings (Pre-Trial Chamber I), No. ICC-02/11-01/11-384, 6 February 2013

Order on the filing of submissions on new applications to participate as victims in the proceedings (Appeals Chamber), No. ICC-01/04-01/06-2978 A4 A5 A6, 14 February 2013

Decision on the conduct of the proceedings following the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute" (Pre-Trial Chamber I), No. ICC-01/11-01/11-325, 26 April 2013

Decision Establishing Principles on the Victims' Application Process (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-67, 28 May 2013

Decision No. 2 on the Conduct of the Trial Proceedings (General Directions) (Trial Chamber V(a)), No. ICC-01/09-01/11-900, 3 September 2013

Decision on victims' participation in the pre-trial proceedings and related issues (Pre-Trial Chamber I), No. ICC-02/11-02/11-83, 11 June 2014

Second Decision on victims' participation in the pre-trial proceedings and related issues (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-111, 1 August 2014

Directions on the conduct of the proceedings (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015

Decision on the request of the common legal representative of victims for assistance from the Victims and Witnesses Unit (Trial Chamber II), No. ICC-01/04-01/07-3608-tENG, 9 October 2015

Order to the Registrar in relation to the legal representation of victims participating in the proceedings (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-331, 28 October 2015

Decision on contested victims' applications for participation, legal representation of victims and their procedural rights (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015

Decision on the 'Request for a determination concerning legal aid' submitted by the legal representatives of victims (Trial Chamber IX , Single Judge), No. ICC-02/04-01/15-445, 26 May 2016

Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims' (Trial Chamber VIII), No. ICC-01/12-01/15-97-Red, 8 June 2016

Decision on Requests Concerning Organisation of Victim Representation (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-476, 17 June 2016

Public redacted version of 'Second Decision on Victim Participation at Trial', 12 August 2016 (Trial Chamber VIII), No. ICC-01/12-01/15-156-Red, 12 August 2016

Decision on Registry's Request for Clarification on the Issue of Legal Assistance Paid by the Court for the Legal Representatives of Victims (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-591, 14 November 2016

Decision on the Application made by the Common Legal Representative of Victims on 2 March 2017 (Trial Chamber II), No. ICC-01/04-01/07-3727-tENG, 15 March 2017

Public Redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute" (Appeals Chamber), No. ICC-01/04-01/07-3778-Red A3 A4 A5, 8 March 2018

Public redacted version of "Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations", 12 July 2018 (Trial Chamber VIII), No. ICC-01/12-01/15-273-Red, 12 July 2018

4. Procedural matters

1. Procedural matters in general

Pending the effective implementation of a secure system for the transmission of documents, it should be considered that, with respect to confidential documents:

1) a participant is deemed notified of a confidential document, decision or order on the day it is effectively received by post by the said participant;

2) the date of filing by a participant of a confidential document is understood to be the day the said document is sent, the postmark being authoritative.

See No. ICC-01/04-62-tEN, Pre-Trial Chamber I, 12 July 2005, p. 3.

Regulation 33(1)(b) of the Regulations of the Court clearly states that neither the day of notification of a document nor the day of filing of a response are taken into consideration for the calculation of the time period available to file a document.

See No. ICC-01/04-135-tEN, Pre-Trial Chamber I, 31 March 2006, para. 9.

In the framework of the Statute and the Rules, the notion of *ex parte* proceedings may involve the following two alternative meanings, as expressed in regulation 24(4) of the Regulations of the Registry:

i. Proceedings where the Prosecution, the Defence, or any other participant (or a combination thereof), while aware that such proceedings exist, have no opportunity to voice their arguments; or

ii. Proceedings where the Prosecution, the Defence, or any other participant (or a combination thereof) are not notified and thus unaware of their existence.

See No. ICC-01/04-01/06-108-Corr, Pre-Trial Chamber I (Single Judge), 19 May 2006, para. 14. See also No. ICC-01/04-01/06-119, Pre-Trial Chamber I (Single Judge), 22 May 2006, pp. 4-5; and No. ICC-01/04-01/06-1058, Trial Chamber I, 6 December 2007, para. 8.

Insofar as *ex parte* proceedings in the absence of the Defence constitute a restriction on the rights of the Defence, *ex parte* proceedings under rule 81(4) of the Rules of Procedure and Evidence shall only be permitted subject to the Prosecution showing in its application that:

i. it serves a sufficiently important objective;

ii. it is necessary in the sense that no lesser measure could suffice to achieve a similar result; and

iii. the prejudice to the Defence interest in playing a more active role in the proceedings must be proportional to the benefit derived from such a measure.

[…]

The Defence must: i. be informed of the existence and legal basis of any Prosecution *ex parte* application under rule 81(2) or (4) of the Rules [of Procedure and Evidence]; ii. be allowed the opportunity to present submissions on (i) the general scope of the provisions that constitute the legal basis of the Prosecution's *ex parte* application; and (ii) any other general matter which in the view of the Defence could have an impact on the disposition of the Prosecution application; iii. be provided, at the very least, with a redacted version of any decision taken by the Chamber in any *ex parte* proceedings under rule 81(2) or (4) of the Rules held in the absence of the Defence.

See No. ICC-01/04-01/06-108-Corr, Pre-Trial Chamber I (Single Judge), 19 May 2006, paras. 13 and 17.

The right set out in article 67(1)(a) of the Statute grants the accused the right to be informed in details of the nature, cause and content of the charges against him as opposed to granting him a general right o receive all documents from the Prosecution in a language he fully understands and speaks; that the Chamber is of the view that the detailed description of the charges together with a list of evidence ("the Charging Document and List of Evidence") provided for in rule 121(3) of the Rules will adequately inform the accused of the nature, cause and content of the charges against him; and that the rights of the accused under article 67(1)(a) of the Statute would be duly guaranteed by the filing by the Prosecution in the record of the case against the suspect of a French version of the Charging Document and List of Evidence and, as the case may be, of the Amended Charging Document and List of Evidence within the time limits provided for in rule 121(3), (4) and (5) of the Rules. Using the words "*as are necessary to meet the requirements of fairness*", article 67(1)(f) of the Statute does not grant the accused the right to have all procedural documents and all evidentiary materials disclosed by the Prosecution translated into a language that the accused fully understands and speaks; and that this interpretation is fully consistent with the case law of the ECHR on this matter.

See No. ICC-01/04-01/06-268, Pre-Trial Chamber I (Single Judge), 4 August 2006, pp. 5-6. See also No. ICC-01/04-01/07-127, Pre-Trial Chamber I (Single Judge), 21 December 2007, paras. 40-41.

The Pre-Trial Chamber's approach that the other participant has to be informed of the fact that an application for *ex parte* proceedings has been filed and of the legal basis for the application is, in principle, unobjectionable. Nevertheless, there may be cases where this approach would be inappropriate. Should it be submitted that such a case arises, any such application would need to be determined on its own specific facts and consistently with internationally recognised human rights standards, as required by article 21(3) of the Statute.

See No. ICC-01/04-01/06-568 OA3, Appeals Chamber, 13 October 2006, para. 67.

Review of decisions by the Court is only allowed either under specific circumstances explicitly provided in the Statute and in the Rules, or by way of interlocutory appeal against decisions other than final decisions, under article 82, paragraph 1(d), of the Statute.

See No. ICC-02/04-01/05-209, Pre-Trial Chamber II (Single Judge), 20 February 2007, p. 4.

A document which is not signed by the counsel and which does not emanate from the counsel nor has been approved by the counsel cannot be accepted as a document emanating from the person through whom the Appellant acts, the only person who has authority to represent him in Court proceedings. Such a document must be therefore rejected as inadmissible.

See No. ICC-01/04-01/06-834 OA8, Appeals Chamber, 21 February 2007, para. 6.

Within the meaning of regulation 35(2) of the Regulations of the Court, a "*good cause*" entails the existence of valid reasons for non-compliance with the procedural obligations of a party to the proceedings. A cause is good, if found upon reasons associated with a person's capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so, must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations. Therefore, inability of counsel to perform his/her duties owing to illness, medically certified, does provide a good cause for the extension of time envisaged by regulation 35(2) (first sentence) of the Regulations of the Court. If a party is allowed in the exceptional circumstances envisaged by regulation 35(2) to submit a document out of time, a similar right is imported to supplement a party's submission, incomplete as it may be, for reasons outside his/her control.

See No. ICC-01/04-01/06-834 OA8, Appeals Chamber, 21 February 2007, paras. 7 and 9.

A procedure for a motion for clarification is not provided for in the Statute of the Court, the Rules of Procedures and Evidence or the Regulations.

See No. ICC-02/04-01/05-18, unsealed on 13 October 2005, Pre-Trial Chamber II, 18 July 2005, p. 2. See also No. ICC-02/04-01/05-60, Pre-Trial Chamber II, 28 October 2005, paras. 16 and 18, and No. ICC-01/04-403, Pre-Trial Chamber I (Single Judge), 3 October 2007, p. 3.

In deciding whether to grant the leave to an applicant to submit observations as *amicus curiae*, according to rule 103 of the Rules, the Chamber shall evaluate whether this is "*desirable for the proper determination of the case*" and whether the observations relate to an issue that the Chamber deems appropriate. This determination shall necessarily be made by the Chamber on a case by case basis. The Chamber considers then that the *rationale* for admitting *amicus curiae* in the proceedings is to have the opportunity to get experts' information on relevant issues of legal interest for the proceedings in order to provide the Chamber with a contribution to the proper determination of the case.

See No. ICC-01/04-373, Pre-Trial Chamber I, 17 August 2007, paras. 3-4.

Exceptional circumstances will need to exist in order to justify any party or participant providing information to the court on an *ex parte* basis when no relief is sought or subsequent application is made on the basis of the material, and when the Chamber has not invited that course of action. Not least, it could cause uncertainty at a later stage in the proceedings: if the bench is merely asked to "*receive*" private information, judicial inactivity could later be interpreted as approval by the chamber either of any action provided proposed by the party or participant, or of any past events that are revealed.

See No. ICC-01/04-01/06-963-Anx1, Trial Chamber I, 26 September 2007, para. 32.

First, *ex parte* procedures are only to be used exceptionally when they are truly necessary and when no other, lesser, procedures are available, and the court must ensure that their use is proportionate given the potential prejudice to the accused. Second, even when an *ex parte* procedure is used, the other party should be notified of the procedure, and its legal basis should be explained, unless to do so is inappropriate. Accordingly, to this limited but important extent there should be a flexible approach. The Chamber should always be provided with a full explanation of the legal basis and a factual justification for the *ex parte* procedure. If the applicant has not notified the other party of the fact of the application or its legal basis, then the reason for not doing so should also be set out for the Chamber's consideration. To the extent that victims have been granted the right to participate on particular issues or as regards particular areas of evidence, consideration should be given to including them in any relevant notification of *ex parte* procedure, and if this is inappropriate, providing the bench with an explanation in writing as to why they have not been informed.

See No. ICC-01/04-01/06-1058, Trial Chamber I, 6 December 2007, para. 12.

Pursuant to first sentence of the regulation 35(2) of the Regulations of the Court a Chamber may extend the time if good cause is shown. The Chamber notes that if the time limit for the document in support of the appeal were not extended, the Prosecutor would have to file his document in support of the appeal during the final week of the year. In this regard, the Chamber notes that this week is unusual in that, over and above the fact that it falls during the three week Court recess, it comprises two public holidays and special days of leave. On this basis the Chamber considers appropriate to extend the time limit for the filing of the document. The Chamber also notes that the three week Court recess does not generally constitute a suspension of the judicial activity.

See No. ICC-01/04-01/07-115 OA, Appeals Chamber, 18 December 2007, paras. 5 and 9.

In principle, the statutory framework set out by the Statute and the Rules do not provide for a motion for reconsideration as a procedural remedy against any decision taken by the Pre-Trial Chamber or the Single Judge.

See No. ICC-01/04-456, Pre-Trial Chamber I, 18 February 2008, p. 4. See also No. ICC-01/04-01/06-123, Pre-Trial Chamber I (Single Judge), 23 May 2006, p. 3 and No. ICC-01/04-01/06-166, Pre-Trial Chamber I (Single Judge), 23 June 2006, para. 10.

Article 64(5) of the Statute establishes that "*upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused*", and rule 136 of the Rules provides that "*persons accused jointly shall be tried together unless the Trial Chamber, on its own motion or at the request of the Prosecution or the Defence, orders that separate trials are necessary, in order to avoid serious prejudice to the accused, to protect the interests of justice or because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with article 65, paragraph 2*". In the view of the Chamber, the ordinary meaning of article 64(5) of the Statute and rule 136 of the Rules provides that there shall be joint trials for persons accused jointly, and establishes a presumption for joint proceedings for persons prosecuted jointly. Considering that joint proceedings during the Pre-Trial phase is consistent with the object and purpose of the Statute and the Rules insofar as: (i) joinder enhances the fairness as well as the judicial economy of the proceedings because, in addition to affording to the arrested persons the same rights as if they were being prosecuted separately, joinder: a. avoids having witnesses testify more than once and reduce expenses related to those testimonies; b. avoids duplication of the evidence; and c. avoids inconsistency in the presentation of the evidence and would therefore afford equal treatment to both arrested persons; (ii) joinder minimises the potential impact on witnesses, and better facilitate the protection of the witnesses' physical and mental well-being; and (iii) concurrent presentation of evidence pertaining to different arrested persons does not *per se* constitute a conflict of interests.

See No. ICC-01/04-01/07-257, Pre-Trial Chamber I, 10 March 2008, pp. 7-8.

An accused's request for interpretation into a language other than the Court's language must be granted as long as he or she is not abusing his or her rights under article 67 of the Statute. If the Chamber believes that the accused fully understands and speaks the language of the Court, the Chamber must assess, on the facts on a case-by-case basis, whether this is so. An accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, non-technical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer. If there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated.

See No. ICC-01/04-01/07-522 OA3, Appeals Chamber, 27 May 2008, paras. 1-3.

[…] Whether one speaks of article 67(1)(a) or (f) of the Statute, it seems that the starting point, as far as languages are concerned, will be a working language of the Court. That is, proceedings will in principle be offered in English or French. An accused may state, however, that he or she wishes to use another language – presumably on the basis that he or she does not fully understand and speak a working language of the Court. The subject of understanding is exclusively the accused. Thus, the Chamber must give credence to the accused's claim that he or she cannot fully understand and speak the language of the Court. This is because it is the accused who can most aptly determine his or her own understanding and it should be assumed that he or she will only ask for a language he or she fully understands and speaks.

The matter does not however, end there. What if the accused fully understands and speaks the language of the Court? The Chamber may have reasons as to why it does not find it appropriate to grant a request to have interpretation into another language. For example, an accused may fully understand and speak more than one language and it may be evident that he or she is asserting the right to use a different language to that being offered by the Court even though the latter is one of the languages that he or she also fully understands and speaks. The Chamber may consider that the accused is acting in bad faith, is malingering or is abusing his or her right to interpretation under article 67. If the Chamber believes that the accused fully understands and speaks the language of the Court, the Chamber must assess, on the facts on a case-by-case basis, whether this is so.

Given the addition of the word fully, and the drafting history, the standard must be high. Therefore, the language requested should be granted unless it is absolutely clear on the record that the person fully understands and speaks one of the working languages of the Court and is abusing his or her right under article 67 of the Statute. An accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, non technical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer. If there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated. Ultimately, the Chamber in question is responsible for ensuring the fair trial of the accused.

See No. ICC-01/04-01/07-522 OA3, Appeals Chamber, 27 May 2008, paras. 58-61.

The Single Judge recalls article 12(1)(b) of the Code of Professional Conduct for Counsel according to which, a counsel shall not represent a client in a case, where he/she "*was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear*".

The Court's statutory provisions, including the Code of Conduct, do not define the scope of the expression "*privy to confidential information*". However, in addressing requests of similar nature, Trial Chambers III and IV adopted the standard of "de minimis *confidential information*", which requires a proof that the person concerned "*became aware of more than*" the "*minimal*" confidential information relevant to the case under consideration. The information is deemed *de minimis* if it is "*so insignificant that a court may overlook it in deciding an issue*". Thus, to prove *a contrario* that the person concerned "*became aware of more than* de minimis *confidential information*", the facts presented should reveal that at least he/she was aware of confidential information of some significance to the case *sub judice*, which prompts the Chamber to invalidate the person's continuous involvement with the opposite party (Defence).

The Single Judge considers that the Court's statutory documents do not prohibit a staff member from the Office of the Prosecutor to join the Defence. Nor do they set a time bar for such an involvement. Accordingly, in the absence of any prohibitive rule to that effect, the person is free to do so subject to the limitations dictated by the existing statutory provisions including those referred to in the Code of Conduct. Furthermore, even assuming that there is a lacuna in the Statute and the Rules, a general principle of law cannot be extracted on the basis of examining only five national jurisdictions, the practice of which is even inconsistent.

See No. ICC-01/09-02/11-185, Pre-Trial Chamber I (Single Judge), 20 July 2011, paras. 15, 17, and 27.

The Appeals Chamber considers that protecting the integrity of the proceedings – in particular their fairness and expedition in the specific context under consideration – is a matter that is necessarily within the jurisdiction of the Pre-Trial Chamber.

[…]

Article 12(1)(b) of the Code of Professional Conduct for Counsel prohibits counsel from appearing in a case in which he or she was involved or privy to confidential information as a staff member of the Court – the OTP being an organ of the Court. Preventing counsel from appearing in such circumstances, but permitting impediments to representation on this basis to be lifted if deemed to be justified in the interests of justice, is consistent with ensuring that a trial is fair and protecting the integrity of the proceedings. Indeed, ensuring that a person is suitable to act as counsel, preventing conflicts of interest, protecting the confidentiality of information and ensuring that one party does not have an unfair advantage arising there from and respecting the rights of the accused are features of a fair trial and also reflect the purposes underpinning article 12(1)(b) of the Code.

In interpreting and applying article 12(1)(b) of the Code, having regard to its ordinary meaning, its context as well as its object and purpose, the Appeals Chamber holds that the provision requires that counsel had knowledge of confidential information relating to the case. The provision, which must be interpreted in light of the Statute, to which it is subject, reflects a fair balance, in the context of impediments to representation and a fair trial, between the interests of the OTP, the right to legal assistance of the accused's choosing (albeit this is not an absolute right) and not unduly restricting the future professional practice of a former staff member of the Court.

The requirement that counsel has knowledge of confidential information relating to the case makes it clear to counsel when he or she is able to represent a client. It is, in the first instance, counsel's responsibility to ensure that an impediment to representation and/or a conflict of interest does not arise, in accordance with his or her professional obligations under the Code. First and foremost, counsel must not take on a case in relation to which he or she was privy of any confidential information as a member of the OTP (subject to any application to lift the impediment that ordinarily arises in the interests of justice, which will be addressed further below).

The threshold imposed by article 12(1)(b) of the Code for preventing counsel from representing a client is therefore not a high one. It contrasts, for example, with the higher standard imposed by article 14(C) of the ICTY Code of Professional Conduct, which prevents counsel from representing a client "*in connection with a matter in which counsel participated personally and substantially as an official or staff member of the Tribunal*" unless the Registrar of that Tribunal determines that no real possibility of a conflict of interest arises. No such personal and substantial involvement in the case is required before counsel is prevented from representing a client at

this Court as a result of having been privy to confidential information relating to that case – and counsel will therefore need to consider the situation with particular care prior to accepting a case.

This is particularly the case given that the potential consequences of not applying the relevant provisions correctly are (i) being disqualified from the case; (ii) the institution of disciplinary proceedings pursuant to the Code, with the ultimate potential sanction being a permanent ban on practising before the Court and being struck off the list of counsel (article 42(1)(e) of the Code); and (iii) an enduring tarnish on counsel's professional reputation (honesty and/or judgment). Given both the nature of the obligation and those potential consequences, the Appeals Chamber would expect counsel to err on the side of caution and either not agree to represent a client at all or, certainly, immediately bring the matter before the relevant Chamber pursuant to article 12(1)(b) of the Code prior to agreeing to represent a client if in any doubt at all about the application of the provisions to him or her.

The Appeals Chamber further finds that if the Prosecutor wishes to challenge the assigasn nment of a particular person as counsel, it is not unreasonable for him to have to demonstrate knowledge of confidential information relating to the case. Contrary to the Prosecutor's submissions, this does not need to be information which counsel presently "*recalls*" – all that is required is to prove that counsel once had knowledge of the particular information.

The Appeals Chamber also does not accept that the standard imposed by article 12(1)(b) of the Code places upon the Prosecutor an impossible evidentiary burden. There are various methods by which the Prosecutor could prove relevant knowledge of one of his staff members in these circumstances, whether by use of methods attempted in the present case (evidence from other staff members, electronic records of materials accessed, records of meetings or e-mail distribution lists) or, indeed, by any other appropriate means by which the Prosecutor can substantiate his allegations. There is nothing in the wording of article 12 of the Code, nor indeed in any other provision of the Court's governing texts, that indicates that there should be a general bar – whether limited by reference to cases that were open at the time of their employment or otherwise – on former staff members of the OTP representing the Defence. On the contrary, as set out above, article 12 of the Code specifically envisages former staff members of the Court appearing as counsel and regulates the considerations that should apply when they do so. In other words, prior association with the OTP does not, *per se*, disqualify a former OTP staff member from working for the Defence. The fact that a case was already open by the time that counsel left the employ of the OTP would not, without more, disqualify counsel from acting for the Defence in that case. A conflict of interest must be established.

[…]

The Appeals Chamber therefore concludes that for an impediment to representation to arise based upon the fact that counsel was "*privy to confidential information*" as a staff member of the Court within the meaning of article 12(1)(b) of the Code, counsel has to have had knowledge of confidential information relating to the case in which counsel seeks to appear.

[…]

The Appeals Chamber considers that, ordinarily, a conflict of interest will be presumed once knowledge of confidential information has been established, as one would usually follow from the other. A duty of confidentiality to a former employer when contrasted with the requirement to represent a present client is likely to lead to a conflict of interest. However, there are circumstances in which there may not be any real conflict of interest or other impediment to representation. The second sentence of article 12(1)(b) of the Code expressly provides for this possibility in providing that the lifting of the impediment to representation under that article may be ordered by the Court "*at counsel's request*" and "*if deemed justified in the interests of justice*".

This broad discretion afforded to the Chamber under article 12(1)(b) of the Code is again consistent with its primary duty to ensure that the proceedings as a whole are fair. It is not possible, in the abstract, to define exhaustively what might be "*in the interests of justice*": this will depend upon all relevant factors and circumstances of a particular case. However, the Appeals Chamber notes that one of the factors that may be considered is likely to be the nature of the confidential information itself. If it is of a "*de minimis*" nature – in the sense of Black's Law Dictionary definition of being "*so insignificant that a court may overlook it in deciding an issue or case*" – this might well be a factor that convinces the Chamber that it is in the interests of justice to permit this particular counsel to represent the accused. Yet a consideration of whether the information was of a "*de minimis*" nature is potentially only one factor that a Chamber may wish to consider in ruling upon whether it is in the interests of justice for this particular counsel to represent the accused in all the circumstances of the particular case. Other factors that might be considered under this head could include the rights of the accused, counsel's position within the Defence team, and concerns about the overall fairness or the appearance of impropriety in relation to the proceedings arising, in the specific circumstances, out of the fact that counsel possessed confidential information relating to the case.

See No. ICC-01/09-02/11-365 OA3, Appeals Chamber, 10 November 2011, paras. 46, 51-58, 64, and 68-70.

The Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.

Furthermore, the Chamber is of the view that the unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions. Indeed, the cooperation regime between the Court and States Parties, as established in Part IX of the Statute, can not in any way be equated with the inter-state cooperation regime which exists between sovereign States. This is evidenced by the Statute itself which refers in article 91 of the Statute to the "*distinct nature of the Court*", and in article 102 of the Statute which makes a clear distinction between "*surrender*", meaning the delivering up of a person by a State to the Court, and "*extradition*", meaning the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

It is the view of the Chamber that when cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within its jurisdiction.

See No. ICC-02/05-01/09-139-Corr, Pre-Trial Chamber I, 12 December 2011, paras. 43-46.

Article 50(2) of the Statute establishes English and French as the working languages of this Court and for these purposes they rank equally. Although article 74 of the Statute sets out various requirements as regards the judgment, the Rome Statute framework does not contain any provision to the effect that it is necessary for the English and French versions to be issued together. Instead, article 67(1)(f) entitles the accused to such translations as are necessary to meet the requirements of fairness, if any documents are not in a language he fully understands and speaks. Rule 144(2)(b) of the Rules indicates that the Chamber's article 74 Decision on criminal responsibility shall be provided as soon as possible to "*the accused in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67, paragraph 1(f)*".

It follows that the essential requirement is for the Chamber to ensure that the accused is provided with a translation of the article 74 Decision in circumstances that protect the fairness of the proceedings. It is generally accepted that the Chamber would need to move to the next phase whatever the result, avoiding the delay that would be caused by waiting for the complete French translation.

[…]

Nevertheless, certain minimum safeguards need to be in place to ensure that the accused and his counsel are able adequately to prepare for this next phase if the accused is convicted. In particular, the Chamber agrees with the Defence that the timing of the next phase, in these circumstances, will depend on the translation into French of those parts of the judgment (as identified by the Defence) which the Chamber considers essential for these purposes. This will not apply if the accused is acquitted.

[…]

The Chamber determines that the Prosecution will be "*notified*" for the purposes of rule 150(1) of the Rules and regulation 31(2) of the Regulations of the Court when the article 74 Decision is effectively sent from the Court by the Registry if the accused is acquitted.

Different considerations would apply in the event of a conviction. As far as the Chamber is aware the accused has either no, or limited, ability as regards reading English. If he is convicted, he will need to prepare for the appellate stage of the case and if he is deemed "*notified*" of the article 74 Decision when the English version is available, he will be obliged to file his appeal within 30 days. In this trial, whatever the overall conclusion, the judgment will run to many hundreds of pages, and it will involve detailed consideration of a large number of complex legal and factual issues. The Chamber is of the view that it would be unfair on the accused, and it would constitute a breach of article 67(1)(f) of the Statute (his entitlement to translations in order to secure fairness), as well as contravening the objective of rule 144(2)(b) of the Rules, to require the accused to prepare for this particular stage of the proceedings when he is effectively unable to read the judgment in English.

Accordingly, under rule 144(2)(b) of the Rules, the Chamber determines that the accused will have been "*notified*" of the article 74 Decision in the event of a conviction (particularly in the context of any appeal), when the French translation is effectively sent from the Court by the Registry.

The Chamber notes that this is consistent with the approach of Pre-Trial Chamber II when it determined that the five-day period to file an application for leave to appeal only commenced on the date of notification of the French translation of the relevant decision. Pre-Trial Chamber I made a similar decision as regards notification of the Arabic translation of a decision originally delivered in English. This Chamber has also earlier ruled that "*no provision exists which entitles a party or a participant to stipulate that time limits should only apply when the decision is provided to it in the working language of the Court of their choice. Instead, the guiding provision is article 67(f) and the provision of translations should be consistent with the requirements of fairness*".

In the event of a conviction, the Chamber considers it fair for the Prosecution also to be "*notified*" of the article 74 Decision at the same time as the Defence. This is potentially relevant to the timing of the transmission of the trial record to the Appeals Chamber, pursuant to rule 151 of the Rules.

See No. ICC-01/-04-01/06-2834, Trial Chamber I, 15 December 2011, paras. 18-25.

If the relevant Victims' written statements contain identifying information that should not be disclosed to the parties prior to the Chamber's ruling on the merits of their applications, the Legal Representatives are to file the victims' written statements on an *ex parte* basis, with proposed redactions to the identifying information. Subject to any changes ordered by the Chamber, the redacted versions will be notified to the parties.

Once the supplemented Applications and written statements have been filed and the Chamber has decided on any proposed redactions, the Chamber will instruct the Victims Participation and Reparations Section to provide the parties with unredacted or lesser redacted versions of the victims' application forms for the Relevant Victims. In addition, the Chamber will provide the parties with the relevant portions of the *ex parte* annexes to the Chamber's victims' participation decisions in which the Relevant Victims were granted participating status in this case.

See No. ICC-01/05-01/08-2027, Trial Chamber III, 21 December 2011, paras. 20-21.

The Common Legal Representative of the main group of victims applied to the Chamber for the registration in the record of a certain number of e-mails transmitting decisions or motions in the instant case. He argued that the prospective need to transmit a complete record of the proceedings to the Appeals Chamber in due course and the principle of public hearings require that the e-mails be filed in the record of the case. Citing in this respect a list of 25 e-mails which, in his view, merit inclusion in the record, he invited suggestions from all of the parties and participants, none of which filed submissions on the Application before expiry of the time limit for response.

The Chamber recalls that the sending of e-mails in the case at bar has generally been driven by two considerations: urgency and celerity, on the one hand, and the purely procedural nature of certain matters of judicial administration, on the other. It underscores that since such e-mails are copied to all of the parties and participants, they afford the necessary transparency and safeguard the inter partes nature of the proceedings.

The Chamber nonetheless shares the Legal Representative's concern with respect to safeguarding the fundamental principle of public hearings and ensuring that the record of the case is as complete as possible, particularly in view of a prospective appeal. It concurs that the use of e-mail to transmit motions, decisions or directions calls for greater vigilance in the maintenance of the record. The Chamber has therefore endeavoured to include the content of such e-mails in the record at hearings or in its filings.

The practice of the Chamber in this regard has effectively been to include references to e-mails pertaining purely to judicial administration in the procedural background to its written or oral decisions and to reproduce or append the content of e-mails pertaining to substantive matters to decisions concerning the same matters. The parties themselves have adhered to this practice in their own written submissions. In any event, the Chamber finds the Application meritorious insofar as the parties and participants may legitimately so move the Court. Accordingly, the Chamber rules that the 25 e-mails identified by the Legal Representative shall be filed in the record of the case as annexes to this decision and, in some instances, shall be incorporated within more extensive e-mail correspondence on the same matter. In certain cases the Chamber requires that the e-mails be appended to the submissions to which they pertain.

See No. ICC-01/04-01/07-3237-tENG, Trial Chamber II, 8 February 2012, paras. 1-5.

The Chamber first notes that no provision under the Statute foresees the filing of an addendum to a response. Indeed, no legal basis has been provided to the Chamber in support of the Legal Representatives' Application. The Chamber emphasizes that, pursuant to regulation 23(1)(d) of the Regulations of the Court, any document filed with the Chamber should contain "*all relevant legal and factual issues, including details of the articles, rules, regulations or other applicable law relied upon*".

See No. ICC-02/05-03/09-304, Trial Chamber IV, 6 March 2012, para. 5.

The Chamber notes that according to article 79 of the Statute in conjunction with rule 98(5) of the Rules, the Trust Fund for Victims (TFV) has an additional mandate to that provided for in article 79(2) of the Statute and rule 98(1)(4) of the Rules, namely a mandate to use other resources for the benefit of victims. This particular mandate is further regulated by the Regulations of the TFV. In particular, according to regulation 50(a) of the Regulations of the TFV, the TFV shall be considered to be seized when:

(i) the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families;

and

(ii) the Board has formally notified the Court of its conclusion to undertake specified activities under (i) and the relevant Chamber of the Court has responded and has not, within a period of 45 days of receiving such notification, informed the Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of

the Rules of Procedure and Evidence, would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

(iii) Should there be no response from the Chamber or should additional time be needed by the Chamber, consultations may be held with the Board to agree on an extension. In the absence of such an agreement, the extension shall be 30 days from the expiry of the period specified in sub-paragraph (a)(ii). After the expiry of the relevant time period, and unless the Chamber has given an indication to the contrary based on the criteria in sub-paragraph (a)(ii), the Board may proceed with the specified activities.

In the 16 November 2009 Decision, the Chamber's main concern in relation to the proposed activities in Central African Republic was the lack of specificity in the Notification. As the Chamber made clear that, in compliance with the regulation 50 of the Regulations of the TFV, "*only the notification of specific activities and projects would enable it to respond and to conclude that a particular activity or project would not predetermine any issue to be determined by the Court*".

Having examined the 2012 Notification and the annexes appended thereto, in particular annex III, the Chamber considers that the information provided therein with respect to the six identified projects is of sufficient specificity in terms of, *inter alia*, the nature of the specified activity and its intended goal.

Turning to the question as to whether any of these projects or activities "*would pre-determine any issue to be determined by the Court, including jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*", the Chamber notes that the six proposed projects are aimed at supporting victims of sexual and gender based crimes falling within the jurisdiction of the Court, in different locations in the CAR. Furthermore, these proposed projects or activities are defined in a non-discriminatory manner, without reference to any identified suspect/accused or particular victim(s). As such, the proposed projects or activities do not appear to pre-determine any issue to be determined by the Court, including jurisdiction or admissibility. Said projects and activities also do not appear to violate the presumption of innocence, or to be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Thus, the Chamber holds that the implementation of any of these activities does not appear to impinge upon the criteria set out in regulation 50(a)(ii) of the Regulations of the TFV. It also follows that the Chamber does not deem it necessary to receive observations from the OPCD, or to request further information from the Board of Directors on the proposed projects or activities.

See No. ICC-01/05-41, Pre-Trial Chamber II, 23 October 2012, paras. 6-10.

In circumstances where a State has offered to accept a detained person and to enforce conditions, it is incumbent upon the Pre-Trial Chamber to consider conditional release. However, where the Pre-Trial Chamber is of the view that no condition could mitigate the identified risks there is no obligation on the Chamber to address the State's proposals any further.

Medical reasons can play a role in decisions on interim release in at least two ways. First, the medical condition of a detained person may have an effect on the risks under article 58(1)(b) of the Statute, potentially negating those risks. Second, the medical condition of the detained person may be a reason for a Pre-Trial Chamber to grant interim release with conditions.

See No. ICC-02/11-01/11-278-Red OA, Appeals Chamber, 26 October 2012, paras. 1-2.

For the purposes of the present decision, the Chamber has considered articles 21, 61 and 67 of the Statute, rules 113, 121 and 135 of the Rules, and regulation 103 of the Regulations of the Court.

Neither the Statute nor the Rules contain any provision specifically addressing fitness to stand trial. However, the concept of fitness to stand trial must be viewed as an aspect of the broader notion of fair trial. It is rooted in the idea that whenever the accused is, for reasons of ill health, unable to meaningfully exercise his or her procedural rights, the trial cannot be fair and criminal proceedings must be adjourned until the obstacle ceases to exist. In this sense, fitness to stand trial can be defined as absence of such medical conditions which would prevent the accused from being able to meaningfully exercise his or her fair trial rights.

With respect to proceedings before the Court, article 67(1) of the Statute enumerates the fair trial rights, which by virtue of rule 121(1) of the Rules are applicable from the first appearance of the suspect before the Pre-Trial Chamber.

In accordance with article 21(3) of the Statute, the application and interpretation of the applicable law must be consistent with internationally recognised human rights. In this regard, the Appeals Chamber has ruled that human rights underpin every aspect of the Statute and that the provisions of the Statute "*must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety*".

In this regard, the Chamber notes the findings of the European Court of Human Rights (the "ECtHR") that the fair trial rights contained in article 6 of the European Convention on Human Rights (the "ECHR") guarantee "*the right of an accused to participate effectively in a criminal trial*". The ECtHR found that, in general, the right of effective participation includes, *inter alia*, not only the right to be present, but also to hear and follow the proceedings, such rights being implicit in the very notion of an adversarial procedure and also capable of being derived from the rights contained in article 6(3)(c), (d) and (e) of the ECHR. The Chamber also notes the finding of the ICTY in the case of *Strugar*, where it was held that the accused must have the capacity "*to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights,* i.e. *to make his or her defence*". On appeal, this finding was confirmed and the Appeals Chamber of the ICTY specifically held that "*the applicable standard is that of meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings*". The same approach has been adopted by the International Criminal Tribunal for Rwanda and the Extraordinary Chambers in the Courts of Cambodia.

The Chamber considers that from the catalogue of fair trial rights, contained in article 67(1) of the Statute, a number of relevant capacities can be discerned which are necessary for the meaningful exercise of these rights. As indicated in the "Order to conduct a medical examination", they include the capacities: (i) to understand in detail the nature, cause and content of the charges; (ii) to understand the conduct of the proceedings; (iii) to instruct counsel; (iv) to understand the consequences of the proceedings; and (v) to make a statement.

In the Chamber's view, the focus on article 67(1) of the Statute makes it clear that the question before the Chamber is not merely the existence of particular medical conditions, or what their sources are, but primarily whether these medical conditions affect the capacities of the person concerned to meaningfully exercise his or her fair trial rights. In reaching its overall determination of fitness to stand trial, the Chamber must take into account all the relevant circumstances of each individual case. The Chamber must also examine whether the negative impact of particular medical conditions can be mitigated by putting in place certain practical arrangements.

[…]

The Chamber is of the view that the overall capacity required for fitness to stand trial is the same irrespective of the stage of proceedings. Indeed, article 67(1) of the Statute applies equally at pre-trial and trial stages, as clearly stated in rule 121(1) of the Rules. The importance of the ability of the suspect to participate meaningfully in the confirmation of charges proceedings is evident as the suspect has the right, in accordance with article 61(6) of the Statute, to object to the charges, challenge the evidence presented by the Prosecutor and present evidence.

The Chamber is of the view that rule 135 of the Rules also applies to the pre-trial phase and has considered the appointment of experts to conduct a medical, psychiatric and psychological examination under this rule to be indispensible in the case at hand. These experts were engaged in order to provide specialised information and medical opinion, based on specific expertise which the Judges do not possess. However, the Chamber considers that it remains exclusively competent to make the determination of the suspect's fitness to stand trial.

[…]

The question is not whether the suspect is at present in full possession of the higher or better faculties he may have had in the past but whether his current capacities are sufficient for him to take part in proceedings against him, taking into account the applicable law and the legal standards developed above. The Chamber considers that the suspect is not physically unfit to take part in the proceedings against him.

Adjustments will need to be made in order to enable the suspect to participate fully at the confirmation of charges hearing. These adjustments may include, *inter alia*, shorter court sessions, the provision of appropriate facilities for him to rest during breaks, the possibility to excuse himself from all or part of the proceedings and to follow them via video-link if he so wishes. The Chamber is of the view that the suspect, together with his counsel, should be given the opportunity to provide views on appropriate arrangements. Accordingly, the Chamber shall, in due course, determine the appropriate practical arrangements for the conduct of the hearings in consultation with the Defence and the Registry.

See No. ICC-02/11-01/11-286-Red, Pre-Trial Chamber I, 2 November 2012, paras. 42-56, 86, 100, and 102.

The present Decision supplements the Original Protocol in light of the Decision on victims' representation and participation.

II. Supplementary protocol concerning contact with victims and the handling of confidential information

1. Application of the Supplementary Protocol

The application of this supplementary protocol concerning contact with victims and the handling of confidential information ("Supplementary Protocol") will be triggered when the Chamber has conducted its preliminary review of a victim's application to participate individually and directly in the case and has submitted the application to the parties for their comments.

2. Definition of victim

Solely for the purposes of the Supplementary Protocol, the use of the term "*victim*" refers to a victim whose identity has been disclosed to the parties following the Chamber's preliminary review of his or her application and submission of that application to the parties for comments.

3. Contacts with victims

A party that intends to contact a victim shall first notify the common Legal Representative of this intention. After being notified, the common Legal Representative shall seek the consent of the victim within five days of receiving notification. If the victim consents, the common Legal Representative shall inform the relevant party and facilitate contact as appropriate.

If the common Legal Representative objects to the interview, he or she shall inform the relevant party. If the common Legal Representative and the party cannot reach an agreement, despite their best efforts, they shall promptly raise the matter with the Chamber. The interview shall not take place until the Chamber rules on the matter. The common Legal Representative may be present during an interview of a victim with the victim's consent. The common Legal Representative present at an interview shall not, in any manner, prevent or dissuade the victim from answering questions freely, except where an objection to any particular question relates to the security of the victim. If the common Legal Representative considers that he or she must object to any part of the procedure followed or a particular line of questioning this will be The common Legal Representative may designate a member of his or her team to attend the meeting on his or her behalf if he or she cannot attend. The Legal Representative has the right to receive a copy of the statement, transcript or recording made during the interview. In addition, it is the responsibility of the common Legal Representative to ensure that appropriate assistance is provided and that, where necessary, the VWU is contacted well in advance of any scheduled interview in order to arrange for an assessment of the need for assistance by a VWU representative during the interview.

4. Communication of non-public information to the public in the course of the parties and participants' investigations

The guidelines in relation to the disclosure of confidential contained in paragraphs 16 to 36 of the Original Protocol shall apply to identifying information related to victims or their identified family members.

See No. ICC-01/09-01/11-472, Trial Chamber V, 12 November 2012, paras. 3-12.

As previously stated by the Chamber, regulation 55(1) of the Regulations of the Court provides that the legal characterisation of the facts may only be changed in the context of the Chamber's final decision on the merits under article 74 of the Statute. In accordance with regulation 55, and as clearly set out in the regulation 55 Notification, the Decision requesting further information, the Suspension Decision and the Decision on the Request for Leave to Appeal, the issuance of the regulation 55 Notification enables the Chamber to rely upon the envisaged potential change in legal re-characterisation in its decision under article 74 of the Statute; no further decision is required.

As previously stated by the Chamber, in accordance with regulation 55(2) of the Regulations, during the trial proceedings and before rendering the decision under article 74 of the Statute, the Chamber shall: (i) give notice to the parties and participants if, at any time during the trial it appears that the legal characterisation of the facts may be subject to change; and (ii) after having heard the evidence, give the participants the opportunity to make oral or written submissions. In addition, the Chamber may suspend the trial proceedings or, if necessary, order a hearing to consider all the matters relevant to the proposed change. According to regulation 55(3) of the Regulations, the Chamber shall, in particular, ensure that the accused has adequate time and facilities for effective preparation.

As also previously stressed by the Chamber, the Appeals Chamber has held that regulation 55 of the Regulations is not inherently incompatible with the Statute, general principles of international law or the inherent rights of the accused. On the contrary, regulation 55 of the Regulations addresses the power of the Trial Chamber to modify the legal characterisation of the facts on its own motion "*at any time during the trial*". This power is to be distinguished from that of the prosecution pursuant to article 61(9) of the Statute. In this context, there is no need for a "*formal decision to amend the charges*", as demanded by the defence, since, as stressed by the Appeals Chamber, "*article 67(1)(a) of the Statute does not preclude the possibility that there may be a change in the legal characterisation of the facts in the course of the trial, and without a formal amendment to the charges*".

See No. ICC-01/05-01/08-2500, Trial Chamber III, 6 February 2013, paras. 14-16.

Article 61(4) of the Statute provides that the Prosecution may "*amend or withdraw*" any charges before the confirmation hearing, upon reasonable notice to the suspect and, in the case of withdrawal, notification to the Pre-Trial of the reasons. Article 61(9) of the Statute provides that after the confirmation of the charges, but before the trial has commenced, the Prosecution may amend the charges with the permission of the Pre-Trial Chamber. It also clearly provides that, after the trial has commenced, the Prosecution may withdraw the charges with the permission of the Trial Chamber. The provision does not squarely address the situation which is now before the Chamber where charges are withdrawn after the confirmation decision but before commencement of the trial.

In the present case, the Prosecution has submitted that current evidence does not support the charges against the accused and that it has no reasonable prospect of securing evidence that could sustain proof beyond reasonable doubt. Significantly, the Defence does not contest the Prosecution's withdrawal. In these circumstances, the Chamber, acting pursuant to article 64(2) of the Statute, considers that the withdrawal of the charges against the accused may be granted.

The Chamber reminds the accused, however, that pursuant to regulation 42 of the Regulations of the Court "*protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect* […] *after the proceedings have been concluded*", and that the Court has jurisdiction over intentional acts of interference with witnesses. Similarly, pursuant to regulation 23 *bis* of the Regulations of the Court, the classification of documents as "*ex parte*" or "*confidential*" remains in place until otherwise ordered by the Chamber.

See No. ICC-01/09-02/11-696, Trial Chamber V, 18 March 2013, paras. 10-12.

In my view article 61(9) is *lex specialis* in relation to amending or withdrawing the charges in the post-confirmation phase of proceedings before the Court. As noted by the Majority, this provision clearly provides that after the confirmation hearing but before the trial has begun, the Prosecutor may amend the charges with the permission of the Pre-Trial Chamber. It equally clearly provides that after "*the commencement of the trial*", charges may be withdrawn with the permission of the Trial Chamber. Like the Majority, I consider that the trial has not yet commenced for the purposes of article 61(9). The trial commences, in the relevant sense, once the charges are read to the accused and opening statements are made followed by the presentation of evidence.

Accordingly, on a plain text reading of article 61(9), there is no requirement for the Prosecutor to seek the permission of any chamber in order to withdraw the charges in the period following confirmation and prior to the commencement of the trial proper.

I cannot accept the implicit premise of the Majority's position that such a requirement can be read into the Statute by reference to the Trial Chamber's authority, set out in article 64(2) of the Statute, to regulate the conduct of the proceedings. Apart from being inconsistent with the clear wording of article 61(9) of the Statute, this kind of interpretation is not in keeping with the statutory framework as a whole which clearly confers responsibility on the Prosecution to initiate investigations and frame the charges upon which the accused is brought to trial. Any limitation on the Prosecution's authority to modify or withdraw the charges must, in my view, be expressly provided for in the Statute. I would therefore interpret the powers conferred on the Chamber, in articles 64(2) and 61(11) of the Statute and rule 134(1) of the Rules, to extend to ordering the formal discontinuance of the case and issuing any related orders but not to authorising a withdrawal of charges, which remains in the sole discretion of the Prosecutor.

Furthermore there is, in my view, no reason of principle to require the Prosecution to seek permission of the Chamber to withdraw the charges prior to commencement of trial. The primary reason to impose a requirement on the Prosecutor to seek permission for a withdrawal of charges would be to safeguard the rights of an accused who may object to a proposed withdrawal on the grounds that he or she is entitled to an acquittal in order to ensure the *ne bis in idem* principle attaches. However, there is nothing in the Statute to suggest that this principle applies prior to the commencement of trial. In this regard, I note that article 61(8) in fact expressly provides for the Prosecution to resubmit charges that have previously been declined for confirmation if there is additional evidence. Nor, in my view, can the recognition of *ne bis in idem* at this point of proceedings be said to be a general principle of law, and as such applicable pursuant to article 21(3) of the Statute, given the vast divergence in national practice as to the temporal scope of the principle.

For the foregoing reasons, I would not have granted permission to withdraw the charges and would simply have terminated the case without further enquiry upon the Prosecution's submission of its notification of withdrawal.

See Partial Dissenting Opinion of Judge Ozaki, No. ICC-01/09-02/11-698, Trial Chamber V, 19 March 2013, paras. 2-5.

It should not be right for a criminal court to compel a prosecutor to proceed to trial with a case which the prosecutor has admitted is insufficiently supported in the evidence currently or prospectively available to her: and, it would be clearly wrong for a prosecutor to decide on her own to proceed to trial with a case similarly deficient. The former situation is not insulated against the disagreeable legal characterisation of the error that the latter situation would bear, merely because the decision of a court is involved. It is therefore correct for the Chamber to accept the reality presented by the Prosecutor's announcement of her decision to withdraw the case against the person accused.

In my view, where there is credible evidence connecting a defendant to the sort of conducts emphasised above, the consequence should not be withdrawal of the charges against him. Lest, other defendants begin to view those conducts as passports to impunity.

Unfettered discretion in the Prosecutor to withdraw confirmed charges at any stage is inconsistent with the general flow of the Rome Statute. In particular, it is inconsistent with the rights of the defence, the interests of victims (which have been given explicit recognition in the process of the ICC), and, the interest of general order in the administration of justice in this Court.

The fate of all these interests ought not to be subjected to the mere happenstance of silence of article 61(9) on a question so important. In my view, the circumstances of that statutory silence only signal what appears to be an error of omission in legislative drafting. The sense of that error begins to emerge if one considers that article 61(9) of the Statute clearly requires such permission for withdrawal of charges after commencement of the trial, which, according to some of the Court's jurisprudence [with which I agree], occurs at the time the Prosecutor's opening statement is made. But there is no sensible rationale yet advanced to explain the legal difference that an opening statement makes, such that properly removes a discretion that the Prosecutor supposedly enjoyed minutes before its delivery. Without that explanation, we are left with the impression that the administration of justice in this Court must be left a slave to the sort of practice that has been deprecated as the "*austerity of tabulated legalism*".

Another clear proof of the drafting error – now claimed as giving the Prosecutor an unfettered discretion to withdraw a confirmed charge before the trial starts – is in the failure of the provision even to provide that the Prosecutor need give notice or reasons when withdrawing a confirmed charge at that stage of the case. That requirement appears in article 61(4), in cases of withdrawal of a charge before commencement of hearing for confirmation of charges.

[…]

In my view then, the silence of the Rome Statute may not control the question whether permission of a Chamber is necessary for the Prosecutor to withdraw confirmed charges before the commencement of the trial in a case that has been transferred to the Trial Chamber pursuant to article 61(11) of the Statute. What must control the question are the context, object and purpose of the Rome Statute, discernible from a composite appreciation of relevant parts of the Rome Statute – when the Statute is read as a whole. As mentioned earlier, account must then be taken of all the interests implicated in the Statute, such as the interests of defendant, victims and orderly administration of justice.

[…]

As regards the interests of victims, it must be noted that article 68(3) of the Statute specifically provides m the relevant respect that where '*the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered*'. Is it the case that the victims' views and concerns are not effectively to be considered by the Chamber if the Prosecutor chooses to withdraw confirmed charges before commencement of trial? But that will be the result if it is accepted that the Prosecutor has discretion to withdraw at that stage. Similarly, it is to be noted that article 75 of the Statute recognises the right of victims to reparation. Should that provision not effectively constrain the discretion of the Prosecutor to withdraw confirmed charges? Were that not the case, the Prosecutor would be free to withdraw charges with no ability on the part of the Chamber to review the reasons for the withdrawal and deny permission if withdrawal would unfairly defeat the victim's right to reparation.

See Concurring Separate Opinion of Judge Eboe-Osuji, No. ICC-01/09-02/11-698, Trial Chamber V, 19 March 2013, paras. 2, 4, 11-13, 29, and 32.

The Appeals Chamber has found above that there is no reason, in principle, why notice of a proposed re-characterisation cannot be given at the present stage of the proceedings. It has been demonstrated earlier that regulation 55 of the Regulations of the Court itself does not prohibit this from being done. Internationally recognised human rights do not require a different interpretation of this legal provision. The cases of the European Court of Human Rights (the "ECtHR") referred to by the Trial Chamber demonstrate that changes to the legal characterisation of facts may be addressed at late stages of the proceedings, including at the appeals stage, or in review proceedings before the highest domestic courts, without necessarily causing unfairness. The jurisprudence of the ECtHR equally provides that notice of a possible re-characterisation is necessary in order to give the accused the possibility to defend himself or herself in a practical and effective manner and in good time against any such possible re-characterisation.

The Appeals Chamber has had regard to accused's arguments in relation to the case-law of the ECtHR, but does not find them to be convincing. None of his arguments undermines the general principle that can be drawn from those cases, namely that notice of a legal re-characterisation at a late stage of the proceedings does not, in and of itself, violate the right to a fair trial. As such, there is no reason of principle as to why, without more, the timing of the notice of re-characterisation would result in a violation of the accused person's right to be informed promptly of the charges under article 67(1)(a) of the Statute in the present case.

The Appeals Chamber, however, recalls that, having been given notice of the potential recharacterisation, regulation 55(3)(a) of the Regulations of the Court requires the accused to have adequate time and facilities for the effective preparation of his defence – and that the Trial Chamber has given the accused the opportunity to make submissions. In those submissions the accused person may, *inter alia*, address the scope of article 25(3)(d) of the Statute and point out measures that he believes are necessary in order to safeguard his rights pursuant

to article 67. The Trial Chamber thereafter will need to assess whether it remains possible for the accused effectively to prepare his defence in light of both the manner in which the trial has been conducted to date and the re-characterisation that is now proposed. The Trial Chamber will also need to consider what measures may need to be implemented to ensure that the trial as a whole remains fair. Such consideration could include an assessment by the Trial Chamber of whether the accused person has, in fact, been prejudiced by a re-characterisation made at this stage, including in particular whether he has been deprived of mounting the defence in relation to article 25(3)(d) of the Statute that he otherwise would have wished to present.

[…]

The Appeals Chamber recalls that, under article 67(1)(a) of the Statute, the accused is entitled to be informed of the "*nature, cause and content*" of the charges, which includes both the factual allegations and their legal characterisation. In light of this provision, the purpose of regulation 55(2) of the Regulations of the Court is to ensure that the accused is informed of a possible change to the legal characterisation. This reading is consistent with the jurisprudence of the ECtHR, according to which notice of an envisaged change in the legal characterisation of the facts is required so as to allow the accused to exercise his or her rights in a practical and effective manner. By issuing the Impugned Decision, the Trial Chamber informed the accused person of the potential change from article 25(3)(a) to article 25(3)(d) of the Statute, thereby ensuring that the accused remains informed of this aspect of the charges, namely their legal characterisation.

As to the argument that the Impugned Decision does not clearly inform the accused person of the facts upon which the Trial Chamber intends to rely, the Appeals Chamber notes that, if a Trial Chamber gives notice under regulation 55(2) of the Regulations of the Court, the Trial Chamber may also need to indicate upon which specific facts, within the "*facts and circumstances described in the charges*", it intends to rely. This is, in particular, because the charges before this Court usually cover complex factual allegations, and more detailed information about the factual allegations to which the potential change in the legal characterisation of the facts relate will therefore often be required to enable the accused to defend himself or herself effectively. Such information, however, may be provided not only at the time of giving notice under regulation 55(2) of the Regulations of the Court, but also, in an adequate manner, subsequently in the proceedings.

[…]

Regulation 55 of the Regulations of the Court exists so as to assist the judges in ensuring that justice is done in individual cases by means of giving notice that the legal characterisation of facts may be subject to change in pursuing its duty to establish the truth and "*to close accountability gaps*". Regulation 55 of the Regulations of the Court specifically empowers the Trial Chamber to give such notice, even in the absence of a request by the Prosecutor to that effect. Giving such notice is therefore a neutral judicial act, which, without more, has no impact on the impartiality of the Judges exercising their powers.

See No. ICC-01/04-01/07-3363 OA 13, Appeals Chamber, 27 March 2013, paras. 93-95, 100-101, and 104.

I subscribe to the Majority's view that "[t]*he timing of the Impugned Decision was not incompatible with regulation 55 of the Regulations of the Court*". The wording of the regulation, stating that notice of a possible re-characterisation may be given "*at any time during the trial*", […]. As long as it can be said that the trial is ongoing (*i.e.*, from the first hearing until a decision under article 74 of the Statute has been rendered), regulation 55 of the Regulations of the Court may in principle be triggered. This conclusion is obviously without prejudice to the need to carefully assess whether the specific circumstances of the case make it possible to actually do so without violating the overarching right of the accused to be tried without undue delay.

[…]

It is beyond controversy that the triggering of regulation 55 of the Regulations of the Court and of the subsequent procedural steps mentioned in its sub-regulations (2) and (3) will result in delaying the proceedings; hence the need to read the provision through the lens of a narrow interpretive criterion which will make the adverse impact on the expeditiousness of the proceedings as limited as feasible. More specifically, I believe that the adverse impact must be circumscribed, and hence be proportional, to the need to safeguard the right to an informed, and therefore effective, defence.

[…]

The notion of modification of the legal characterisation of facts cannot be read as if it were to encompass any change brought to the initial accusation, because this would be tantamount to obliterating the right of the accused to be tried expeditiously. Rather, it must be qualified and tailored in order to ensure that the right to be tried without undue delay be curtailed only to the extent that it is necessary, with a view to preserving the right to an effective defence. Accordingly, it should be read so as to encompass only those modifications which, being significant, are suitable to have a meaningful impact on the "*nature, cause and content*" of the charges.

[…]

In my view, a change in "*the legal characterisation of facts to accord with* […] *the form of participation of the accused under articles 25 and 28*" triggering the application of regulation 55 of the Regulations of the Court only occurs when a Chamber envisages the possibility of switching from (any of the forms of responsibility provided under) article 25 to (any of the forms of responsibility provided under) article 28 of the Statute, or vice versa. Conversely,

whenever a Chamber, based on its assessment of the evidence, contemplates applying one particular form of responsibility among those listed in the same provision as the one originally charged, such application does not amount to a change in the legal characterisation of facts for the purposes of regulation 55, irrespective of whether that particular form happens to be the same as charged by the Prosecutor or any other form provided within the same provision.

[…]

Under the approach taken by the Impugned Decision (and by the Majority), the triggering (or not) of regulation 55 in respect of a shift from one form of participation listed in article 25(3) to another will depend on the particular theoretical angle taken by the relevant Chamber. Whenever such a Chamber takes the view that article 25(3) provides for at least as many distinct forms of responsibilities as it has subparagraphs, any shift between them will result in the application of regulation 55; instead, this will not happen whenever the Chamber rather chooses to read the provision as a unitary set, declining several expressions of a single concept of participation. I believe that the ensuing degree of uncertainty and unpredictability is so high as to make this approach incompatible with the obligation of the Court to construe its instruments in such a way as to make them consistent both with the principle of legality and with internationally recognised human rights.

Second, a strict and logically consistent adhesion to the approach taken by the Trial Chamber would result in unreasonably broadening the scope of application of regulation 55 of the Regulations of the Court, even beyond the already ample boundaries traced by the Impugned Decision.

A rigorous application of the approach taken by the Trial Chamber would thus entail that for each case brought under article 25 of the Statute there would be as many as about nine scenarios possibly triggering the application of regulation 55 of the Regulations of the Court. Under these premises, and given the complexity of the cases falling within the jurisdiction of the Court, it seems reasonable to envisage that virtually all of the cases coming before the Court may, at one point of the proceedings, require the application of regulation 55 of the Regulations of the Court and the resulting addition of procedural steps to proceedings which are already likely to be lengthy because of the very nature of the crimes adjudicated by the Court. The ensuing impact on the necessary expeditiousness of the proceedings as a fundamental tenet of the right to a fair trial seems, at the very least, questionable; the more so when one bears in mind that the overall system of the Rome Statute appears to be aimed at favouring an early determination of the boundaries of each case, first and foremost through the pre-trial phase and the decision on the confirmation of the charges, as well as through the prohibition to amend the charges after the commencement of the trial (article 61(9) of the Statute).

Accordingly, I submit that both the general principles governing the interpretation of the instruments of the Court (in particular, the need to ensure their consistency with fundamental human rights) and the overarching features of its proceedings make it mandatory to restrictively interpret regulation 55 of the Regulations of the Court.

For these reasons, I maintain that the change envisaged by the Trial Chamber in the Impugned Decision does not amount to a modification in "*the legal characterisation of facts*" within the meaning and for the purposes of regulation 55 of the Regulations of the Court.

[…]

I come to the conclusion that the Trial Chamber should not have applied regulation 55(2) of the Regulations of the Court. More specifically, I believe that the Impugned Decision, in light of its content (or, rather, the lack of it), violates right of the accused person to be informed of the charges in detail.

The right to be adequately informed of the nature and content of the charges requires that, in giving notice of their intention to consider a re-characterisation within the meaning of regulation 55 of the Regulations of the Court, the relevant Chamber provides at the same time adequate information as to the factual and legal scope of that change, with a view to allowing the accused to promptly take a meaningful stance and swiftly review his or her defence strategies accordingly, if need be. I therefore take the view that the Impugned Decision does not provide enough detail to allow the accused person effectively to prepare his defence vis-à-vis the envisaged re-characterisation.

See Dissenting Opinion of Judge Cuno Tarfusser, No. ICC-01/04-01/07-3363 OA13, Appeals Chamber, 27 March 2013, paras. 2, 6, 8, 10, 16-20, 22, and 27.

Article 64(4) of the Statute provides the Chamber with discretionary power to refer "*preliminary issues*" to the Pre-Trial Chamber or another available judge of the Pre-Trial Division where it is necessary for its "*effective and fair functioning*". In order to exercise this power, therefore, the Chamber must satisfy itself that the matter amounts to a "*preliminary issue*" and that a referral is "*necessary*" for the "*effective and fair functioning*" of the Chamber.

See No. ICC-01/09-02/11-728, Trial Chamber V, 26 April 2013, para. 83.

In my view, it would never be proper for the Chamber to refer the case back to the Pre-Trial Chamber pursuant to article 64(4) of the Statute for the purpose of reviewing the validity of the charges. As discussed in my partially dissenting opinion to the "Decision on the withdrawal of the charges against Mr Muthaura", it is the

role of the Prosecution to frame the charges upon which the accused is brought to trial. The Chamber does not have the competence to refer back to the Pre- Trial Chamber an issue over which it has no competence to begin with. Therefore, in the case of a finding by the Chamber that there were serious substantive deficiencies in the Confirmation Decision which may render the charges flawed or invalid, the appropriate course would be for the Prosecution to be invited to withdraw or seek amendment of the charges pursuant to article 61(9) of the Statute. If the Prosecution were to refuse to do so, the trial will continue, or, if the Chamber finds that the continuation of the trial on the basis of such charges violates the fundamental rights of the accused so that a fair trial becomes impossible, it will rely on its general power and obligation as set out in article 64(2) of the Statute, and terminate or stay the proceedings.

See Separate Opinion of Judge Ozaki, No. ICC-01/09-02/11-728-Anx1, Trial Chamber V, 26 April 2013, para. 3.

In the view of the Chamber, the authority to issue a reprimand and warning for failure to identify and disclosure of materials which may affect the credibility of Prosecution evidence, whilst not expressly provided for in the statutory framework of the Court, falls squarely within the Chamber's broad discretionary powers set out in articles 64(2) and 64(6)(f). These provisions, respectively, oblige the Chamber to ensure a fair trial and uphold the interests of justice and authorise it to rule on any other relevant matters. The Chamber recalls the finding of Trial Chamber I in *Lubanga* that "*disclosure of exculpatory material in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial*".

As such, the Chamber considers it to be appropriate for a reprimand to be issued, as a form of sanction against the Prosecution, in cases of clear violations of this right. Moreover, in appropriate circumstances, a reprimand could be coupled with additional, more stringent sanctions or remedies for the Defence (for instance, the exclusion of evidence or imposition of fines).

See No. ICC-01/09-02/11-728, Trial Chamber V, 26 April 2013, paras. 88-89.

I share the view that only admonition of the Prosecution is warranted for the failure to disclose the Asylum Affidavit. The reasons for it, in my view, are the Prosecution's own admission that the affidavit should have been disclosed and their explanation for the mistaken failure to disclose. In my view, the '*serious concerns*' alluded to in the Chamber's decision in relation to the rights of the accused and the integrity of the proceedings are anchored in the worrisome question reasonably provoked whether similar failings have not occurred in the past in this case or may not recur in the future. It is for that reason that I support the requirement of the Prosecutor and her deputy to certify against these risks as a confidence-building measure. But I am not convinced that the mistaken failure to disclose the Asylum Affidavit itself has been established as having already violated the rights of the accused in a manner that caused material prejudice or already undermined the integrity of the judicial process. There is a threshold that must be met before the forces of the law are unleashed substantively against a mistake. Whether such a threshold is captured in the maxim de minimis non curat lex or in the rule of '*harmless error*' is not as important as the general idea itself.

See Corrigendum of Concurring Separate Opinion of Judge Eboe-Osuji, No. ICC-01/09-02/11-728-Anx3-Corr2-Red, Trial Chamber V, 2 May 2013, para. 22.

As the Staff Regulations make clear, the authority to impose disciplinary measures on Prosecution staff for misconduct lies primarily with the Prosecutor. In addition, given that article 42(2) of the Statute provides that the Prosecutor shall have full authority over the management and administration of the Office, and because this Chamber is only seized of the present case, the Chamber agrees that it lacks the authority to promulgate a code of conduct which would apply to "*all*" Prosecution lawyers.

However, pursuant to article 64(2) and 64(6)(f) the Chamber has the power to regulate the conduct of the proceedings in the case before it. The Chamber also has the power, pursuant to article 71, to order sanctions for misconduct. In the view of the Chamber, article 71 is specifically directed towards conduct occurring within the courtroom referring as it does to "*persons present before*" the Court. […] Although the Appeals Chamber did not directly consider the question of whether article 71 of the Statute is limited to misconduct committed during or in close connection with courtroom proceedings, it is significant that the directions in question had been given orally and in writing during the course of an ongoing trial. Finally, the Chamber notes that equivalent misconduct provisions at other international courts are not limited to persons "*present*", suggesting that an in court requirement was purposefully included by the drafters.

The Chamber considers, however, that it has the power to address misconduct occurring outside the courtroom by having recourse to its broad discretionary powers to ensure a fair trial and uphold the interests of justice as provided for in article 64(2) of the Statute and to rule on any other relevant matters in performing its functions as provided for in article 64(6)(f) of the Statute. It is axiomatic that these provisions grant sufficient power to impose sanctions for breaches of its own orders as without such power it could not ensure a fair trial or otherwise perform its functions.

These broadly framed provisions may indeed be seen as a codification of the concept of "*inherent powers*" which provide courts with authority to undertake all acts reasonably required to efficiently perform their functions. In the view of the Chamber this necessarily includes the ability to sanction breaches of its own orders and similar misconduct occurring outside the courtroom.

In the Chamber's view, the Code of Professional Conduct for Counsel should, where applicable and to the extent possible, also apply to members of the Prosecution, for purposes of the conduct of this case.

See No. ICC-01/09-02/11-747, Trial Chamber V(b), 31 May 2013, paras. 12-16.

The Court recently noted in a decision on an application for disqualification of a judge in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* that it is not necessary for an applicant seeking to disqualify a judge to show actual bias on behalf of the judge; rather, the appearance of grounds to doubt his or her impartiality will be sufficient. In that case, it was considered that the relevant standard of assessment was whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge.

The majority in *Banda/Jerbo* emphasised further that such standard is concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension was objectively reasonable. Additionally, they cautioned that there is a strong presumption of impartiality that is not easily rebutted:

The disqualification of a judge [is] not a step to be undertaken lightly, [and] a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice. When assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case.

See No. ICC-01/04-01/06-3040-Anx, Presidency, 11 June 2013, paras. 9-10.

It is an accepted axiom in the administration of justice that each case must be determined according to its own particular facts and circumstances. That remains the dominant consideration, notwithstanding that the resulting decisions establish the framework of judicial precedents for subsequent cases that identify with the facts and circumstances of earlier cases. As indicated earlier, the facts and circumstances that make the present application peculiar are that the person accused has in the meantime, during the pendency of this case, become the executive Deputy Head of State of the country where the alleged crimes occurred; as a result, he has duties of state to perform, the accommodation of which he seeks, relative to the requirement of him to be present during his trial. These facts and circumstances make this case different from the average case.

[…]

There is no doubt that presence at trial is a right for the accused. Article 67 provides for '[r]*ights of the accused*'. Among them is the '*minimum* [guarantee] ... *to be present at trial*' specified in clause 67(1)(d). Therefore, it is correct to say that presence at trial is primarily a matter of right for the accused, viewed from the particular perspective of article 67(1)(d).

[…]

In the Chamber's view, that the right to presence can be voluntarily waived is a settled proposition in international law. According to the ICTR Appeals Chamber: "*Such right is clearly aimed at protecting the accused from any outside interference which would prevent him from effectively participating in his own trial; it cannot be violated when the accused has voluntarily chosen to waive it*". This observation is wholly consistent with a long line of case law of the European Court of Human Rights that also recognises that the right to presence can be waived – either expressly or by necessarily implication.

[…]

The Chamber finds that the plain wording of article 63(1) and the Statute taken as a whole make the accused the subject of the duty in question. It is easy enough to see that in the plain wording of the provision – '[t]*he accused shall be present during the trial*'. As well, it should not be too difficult to appreciate that a holistic reading of the Statute also imposes the duty on the accused. One reason among many for this view is that such a duty is consonant with judicial control over the case being tried. Comprised in that judicial control is the need to continue to subject accused persons to the jurisdiction of the Trial Chamber during the course of the trial, especially when (a) the trial is prolonged, and (b) there are no other equally strong legal sources of such judicial control for this particular international court, unlike in national jurisdictions where such sources of power may exist in different pieces of legislation, case law or customary law that guide the work of the courts or the police. Article 63(1) thus affords an unquestionable statutory basis for the Chamber to make impositions upon the time and whereabouts of the accused for purposes of the trial; such that the failure to comply with any resulting order of the Chamber may attract due sanctions and forfeitures against the accused upon a clear statutory basis.

Beyond this duty upon the accused, the Chamber is not persuaded that the provision also imposes an equivalent duty upon the Chamber. Such a view of the duty is neither apparent from the plain language of the provision nor from an appreciation of the Statute as a whole. First, from the perspective of plain language, the provision that says that the "*accused shall*" be present during the trial does not implicate any apparent or implied restraint on the discretion of the Court to excuse the accused in a reasonable way from the duty imposed on him to be present during the trial.

[…]

And, secondly, reading the Statute as a whole will similarly not support the view that the duty is upon the Chamber. For, such a conclusion is not entirely consistent with the idea (reviewed above) that the duty which article 63(1) imposes upon the accused inures to the benefit of the Court itself for purposes of judicial control. Furthermore, an interpretation that imposes the duty on the Chamber will not only foster judicial inefficiency by constraining the Chamber to stop the trial on every occasion that the accused is enable with good reasons to be present during the trial although he consents that the trial may proceed in his absence (as was obviously the case in the *Bemba* trial); but it will also hold the Court hostage to impunity by negating the power of the Chamber to proceed with the trial of an accused who deliberately absconded from his own trial in circumstances that are precisely calculated to frustrate the trial and the course of justice. The outcome indicated in the latter scenario and the view that supports it are wholly detrimental to the overall purpose of the establishment of the Court. It plays into the hands of the very impunity that the Statute eschews so fundamentally.

[…]

This Chamber remains to be convinced that the trial is foreclosed in this Court in the case of an accused who absconded from his own trial after having made appearances before the Court and accepted the Court's jurisdiction. This is all the more so when such an accused had made to the Court pledges of continued cooperation and appearance and been allowed to remain out of detention on summons to appear or judicial interim release. Apart from the strong string of practice and precedents at the national level that generally supports such trials, as seen below, there is an equally strong and compelling recognition of such procedure in international law.

[…]

Bearing the foregoing in mind, the Chamber considers that the general rule as to presence, dictated by the duty on the accused to be present, is one of continuous presence at trial. In exceptional circumstances, however, the Chamber may exercise its discretion under article 64(6)(f) of the Statute to excuse an accused, on a case-by-case basis, from continuous presence at trial. The exceptional circumstances that would make such excusal reasonable would include situations in which an accused person has important functions of an extraordinary dimension to perform. It will not be possible to prescribe a hard and fast template for the test. It will be for each Trial Chamber to appraise the situation according to its own judgement. But it suffices, for now, to venture the view that the functions that meet the test are not ones that many people are in a position to perform at the same time and in the same sphere of operation.

[…]

In the end, the Chamber considers that the purpose of article 63(1) is to ensure that a Trial Chamber will maintain judicial control over the accused, from the perspective of making impositions on his time and whereabouts, for purposes of effective inquiry into his individual responsibility for the crimes as charged. It is neither reasonable nor necessary to interpret the provision in a manner that eliminates the discretion of the Trial Chamber reasonably to permit the accused to carry out his duties as his country's executive Deputy Head of State who, as an accused, remains fully subject to the jurisdiction of the Court for purposes of the inquiry into his individual criminal responsibility under the Court's Statute.

[…]

In the circumstances, the Chamber is satisfied that article 27 is mainly intended to accomplish (i) the (now usual) removal of immunity from jurisdiction on grounds of official position; and (ii) the removal of any special immunity or procedure that impedes effective exercise of jurisdiction of the Court over a public office holder in relation to his individual criminal responsibility.

The object of article 27 is not to remove from the Trial Chamber all discretion to excuse an accused from continuous presence in an ongoing trial, when the excusal is recommended by the functions implicit in the office that he or she occupies. Hence, the Chamber does not consider that the object of article 27 is offended or wholly defeated.

[…]

Perhaps, the clearest indication that article 27 may not have been aimed at nullifying the traditional rules of international law in this regard, is evident in article 27(2). It does not proclaim the abolishment of all "*immunities and special procedures*" that attached to official capacity under national or international law. The concern of article 27(2), rather, is that such immunities and special procedures "*shall not bar the Court from exercising its jurisdiction over such a person*". It is particularly for this reason that it is doubtful that the opening wording of article 27(1) – *i.e.* that the Statute shall apply "*equally to all persons without any distinction based on official capacity*"- signals legislative intention to eliminate all procedural indulgences that are sensitive to the functional reasons that customary international law recognised immunities for Heads of State and senior state officials; notwithstanding that any such indulgence poses no real obstacle to the Court's exercise of jurisdiction to inquire into the individual criminal responsibility of the office holder.

See No. ICC-01/09-01/11-777, Trial Chamber V(a), 18 June 2013, paras. 27, 35, 37, 42-44, 46, 49, 53, 70-71, and 98. See also, No. ICC-01/09-02/11-830, Trial Chamber V(b), 18 October 2013, paras. 66 and 67.

Pursuant to article 63(1) of the Rome Statute, the presence of the accused during the trial is required, subject to the exceptional circumstance explicitly contained in paragraph 2 of that same provision.

The presence of the accused is a fundamental right enshrined in article 67(1)(d) of the Statute, a guarantee of due process provided for in internationally recognised human rights law, but also an obligation of the accused and a procedural requirement, which is reflected by the word "*shall*" used in article 63(1) of the Statute, denoting a requirement and not an option.

The unequivocal wording of article 63(1) of the Statute contrasts with article 61(2)(a) of the Statute, which clearly stipulates that the suspect may waive his or her right to be present at the confirmation of charges hearing. Moreover, rules 123, 124, 125 and 126 of the Rules of Procedure and Evidence are detailed provisions which set the strict legal framework in which the confirmation of charges can be held in the absence of the suspect. No such provisions exist for trial because this is clearly ruled out in article 63(1) of the Rome Statute, subject to the one exception of the disruptive accused person. This reflects the distinct nature of these two stages in the proceedings. The confirmation of charges hearing is limited in scope, and has a lower evidentiary threshold. In fact, the decision of the Pre-Trial Chamber is not per se an appealable decision. On the contrary, trial proceedings are broader in scope, have the highest evidentiary threshold, and are in essence, of an oral and adversarial nature. Moreover, all decisions taken under articles 74, 75 and 76 of the Statute are automatically appealable, which reflects their significance and potential impact on the rights of the accused person.

Pursuant to article 64 of the Statute, the Chamber shall exercise its functions in accordance with the Statute, in a fair and impartial manner, and thus require the presence of the accused during the entirety of the trial proceedings. The interests of the victims and those of the Prosecution are aligned in this regard, as the absence of the accused could significantly affect the fairness of the proceedings.

The Chamber has the duty to ensure that all accused are treated fairly and impartially. Pursuant to article 21(3) of the Statute, all accused must be treated equally, without making any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth birth or other status. Moreover, the first sentence of article 27 of the Statute clearly states that the "*Statute shall apply equally to all persons without any* [favourable or unfavourable] *distinction based on official capacity*". Article 63(1) of the Statute mandates that the "*accused shall be present at trial*". Read jointly, these two provisions dictate that all accused persons shall be present at trial, regardless of their official capacity. Pursuant to the above Statutory provisions, as well as internationally recognised human rights, all persons shall be equal before courts and tribunals and no accused should be accorded privileged treatment, as equality under the law is a fundamental value of the administration of justice. The accused should not be given a different legal status on the basis of his personal position as Deputy President of the Republic of Kenya.

[…]

I consider that the accused absence may be permissible in some specific and limited instances, where objective and reasonable circumstances exists, and only if the accused personally requests authorisation for his absence to the Chamber.

Pursuant to article 64(2) of the Statute, the Chamber could grant such an exceptional procedural measure, insofar as the absence of the accused does not affect the fairness and expeditiousness of the proceedings. Moreover, in accordance with article 67 of the Statute, the Chamber must determine in each instance that the accused's decision to be absent from trial has been made voluntarily, knowingly and unequivocally. This determination cannot be made in abstracto, for the entirety of the trial proceedings, but must be evaluated on a case-by-case basis, taking into consideration the specific circumstances of particular stages of the trial proceedings and the impact that these may have on the fundamental rights of the accused enshrined in article 67 of the Statute. In essence, to grant a "*once and for all*" request of the accused to waive his right to be present in trial would be contrary to the Chamber's duty to safeguard the rights of the accused at all stages of the trial proceedings and to ensure that the trial is fair.

When deciding on specific requests, the Chamber could take into consideration factors such as: a) the witnesses' schedule (*i.e.* whether hearings will be held on a daily basis or in an intermittent manner during a period of time; or b) whether the presence of the accused is indispensable (*i.e.* a witness needs to identify the accused during the testimony). Moreover, submissions of the Prosecution, as well as the views and concerns of victims, should be sought in each instance.

See Dissenting Opinion of Judge Herrera Carbuccia, Trial Chamber V(a), No. ICC-01/09-01/11-777-Anx2, 18 June 2013, paras. 3-7, and 9-11.

In the context of the present Request, the Single Judge considers that the Prosecutor's Request has been made "*before the trial has* [actually] *begun*" in accordance with article 61(9) of the Statute, and therefore, she is competent to entertain it on the merits.

In relation to the second part of the Defence's request, which is actually the subject-matter of the Prosecutor's Request, *i.e.*, whether to grant or deny the Prosecutor's Request for amending the temporal scope of the charges, the Single Judge recalls article 61(9) of the Statute which stipulates:

After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

In this regard, the Single Judge recalls her previous finding that the wording of article 61(9) of the Statute allows the Prosecutor to request permission to amend the charges up until the actual commencement of the trial, provided that a request to this effect is properly "*supported and justified*". The Chamber's permission is a *conditio sine qua* non for any amendment of the charges at this stage, as dictated by the Statute. This statutory requirement suggests that the Prosecutor should not benefit from an unfettered right to resort to article 61(9) of the Statute at her ease, particularly, if such permission will negatively affect other competing interests, such as the fairness and expeditiousness of the proceedings, which would result in causing prejudice to the rights of the accused.

Indeed, in the 21 March 2013 Decision in the context of the *Kenyatta* Case, the Single Judge made clear that granting permission pursuant to article 61(9) of the Statute to amend the charges confirmed "*entails consideration of the Prosecutor's Request and an evaluation of other relevant information*". Thus, in arriving at a proper and balanced decision on the Request, the Single Judge shall take into consideration "[the] *diverse factors affecting the case* sub judice".

The Single Judge is cognizant that the Prosecutor is not barred, under the legal framework of the Court, from continuing her investigation post confirmation of charges when needed for her case and for the principal goal of determining the truth. This power is inherent in the Prosecutor's discretion to conduct her investigation, as provided by the legal texts of the Court. However, the exercise of such discretion should be diligent and professional and should also not lead to abuse.

In conclusion, if one compares the Prosecutor's follow up in this case concerning her request for the amendment of the charges and the time-frame taken to seize this Chamber, with the manner in which the Prosecutor handled a similar request in the *Kenyatta* Case, the lack of diligence, organization and efficiency on the part of the Prosecutor in the present case becomes evident. If such procedural performance were to be tolerated, this would taint the fairness and expeditiousness of the entire proceedings.

It follows that authorizing an amendment of the charges in the absence of any justification as to the belated nature of the Prosecutor's Request on an issue that has been crucial since the confirmation of charges hearing would result in an unfair burden for the Defence, which would require much time to conduct its investigation on the extended temporal scope of the charges in the greater Eldoret area. This course of action would unduly compromise the rights of the accused persons to be informed promptly of the nature, cause and content of the charges, to have adequate time and facilities for the preparation of their the charges, to have adequate time and facilities for the preparation of their defence and to be tried without undue delay, as provided in articles 67(1)(a) to (c) of the Statute. In light of the foregoing, the Single Judge cannot but reject the Prosecutor's Request.

See No. ICC-01/09-01/11-859, Pre-Trial Chamber II (Single Judge) 16 August 2013, paras. 29-31, 34, and 41-42.

Whether the proceeding shall be severed and/or terminated

The Chamber recalls that, according to article 19(1) of the Statute, the Chamber "*shall satisfy itself that it has jurisdiction in any case brought before it*". Pursuant to article 25(1) of the Statute, the Court has jurisdiction only over "*natural*" persons.

The Chamber recalls that the purpose of criminal proceedings is to determine individual criminal responsibility, and notes that other chambers of this Court have terminated proceedings against deceased persons for lack of jurisdiction.

The Chamber further notes that in cases involving the termination of proceedings against a deceased accused person or suspect before this Court and before other international courts, a termination decision was supported by the provision of a death certificate issued by an official governing body. In the present case no such certificate has been obtained. The Chamber is, however, not persuaded that the production of a death certificate is an essential pre-requisite to the termination of criminal proceedings, as suggested by the CLR. Instead, it is one of the avenues available to the Chamber to prove the relevant fact, namely that the person is deceased. In seeking to establish this fact, nothing prevents the Chamber from considering evidence other than an official death certificate.

[…]

The Chamber takes note of the submissions of the defence and the Registry that no official death certificate has been issued in relation to the accused or that it is highly unlikely that such an official death certificate will be issued in the near future. The Chamber finds the submissions and the evidence on this matter to be persuasive. It is satisfied that it is not possible to obtain an official death certificate with respect to the accused in the near future.

The circumstances of the case at hand are unusual in that it is not possible to obtain an official death certificate or otherwise safely explore other measures to prove, with certainty, the accused' death (*e.g.* exhumation followed by a DNA analysis). In the circumstances, the Chamber is of the view that it is appropriate to terminate the case against the accused without prejudice to resume such proceedings should information become available that he is alive, instead of proceeding under article 64(5) of the Statute by severing the case. Should there be a need to reopen the case against the accused, the case shall proceed from the stage of the proceedings at which it currently stands.

See No. ICC-02/05-03/09-512-Red, Trial Chamber IV, 4 October 2013, paras. 17-19, and 25.

The Majority of the Chamber considers that the conditional grant of the Excusal Request strikes an appropriate balance with respect to the competing interests at stake. It is recognised that the presence of the accused during the trial is not only a right (by virtue of article 67(1)(d)), but also a duty on the accused (by virtue of article 63(1)).

Presence of the accused is the default position, necessitated by the imperatives of judicial control. However, when the Statute is read as a whole, and taking into account the general body of international law, of which the Statute forms a part, there remains a residue of discretion which permits a Trial Chamber to make reasonable exceptions to the default duty of presence of an accused. Application of this exception is to be done on a case-by-case basis and requires the careful balancing of all the interests concerned. Hence, the grant of the Excusal Request, in part, is an exception to the general rule. The general rule remains that the accused must be present in the courtroom during the trial. In the unique and particular circumstances of this case, the aim of that general rule is sufficiently met by the regime of presence that the Majority of the Chamber now directs:

a. The accused must be physically present in the courtroom for the following hearings:
   i. the entirety of the opening statements of all parties and participants;
   ii. the entirety of the closing statements of all parties and participants;
   iii. when victims present their views and concerns in person;
   iv. the entirety of the delivery of judgment in the case;
   v. the entirety of the sentencing hearings (if applicable);
   vi. the entirety of the sentencing (if applicable);
   vii. the entirety of the victim impact hearings (if applicable);
   viii. the entirety of the reparation hearings (if applicable); and
   ix. any other attendance directed by the Chamber.

b. The accused is excused from continuous presence at other times during the trial. This excusal is strictly for purposes of accommodating his discharge of duties as the President of Kenya. The resulting absence from the trial must therefore always be and be seen to be directed towards performance of those duties of state.

c. The Chamber further requires the Defence to file with the Registry, no later than one day after the time-limit for request for leave to appeal this Decision, a waiver signed by the accused, in the form attached as an annex to this Decision.

Violation of any of these conditions of excusal may result in the revocation of the excusal and/or the issuance of an arrest warrant, as appropriate.

This decision and its conditions may, from time to time, be reviewed by the Chamber, of its own motion or at the request of any party or participant.

See No. ICC-01/09-02/11-830, Trial Chamber V(b) 18 October 2013, paras. 123-124.

I share the Majority's conclusion that article 63(1) of the Statute imposes a duty on the accused to be present at trial and that such presence at trial is the "*default position*". Where I part company with the Majority is in respect of the inter-related findings that (i) article 63(1) imposes no corollary obligation on the Chamber to require the accused's presence and (ii) that the Chamber retains a discretion, by virtue of articles 64(2) and 64(6)(f), to set aside this duty and to excuse an accused from attending substantially all of the trial.

According to article 21 of the Statute, the applicable law of the Court is discerned in the first instance by reference to the Statute, the Elements of Crimes and the Rules of Procedure and Evidence. As the Appeals Chamber has stated, the interpretation of the provisions of the Statute is in turn governed by the Vienna Convention on the Law of Treaties. Article 31 of the Vienna Convention provides that a treaty shall be interpreted "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".

Invoking this principal rule of interpretation, in my view the correct interpretation of article 63(1) of the Statute is that the accused is required to be continuously and physically present at trial. This is not a requirement that can be waived by the Chamber, subject to very limited exceptions. The ordinary meaning of the provision, looked at on its own terms, clearly suggests that the presence of the accused is a requirement of the trial.

Reading the provision in its context only strengthens support for this interpretation. Specifically, I agree with the submissions by the Prosecution and the Legal Representative as to the relevance of articles 61(2)(a), 63(2), 67(1)(d), 58(1)(b)(i) and 58(7) of the Statute in understanding the meaning of article 63(1) of the Statute. Additionally, article 64(8)(a) clearly envisages the presence of an accused at the opening of trial for the purposes of being read the charges and taking a plea.

This interpretation is also consistent with the object and purpose of the Statute. According to the jurisprudence of the Appeals Chamber, the object may be derived "*from the chapter of the law in which the particular section is included*" and purpose "*from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty*". Having particular regard to the preamble, the general principles section, and the section governing trial proceedings, in my view the object and purpose can be summarised as ensuring an end to impunity for the perpetrators of serious violations of international criminal law, without distinction based on the capacity or seniority of those perpetrators, in accordance with the highest standards of justice.

I cannot accept the Majority view that the Statute's aim of ending impunity compels a contrary interpretation of article 63(1) of the Statute whereby the Chamber may in its discretion waive the requirement for an accused, who is voluntarily cooperating with the Court and not subject to arrest, to attend substantially all of the trial. In particular I am not convinced by what appears to be the underlying rationale of the Majority in arriving at this view, which is that this level of discretion must be recognised to prevent a future hypothetical scenario of a trial being indefinitely stalled if an accused absconds after an initial appearance.

Additionally, the clear statutory obligation on the Chamber, pursuant to articles 21(3) and 27 of the Statute, is to treat all accused equally without distinction on the basis of official capacity or other status. While I agree with the Majority this does not compel identical treatment of, or the granting of identical relief to, all persons regardless of their particular circumstances it does, in my view, prohibit special legal accommodation being granted to the accused simply by virtue of his position as President of Kenya. Therefore, I must dissent from the opinion of my colleagues to the extent that a contrary impression may be conveyed.

See Dissenting Opinion of Judge Ozaki, Trial Chamber V(b), No. ICC-01/09-02/11-830-Anx2, 18 October 2013, paras. 3-13.

Article 63(1) of the Statute does not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused.

The discretion that the Trial Chamber enjoys under article 63(1) of the Statute is limited and must be exercised with caution. The following limitations exist: (i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) any absence must be limited to that which is strictly necessary; (iv) the accused must have explicitly waived his or her right to be present at trial; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.

At the outset, the Appeals Chamber notes that article 63(1) of the Statute establishes that the accused shall be present during the trial, reflecting the central role of the accused person in proceedings and the wider significance of the presence of the accused for the administration of justice. The accused person is not merely a passive observer of the trial, but the subject of the criminal proceedings and, as such, an active participant therein. It is important for the accused person to have the opportunity to follow the testimony of witnesses testifying against him or her so that he or she is in a position to react to any contradictions between his or her recollection of events and the account of the witness. It is also through the process of confronting the accused with the evidence against him or her that the fullest and most comprehensive record of the relevant events may be formed. Furthermore, the continuous absence of an accused from his or her own trial would have a detrimental impact on the morale and participation of victims and witnesses. More broadly, the presence of the accused during the trial plays an important role in promoting public confidence in the administration of justice.

[…]

The Appeals Chamber considers that the fact that a continuously disruptive accused person may be "*excused*" from the courtroom against his will supports the conclusion that an excusal may be permissible if the accused voluntarily waives his or her right to be present.

In formulating article 63 of the Statute, the drafters initially aimed to establish the presence of the accused during the trial as a general rule. As the debate evolved, discussions relative to article 63 of the Statute became more focused on the issue of whether to explicitly include or exclude the possibility of holding trials in absentia Ultimately, concerns in relation to the rights of the accused, as well as the practical utility of trials in absentia and their potential to discredit the Court prevailed and article 63(1) of the Statute was incorporated in order to preclude this possibility.

This background is instructive in considering the rationale for including a provision specifying that "[t]*he accused shall be present during the trial*" in addition to the right of the accused "*to be present at the trial*" under article 67(1)(d) of the Statute. The Appeals Chamber finds that part of the rationale for including article 63(1) of the Statute was to reinforce the right of the accused to be present at his or her trial and, in particular, to preclude any interpretation of article 67(1)(d) of the Statute that would allow for a finding that the accused had implicitly waived his or her right to be present by absconding or failing to appear for trial.

The discretion that the Trial Chamber enjoys under article 63(1) of the Statute is limited and must be exercised with caution. In this respect, the Appeals Chamber recalls that the presence of the accused must remain the general rule and that article 63(1) of the Statute clearly limits the Trial Chamber's discretion to excuse an accused person from presence during the trial. The restrictions on the removal of a disruptive accused, explicitly set out in article 63(2) of the Statute, are also instructive in determining the limits of the Trial Chamber's discretion under article 63(1) of the Statute.

Article 63(2) of the Statute makes it clear that the removal of a disruptive accused can take place only in exceptional circumstances and as a last resort *i.e.* after other reasonable alternatives have proved inadequate. Furthermore, the removal of the accused shall take place only for such duration as is strictly required. Finally, even if removed, the accused must still be represented by and in a position to instruct counsel.

From the foregoing, the following limitations on the discretion of the Trial Chamber to excuse an accused person from presence during trial may be derived:

(i) the absence of the accused can only take place in exceptional circumstances and must not become the rule;

(ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial;

(iii) any absence must be limited to that which is strictly necessary;

(iv) the accused must have explicitly waived his or her right to be present at trial;

(v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and

(vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.

The Appeals Chamber concludes that the Trial Chamber in the present case interpreted the scope of its discretion too broadly and thereby exceeded the limits of its discretionary power. In particular, the Trial Chamber provided the accused with what amounts to a blanket excusal before the trial had even commenced, effectively making his absence the general rule and his presence an exception. Furthermore, the Trial Chamber excused the accused without first exploring whether there were any alternative options. Finally, the Trial Chamber did not exercise its discretion to excuse The accused on a case-by-case basis, at specific instances of the proceedings, and for a duration limited to that which was strictly necessary.

See No. ICC-01/09-01/11-1066 OA5, Appeals Chamber, 25 October 2013, paras. 1, 2, 50, 51-54, and 61-63.

In our view, the Trial Chamber erred in law when it found that article 63(1) of the Statute does not impose a duty on the Chamber. Pursuant to article 21(1) of the Statute, the Trial Chamber is bound to apply "[in] *the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence*". Article 63(1) of the Statute regulates the presence of the accused at trial and this provision was binding on the Trial Chamber in deciding on the request for excusal.

For the reasons set out hereunder, we would have found that article 63(1) of the Statute establishes a requirement that the accused be present during the trial and that the Trial Chamber erred in law when it found that, in exceptional circumstances, the Chamber may exercise its discretion to excuse an accused, on a case-by-case basis, from continuous presence at trial.

The interpretation of provisions of the Statute is governed by the Vienna Convention on the Law of Treaties, article 31 of which dictates that "[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose*". In our view, the ordinary meaning of article 63(1) of the Statute is clear and unambiguous: "*the accused shall be present during trial*". The use of the word "*shall*" clearly establishes that the presence of the accused is a requirement of the trial.

This interpretation is confirmed when article 63(1) of the Statute is read in its context. First, exceptions to the requirement that the accused be present are explicitly set out in the Statute, most notably in article 63(2) thereof, which deals with the removal of a continuously disruptive accused. Second, the possibility for the accused to waive his or her right to be present at the confirmation hearing is explicitly set out in article 61(2)(a) of the Statute. There is no analogous provision whereby the accused could waive his or her right to be present during the trial. The silence of the Statute in this regard is not particularly surprising, given the existence of a provision mandating the presence of the accused during the trial. It may be observed that articles 63(2) and 61(2)(a) of the Statute, explicitly provide for the absence of the accused and clearly regulate the consequences of the accused's

absence in those cases and any related impact on the exercise of his or her rights, demonstrating that the Statute does not allow for the introduction of a further unwritten exceptions to the requirement of presence. Third, article 58(1)(b) and 58(7) of the Statute allow the Pre-Trial Chamber to issue a warrant of arrest "[to] *ensure the person's appearance at trial*" or a summons to appear if "*a summons is sufficient to ensure the person's appearance*". It is clear that excusing an accused from the obligation to attend trial would make a warrant or summons issued on this basis redundant. Fourth, article 67(1)(d) of the Statute incorporates the right of the accused to be present at trial. The inclusion of this provision setting out the right of the accused to be present would be entirely redundant if article 63(1) of the Statute were interpreted as itself encapsulating such a right. As a result, we understand that both provisions are aimed at different things and that the inclusion of article 67(1)(d) of the Statute further emphasises the fact that article 63(1) of the Statute establishes a requirement that the accused be present.

Turning to the object and purpose of the Statute, we find that this also supports the conclusion that the presence of the accused is required during the trial. The Court was established with the primary aim of bringing an end to impunity and ensuring the effective prosecution of the perpetrators of the most serious crimes of concern to the international community as a whole. In order for a case to reach trial, the Pre-Trial Chamber must have confirmed the charges, determining that there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Therefore, accused persons on trial before the Court face extremely serious charges in relation to which a relatively high evidentiary threshold has been found to have been met. It is worthwhile to note that, in this particular case, the accused is on trial for his alleged commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution under article 7(1)(a), (d) and (h) of the Statute respectively. In interpreting article 63(1) of the Statute, it seems indisputable that the establishment of the presence of the accused as a requirement is consistent with the gravitas of the proceedings and their importance from the perspective of the victims of the alleged crimes and the international community as a whole.

[…]

Suffice it to add two observations in order to underline the heightened importance of the presence at trial of a person accused of international crimes. First, such trials are inherently complex, generally entailing a lengthy presentation of evidence on the part of the Prosecutor and the defence. In the case of accused persons alleged to be indirectly criminally responsible for a particular crime, much of these evidentiary hearings are devoted to proving or disproving the existence of a complicated legal and factual nexus between the person and the crimes. It is axiomatic that the presence of the accused at these hearings is important to facilitate his or her ongoing participation in the defence of the case against him or her. Second, it is important that the accused is present in order to allow the judges to have the opportunity to observe all parties, including the accused, as the evidence is presented. On the basis of the above reasoning, we would have found that the ordinary meaning to be given to article 63(1) of the Statute in its context and in the light of its object and purpose is clear: the accused is required to be present during the trial.

As the meaning of article 63(1) of the Statute is clear there is no need to have recourse to the *travaux préparatoires*, in order to confirm or determine its meaning; in particular, regarding the latter there is no suggestion that the interpretation set out above would lead to a manifestly unreasonable or absurd result. However, given the short period of time that has elapsed since the negotiations of the Statute were concluded, the *travaux préparatoires* may yet serve as a useful reference. In this context, a wholesale departure from the intention of the drafters in order to give effect to a creative interpretation of the Statute would appear to be an inappropriate arrogation of the legislative function by the judiciary.

See Joint Separate Opinion of Judge Kourula and Judge Ušacka, No. ICC-01/09-01/11-1066-Anx OA5, Appeals Chamber, 25 October 2013, paras. 5-11.

In the *Gbagbo* Judgment the Appeals Chamber recalled that there is "*a clear difference between the standard of a decision under article 60(2) of the Statute, and under article 60(3) of the Statute*". While a review of detention pursuant to article 60(2) entails a decision *de novo* in which the Pre-Trial Chamber must decide whether the conditions of article 58(1) are met, the Pre-Trial Chamber may modify its ruling on release or detention under article 60(3) if "*it is satisfied that changed circumstances so require*". The Appeals Chamber clarified further that: If there are changed circumstances, the Pre-Trial or Trial Chamber will need to consider their impact on the factors that formed the basis for the decision to keep the person in detention. If, however, the Pre-Trial or Trial Chamber finds that there are no changed circumstances, that Chamber is not required to further review the ruling on release or detention.

Indeed, the Appeals Chamber has previously held that "[t]*he Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention*" in the absence of changed circumstances, given that "*the the scope of the review carried out in reaching a decision under article 60(3) is potentially much more limited than that to be carried out in reaching a decision under article 60(2) of the Statute*".

In light of this jurisprudence, the Appeals Chamber finds that the appellant's argument that the Pre-Trial Chamber erred in failing to perform "*a systematic review of each of the circumstances which together had provided the basis for the detention decision, in order to determine whether any of these had changed*", distorts the manner m which reviews of detention pursuant to article 60(3) of the Statute should be conducted. It is first for the Pre-

Trial Chamber to determine whether changed circumstances exist to warrant the disturbing of a previous ruling on detention, rather than addressing each factor underpinning detention in a de novo manner to "*determine whether any of these had changed*".

The Appeals Chamber has previously held that "[t]*he Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention*" and does not have to "*entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions*". Accordingly, this ground of appeal is dismissed.

In relation to the appellant's arguments that the Pre-Trial Chamber erred in not sufficiently reasoning its decision on conditional release, the Appeals Chamber recalls that the Pre-Trial Chamber's finding on the risks associated with conditional release have remained unchanged since its Decision of 13 July 2012, a finding that was subsequently upheld on appeal. Furthermore, given that "*the scope of review carried out in reaching a decision under article 60(3) is potentially much more limited than that to be carried out in reaching a decision under article 60(2) of the Statute*", it is not unreasonable for the Pre-Trial Chamber to have refrained from providing additional reasoning when reviewing its finding on conditional release, given that no changed circumstances were found.

See No. ICC-02/11-01/11-548 OA4, Appeals Chamber, 29 October 2013, paras. 51-53, 112, and 119.

In setting the date of the confirmation of charges hearing, the Chamber must take into account the delays that have already taken place since the first appearance of the suspect and the limited scope and purpose of the confirmation of charges hearing in accordance with the Court's statutory regime. As reiterated at the status conference, the confirmation of charges hearing is not intended to be a "*mini trial*" or a trial before the trial. Furthermore, the Chamber needs to take into account its obligation to conduct proceedings expeditiously in accordance with the suspect's right under article 67(1)(c) of the Statute to be tried without undue delay. Finally, the Chamber must ensure that the date of the confirmation hearing allows for the respect of the time limits set out in rule 121(3) and (6) of the Rules.

In light of the date of the confirmation of charges hearing and in accordance with rule 121(3) and (6) of the Rules, time limits must be set for the provision of the Prosecutor's document containing the charges (the "DCC") and list of evidence as well as for the submission by the Defence of its list of evidence.

With respect to the DCC to be submitted by the Prosecutor, the Chamber observes that a "*charge*" is composed of the facts underlying the alleged crime as well as of their legal characterization.

In this regard, the Chamber recalls that, under article 67(1)(a) of the Statute, the suspect has the right "[t]*o be informed promptly and in detail of the nature, cause and content of the charge*[s]" against him. To give effect to this right in the context of the confirmation of charges proceedings, rule 121(3) of the Rules mandates the Prosecutor to provide the suspect with a "*detailed description of the charges*", and regulation 52(b) of the Regulations further indicates that the document containing the charges shall include, *inter alia*, "[a] *statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial*".

Furthermore, the Chamber observes that one of the core purposes of confirmation of charges is to fix and delimit the factual scope of trial. In this regard, article 74 of the Statute states that "*the decision at trial shall not exceed the facts and circumstances described in the charges and any amendment to the charges*". Accordingly, in the event that any charges are confirmed, the factual parameters of the case at trial are determined by the charges as presented by the Prosecutor, to the extent confirmed by the Pre-Trial Chamber. Such delimiting effect can only be ascribed to those facts and circumstances which underlie the charges and must be described therein ("*material facts*"). Conversely, no constraining power is attributed to those factual allegations presented by the Prosecutor in the DCC, or at the confirmation of charges hearing, with a view to demonstrating or supporting the existence of material facts ("*subsidiary facts*"). Such subsidiary facts may be analysed by the Pre-Trial Chamber insofar as relevant to determine the existence of material facts, but are not themselves part of the charges and are not subject to confirmation by the Pre-Trial Chamber under article 61(7) of the Statute.

See No. ICC-02/11-01/11-325, Pre-Trial Chamber I, 14 December 2013, paras. 22-27. See also No. ICC-02/11-02/11-57, Pre-Trial Chamber I, 14 April 2014, paras. 11-12.

The Chamber notes that the words "*termination of the proceedings*" are referred to in the Statute only in article 85(3), in a situation where the accused person is either arrested or convicted and "[I]*n exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason*". Although this provision shows that a "*termination of the proceedings*" is an available procedural remedy in the framework of the Statute, the Chamber finds that article 85(3) does not apply to the present case as the accused is neither detained nor convicted.

The Chamber notes that the wording used by the defence in its Request to characterise the prosecution's failure to disclose these statements at pre-trial stage suggest that the defence relies on the doctrine of "*abuse of process*": "[T]*his conduct is odious to the administration of Justice*", "[T]*he OTP have not investigated this exonerating circumstance equally or at all. Instead, the OTP treated these facts as an inconvenient truth, to be ignored whenever*

possible. This pattern of OTP conduct demonstrates that the Defence and the Chamber cannot in any respect rely on the OTP's investigations, as proposed by the Trial Chamber in rejecting the Defence's request for a temporary stay of proceedings, as a counter-balancing measure to the severe prejudice to the Defence arising from their inability to investigate in Sudan", or "[T]*he cumulative effect of these breaches is that it would be repugnant to the administration of justice to proceed with this trial*".

The Appeals Chamber addressed the "*doctrine or principle of abuse of process*" for the first time in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("*Lubanga* case''), in the context of a defence's request for stay of proceedings. It is the Chamber's view that the principles applied in the *Lubanga* case are instructive in the present case.

Although the Appeals Chamber recognised that "*the Statute does not provide for stay of proceedings for abuse of process as such*", it underlined that "[W]*here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped*". The Chambers of the Court also stated that "[N]*ot every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial*". The Appeals Chamber set then a high threshold for a Chamber to impose a stay of proceedings, requiring that it be "*impossible to piece together the constituent element of a fair trial*". These principles were applied recently before Trial Chamber V(b) as it was seised of a request for permanent stay of proceedings due to abuse of process.

The Chamber considers that the high threshold applicable to a stay of proceedings, defined as a "*drastic*" and "*exceptional*" remedy is, *a fortiori* applicable to a request for termination of proceedings, which in effect, if granted, puts a definitive end to a case.

Finally, the Chamber recalls the relevant principles it set out in its "Decision on the defence request for a temporary stay of proceedings" ("Stay Decision"). In the Stay Decision, the Chamber specifies that a stay of proceedings is exceptional and should be resorted to only "*where the Chamber is convinced that the situation motivating the request for the stay cannot be resolved at a later stage or cannot be cured during the Chamber's conduct of the trial*". These principles are also applicable to the Chamber's determination of the Request.

See No. ICC-02/05-03/09-535-Red, Trial Chamber IV, 30 January 2014, paras. 24-29.

Regulation 55 of the Regulations of the Court is said to serve two broad purposes. The first is to allow more focused trials on clearly delineated charges. The second is to avoid "*impunity gaps*" that may be caused by technical acquittals in the "*fight against impunity*".

While the Appeals Chamber has upheld the validity of the regulation generally, it has stressed the need to ensure the rights of the accused to a fair and impartial trial are "*fully*" protected, and has suggested that safeguards in addition to those outlined in regulation 55(2) and (3) may be required depending on the circumstances of the case. The Appeals Chamber has indeed emphasised that recharacterisation must not render the trial unfair. […].

Through the invocation of regulation 55 at this late stage, the Majority has "*mould*[ed] *the case against the accused*" in order to reach a conviction on the basis of a form of criminal responsibility that was never charged by the Prosecution. In doing so, and contrary to article 74 and regulation 55(1), the Majority has substantially exceeded the scope of the facts and circumstances as confirmed by the Pre-Trial Chamber. For this reason alone, I consider the judgment to be invalid as a matter of law .

Even if there were no concerns regarding the ambit of the confirmed charges, I still believe that a series of the convicted's rights have been fundamentally violated. Although the mere fact of activating regulation 55 at this late stage may not, in itself, have given rise to an appearance of bias, I believe that the manner in which the ensuing proceedings have been handled infringe upon the accused's right to a fair and impartial hearing. I believe there has been a serious misapprehension of the convicted's right to remain silent pursuant to article 67(1)(g). In addition, I consider that the Majority's determined refusal to provide the accused with clear and precise notice of the altered charges was in flagrant violation of article 67(1)(a). This, in itself, has made the entire procedure under regulation 55 unfair and, moreover, caused unnecessary delays. Potentially the most troublesome denial of the convicted's rights is the failure to afford the Defence a reasonable opportunity to conduct further investigations to respond to the new form of criminal responsibility, instead restricting the Defence to providing submissions on article 25(3)(d)(ii) on the basis of the existing record. This was hardly a meaningful alternative to fresh investigations, particularly considering that the Defence was afforded no insight into how the Majority would formulate its case under article 25(3)(d)(ii). Accordingly, the accused could do little more than proffer general denials. Given that the Defence never had any reasonable opportunity to conduct meaningful investigations under the prevailing conditions of insecurity in Eastern Democratic Republic of the Congo ("DRC"), I consider that the accused was not afforded a fair chance to defend himself against the charges under article 25(3)(d)(ii), which constitutes a clear violation of article 67(1)(b) and (e).

[…]

Regulation 55(1) stipulates that the Chamber may only change the legal characterisation of facts and circumstances described in the charges. This provision mirrors article 74(2), which provides that the judgment "*shall not exceed the facts and circumstances described in the charges and any amendments to the charges*". As the Appeals Chamber pointed out, the Trial Chamber is thus bound to the factual allegations in the charges and any application of regulation 55 must be confined to those facts. Crucially, the Appeals Chamber stated that the text of regulation 55 "*only refers to a change in the legal characterisation of the facts, but not to a change in the statement of the facts*".

The question then arises as to whether the facts upon which the Majority has relied for the conviction of the accused under article 25(3)(d)(ii), are indeed part of the facts and circumstances described in the charges. […].

1. The Judgment relies on facts that clearly fall outside the "facts and circumstances" of the Confirmation Decision

Whereas regulation 55 allows for a change in the legal characterisation of the factual allegations, such a change should be confined to facts already confirmed by the Pre-Trial Chamber. The factual allegations cited in support of a charge under article 25(3)(d)(ii) must thus be the same "*facts and circumstances*" as were relied upon by the Pre-Trial Chamber for the confirmation of the charges under article 25(3)(a). It might, under certain conditions, be permissible to rely on fewer elements of the "*facts and circumstances*", but it is strictly forbidden to introduce any new factual elements or to rely on facts that are mentioned in the Confirmation Decision, but which do not form part of the "*facts and circumstances*" of the charges. The key question is thus where to draw the line between the "*facts and circumstances*" on the one hand, and other factual references contained in the confirmation decision.

[…]

2. The Judgment changes the narrative of the charges so fundamentally that it exceeds the facts and circumstances described in the charges

Even assuming that the Majority Opinion had not formally exceeded the "*facts and circumstances*" of the Confirmation Decision, I strongly believe that the charges under article 25(3)(d)(ii) involve such a fundamental change in the narrative that this violates the requirements of article 74 and regulation 55.

[…]

As already indicated, charges are more than a list of atomic facts and a corresponding list of legal elements. Instead, charges allege the existence of specific relations between different facts and construct a particular narrative on this basis which, if true, would cover all the legal elements of the charges with which it corresponds. Like with a Tangram or a Lego set, it would, in theory, be possible to combine the individual pieces that are contained in the narrative in many different ways so that different shapes appear. However, I am of the view that it is not permissible under regulation 55(1) to rearrange the pieces of the charges to construct a different shape or to take away certain pieces when this results in the original shape becoming unrecognisable. In other words, charges are not merely a loose collection of names, places and events which can be ordered and reordered at will. Instead, charges must represent a coherent description of how certain individuals are linked to certain events, defining what role they played in them and how they related to, and were influenced by, a particular context. Charges therefore constitute a narrative in which each fact belonging to the "*facts and circumstances*" has a particular place. Indeed, the reason why facts are included in the "*facts and circumstances*" is precisely because of how they are relevant to the narrative in a particular way. Taking an isolated fact and fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a "*change in the statement of facts*", something the Appeals Chamber has found to be clearly prohibited by regulation 55(1).

[…]

In sum, the key factor in evaluating whether the narrative has changed fundamentally is the question of whether a reasonably diligent accused would have conducted substantially the same line of defence against both the old and the new charge. If this is not the case, then this constitutes a clear indication that the narrative of the recharacterised charges has changed so much that it goes beyond the "*facts and circumstances*" as confirmed.

[…]

In any event, even if the charges under article 25(3)(d)(ii) could be considered as lesser included offences under article 25(3)(a), the fairness in convicting someone of a lesser included offence fundamentally depends on the defence having had sufficient certainty of this possibility. The defence only needs to respond to the elements of the offences charged to secure an acquittal. Unless the defence is put on clear notice that the lesser included offence is in play, it cannot be blamed for concentrating its efforts on rebutting the allegations actually charged.

b) Prohibition to take facts out of context

Furthermore, I submit that the concept of "*facts and circumstances*" refers to the allegations as formulated in a coherent narrative. The "*facts and circumstances*" present a structured evidentiary argument, not just a collection of unrelated facts. All references to particular dates, places or persons must be seen in the context of the narrative that is put forward in the narrative of the "*facts and circumstances*". Accordingly, it is not permissible, in my view, to simply lift out a particular factual proposition and use this as part of a significantly different factual claim.

[…]

5. The expediency of the proceedings (article 64(2)) and the right to be tried without undue delay (article 67(1)(c))

[…]

a) General principle

The right to be tried without undue delay is clearly laid out in major international human rights instruments, stemming from the fundamental basis that prolonged proceedings "*can put a considerable strain on accused persons*" and potentially "*exacerbate existing concerns such as uncertainty as to the future, fear of conviction, and the threat of a sanction of an unknown severity*".

Before this Court, while article 64(2) affords Trial Chambers discretion in determining what constitutes a fair trial, the task remains to ensure fairness, expeditiousness, and respect for the rights of the accused, alongside regard for the protection of witnesses and victims. The word expeditious reappears in the Rules, which require that the Court has "*regard to the need to facilitate fair and expeditious proceedings*" and that those participating in proceedings "*endeavour to act as expeditiously as possible*". Similarly, article 67(1)(c) provides for the right of the accused to be tried without undue delay. All stages of the case, from the time the suspect is informed that the authorities are taking steps towards prosecution until the definitive decision, namely final judgment or dismissal of the proceedings, including appeal, must occur without undue delay. […].

See No. ICC-01/04-01/07-3436-AnxI, Minority Opinion of Judge Van den Wyngaert, 8 March 2014, paras. 10-13, 16-18, 27-28, 32-33, 35, 40-41, and 120-121.

At the outset, the Chamber notes that the parties and participants are in agreement that a "*no case to answer*" motion is consistent with the statutory framework and should be permitted in this case.

The Chamber is mindful of the fact that the procedural device of a "*no case to answer*" motion is innately linked to an adversarial model where opposing parties present their own cases, and the term "*no case to answer*" motion is itself a colloquial expression drawn from the common law tradition. In some jurisdictions it is also known as motion for "*judgement of acquittal*", motion for "*directed verdict of acquittal*", motion for "*non-suit*" or "*half-time*" motion. The procedural system of the Court, that combines elements from both civil law and common law, is the result of the compromise struck in the negotiations on the Statute and the subsequent negotiations on the Rules. Naturally, the Court is not bound by the test or modalities adopted in domestic jurisdictions. Similarly, while the jurisprudence of the *ad hoc* tribunals, whose procedural rules are an amalgamation of common law and civil law procedure, may provide relevant guidance, it is not controlling. Any utilisation of a "*no case to answer*" motion in the present case must be derived from the Court's statutory framework, having regard to the purpose such a motion would be intended to fulfil in the distinctive institutional and legal context of the Court.

The primary rationale underpinning the hearing of a "*no case to answer*" motion – or, in effect, a motion for a judgment of (partial) acquittal – is the principle that an accused should not be called upon to answer a charge when the evidence presented by the Prosecution is substantively insufficient to engage the need for the defence to mount a defence case. This reasoning flows from the rights of an accused, including the fundamental rights to a presumption of innocence and to a fair and speedy trial, which are reflected in articles 66(1) and 67(1) of the Statute.

It is also noted that the Statute places the onus on the Prosecution to prove the guilt of an accused. This is consistent with the underlying premise of a "*no case to answer*" motion, which is appropriately brought in cases where the Prosecution has failed to fulfil that burden by not having presented evidence for the elements that would be required to be proven in order to support a conviction.

In this context, it is appropriate to note that the filtering function fulfilled by the confirmation of charges stage, whereby it must be determined that there is "*sufficient evidence to establish substantial grounds to believe that the person committed the crime charged*", does not obviate a potential subsequent need for a "*no case to answer*" motion. The lower evidentiary standard, limited evidentiary scope and distinct evidentiary rules applicable at the confirmation of charges stage do not preclude a subsequent consideration of the evidence actually presented at trial by the Prosecution in light of the requirements for conviction of an accused. Furthermore, the nature and content of the evidence may change between the confirmation hearing and completion of the Prosecution's presentation of evidence at trial. In addition, the Prosecution need not introduce the same evidence at trial as it did for confirmation.

The Statute and Rules do not currently explicitly provide for "*no case to answer*" motions. However, Article 64(3)(a) of the Statute sets out that the Chamber shall "[c]*onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings*". It has also been correctly suggested that the Chamber could entertain "*no case to answer*" motions pursuant to its power to "*rule on any other relevant matter*", as contained in article 64(6)(f) of the Statute. Similarly, rule 134 of the Rules confers broad powers on the Chamber to rule on "*any issue concerning the conduct of the proceedings*" and on "*issues that arise during the course of the trial*". These provisions grant the Chamber the necessary authority to consider "*no case to answer*" motions in appropriate circumstances.

Moreover, the Chamber considers that permitting such motions, in principle, would be consistent with its general obligation, pursuant to article 64(2) of the Statute, to ensure that the trial is fair and expeditious and conducted in a manner which respects the rights of the accused and has due regard for the protection of victims and witnesses. By paring away charges which are found not to be sufficiently supported by evidence after the conclusion of the presentation of evidence by the Prosecution, a "*no case to answer*" motion has the potential to contribute to a shorter and more focused trial, thereby providing a means to achieve greater judicial economy and efficiency in a manner which promotes the proper administration of justice and the rights of an accused. The Chamber is cognisant that victim participation is a special feature of this Court, but this participation does not in itself form an inhibition to a "*no case to answer*" motion.

The Chamber observes that the Statute does not prescribe a fixed structure for the manner or order in which evidence should be presented at trial. It is therefore for individual Trial Chambers, in light of the structure adopted in any particular case, to consider whether or not a "*no case to answer*" motion would be apposite for such proceedings. The trial in this case has proceeded according to the general practice in the administration of international criminal justice, which involves an arrangement in which the defence presents its own case following the conclusion of the case for the prosecution. Consequently the structure adopted is conducive to the hearing of a "*no case to answer*" motion in this case.

In light of the foregoing, the Chamber considers that enabling, in principle, a determination on whether or not the Defence has a case to answer, could contribute to a more efficient and expeditious trial, and as such is fully compatible with the rights of the accused under the Statute, while not derogating from the rights of the Prosecution and the victims.

[…]

As previously noted, there is no explicit provision setting out the applicable legal standard for a "*no case to answer*" motion before the Court. It is therefore necessary for the Chamber to determine an appropriate legal standard, consistent with the statutory framework. As discussed above, a "*no case to answer*" motion pleads that there has been insufficient evidence, or "*no case*", presented which could reasonably support a conviction. The effect of a successful "*no case to answer*" motion would be the rendering of a full or partial judgment of acquittal.

As an initial point, a distinction needs to be made between the determination made at the halfway stage of the trial, and the ultimate decision on the guilt of the accused to be made at the end of the case. Whereas the latter test is whether there is evidence which satisfies the Chamber beyond a reasonable doubt of the guilt of the accused, the Chamber recalls that the objective of the "*no case to answer*" assessment is to ascertain whether the Prosecution has lead sufficient evidence to necessitate a defence case, failing which the accused is to be acquitted on one or more of the counts before commencing that stage of the trial. It therefore considers that the test to be applied for a "*no case to answer*" determination is whether or not, on the basis of a *prima facie* assessment of the evidence, there is a case, in the sense of whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber could convict the accused. The emphasis is on the word "*could*" and the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of a trial. For the present purposes, the Chamber therefore need not elaborate on the standard of proof for conviction at the final stage.

The determination of a "*no case to answer*" motion does not entail an evaluation of the strength of the evidence presented, especially as regards exhaustive questions of credibility or reliability. Such matters – which go to the strength of evidence rather than its existence – are to be weighed in the final deliberations in light of the entirety of the evidence presented. In the *ad hoc* tribunal jurisprudence this approach has been usefully formulated as a requirement, at this intermediary stage, to take the prosecution evidence "*at its highest*" and to "*assume that the prosecution's evidence was entitled to credence unless incapable of belief*" on any reasonable view. The Chamber agrees with this approach.

It is useful, at this stage, to clarify the scope of "*evidence*" to be considered for the purposes of the Chamber's assessment of a "*no case to answer*" motion. Based on a combined reading of articles 69(4) and 74(2) of the Statute and rule 64(3) of the Rules, the Chamber shall consider as evidence only what has been "*submitted and discussed* […] *at trial*", and has been found to be admissible by the Chamber, whether originally submitted by the parties or ordered for production by the Chamber pursuant to article 64(6)(d) of the Statute.

In respect of the elements required to be proved in order to sustain a conviction before the Court (i) both the legal and factual components of the alleged crime and (ii) the individual criminal responsibility of the accused must be established. Therefore, evidence which could support both of those aspects must be present.

In respect of the components of the alleged crime(s), it is recalled that rule 142(2) of the Rules provides that where there is more than one charge the Trial Chamber shall, in its deliberations, reach a verdict separately on each charge. In that light, the Chamber considers that the appropriate analysis in the context of a "*no case to answer*" motion would be for each count to be considered separately. That a count is alleged to include multiple incidents does not mean that each individual incident pleaded within the charges would be considered. Rather, in the context of a "*no case to answer*" determination, it is more appropriate to consider whether or not there is evidence supporting any one of the incidents charged. The presence of such evidence on the record would defeat

the "*no case*" motion, provided there is also evidence which could support the alleged form of participation, as discussed next.

For a conviction at the end of trial, once it is determined that the evidence for the relevant crime and its underlying context are satisfied to the required standard, it is sufficient to establish individual criminal responsibility for those crimes through only one mode of liability. Consequently, in the context of a "*no case to answer*" determination, once it is established that there is evidence which could support any one pleaded mode of liability, in respect of each count, that aspect of the required elements would be satisfied and there is no need to consider other modes of liability.

However, it is recalled that pursuant to regulation 55 of the Regulations a Chamber may change the legal characterisation of facts to accord with the crimes or forms of participation specified in the Statute, provided such re-characterisation does not exceed the facts and circumstances described in the charges. The Trial Chamber could therefore refuse to grant a "*no case to answer*" motion on the basis that, although no evidence was presented which could support the legal characterisation of the facts as set out in the document containing the charges, it appears to the Chamber at the time of rendering its decision on the "*no case to answer*" motion that the legal characterisation of the facts may be subject to change, in accordance with regulation 55 of the Regulations.

[…]

The Chamber observes that the general standard outlined hitherto is consistent with the jurisprudence of the *ad hoc* tribunals, which hear motions for judgments of acquittal in a similar legal framework. The ICTY rule governing "*judgements of acquittal*" sets out that "[a]*t the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction*". The ICTY Appeals Chamber has formulated the applicable test as being "*whether there is evidence (if accepted) upon which a reasonable* [trier] *of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question*", not whether the accused's guilt has been established beyond reasonable doubt. That test has been applied consistently by ICTY and ICTR trial chambers when assessing motions pursuant to rule 98 *bis* of their respective Rules of Procedure and Evidence.

In light of each of the matters considered above, the Chamber finds that the test to be applied in determining a "*no case to answer*" motion, if any, in this case is whether there is evidence on which a reasonable Trial Chamber could convict. In conducting this analysis, each count in the Document Containing the Charges will be considered separately and, for each count, it is only necessary to satisfy the test in respect of one mode of liability, as pleaded or for which a regulation 55 of the Regulations notice has been issued by the Chamber. The Chamber will not consider questions of reliability or credibility relating to the evidence, save where the evidence in question is incapable of belief by any reasonable Trial Chamber.

C. Timing of and Procedure for any "No Case to Answer Motion"

[…]

It follows from the analyses in the previous sections that the Chamber considers the appropriate moment in the current proceedings to file "*no case to answer*" motions, if any, is after the close of the Prosecution case and prior to the presentation of evidence by the Defence. However, should the Legal Representative be granted permission to present separate evidence, any "*no case to answer*" motion should instead be brought only after the completion of the presentation of such evidence by the Legal Representative.

It is additionally recalled that, although the burden to prove the guilt of the accused rests on the Prosecution, the Chamber may request the submission of evidence or hear witnesses when it considers this necessary for its determination of the truth. Should the Chamber decide that it wishes to request the submission of additional evidence following completion of the Prosecution's case, and prior to presentation of evidence by the Defence, appropriate directions will be given at the relevant time, including whether or not such evidence is to be produced prior to considering any "*no case to answer*" motion.

The Chamber notes that differing modalities have been adopted for the hearing of motions for judgments of acquittal at the *ad hoc* tribunals. The relevant rule at the ICTY, for example, specifies that decisions on such motions are to be rendered orally, following hearing the oral submissions of the parties. By contrast. Rule 98 *bis* at the ICTR envisages the filing of a written motion. The Chamber considers that, in this case, being provided with concise and focused written submissions would be most conducive to the efficient consideration of any "*no case to answer*" motion.

[…]

Finally, the Chamber considers it appropriate to note that the decision to, in principle, allow "*no case to answer*" motions is not intended to in any way pre-judge whether or not a motion of that kind should actually be pursued in this case. Bearing in mind that the purpose of permitting such motions is to promote the rights of an accused by providing a means to create a shorter, more focused and streamlined trial, the Defence should carefully consider – in light of the legal standard which will be applied, as specified above, and the evidence actually presented by the Prosecution at trial – whether or not a "*no case to answer*" motion is warranted in the circumstances. Such motions should not be pursued on a merely speculative basis or as a means of raising

credibility challenges that are to be considered at the time of final deliberations. Nor should they be filed merely to shape the Chamber view as to the strength of the Prosecution case thus far presented.

See No. ICC-01/09-01/11-1334, Trial Chamber V(a), 3 June 2014, paras. 10-18, 22-29, 31-32, 34-36, and 39.

As held previously by the Chamber, "*the Prosecutor may generally charge in the alternative*". At this stage of the proceedings, the Chamber is not called upon to engage in a full-fledged trial and to decide on the guilt or innocence of the person charged. Rather, the mandate of the Pre-Trial Chamber is to determine which cases should proceed to trial. Additionally, the Chamber may be presented with facts, supported with evidence, which may satisfy different modes of responsibility. Accordingly, the Chamber considers that at this stage of the proceedings it may confirm alternative charges presented by the Prosecutor as long as each charge is supported by sufficient evidence to establish substantial grounds to believe that the suspect has committed one or more of the crimes charged. In this regard, the Chamber recalls article 61(5) of the Statute, which levies on the Prosecutor to support "*each charge*" with sufficient evidence. Whether or not the Prosecutor has done so is a question to be assessed by the Chamber in light of its determination under article 61(7) of the Statute. Accordingly, the Prosecutor's "*failure*" to support the charges against Mr. Ntaganda, as asserted by his Defence, is mainly an evidentiary question which should be resolved under this article. Should the Chamber determine that the Prosecutor has not supported each charge with sufficient evidence to the required evidentiary threshold, the result is, *inter alia*, to decline to confirm one or more of the charges. It follows that the Defence argument must be rejected.

See No. ICC-01/04-02/06-309, Pre-Trial Chamber II, 9 June 2014, para. 100.

II. Contextual elements of the alleged crimes against humanity

The Chamber recalls that, in accordance with the Statute, crimes against humanity require a widespread or systematic attack against the civilian population. Therefore, the Chamber needs to establish, first, the existence of an attack directed against the civilian population and, second, the widespread or systematic character of the attack.

A. The existence of an attack directed against a civilian population

The definition of "*attack*" under article 7(2)(a)of the Statute requires a course of conduct involving the commission of multiple acts pursuant to or in furtherance of a State or organisational policy. Therefore, this definition already involves – although to a lesser extent – quantitative and qualitative aspects that may also be relevant for the establishment of the "*widespread*" or "*systematic*" nature of the attack under article 7(1) of the Statute.

a) Course of conduct involving multiple commission of acts referred to in article 7(1) of the Statute against any civilian population

The expression "*course of conduct*" already embodies a systemic aspect as it describes a series or overall flow of events as opposed to a mere aggregate of random acts. As already recognised by the jurisprudence of the Court, it implies the existence of a certain pattern as the "*attack*" refers to a "*campaign or operation carried out against the civilian population*", which involves the multiple commission of acts referred to in article 7(1) of the Statute directed against any group distinguishable by nationality, ethnicity or other distinguishing features, including (perceived) political affiliation.

Therefore, while a course of conduct must involve multiple acts, the occurrence of those acts is not the only evidence that may be relevant to prove its existence. On the contrary, since the course of conduct requires a certain "*pattern*" of behaviour, evidence relevant to proving the degree of planning, direction or organisation by a group or organisation is also relevant to assessing the links and commonality of features between individual acts that demonstrate the existence of a "*course of conduct*" within the meaning of article 7(2)(a) of the Statute.

[…]

b) Course of conduct pursuant to or in furtherance of a State or organisational policy to commit such attack

According to article 7(2)(a) of the Statute, the course of conduct involving the multiple commission of acts referred to in article 7(1) must be carried out "*pursuant to or in furtherance of a State or organizational policy to commit such attack*".

As clarified by the Elements of Crimes, the "*policy*", for the purposes of the Statute, must be understood as the active promotion or encouragement of an attack against a civilian population by a State or organisation. The Chamber observes that neither the Statute nor the Elements of Crimes include a certain rationale or motivations of the policy as a requirement of the definition. Establishing the underlying motive may, however, be useful for the detection of common features and links between acts. Furthermore, in accordance with the Statute and the Elements of Crimes, it is only necessary to establish that the person had knowledge of the attack in general terms. Indeed, the Elements of Crimes clarify that the requirement of knowledge "*should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization*".

The Chamber also observes that in accordance with the established jurisprudence of the Court, an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy the policy criterion, and that there is no requirement that the policy be formally adopted.

Furthermore, the Chamber is of the view, consistent with the jurisprudence of the Court, that the concept of "*policy*" and that of the "*systematic*" nature of the attack under article 7(1) of the Statute both refer to a certain level of planning of the attack. In this sense, evidence of planning, organisation or direction by a State or organisation may be relevant to prove both the policy and the systematic nature of the attack, although the two concepts should not be conflated as they serve different purposes and imply different thresholds under article 7(1) and (2)(a) of the Statute.

Finally, in accordance with article 7(2)(a) of the Statute, the policy to carry out the attack against the civilian population must be attributed to a State or an organisation. With respect to the latter, Chambers of the Court have consistently held that the policy may be linked to groups that govern a specific territory or to an organisation that has the capability to commit a widespread or systematic attack against the civilian population. A view has also been expressed that the organisation within the meaning of article 7(2)(a)of the Statute must partake of some characteristics of a State, which "*eventually turn the private* 'organization' *into an entity which may act like a State or has quasi-State abilities*". In the present case, the Chamber is of the view that the organisation alleged by the Prosecutor and satisfactorily established by the available evidence would meet the threshold under either interpretation and that, accordingly, it is unnecessary for the Chamber to dwell any further on this point. In any case, the Chamber considers that, regardless of the interpretation of the notion of organisation, it is important that, as part of the analysis of the facts before it, the Chamber is able to understand how the organisation operates (for instance in terms of whether a chain of command or certain internal reporting lines exist) in order to determine whether the policy to carry out the attack is attributable to the organisation.

[…]

B. Widespread and systematic character of the attack

According to the established jurisprudence of the Court, the term "*widespread*" connotes the large-scale nature of the attack and the number of targeted persons. In the present case, Pre-Trial Chamber III has previously adopted the approach followed by Pre-Trial Chamber II, according to which the term "*widespread*" encompasses the large-scale nature of the attack, in the sense that it "*should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims*", and that this assessment is not exclusively quantitative or geographical, but must be carried out on the basis of the individual facts.

The alternative requirement that the attack be "*systematic*" has been consistently understood in the jurisprudence of the Court as pertaining to the organised nature of the acts of violence and the improbability of their random occurrence. Further, according to the jurisprudence of the Court, the systematic nature of an attack can "*often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis*".

The Chamber considers that the attack referred to above was large-scale in nature, as it: (i) involved a large number of acts; (ii)targeted and victimised a significant number of individuals; (iii) extended over a time period of more than four months; and (iv) affected the entire city of Abidjan, a metropolis of more than three million inhabitants. Considering the cumulative effect of this series of violent acts, the Chamber is of the view that there are substantial grounds to believe that the attack was "*widespread*" within the meaning of article 7(1) of the Statute.

[…]

III. Individual criminal responsibility of the suspect

The Chamber notes that the Prosecutor alleges that the suspect is criminally responsible for the crimes charged under "*alternately, article 25(3)(a) (indirect co-perpetration), 25(3)(b) (order, solicit and induce) and 25(3)(d), as well as article 28(a) and 28(b) of the Statute*". Accordingly, the Prosecutor requests the Chamber to confirm the charges as presented, thereby maintaining the proposed alternative grounds of criminal responsibility, and ultimately permitting these alternatives to be presented to the Trial Chamber for its final determination.

The Chamber is of the view that when alternative legal characterisations of the same facts proposed by the Prosecutor are satisfactorily established by the evidence, it is appropriate that the charges be confirmed with the various available alternatives, in order for the Trial Chamber to determine whether any of those legal characterisations is established to the applicable standard of proof at trial.

Taking stock of past experience of the Court, the Chamber is also of the view that confirming all applicable alternative legal characterisations on the basis of the same facts is a desirable approach as it may reduce future delays at trial, and provides early notice to the defence of the different legal characterisations that may be considered by the trial judges. This more flexible approach is, of course, without prejudice to the possibility that trial judges, following the applicable procedure, consider other alternatives as well.

Accordingly, the Chamber will hereunder provide its finding as to the alternative modes of liability proposed by the Prosecutor, and its determination on whether each of them is sufficiently supported by the available evidence.

See No. ICC-02/11-01/11-656-Red, Pre-Trial Chamber I, 12 June 2014, paras. 207-210, 213-217, 222-224, and 226-229.

An absolute majority of eight judges found the Application to be inadmissible on the ground that the Legal Representative has no standing to bring an application for the disqualification of a judge ("Majority"). A minority of three judges found the Application to be admissible on the ground that the Legal Representative has standing to bring the Application ("Minority"). Two judges abstained from the decision.

The Plenary first noted article 41(2)(a) of the Rome Statute, which lays down the principle of impartiality, providing that "[a] *judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground*". The Plenary then reflected upon article 41(2)(b) of the Statute, which stipulates that: "[t]*he Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph*". The Plenary noted that this provision does not refer to victims who have been authorised to participate in the proceedings. The Plenary then deliberated the argument of the Legal Representative that the provision should be read as including victims, in accordance with article 21(3) of the Statute.

The Majority was mindful of the role played by the victims in the reparations proceedings, considering that they are indeed important protagonists at the reparations stage. They considered the literal language of article 41(2)(b) of the Statute, recalling that: "[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*", as reflected in article 31 (on the "*General rule of interpretation*") of the Vienna Convention on the Law of Treaties ("*Vienna Convention*"). They then considered whether it was necessary to resort to any principles of treaty interpretation in the instant case, recalling that pursuant to article 32 (on "*Supplementary means of interpretation*") of the Vienna Convention:

> [r]*ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.*

The Majority considered that the ordinary meaning of article 41(2)(b) of the Statute was neither ambiguous nor unreasonable. Nor was there any lacuna in the law which called for further judicial interpretation. The law was plain and determinate as to who was entitled to bring an application for the disqualification of a judge. That right was limited to the Prosecutor and the person being investigated or prosecuted.

The Majority further considered that the victims would not be prejudiced by such a finding; it was sufficient to limit the right to the person being investigated or prosecuted and to the Prosecutor, who is deemed to act in the general interest of the international community. The Majority also considered that broadening the provision to include victims could create uncertainty as to whether a collective or individual right had been bestowed upon the victims and thus lead to an absurd result. Moreover, the Majority considered that proceedings concerning the disqualification of a judge are exceptional in their nature given: on the one hand, the presumption of impartiality which attaches to judicial office, whereby it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case and, on the other hand, the duty upon a judge pursuant to rule 35 of the Rules to request to be excused where that judge has reason to believe that a ground for disqualification exists in relation to him or her and not to wait for a request for disqualification to be made against them. Thus, considering disqualification an extraordinary remedy, the Majority found that the explicit wording of the Statute should be interpreted strictly, particularly in the absence of any apparent mistake in drafting.

The Minority found that the victims have an important role to play in the reparations proceedings, in which they arguably have the most interest, and, at this particular stage of the proceedings, should be entitled to challenge the composition of the bench through a request for the disqualification of a judge.

The Minority noted that the Statute uniquely establishes the right of victims to participate in international criminal proceedings. Article 68(3) of the Statute provides: "[w]*here 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 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…*"

The Minority maintained that the Statute must be interpreted in a manner that gives meaning to the victims' right to participate in accordance with article 68(3). The Minority considered that in the instant case, the personal interests of the victims were most certainly affected by the fact or appearance of any partiality on the bench deciding the reparations proceedings. As such, they considered that article 41(2)(b) of the Statute should be given a purposive or teleological interpretation in order to ensure that those interests of victims, which are independent of those of the defence and even those of the prosecution, are appropriately protected at the reparations stage of the proceedings.

V. Concurring Separate Opinion of Judge Eboe-Osuji

On the question of the victims' *locus standi*, he is deeply sympathetic with victims' desire for standing to seek disqualification of judges where there are compelling reasons to seek disqualification. Although he had abstained during the voting on that particular question, he is of the view that the Plenary's decision in that regard is ultimately correct, taking into account various considerations that bear on the matter. For one thing, it is often the case that the texts of statutory provisions leave room for ambiguity as to the intendment of the particular provision in question. But, that is not the case with article 41(2)(b) of the Statute, as to who has standing to seek disqualification of judges. It is to be stressed that article 41 is the only provision that confers upon the Plenary the power to take the extraordinary step of disqualifying a judge from a case with which he or she is seised. There appears to be little room for ambiguity as to whom article 41(2)(b) permits to bring such an application. That permission is provided for in the following words: "*The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph*". There is no room for ambiguity in that provision, such that the victims may also be read into article 41(2)(b) as among parties and participants who may bring applications for disqualification of judges.

See No. ICC-01/04-01/07-3504-Anx, Plenary of Judges, 22 July 2014, paras. 41-48, and 54.

The plenary has previously established that it is not necessary for an applicant seeking to disqualify a judge to show actual bias on behalf of the judge; rather, the appearance of grounds to doubt his or her impartiality will be sufficient.

The relevant standard of assessment is whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge. This standard is concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension is objectively reasonable.

Additionally, there is a strong presumption of impartiality attaching to a judge that is not easily rebutted. […].

The Plenary considered that the entitlement of a judge to express a different opinion from the majority, whether concurring or dissenting, is safeguarded by article 74 of the Statute and the expression of a minority opinion does not render a judge biased or partial in further proceedings. The Plenary considered that the reasoning in the Application ultimately implied an inconsistency with the idea of the independence of mind that judges bring to bear in judgment making. It considered that such independence is both external and internal, including autonomy from other members of the bench, and allows judges to maintain their intellectual integrity. Moreover, the Plenary considered that minority opinions protect judicial proceedings from the influence of forced uniformity, afford necessary impetus for the development of the law and prevent stagnation in decision making. It considered that minority opinions enrich the quality of decisions and improve their clarity from the perspective of the views of the judges thus expressed, and demonstrate to the parties, participants and public at large that a case has been thoroughly assessed. The Plenary considered it a paradox that a bastion of judicial independence was being used as a basis for the disqualification of the Judge.

Moreover, the Plenary considered that if it were to accept the reasoning of the Legal Representative, then any time that a decision is taken, whether by majority or unanimously, on the guilt or innocence of an accused, then the same bench could never proceed to sit in the reparations proceedings. The Plenary considered that such reasoning is contrary to article 74(1) of the Statute which stipulates: "[a]*ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations…*" Further, it noted that this line of reasoning would lead to an impractical and unreasonable outcome, contrary to the interests of justice, given that it would entail the complete replacement of one chamber (which has heard all the evidence in a particular case) with another (which has not heard any of the evidence in the case). Finally, without opining on the way in which evidence from the trial would be used during the reparations proceedings, the Plenary considered that a minority judge dissenting on conviction or acquittal in a case is, at any rate, bound by the decision of the majority of the chamber.

[…]

V. Concurring Separate Opinion of Judge Eboe-Osuji

[…]

Concerning the substantive complaint of the victims in the present case, quite apart from the matter of their *locus standi*, Judge Eboe-Osuji feels the need to add the following observations, while agreeing entirely with the decision and reasoning of the Plenary as it stands. Judge Eboe-Osuji wishes to reiterate, as apposite in the present case, the observations that he had previously made in the Plenary decision on the request to disqualify Judge Song in the *Lubanga* appeal.

It is a central tenet of the law of disqualification of judges that the correct stand-point of appreciation of the matter is from the perspective of the average by-stander who is fully informed of the circumstances. The correct stand-point of appreciation is not solely from the perspective of the complaining party. And the test is whether the average by-stander, fully informed of the circumstances, will indeed apprehend bias in the ultimate decision in which the impugned judge participated or is to participate. For an apprehension of bias to be legitimate or valid, it is critical that the average by-stander be fully informed of all the circumstances in the case.

See No. ICC-01/04-01/07-3504-Anx, Plenary of Judges, 22 July 2014, paras. 38-40, 51-52, and 57-58.

With the First and Second Requests for Participation, Victim Groups I and II seek leave to participate in the appeals against the Conviction Decision. The Appeals Chamber recalls the *Katanga* Notice of Discontinuance, giving notice of the discontinuance of his appeal pursuant to rule 152(1) of the Rules of Procedure and Evidence, and the Prosecutor's Notice of Discontinuance informing the Appeals Chamber of her decision to discontinue her appeal.

The Appeals Chamber observes that rule 152(1) of the Rules of Procedure and Evidence stipulates that "[a]*ny party who has filed an appeal may discontinue the appeal at any time before judgement has been delivered. In such case, the party shall file with the Registrar a written notice of discontinuance of appeal. The Registrar shall inform the other parties that such a notice has been filed*". Accordingly, the Appeals Chamber notes that it is within the party's discretion to discontinue an appeal and that the Court's legal framework does not provide for a role of the Appeals Chamber therein.

The Appeals Chamber further notes that due to the discontinuance, the appeal proceedings in the present case are terminated. The Appeals Chamber considers that, as a consequence, the First and Second Requests for Participation are moot and must be dismissed.

See No. ICC-01/04-01/07-3505 A A2, Appeals Chamber, 24 July 2014, paras. 12-14.

In the Chamber's view, investigative inquiries need not be confined merely to the immediate period of the violence. Such inquiries are also appropriately conducted with respect to any period during which it is reasonably surmised, having regard in particular to the existing evidence, that related preparatory or post-violence steps may have been undertaken by an accused. In the context of certain records, a longer time period may also be justified for comparative purposes where patterns of activity may be significant in revealing unusual communications or transactions. In this case, the Chamber is satisfied that the Prosecution has appropriately specified and justified, in terms of relevance and necessity, the time period in question [in its cooperation request addressed to the Kenyan Government].

See No. ICC-01/09-02/11-937, Trial Chamber V(b), 29 July 2014, para. 37.

Regulation 101(2)(d) of the Regulations of the Court provides that the Prosecutor may request the Chamber to prohibit, regulate or set conditions for contact between a detained person and any other person, with the exception of counsel, if the Prosecutor has reasonable grounds to believe that such contact could be used by a detained person to breach an order for nondisclosure made by a judge.

In addition to passive monitoring of all non-privileged telephone calls under regulation 174 of the Regulations of the Registry, active monitoring is provided for in regulation 175 of the Regulations of the Registry, according to which the Chief Custody Officer may monitor calls at random and terminate a call and report to the Registrar in case he or she has reasonable grounds to believe that the detainee or the interlocutor may be attempting, *inter alia*, to breach an order for non-disclosure. In addition, pursuant to the same regulation, the Registrar alone may order that all non-privileged calls of a detained person be actively monitored.

Pursuant to regulation 183 of the Regulations of the Registry, all non-privileged visits are conducted within the sight and hearing of staff of the detention unit and monitored by video surveillance. Regulation 184 of the Regulations of the Registry provides for further monitoring of visits upon authorisation of the Registrar in case the Chief Custody Officer has reasonable grounds to believe that the detained person or the visitor may be attempting, *inter alia*, to breach an order for non-disclosure.

[…]

Moreover, considering the provisions regulating the passive and active monitoring of telephone calls and visits of detainees at the ICC detention unit as outlined above, the Single Judge is of the view that the Registrar is already in a position to monitor non-privileged telephone calls and visits of detainees, *inter alia* with a view to preventing potential breaches of orders for nondisclosure. Any breaches of orders for non-disclosure or other breaches will be reported to the Presidency.

In the view of the Single Judge, additional measures which further encroach upon a detainee's communication with others must be weighed against the detained person's right to privacy. In light of the available documentation in the instant case, the Single Judge finds that the potential need for additional measures to verify if the suspect has breached or could breach orders for non-disclosure as requested by the Prosecutor is outweighed by his right to privacy.

At the same time, the Single Judge clarifies that this decision is without prejudice to the abovementioned competences that the Registrar may start or continue to exercise with respect to the suspect visits or telephone calls. The Registrar should also continue providing guidance to the Defence concerning proper ways of communication with the suspect, including on the use of Ringtail.

See No. ICC-02/11-02/11-133, Pre-trial Chamber I (Single Judge), 28 August 2014, paras. 4-6, and 9-11.

Article 67(1)(a) of the Rome Statute establishes the suspect's right to be informed promptly and in detail of the nature, cause and content of the charge. Rule 121(3) of the Rules of Procedure and Evidence mandates the Prosecutor to provide a detailed description of the charges within a reasonable time before the confirmation of charges hearing. Regulation 52 of the Regulations of the Court further details the required content of the

document containing the charges which shall include, *inter alia*, a statement of the facts which provides a sufficient legal and factual basis to bring the person to trial, and a legal characterisation of the facts to accord both with the crimes under articles 6, 7, or 8 of the Statute, and the precise form of participation under articles 25 and 28 of the Statute.

The Single Judge notes that regulation 52 of the Regulations makes clear that for purposes of informing the suspect of the nature, cause and content of the charges brought against him or her, it is sufficient for the Prosecutor to clearly set out the relevant facts and identify their proposed legal characterisation. In the present case, the Prosecutor argues that the same alleged facts may fall under alternative legal characterisations, and charges the suspect accordingly.

In the view of the Single Judge, by setting out the alleged facts and by alleging that these facts give rise to the suspect's criminal responsibility under the alternative modes of liability charged, *i.e.* article 25(3)(a), (b), (c) and (d) of the Statute, the Prosecutor has clearly identified the proposed legal characterisation of the alleged facts as outlined in the DCC, within the meaning of regulation 52 of the Regulations, and informed the suspect of the nature, cause and content of the charges against him. The Single Judge is of the view that the Defence has thus been put on notice of both the alleged facts as well as their proposed legal characterisation with regard to all alternative modes of liability charged.

Concerning the charges under article 25(3)(d) of the Statute, the Single Judge considers that the Prosecutor's identification of article 25(3)(d) of the Statute in either of its subsections is appropriate, and that the Defence has thus been put on notice of the suspect's alleged criminal responsibility under article 25(3)(d) of the Statute as one of the alternative modes of liability.

See No. ICC-02/11-02/11-143, Pre-Trial Chamber I (Single Judge), 1 September 2014, paras. 6-9.

Confirmation of alternative charges may better preserve the interests of the Defence in that it provides early notification of potential alternatives and thus reduces the need to resort to regulation 55 of the Regulations of the Court, which may come at a considerable cost to the expeditiousness of the proceedings.

Under the statutory legal framework, confirmation of charges under one mode of liability does not preclude the trial from proceeding or a conviction from being entered under another mode of liability based on the same facts and circumstances. Indeed, in accordance with regulation 55 of the Regulations "[i]*n its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges*". This regulation provides for a procedure of notification to the Defence prior to this course being taken. Recent cases demonstrate that such a notification may be given not only at the conclusion of the proceedings but also immediately after the end of the confirmation process, shortly after commencement of the trial.

See No. ICC-02/11-01/11-680, Pre-Trial Chamber I, 11 September 2014, paras. 51-52.

The instant Application requests *inter alia*: (i) that the resignation letter of the concerned judge be provided to the parties and (ii) the appointment of an independent expert to assess whether the Judge was capable of fulfilling his judicial functions up to 30 June 2014.

[…]

In relation to the second request, the Presidency notes that the Decision Confirming the Charges was filed on 12 June 2014. Whereas the Application for leave to Appeal the Decision Confirming the Charges was filed by the Defence on 29 July 204, after both the resignation of the concerned judge, notice of which was published on 30 June 2014, and the news of his subsequent death, notice of which was published on 22 July 2014, the Application for Leave to Appeal did not make any challenge to capacity of the concerned judge to hear the case at the pre-trial level. Further, the present Application to the Presidency was filed only on 23 September 2014, and after the Presidency had assigned the case, and transferred the record of proceedings thereof, to Trial Chamber I on 11 September 2014. It was incumbent on the Defence to make any challenge against the Judge: (i) before the Chamber, (ii) within the Application for Leave to Appeal submitted to the Chamber or (iii) before the Presidency prior to the conclusion of the pre-trial proceedings before the Chamber.

See No. ICC-02/11-01/11-690, Presidency, 7 October 2014, paras. 25 and 27.

[…] [T]he Chamber considers that an accused may be transferred out of the detention centre when compelling humanitarian circumstances justify such a transfer. Similar transfers have been authorised previously by other Chambers of this Court and, for example, at the International Criminal Tribunal for the Former Yugoslavia. However, as is the case in the conditional release jurisprudence, in order to grant such a transfer, a Chamber must impose specific conditions and a State willing and able to enforce those conditions must be identified.

The Chamber does consider the accused's request to be transferred to Côte d'Ivoire to organise his mother's funeral to constitute humanitarian circumstances. However, the Chamber is not persuaded in the circumstances that any set of specific conditions can sufficiently mitigate the security and logistical concerns identified by Côte d'Ivoire, the Registry, the Prosecution and the Legal Representative of victims. The Chamber cannot justify

granting the relief sought when doing so runs such a risk of endangering the populace in Côte d'Ivoire, Court staff and the accused himself.

See No. ICC-02/11-01/11-711-Red, Trial Chamber I, 29 October 2014, paras. 25-27.

The Chamber renders its determination under the applicable standard at this stage of the proceedings, as set out in article 61(7) of the Statute, on whether there is sufficient evidence to establish substantial grounds to believe that the Suspects committed each of the offences as charged, consistent with the jurisprudence of the Court. To meet this evidentiary threshold, the Chamber must be "*thoroughly satisfied that the* [Prosecutor's] *allegations are sufficiently strong to commit* [the person] *for trial*". Pre-Trial Chambers have consistently held that to meet the evidentiary burden of "*substantial grounds to believe*" the Prosecutor must "*offer concrete and tangible proof demonstrating a clear line of reasoning underpinning* [the] *specific allegations*". All findings of the Chamber in the present decision are made on the basis of the statutory standard applicable at this stage of the proceedings and are based on an assessment of the evidence relied upon by the Prosecutor and the Defence, as included in their respective lists of evidence pursuant to rule 121(3) and (6) of the Rules, taking into account the written submissions filed in lieu of hearing and the responses thereto.

This decision represents the result of the Chamber's own assessment of the Prosecutor's allegations in light of the entirety of the evidence presented by the parties, as referred to in the footnotes to the decision. The Defence arguments and challenges to the Prosecutor's evidence have been considered throughout this assessment. […].

The Suspects are charged, as the case may be, with offences against the administration of justice as provided under articles 70(1)(a)-(c) of the Statute. The Chamber will proceed to succinctly outline its reading of those provisions, to the extent necessary.

With regard to the offence under article 70(1)(a) of the Statute, "*giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth*", the Chamber considers that this offence is committed when a witness intentionally provides a Chamber with information that is false, or otherwise withholds information that is true. The obligation to tell the truth relates to any type of information that the witness provides or withholds while testifying under oath. Moreover, any third person may be prosecuted as an accessory under article 25(3)(b)-(d) of the Statute, provided that the witness's testimony was objectively false. This applies irrespective of whether the Prosecutor has presented charges against the witness as a direct perpetrator of the offence pursuant to article 25(3)(a) of the Statute.

As for the offence of "*presenting evidence that the party knows is false or forged*", under article 70(1)(b) of the Statute, the Chamber considers that the reference to "*evidence*" in this provision has to be construed so as to include all types of evidence, namely documents, material and tangible objects, as well as oral evidence. Such evidence is deemed to be "*presented*" when it is introduced in the proceedings, thereby being made available to the parties, the participants and the Chamber. As to the reference to a "*party*", the Chamber considers that the expression only refers to those who have the right to present evidence to a chamber in the course of proceedings before the Court. This obviously covers members of the Defence team and the accused. In addition, accessorial liability under article 25(3)(b)-(d) of the Statute may be incurred by any third person who does not have such capacity.

As regards article 70(1)(c) of the Statute, the provision proscribes any conduct that may have (or is expected by the perpetrator to have) an impact or influence on the testimony to be given by a witness, inducing the witness to falsely testify or withhold information before the Court. As the use of the word "*corruptly*" suggests, the relevant conduct is aimed at contaminating the witness's testimony. The Chamber takes the view that the offence of corruptly influencing a witness is constituted independently from whether the pursued impact or influence is actually achieved and must therefore be understood as a conduct crime, not a result crime.

[…]

The Chamber recalls rule 163(1) of the Rules, according to which "*the Statute and the Rules shall apply* mutatis mutandis *to the Court's investigation, prosecution and punishment of offences defined in article 70*". This means that article 25(3) of the Statute is equally applicable to the present case and, accordingly, the Chamber's assessment of the role of each suspect shall be governed by the interpretation of this provision. For the purposes of the present decision, the Chamber succinctly sets out its reading of the relevant law, to the extent necessary.

Co-perpetration within the meaning of article 25(3)(a) of the Statute requires two or more persons to agree to contribute to the commission of the offence and to act accordingly. Perpetration is subsumed under the mode of liability of co-perpetration.

With regard to the terms "*soliciting*" and "*inducing*" within the meaning of article 25(3)(b) of the Statute, the Chamber is of the view that they both characterize the situation whereby the perpetrator is prompted by another to commit the offence. In this respect, the Chamber finds it sufficient to recall its previous jurisprudence on "*inducing*" and clarifies that the legal requirements are the same.

In relation to the different forms of responsibility employed in article 25(3)(c) of the Statute, the Chamber considers that the elements of this mode of liability are met insofar as the accessory's contribution has an effect on the commission of the offence and is made with the purpose of facilitating such commission.

See No. ICC-01/05-01/13-749, Pre-Trial Chamber II, 11 November 2014, paras. 25-30, and 32-35.

A Trial Chamber enjoys broad discretion in determining a sentence. The sentence must be determined by weighing and balancing all the relevant factors. The weight given to an individual factor and the balancing of all relevant factors in arriving at the sentence is at the core of a Trial Chamber's exercise of discretion. However, a Trial Chamber's failure to consider one of the mandatory factors listed in rule 145(1)(b) of the Rules of Procedure and Evidence can amount to a legal error in the context of challenging the Trial Chamber's discretionary decision on sentencing.

With respect to appeals against sentencing decisions, the Appeals Chamber's primary task is to review whether the Trial Chamber made any errors in sentencing the convicted person. The Appeals Chamber's role is not to determine, on its own, which sentence is appropriate, unless it has found that the sentence imposed by the Trial Chamber is "*disproportionate*" to the crime. Only then can the Appeals Chamber "*amend*" the sentence and enter a new, appropriate sentence.

The Appeals Chamber will only intervene in a Trial Chamber's exercise of its discretion in determining the sentence if: (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law: (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.

Article 83(2) of the Statute requires that the sentence be "*materially affected by error of fact or law or procedural error*". The material effect of such an error is only established if the Trial Chamber's exercise of discretion led to a disproportionate sentence.

[…]

At the outset, the Appeals Chamber notes that article 83(2) and (3) of the Statute clarifies that, with respect to appeals against sentencing decisions, the Appeals Chamber's primary task is to review whether the Trial Chamber made any errors in sentencing the convicted person. The Appeals Chamber's role is not to determine, on its own, which sentence is appropriate, unless – as stipulated in article 83(3) of the Statute – it has found that the sentence imposed by the Trial Chamber is "*disproportionate*" to the crime. Only then can the Appeals Chamber "*amend*" the sentence and enter a new, appropriate sentence.

Furthermore, as set out in the previous section, the Trial Chamber's main task is to weigh the relevant factors in order to determine a sentence that reflects the culpability of the convicted person. The Court's legal texts do not lay down any explicit requirements for how the factors should be balanced. As noted above, the Appeals Chamber considers that the Trial Chamber has broad discretion in the determination of a sentence. In this regard, the Appeals Chamber notes that article 81(2)(a) of the Statute states that a decision on sentence can only be appealed on the ground that there is "*disproportion between the crime and the sentence*". The drafting history reveals that delegates considered including the qualifiers of "*significantly*" or "*manifestly disproportionate*", but ultimately rejected them. Proportionality is generally measured by the degree of harm caused by the crime and the culpability of the perpetrator and, in this regard, relates to the determination of the length of sentence. While proportionality is not mentioned as a principle in article 78(1) of the Statute, rule 145(1) of the Rules of Procedure and Evidence provides guidance on how the Trial Chamber should exercise its discretion in entering a sentence that is proportionate to the crime and reflects the culpability of the convicted person.

In respect of discretionary decisions, the Appeals Chamber has held in relation to appeals raised pursuant to article 82(1) of the Statute:

> *The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion* […] *merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.* […] [T]*he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion* […], *save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.*

The Appeals Chamber considers that the above standard of review also applies to sentencing decisions. With respect to legal errors, the Appeals Chamber recalls that rule 145 of the Rules of Procedure and Evidence provides the overall framework for a Trial Chamber's determination of a proportionate sentence and, within this framework, rule 145(1)(b) of the Rules of Procedure and Evidence states that the Court "*shall*" balance all of the relevant factors in determining the sentence. Thus, a Trial Chamber's failure to consider one of the mandatory factors listed in rule 145(1)(b) of the Rules of Procedure and Evidence can amount to a legal error in the context of challenging the Trial Chamber's discretionary decision on sentencing.

The Appeals Chamber recalls that rule 145(1)(a) of the Rules of Procedure and Evidence requires that "*the totality of any sentence* […] *must reflect the culpability of the convicted person*". The Appeals Chamber recalls that a Trial Chamber determines the sentence by weighing and balancing all the relevant factors. The Appeals

Chamber considers that the weight given to an individual factor and the balancing of all relevant factors is at the core of a Trial Chamber's exercise of discretion as the court of first instance.

Thus, the Appeals Chamber's review of a Trial Chamber's exercise of its discretion in determining the sentence must be deferential and it will only intervene if: (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.

Finally, article 83(2) of the Statute requires that the sentence be "*materially affected by error of fact or law or procedural error*". The Appeals Chamber considers that the material effect of such an error is only established if the Trial Chamber's exercise of discretion led to a disproportionate sentence.

See No. ICC-01/04-01/06-3122 A4 A6, Appeals Chamber, 1 December 2014, paras. 1-4, and 39-45.

The rights of the victims of the crimes attributed to the suspect are affected by Libya's failure to surrender him to the Court. In the absence of any proceeding aimed at determining whether he is criminally responsible for the crimes that resulted in the harm claimed by the victims, they are deprived of their right to have justice delivered, notwithstanding the Court's jurisdiction over the case. As recently underlined by the legal representative of victims who have communicated with the Court and participated in the admissibility proceedings in the present case, "*the victims have been waiting for justice for more than two years now*" and "[t]*he refusal of Libyan authorities to surrender and/or delay in the transfer of the suspect to the Court can only prejudice the interests of the victims in the proceedings*".

See No. ICC-01/11-01/11-577, Pre-Trial Chamber I, 10 December 2014, para. 29.

In the present decision, the Chamber renders its determination under article 61(7) of the Statute on whether there is sufficient evidence to establish substantial grounds to believe that suspect committed each of the crimes charged. According to the jurisprudence of the Court, in order to meet this evidentiary threshold, the Prosecutor must "*offer concrete and tangible proof demonstrating a clear line of reasoning underpinning* [her] *specific allegations*".

The Chamber's determination is based on an assessment of the evidence relied upon by the Prosecutor and the Defence – and included for this purpose on their respective lists of evidence pursuant to rule 121(3) and (6) of the Rules of Procedure and Evidence – taking into account the oral and written submissions advanced by the parties as well as the legal representative of the victims admitted to participate at the confirmation of charges hearing.

The Chamber has assessed the probative value of the relevant evidence, bearing in mind that due to the limited scope and purpose of the confirmation of charges proceedings, such assessment is limited and that, as recognised by the Appeals Chamber, the evaluation of the credibility of witnesses is "*necessarily presumptive*". Indeed, the Chamber is mindful of the guidance of the Appeals Chamber that while a Pre-Trial Chamber may evaluate the credibility of witnesses, "*it should take great care in finding that a witness is or is not credible*", as it considers that the credibility of witnesses can only be properly addressed at trial.

The conclusions of the Chamber are based on the totality of the available evidence, considered in a system as a whole, regardless of which party originally tendered the evidence in the record of the case. Consistent with the established practice of Pre-Trial Chambers, the items of evidence referred to in the present decision are included for the sole purpose of providing the reasoning that underpins its determination. This is without prejudice to the relevance of other items of evidence than those referred to, which the Chamber has in any case considered thoroughly. More specifically, a lack of explicit reference to an item of evidence may signify that the finding to which it relates is already sufficiently supported by other pieces of evidence, or, conversely, that a certain finding, satisfactorily established in light of the evidence taken as a whole, is not negated by one or more other discrete items of evidence.

The same applies to the arguments advanced by the parties and participants in their submissions, each of which has been carefully considered as part of the Chamber's determination. This decision does not explicitly address each and every submission of the parties and participants, but only those that are necessary to provide sufficient reasoning for the Chamber's determination under article 61(7) of the Statute.

[…]

The Prosecutor alleges that the suspect is criminally responsible for the crimes charged under the alternative modes of liability of article 25(3)(a), 25(3)(b), 25(3)(c) and 25(3)(d) of the Statute. As this Chamber has stated previously, when alternative legal characterisations of the same facts proposed by the Prosecutor are satisfactorily established by the evidence, it is appropriate that the charges be confirmed with the various available alternatives, in order for the Trial Chamber to determine whether any of those legal characterisations is established to the applicable standard of proof at trial.

See No. ICC-02/11-02/11-186, Pre-Trial Chamber I, 11 December 2014, paras. 12-16, and 133.

At the outset, the Chamber notes that this is the first time a request for joinder has been filed before a Trial Chamber of this Court. The Chamber notes the Defence submissions concerning the applicable law, in particular that the charges against an accused must first be joined under Article 64(5) of the Statute before joinder of trials

is possible under Rule 136 of the Rules. The Defence argues, relying on the plain language of the French version of the Statute and Rules, that trial proceedings can only be joined, after completion of the confirmation stage, if the charges confirmed against two or more accused are identical.

In this regard, the Chamber observes that the Court's legal documents must be interpreted in accordance with the ordinary meaning given to the terms, as used in their context, and in light of the object and purpose. The Chamber must exclude any interpretation that would render statutory provisions meaningless or ineffective.

As set out above, Article 64(5) of the Statute provides, *inter alia*, that, among its functions and powers, a Trial Chamber may, '*as appropriate*', order joinder in respect of charges against more than one accused. Rule 136(1) of the Rules, concerning '[j]*oint and separate trials*', provides that persons accused jointly are to be tried together unless the Trial Chamber considers that separate trials are necessary (i) in order to avoid serious prejudice to the accused, (ii) to protect the interests of justice or (iii) because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with Article 65(2) of the Statute. Rule 136(2) of the Rules ensures that, in joint trials, each accused is afforded the same rights as if such accused were being tried separately.

The Chamber considers that Article 64(5) of the Statue and Rule 136 of the Rules must be read together, the former establishing a broad, discretionary power of the Chamber to join charges, and the latter providing guidance as to the exercise of this discretion and the circumstances in which joinder is justified. Whether separate trials are necessary in order to avoid '*serious prejudice*' to the accused and protect the interests of justice, as provided in Rule 136(1) of the Rules, is a consideration to be taken into account in all cases where joint trials are contemplated.

If it were to construe Article 64(5) of the Statute and Rule 136 of the Rules as submitted by the Defence, the Chamber would have no power to jointly try persons charged in different confirmation decisions unless the facts and circumstances described in these charges are identical. Nothing in the plain language of these provisions indicates that the power of the Trial Chamber to join charges is limited to such situations. The Chamber further finds that the Defence interpretation would, in practice, unduly restrict the Chamber's ability to order the joinder of charges and trials under Article 64(5) of the Statute and Rule 136 of the Rules. Such limited utility would defeat the object and purpose of these provisions.

In this respect, the Chamber considers that Article 64(5) of the Statute and Rule 136 of the Rules must be read in light of Article 64(2) of the Statute, which provides that the Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. According to Pre-Trial Chamber I, joint proceedings are consistent with the object and purpose of the Statute and Rules insofar as they enhance the fairness and expeditiousness of the proceedings by avoiding the duplication of evidence, inconsistency in the presentation and assessment of evidence, undue impact on witnesses and victims, and unnecessary expense. The Appeals Chamber has confirmed that, consistent with the rights of the accused, joinder promotes the '*efficacy of the criminal process*' and expeditiousness of the proceedings.

The Chamber therefore finds that it has the power, under Article 64(5) of the Statute and Rule 136 of the Rules, to join charges against more than one accused, even when those charges are not identical. The Chamber finds it appropriate to consider the nature of the charges and whether a connection exists between them.

In the *Katanga* Joinder Decision, Pre-Trial Chamber I considered that the Prosecutor had made a joint application for arrest warrants, alleged that both accused were co-perpetrators of crimes arising from the same incident, and relied on the same evidence against both accused. The Chamber further notes the '*same transaction*' test applied at the ICTY, ICTR and SCSL, which is mentioned in the drafting history relating to Article 64(5) of the Statute. Under the '*same transaction*' test, the fundamental question is whether persons are charged with having committed crimes, regardless of whether those crimes are alleged to be the same crimes, in the course of the same transaction. The individual acts or omissions of two or more accused, '*whether occurring as one event or a number of events, at the same or different locations*' or time periods, are part of the '*same transaction*' if they are alleged to form part of a common scheme, strategy or plan. The Chamber considers that the '*same transaction*' concept and the jurisprudence related to joinder at the *ad hoc* tribunals may be of assistance in interpreting and applying Article 64(5) of the Statute and Rule 136 of the Rules.

Finally, the Chamber notes that the European Court of Human Rights has found that the proper administration of justice may be best served by the joint and parallel progression of cases involving charges which are interdependent and closely linked.

Accordingly, in exercising its discretion to determine whether joinder is appropriate, the Chamber will consider (a) the charges contained in the Confirmation Decisions and whether separate trials are necessary in order (b) to avoid '*serious prejudice*' to the accused and (c) to protect the interests of justice.

a) Consideration of the charges

In considering the charges against the two Accused, the Chamber will have regard to the Confirmation Decisions which define the parameters of the charges at trial.

[…]

The Chamber finally emphasises that the Prosecution has not requested, nor does the Chamber have the power to authorise, amendments to the facts and circumstances described in the charges against either Accused. Pursuant to Article 74(2) of the Statute, the final decision on the guilt or innocence of Mr Gbagbo shall not exceed the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber in the *Gbagbo* Confirmation Decision. Likewise, the final decision on the guilt or innocence of Mr Blé Goudé shall not exceed the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber in the *Blé Goudé* Confirmation Decision.

b) 'Serious prejudice to the accused'

Chambers at the Court and the *ad hoc* tribunals have generally assessed potential prejudice caused by joinder to the rights of the accused in reference to expeditiousness and conflicts of interest, for example, the presentation of evidence relevant to only one accused or the possibility of antagonistic defences.

In relation to Defence submissions concerning the prejudice that may arise from the merging and amendment of charges, the Chamber reiterates that the Prosecution has not requested, and the Chamber has no power to authorise, amendments to the facts and circumstances described in the charges against either Accused. The Chamber further emphasises that it has only considered the Confirmation Decisions in assessing whether charges against Mr Gbagbo and Mr Blé Goudé may be joined. It has drawn no conclusions nor made any assumptions relating to the charges.

In relation to submissions concerning the possibility of different defences and the presentation of evidence relevant to only one Accused, the Chamber stresses that joinder, by its very nature, contemplates such '*attendant inevitable minimum prejudices*'. The Chamber, composed of professional judges, is capable of fully taking into consideration the circumstances and specific aspects of each concrete case and set of charges before it when determining the guilt or innocence of an Accused, excluding extraneous factors such as any prejudicial evidence. Taking this into account, the Defence fails to explain, other than asserting that confusion will result (in particular, in the examination of witnesses from two different perspectives), how these potential consequences of joinder will nevertheless cause '*serious prejudice*' to the Accused. Recalling that the charges are closely linked, the Chamber considers that any prejudice to the accused would be minimal in comparison to the overall benefits to the interests of justice addressed below.

Moreover, the Defence indicates that the right to adequate time and facilities would necessitate a delay to the start date of the trial, while, at the same time, threatening the right of the Accused to be tried without undue delay. The ICTY Appeals Chamber and European Court of Human Rights have confirmed that the proper administration of justice may be best served by joinder, even if it risks some delay or adds some degree of complexity in the proceedings. In any event, the question of the time needed for adequate trial preparation on the part of the Defence teams is a matter of trial management to be determined by the Chamber at the appropriate time in the proceedings.

Accordingly, the Chamber finds that separate trials are not necessary in order to avoid '*serious prejudice*' to Mr Gbagbo and Mr Blé Goudé. The Chamber considers that a joint trial is appropriate to ensure a fair and expeditious trial pursuant to Article 64(2) of the Statute and, as will be explained in the following section, is in the interests of justice.

c) 'The interests of justice'

Chambers at the Court and the *ad hoc* tribunals have generally considered the following factors in assessing whether joinder serves the interests of justice: duplication of evidence; consistency in the presentation and assessment of evidence and verdicts; the interests of victims; hardship to witnesses, the likelihood of their reappearance and risk of exposure for protected witnesses; and judicial economy including considerations related to the number of witnesses the Prosecution would have to call in a joint versus separate trials, the length of a joint trial relative to the cumulative length of separate trials and economical use of court resources.

The Chamber notes that, according to the Prosecution, largely the same evidence has been and will be disclosed in both cases, largely the same evidence was relied upon by the Prosecution at the confirmation hearing and the Prosecution will present largely the same evidence at trial against both Accused. Defence submissions concerning the different evidence the two Defence teams will present is unsubstantiated by further detail. The Chamber is therefore satisfied that a joint trial would, at a minimum, avoid the duplication of a significant body of evidence.

A joint trial would also avoid the risk of inconsistent treatment and assessment of evidence in separate trials, and, in turn, inconsistent verdicts. Further, it is evident that requiring witnesses to testify twice could pose hardship to witnesses, as well as increase the risk of exposure of protected witnesses. For all these reasons, the Chamber considers a joint trial to be in the interests of witnesses and victims and in accordance with the Chamber's obligations under Article 68(1) of the Statute.

In relation to judicial economy, the Chamber considers that two separate trials, in which the evidence will be largely the same, whether conducted simultaneously or otherwise, are likely to require more court hours and resources than one joint trial, and will lead to a duplication of efforts on the part of all organs of the Court. Indeed, in light of the close connection between the two cases before this Chamber, conducting two trials would require the Prosecution to demonstrate twice the factual allegations underpinning the charges against

both Accused. The Chamber considers that this would be a misuse of resources with no discernible benefit for the overall interests of justice.

The Chamber therefore considers that separate trials are not necessary at this stage in order to protect the interests of justice. The Chamber considers that, in accordance with Article 64(2) of the Statute, a joint trial is the most appropriate solution.

d) Conclusion

Pursuant to Article 64(5) of the Statute and Rule 136 of the Rules, the Chamber finds it appropriate to join the charges and jointly try Mr Gbagbo and Mr Blé Goudé. Pursuant to Article 64(2) of the Statute, the Chamber shall ensure the fairness of these joint trial proceedings. Under Rule 136(2) of the Rules, it shall accord the same rights to each accused as if they were being tried separately.

See No. ICC-02/11-01/15-1, Trial Chamber I, 11 March 2015, paras. 42-52, and 57-68.

At the outset, the Chamber notes that both Defence teams allege ambiguity in the Joinder Decision which, they submit, has impeded their ability to abide by the Chamber's instructions relating to the *Gbagbo* and *Blé Goudé* case records. Yet, the *Gbagbo* Defence Request was filed more than two weeks after the Joinder Decision. The *Gbagbo* Defence does not provide any reason why it did not make its request sooner. In the exercise of reasonable diligence, the Chamber considers that the *Gbagbo* Defence Request could have been made in a timelier manner.

The Chamber further notes the Defence request for clarification as to the classification it should use to transmit material only to the parties and not the LRV. Considering Regulation 23 *bis* of the Regulations and previous instructions by the Chamber and Single Judge in this regard, the Chamber finds that this request is without merit and will not be entertained further.

Turning to the request for clarification of the term '*case record*', the Chamber recalls that, in relevant part, the Joinder Decision referred to Rules 121(10) and 131 of the Rules. These provisions concern the record of proceedings before the Pre-Trial Chamber and provide that, *inter alia*, the Prosecution, Defence and LRV may consult it, subject to any justified restrictions. The Joinder Decision also referred to Regulation 21 of the Regulations of the Registry, providing that a '*case record shall be a full and accurate record of all proceedings*', thus referring to the entirety of the case record. The Chamber instructed the parties to indicate any objection to any party or participant being granted access to any confidential material on the *Gbagbo* and *Blé Goudé* case records. These instructions were clear.

Finally, in relation to the request for an extension of time, the Chamber notes the principle of publicity guaranteed by Articles 64(7) and 67(1) of the Statute, and that, pursuant to Regulation 23 *bis* (3) of the Regulations, material on the case record should retain its classification only so long as it is justified. The Chamber further considers that it is in the interests of justice and all parties that access to '*confidential*', '*confidential, ex parte*' and '*under seal*' material is limited to a necessary and proportional extent. The Chamber must therefore ensure that the parties and participants have adequate time to review, and make reasoned submissions on access to, '*confidential*', 'confidential', '*ex parte*' and 'under seal' material on the *Blé Goudé* and *Gbagbo* case records. In this regard, both Defence teams and the Prosecution indicate that an extension of time would facilitate a thorough and accurate review. Both Defence teams request an extension of three weeks, which the Prosecution does not oppose.

Pursuant to Regulation 35(2) of the Regulations, the Chamber therefore considers that there is good cause to extend by three weeks the deadline for the parties, LRV and Registry to indicate any objection, and the reasons therefore, to any party or participant (including the LRV) being granted access to any 'confidential', '*confidential, ex parte*' or '*under seal*' material on the *Gbagbo* and *Blé Goudé* pre-trial and trial case records.

See No. ICC-02/11-01/15-30, Trial Chamber I, 13 April 2015, paras. 7-11.

The Single Judge notes that Regulation 19 *bis* (2) of the Regulations provides:

Unless otherwise determined by a Chamber, during the judicial recess hearings shall be limited to urgent issues and time limits shall not be suspended.

The Single Judge considers that, while the legal framework of the Court therefore allows for suspension of time limits during the judicial recess on an exceptional basis. Regulation 19 *bis* (2) of the Regulations clearly stipulates that time limits shall not be suspended unless the Chamber otherwise determines. In deciding whether or not circumstances exist that may warrant a departure from the norm, the Single Judge considers that he ought to '*take into account the particular circumstances of the case which have a bearing on the matter*', including the nature of the issues alleged by the Defence, and the current stage of the proceedings.

See No. ICC-02/11-01/15-135, Trial Chamber I (Single Judge), 14 July 2015, paras. 3-4.

The Single Judge emphasises that, if the Defence is unable to abide by an order, it must avail itself of all reasonable measures, including those provided in the legal framework of the Court, to avoid or remedy such anticipated non-compliance.

See No. ICC-02/11-01/15-150, Trial Chamber I (Single Judge), 21 July 2015, para. 10.

Pursuant to regulation 37(2) of the Regulations of the Court, a Chamber may grant an extension of the page limit "*in exceptional circumstances*". Having considered [the Defence]'s arguments, the Appeals Chamber is not persuaded that the nature, purported complexity and novelty of the issues that [it] intends to raise in his appeal constitute exceptional circumstances warranting an extension of the applicable page limit of the document in support of the appeal in this instance.

See No. ICC-02/11-01/15-144 OA6, Appeals Chamber, 22 July 2015, para. 6.

The Chamber notes that the Prosecution appears to have bypassed other statutory remedies available before making the Request. Before moving the Chamber to exercise its *proprio motu* powers under Regulation 55(2) of the Regulations, the Prosecution could have sought (i) leave to appeal the *Gbagbo* Confirmation Decision or (ii) pursuant to Article 61(9) of the Statute, an amendment thereto. Notwithstanding this failure, as set out below and in the specific context of the *Gbagbo* Confirmation Decision, it is apparent to the Chamber that the legal characterisation of the facts described in the charges may be subject to change. In these unique circumstances, the Prosecution's failure to exhaust other remedies does not impact on the Chamber's obligation to give notice under Regulation 55(2) of the Regulations.

IV. Analysis

The Chamber is bound by the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber. Regulation 55(1) of the Regulations enables the Chamber to, in its decision under Article 74 of the Statute, change the legal characterisation of these facts in order '*to close accountability gaps, a purpose that is fully consistent with the Statute*'. If, as the Defence asserts, the Chamber was unable to revisit the legal characterisation confirmed by the Pre-Trial Chamber, there would be a '*risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect*'.

Pursuant to Regulation 55(2) of the Regulations, if, at any time during the trial, it appears to the Chamber that the legal characterisation of the facts may be subject to change, the Chamber shall give notice to the parties and participants of such a possibility and ensure that they have adequate time and facilities for effective preparation.

Regulation 55(2) of the Regulations may be invoked '*at any time during the trial*'. The Chamber considers that, in this context and the special circumstances of this case, the term '*trial*' is not limited to the hearing of evidence, but also extends to the phase after a trial chamber is seised of a case and before opening statements. This interpretation is consistent with the purpose of Regulation 55(2)-(3) of the Regulations, and the Chamber's overarching obligation, to ensure that a trial is fair and expeditious. Indeed, according to the Appeals Chamber, notice under Regulation 55(2) of the Regulations '*should always be given as early as possible*'.

[…]

The Chamber has assessed whether this possible recharacterisation would exceed the confirmed facts and circumstances. In doing so, and without making any conclusion as to the legal interpretation thereof, the Chamber has had regard to the elements required on the face of Article 28(a) and (b) of the Statute and the facts and circumstances described in the charges. For present purposes and without prejudice to any decision under Regulation 55(1) of the Regulations and Article 74 of the Statute, the Chamber is satisfied that, as the Prosecution demonstrates in the Request, the possible recharacterisation would not exceed the facts and circumstances described in the charges.

[…]

Regulation 55(2) of the Regulations entitles the parties and participants to make submissions after the hearing of the evidence and at an appropriate stage of the proceedings. The Chamber considers that this can be done in closing briefs and/or statements after the closure of the evidence pursuant to Rule 141 of the Rules. It is premature to set the modalities for such submissions.

See No. ICC-02/11-01/15-185, Trial Chamber I, 20 August 2015, paras. 8-11, 14, and 16.

The Defence are requesting that the Chamber determine that the Pre-Trial Brief, a document provided by the Prosecution at the invitation of the Chamber, must be officially translated into a language the accused persons fully understand in order for them to understand in detail the nature, cause and content of the charges, within the meaning of Article 67(1)(a) of the Statute. […].

In the view of the Chamber, the Statute, Rules and Regulations provide a framework which ensures that an accused receives adequate notice of the nature, cause and content of the charges, within the meaning of Article 67(1)(a) of the Statue. This framework provides that the accused shall receive a document containing the charges on which the Prosecutor intends to bring the person to trial and that the Pre-Trial Chamber shall deliver a decision on the confirmation of charges, setting out those charges for which there is sufficient evidence to establish substantial grounds to believe the person committed the crimes charged.

The Chamber has previously stated that '*the facts and circumstances described in the charges against either accused have been clearly established by the Pre- Trial Chamber in the respective Confirmation Decisions*'. The Chamber underlined that '*regardless of whether the evidence to be relied on at trial by the Prosecution was used at the pre-trial stage, the facts and circumstances underlying the charges against the accused remain unchanged, as outlined in the two Confirmation Decisions*'. The Chamber recalls that the Appeals Chamber has stated that, based on the Court's

statutory framework and the respective roles of the Prosecutor and the Pre-Trial Chamber in the confirmation process, this confirmation decision sets the parameters for trial. Accordingly, the Chamber's decision under Article 74 of the Statute '*shall not exceed the facts and circumstances described in the charges and any amendments to the charges*'.

In addition, this legal framework requires that the Defence receive notice of the evidence the Prosecution intends to use prior to the confirmation hearing. It sets out that the accused shall receive the Prosecution's list of evidence for the confirmation proceedings, pre-trial disclosure of prosecution witnesses and provides for the inspection of all items which are material to the preparation of the defence.

[…]

In light of the above, the Chamber is not convinced that not receiving the Prosecution's Pre-Trial Brief in a language the accused persons fully understand infringes on the right of [the Accused] to be informed in detail of the nature, cause and content of the charges within the meaning of Article 67(1)(a) of the Statute.

The Chamber also observes that the jurisprudence from the ECHR cited by the *Gbagbo* Defence does not support its position that it is entitled to an official translation of any relevant material providing information concerning the charges. The ECHR stated that while special attention does need to be paid to the charging document – *i.e.* the indictment – Article (6)(3)(e) of the European Convention on Human Rights '*does not go so far as to require a written translation of all items of written evidence or official documents in the procedure*', but rather that the '*the accused is entitled to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events*'.

Nevertheless, the Chamber agrees that a Pre-Trial Brief is beneficial for the preparation of the Defence. It was on that basis that the Chamber invited the Prosecution to file a pre-trial brief in the case record, noting that '*such a document could facilitate the fair and expeditious conduct of the trial proceedings*' and that '*in light of the joinder and the two Confirmation Decisions* [a pre-trial brief] *would be beneficial to the Defence in preparation for trial*'.

The Chamber therefore considers that receiving a French version of the Pre-Trial Brief would indeed be useful, particularly in light of the fact that the Prosecution intends to call 137 witnesses to testify and has listed 4,790 items of evidence in the List of Evidence. In this respect, it is to be noted that both Defence teams received – from the Court Interpretation and Translation Section – a non-official (draft) translation of the Pre-Trial brief as of 2 and 7 September 2015. In addition, the Chamber observes that the accused persons are aided in discussing, analysing and preparing their defence by their counsel, who are able to function effectively in both working languages of the Court should any questions concerning the Pre-Trial Brief arise.

See No. ICC-02/11-01/15-224, Trial Chamber I, 16 September 2015, paras. 12-15, and 17-20.

Article 67(1) of the Statute requires that an accused must have the capacity to understand and defend himself against the charges, which includes, *inter alia*, the capacity to:

- Understand the purpose, including the consequences, of the proceedings;
- Understand the course of the proceedings, including the nature and significance of pleading to the charges;
- Understand the evidence;
- Testify or give an unsworn statement (should the accused so choose); and
- Instruct counsel in the preparation and conduct of a defence

The Chamber emphasises that the Appointed Experts are not required to themselves make a determination of [the Accused]'s fitness to stand trial; that is a legal determination to be made by the Chamber. However, the Chamber considers that the aforementioned considerations will assist its assessment.

[…]

Redactions should not be applied to facts, conclusions or recommendations which concern [the Accused]'s fitness to stand trial or relate to any impact his health may have on the trial, such as trial modalities or scheduling, and, in any event, they may not be applied in a manner that would prevent sensible observations being made thereon.

See No. ICC-02/11-01/15-253, Trial Chamber I, 30 September 2015, paras. 13-14, and 19.

Under the Second Issue, the Chamber notes that the Defence argues that the Chamber's ruling in the Impugned Decision effectively requires the Defence counsel to work in English, and that the Chamber erred in determining that providing a draft French translation of the Pre-Trial Brief to the accused was sufficient. The Defence's arguments on this point are no longer linked to [the Accused]'s rights pursuant to Article 67(1)(b) and (f) of the Statute to receive those translations which are necessary in the interests of fairness to allow him to actively participate in the development of his defence strategy. Its complaint lies in the incorrect assertion that the Defence team is entitled to work only in French, even though the working languages of the Court are English and French.

See No. ICC-02/11-01/15-307, Trial Chamber I, 22 October 2015, para. 11.

The Chamber acknowledges the importance and benefit of bringing the work of the Court closer to those affected by the case. However, in deciding pursuant to Rule 100 of the Rules whether it is in the interests of justice to hold hearings in a place other than the host State, this benefit must be balanced with other pertinent factors, including: (i) whether the potential host State would support the Request; (ii) the security situation in either location, noting the submissions concerning the timing of commencement date in relation to the elections in Côte d'Ivoire; (iii) ensuring the safety and wellbeing of the accused; and (iv) the time and resources required to conduct all of the necessary arrangements attendant with holding proceedings in a State other than the host State, including, *inter alia*, whether the potential host State has concluded an Agreement of Privileges and Immunities of the International Criminal Court (APIC) with the Court.

See No. ICC-02/11-01/15-316, Trial Chamber I, 26 October 2015, para. 15.

The Chamber recalls that it is not required '*to entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions*'. This principle was recently affirmed in the Appeals Chamber Judgment on Ninth Article 60(3) Decision, in which it was held that, without more, by raising the same arguments already considered and rejected by the Chamber, '*Mr Gbagbo demonstrates mere disagreement with the Trial Chamber's finding that his arguments are irrelevant*'.

[…]

However, the Chamber recalls that, in conducting a review of detention under Article 60(3) of the Statute, '[w]*hen addressing changed circumstances, the Prosecution does not have to re-establish the same underlying facts if these facts continue to apply*'.

See No. ICC-02/11-01/15-328, Trial Chamber I, 2 November 2015, paras. 6 and 14.

Pursuant to Article 64(6)(a) of the Statute, and Rule 135 of the Rules, the Chamber must satisfy itself that the accused understands the nature of the charges against him. This assessment necessarily includes a determination not only that the accused understands the nature of charges, but also has the capacity to exercise his procedural rights, including with the assistance of his counsel, as enumerated under Article 67(1) of the Statute.

In this regard, the Chamber fully endorses the statement made by Pre-Trial Chamber I that:

> [T]*he concept of fitness to stand trial must be viewed as an aspect of the broader notion of fair trial. It is rooted in the idea that whenever the accused is, for reasons of ill health, unable to meaningfully exercise his or her procedural rights, the trial cannot be fair and criminal proceedings must be adjourned until the obstacle ceases to exist. In this sense, fitness to stand trial can be defined as absence of such medical conditions which would prevent the accused from being able to meaningfully exercise his or her fair trial rights.*

The Chamber also endorses the Pre-Trial Chamber's observation that meaningful exercise of one's fair trial rights does not require that the person be able to exercise them as "*if he or she were trained as a lawyer or judicial officer*", and notes relevant jurisprudence from the Appeals Chamber of the ICTY in *Strugar* that that:

> *An accused represented by counsel cannot be expected to have the same understanding of the material related to the case as a qualified and experienced lawyer. Even persons in good physical and mental health, but without advanced legal education and relevant skills, require considerable legal assistance, especially in case of such complex legal and factual nature as in those brought before the Tribunal.*

As a recalled previously, to ascertain fitness to stand trial, an accused must have the capacity to: (i) understand the purpose, including the consequences of the proceedings; (ii) understand the course of the proceedings, including the nature and significance of pleading to the charges; (iii) understand the evidence; (iv) testify or give an unsworn statement (should the accused so choose); and (v) instruct counsel in the preparation and conduct of his defence.

Having enumerated the various capacities an accused must possess in order for the Chamber to satisfy itself that he can meaningfully participate in the trial – to such a degree that he has an understanding of the essentials of the proceedings, and in such way that it allows him to effectively exercise his fair trial rights – the Chamber is guided by the notion that:

> *An accused's ability to participate in his trial should be assessed by looking at whether his capacities are, viewed overall and in a reasonable and* [common sense] *manner, at such a level that it is possible for* [him or her] *to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights.* […] *Effective participation requires a* "broad understanding" *of the trial process with a comprehension of the* "general thrust" *of what is said in court.*

See No. ICC-02/11-01/15-349, Trial Chamber I, 27 November 2015, paras. 32-36.

Regulation 55 of the Regulations of the Court provides, in relevant part, as follows:

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written

submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

In accordance with regulation 55(2) of the Regulations of the Court, notice of a possible re-characterisation of the facts may be given "*at any time during the trial*". The Appeals Chamber has had occasion in the past to pronounce on the meaning of this phrase, albeit in the context where notice was issued at the deliberations stage of the trial but before a decision under article 74 of the Statute was rendered. In this case, the Appeals Chamber held that while the timing of the issuance of notice was not "*incompatible*" with regulation 55 of the Regulations of the Court, it was however preferable that such notice be given "*as early as possible*".

In the case at hand, the Appeals Chamber concurs with the views expressed by the Prosecutor in so far as she argues that early notice of a possible re-characterisation of the facts is consistent with the accused person's right under article 67(1)(a) of the Statute "[t]*o be informed promptly and in detail of the nature, cause and content of the charge*" and with the duty of the Trial Chamber under article 64(2) of the Statute to "*ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused*".

The question arising, however, is whether by the terms of regulation 55 of the Regulations of the Court, the Trial Chamber is precluded from issuing notice of a possible recharacterisation of the facts at an early stage of the proceedings, namely, when it is seised of a case and before opening statements are heard. In this respect, the Appeals Chamber disagrees with [the Defence]'s restrictive interpretation of the phrase "*at any time during the trial*" in regulation 55(2) of the Regulations of the Court, as being limited to the stage where the hearing of evidence has begun. While the Appeals Chamber is not called upon to consider whether the term "*trial*" has the same interpretation when used in other contexts throughout the legal framework of the Court, in its view, the ordinary meaning of the phrase "*at any time during the trial*" in the context of regulation 55 does not exclude the stage after a Trial Chamber is seised of a case and before opening statements. This is because regulation 55(2) of the Regulations of the Court requires notice to be issued when it "*appears*" to the Trial Chamber that the legal characterisation of facts may be subject to change. This may become apparent to the Trial Chamber at any time before a decision under article 74 of the Statute is rendered. In these circumstances, to restrict the issuance of such a notice to a stage at which opening statements have been heard would be inconsistent with the requirement that notice be issued as "*early as possible*" and prejudicial to the accused person.

In the present case, the Appeals Chamber observes that prior to the hearing of opening statements the Trial Chamber concluded that the legal characterisation of the facts and circumstances described in the charges may be subject to change based on its review of the Confirmation Decision, the Request for Notice and the Pre-Trial Brief. The Trial Chamber was therefore required, pursuant to regulation 55(2) of the Regulations of the Court, to place the participants on notice as early as possible. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's interpretation of regulation 55 of the Regulations of the Court, in particular with the timing of the issuance of the notice, as it is compatible with the terms of regulation 55(2) of the Regulations of the Court and consistent with the previous jurisprudence of the Appeals Chamber.

Notwithstanding the fact that regulation 55 of the Regulations of the Court is part of the "*coherent procedure*" available to the Trial Chamber, the Appeals Chamber finds that the mere issuance of notice of a possible recharacterisation does not amount to an amendment of the charges. As previously stated by the Appeals Chamber, "*article 61(9) of the Statute and Regulation 55 address different powers of different entities at different stages of the procedure, and the two provisions are therefore not inherently incompatible*". Furthermore, as indicated by the Prosecutor, resort to regulation 55 by the Trial Chamber is not contingent on whether the procedure under article 61(9) of the Statute for the amendment of charges was applied. On the contrary, regulation 55 is only triggered where it appears to the Trial Chamber that the legal characterisation of the facts and circumstances may be subject to change. […].

With respect to [the Defence]'s argument that the Impugned Decision is inconsistent with the recommendations of the Pre-Trial Practice Manual that recourse to regulation 55 of the Regulations of the Court should be limited, the Appeals Chamber considers this argument to also be misguided. The Pre-Trial Practice Manual is an explanatory document that contains general recommendations and guidelines regarding best practices at the Court, based on the experience and expertise of the Pre-Trial judges. However, it is not a binding instrument designed to have the same force and effect as the Statute, Rules of Procedure and Evidence or the Regulations of the Court. As such, the Trial Chamber cannot be constrained in its application of regulation 55 by a recommendation contained in the Pre-Trial Practice Manual. Given that all of [the Defence]'s arguments in relation to the Statute, Rules of Procedure and Evidence and the Regulations of the Court have been addressed above, the Appeals Chamber sees no need to further consider this argument and accordingly dismisses it.

[…]

The Appeals Chamber notes that the interpretation of any legal text is independent of the particular circumstances of a case. The "*context and special circumstances*" of a case become relevant only when a particular interpretation of the law is being applied. In the circumstances, the Appeals Chamber concurs with [the Defence]'s argument and finds that the Trial Chamber relied on irrelevant criteria in its interpretation of regulation 55 of the Regulations of the Court. However, the Appeals Chamber finds that this did not have any material effect on the Trial Chamber's interpretation as confirmed above. Accordingly, the argument is rejected.

In sum, the Appeals Chamber finds that the Trial Chamber correctly interpreted the phrase "*at any time during the trial*" in regulation 55(2) of the Regulations of the Court, to extend to the phase after the Trial Chamber is seised of a case and before opening statements. As such it was not per se unlawful for the Trial Chamber to give notice to the participants that the legal characterisation of facts may be subject to change at a stage prior to the hearing of opening statements. The first ground of appeal is therefore rejected.

[…]

The Appeals Chamber "*will correct an exercise of discretion* […] *where: (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion*". Additionally, when such an exercise of discretion has been established, the Appeals Chamber must be satisfied that the "*improper exercise of discretion materially affected the impugned decision*". An abuse of discretion occurs when the impugned decision is "*so unfair or unreasonable as to* 'force the conclusion that the Chamber failed to exercise its discretion judiciously'". The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion.

[…]

Furthermore, the Appeals Chamber emphasises that notice of a possibility of re-characterisation pursuant to regulation 55(2) of the Regulations of the Court need not be based on evidence heard at trial, but may, as in the present case, be based on documents such as those discussed above.

[…]

The Appeals Chamber has previously held that [it] does not accept that a change in the narrative exceeds per se the facts and circumstances described in the charges. Focusing on certain facts to the exclusion of others will necessarily alter the narrative: indeed, it would appear inevitable that a change in characterisation would result in a change of narrative to a certain extent

The Appeals Chamber concurs with the Prosecutor that the manner in which the Pre-Trial Chamber declined to confirm liability under article 28 of the Statute, that is due to a different understanding of the narrative of the facts and not due to a rejection of the facts themselves, was a relevant factor to the Trial Chamber's decision to issue notice. The Appeals Chamber considers that Mr Gbagbo has not demonstrated that it was unreasonable for the Trial Chamber to consider this factor.

See No. ICC-02/11-01/15-369 OA7, Appeals Chamber, 18 December 2015, paras. 48-54, 56-57, 64, 68, and 70-71.

The Chamber observes, firstly, that the Request was made by the representatives of the Republic of Côte d'Ivoire without it having identified any legal basis for its request to attend the hearings in the case. The Republic of Côte d'Ivoire is neither a party nor participant in these proceedings and currently has no standing to address the Chamber on matters related to the case.

The Chamber may, however, if it considers it desirable for the proper determination of a case, invite or grant leave to a State to submit, in writing or orally, any observation on any issue that it deems desirable for the proper determination of the case. […].

See No. ICC-02/11-01/15-381, Trial Chamber I, 8 January 2016, paras. 4-5.

There is no provision in the Statute or the Rules of Procedure and Evidence explicitly providing for the possibility to conduct a site visit. However, a chamber may decide to conduct a site visit pursuant to Articles 64, 69 and 74 of the Statute where such a visit may assist the Chamber in its assessment of the evidence. A chamber therefore enjoys discretion in deciding whether to conduct a site visit, the utility of which must be assessed in view of the particular circumstances of the case.

The Chamber takes note of the parties' and participant's submissions on the purpose of conducting one or more site visits in the present case. It considers that a site visit may provide the Chamber with the opportunity to obtain a firsthand impression of the locations relevant to the charges, to enhance its understanding of the alleged events, and to be in a better position to assess the evidence presented during trial. The Chamber notes that the parties and participants propose to visit sites located in various neighbourhoods in Abidjan. With regard to the presence of the accused persons the Chamber notes that the *Gbagbo* Defence did not address this issue, and that the *Blé Goudé* Defence has left the decision in the discretion of the Chamber. It further notes the concerns expressed in particular by the Registry, and that other chambers have conducted site visits without the presence of the accused persons.

In order for this Chamber to properly assess whether a site visit would be feasible in the circumstances and of material assistance for the purpose of its evaluation of the evidence, the Chamber considers it appropriate to defer the decision on any such visit to a later stage of the proceedings, after having heard the evidence, given its view that such visit would, if ordered, be more appropriately conducted after the conclusion of the presentation of evidence by the Prosecution.

See No. ICC-02/11-01/15-386, Trial Chamber I, 12 January 2016, paras. 12-14.

The Single Judge notes that the Defence filed a purported response to the Registry Observations on 28 October 2015, without seeking authorisation to do so. Pursuant to Regulation 24(1) and (4) of the Regulations, the Single Judge considers that the Defence was not entitled to file its Further Submissions without requesting leave from the Chamber. Accordingly, the Further Submissions are unauthorised and have not been considered in rendering the present decision.

The Single Judge observes that, pursuant to Rule 20(1)(b) of the Rules, the Registry shall '[p]*rovide support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence*'.

[…]

Accordingly, the Single Judge finds the Request to be premature and entirely lacking in merit. Should the Defence have specific and substantiated concerns it requires assistance in relation to, it must first approach the Registry and, if agreement cannot be reached, only then seise the Chamber. Should the Defence require support in terms of security assistance while on mission, or the ability to conduct communications in a secure manner beyond use of the standard equipment issued by the Registry, then it may directly approach the Registry with such requests, which may then be addressed, as appropriate, under the Registry's obligations pursuant to, *inter alia*, Rule 20 of the Rules. On a similar basis, in the absence of any compelling material underpinning the occurrence of interception of Defence communications, the Single Judge does not consider there to be a concrete basis for warning against interference with Defence investigations to either Côte d'Ivoire or France. It therefore follows that the Single Judge also considers the request of the Defence to suspend the trial commencement date until the Defence can investigate adequately to be wholly unwarranted.

See No. ICC-02/11-01/15-351-Red, Trial Chamber I, 13 January 2016, paras. 6-7, and 10.

Article 108(1) of the Statute provides that "[a] *sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution* [or] *punishment has been approved by the Court at the request of the State of enforcement*". Article 108(3) indicates that this provision ceases to apply if a sentenced person, *inter alia*, remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court.

The Presidency notes that the convicted person was not released from custody by the DRC authorities following the completion of the sentence imposed by the Court on 18 January 2016. In such circumstances, he has not been given the opportunity to remain voluntarily for more than 30 days in the territory of the DRC, pursuant to article 108(3) of the Statute.

The Presidency also notes […] that article 108(1) implicitly requires that, ordinarily, the approval of the Court would be sought prior to the commencement of the relevant prosecution, punishment or extradition.

Nonetheless, while delayed, the letter dated 29 February 2016 does constitute a request by the DRC for the approval of the Court, pursuant to article 108(1) of the Statute.

The legal texts of the Court do not expressly set out any relevant criteria to be applied by the Court when considering the approval of the prosecution, punishment or extradition of a sentenced person by a State of enforcement. The Presidency thus considers that such provisions need to be interpreted in context, taking into account the purpose of the Rome Statute and the nature of the Court. The Presidency notes that the Court only has jurisdiction over a limited number of international crimes and that even in this respect, it is an institution of last resort, intended to complement and not replace national systems. These essential features of the Rome Statute system, compounded with the general fundamental objective of ensuring accountability for serious crimes, suggest that the Court´s approval should only be denied when the prosecution, punishment or extradition of sentenced persons may undermine certain fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court.

Accordingly, the Presidency will first consider whether there is a potential undermining of the key relevant principle of *ne bis in idem*. […].

[…]

In applying article 108(1) in conjunction with article 20(2), the Presidency cannot widen the scope of the latter which only prohibits trial for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court and does not prohibit trials for conduct within the ambit of the ICC's investigations. The Presidency notes that the interpretation of article 108(1) […], which considers the entire ambit of the investigation, would have the result that the choices of the Prosecutor following the referral of a situation to the Court would shield individuals subject to investigation from domestic prosecution for other crimes, including crimes of potentially equal gravity. Such outcome would be inconsistent with the notion of complementarity and the objective of ensuring accountability for crimes. This objective is explicitly espoused in the preamble of the Statute which declares that "*the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level*". Accordingly, when the Presidency considers, under article 108(1), whether the prospective prosecution of [the

convicted person] may offend the principle of *ne bis in idem*, it does so by reference only to the content of that rule specified in article 20(2).

[…]

[…] Accordingly, to the extent that the domestic prosecution of [the convicted person] does not relate to the same crimes of which he has been convicted and acquitted by the Court, the principle of *ne bis in idem* espoused in article 20(2) is not undermined.

The Presidency must also consider whether the prosecution, punishment or extradition referred to in article 108(1) undermines other fundamental principles or procedures or otherwise affects the integrity of the Court.

[…]

The Presidency reiterates that under article 108(1) of the Rome Statute, the approval of the prosecution, punishment or extradition of a sentenced person should only be denied when it undermines fundamental principles or procedures of the Rome Statute or otherwise affects the integrity of the Court. […].

For the reasons given above and taking into account the information available, the Presidency is of the view that the proposed prosecution of the convicted person, as set out in the "*Décision de renvoi*", does not undermine fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court. Therefore, the Presidency hereby approves, pursuant to article 108(1) of the Statute, the prosecution of the convicted person as set out in the "*Décision de renvoi*".

See No. ICC-01/04-01/07-3679, The Presidency, 7 April 2016, para. 16-21, 23, 25-26, and 31-32.

The Statute does not provide guidance on reconsideration of interlocutory decisions. However, the Chamber considers that the powers of a chamber allow it to reconsider its own decisions, whether prompted by one of the parties or *proprio motu*. Reconsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.

See No. ICC-01/04-02/06-1282, Trial Chamber VI, 18 April 2016, para. 12.

Pursuant to Rule 134(3) of the Rules, the Presiding Judge or the Chamber may rule on any issues that arise during the course of the trial, including any modification or additions to the current directions. By their technical nature and their being directly instrumental to the fundamental need to ensure the fair and expeditious conduct of the trial, directions are subject to modification, including in light of actual developments. Such developments are inherent in the nature of a trial and, as such, not predictable in advance. Accordingly, the parties must be ready to expect and welcome such changes and to promptly adapt to them with a view to contributing to the overall fairness and expeditiousness of the proceedings. In shaping the revised text of the directions, the Chamber has considered the submissions made by the parties both in the filings listed in paragraph 7 above and during the status conference held on 26 April 2016 and has deliberately refrained from restating what is explicitly provided for in the applicable law pursuant to Article 21 of the Statute. The directions thus supplement or assist in the interpretation and application of the legal framework where necessary. In the same vein, the Chamber has deliberately omitted to rule in relation to phases of the proceedings which have been in the meantime completed.

The main principles upon which the revised directions rely on are the following: (i) the accused's right to be tried without undue delay and the subsequent need to maximise the efficiency of time spent in the courtroom, pursuant to Articles 64(2) and Article 67(1)(c) of the Statute; (ii) the Chamber's statutory mandate to ascertain the truth pursuant to Article 69(3) of the Statute, which makes it unnecessary to refer to the case as being either "*the Prosecutor's*" or "*the Defence's*"; (iii) the applicable law pursuant to Article 21 of the Statute, which creates a unique criminal procedure, independent and distinct from any other national or international jurisdiction; (iv) the fact that, although the parties are entitled to a degree of deference in the selection and presentation of their evidence, their discretion is not unlimited and is subject to the Chamber's and the Presiding Judge's trial management powers pursuant to Article 64 of the Statute.

In this perspective, the Chamber recalls that the Prosecutor undertook to reduce the number of witnesses and items of evidence where possible prior to the commencement of the trial following discussions with the defence (ICC-02/11-01/15114). No such reduction has been announced so far. As said, the Prosecutor's discretion as to the presentation of her evidence is subject to the Chamber's trial management powers. In particular, the Chamber emphasises its power to identify issues critically relevant to its determination of the charges and to instruct the parties to prioritise and bring forward evidence relating to such issues first, subject to adequate notice, and particularly the rights of the Defence pursuant to Article 67(1)(b) of the Statute.

As regards the issue of legal representation of victims, the Chamber reiterates that the system established pursuant to decisions taken at the pre-trial stage in both the *Gbagbo* and the *Blé Goudé* cases, as reviewed by the Chamber prior to the opening of the trial, meets all of the requirements for effective and fair representation of victims, and shall therefore be maintained throughout the trial proceedings.

See No. ICC-02/11-01/15-498, Trial Chamber I, 4 May 2016, paras. 10-13.

First and foremost, article 64(3)(a) of the Statute confers on the Trial Chamber the responsibility for adopting such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings. It therefore goes without saying that changing the rules should not create unfairness for the parties. It should be stressed, in this regard, that although a change to the rules may not worsen the position of the parties from a substantive point of view, the fact of the change itself may negatively affect them. This is because parties prepare, months in advance of the actual trial, with a particular set of rules in mind. This right to prepare is borne in the Prosecution's obligation to prove the guilt of the accused under Article 66 and the accused's right to have adequate time and facilities for the preparation of his defence under Article 67. If a change to the rules renders some of that preparation useless, this may cause unfairness, because the party could have used its limited resources to better effect otherwise. Similarly, if a change in the rules requires parties to prepare in a manner differently from what would have been reasonably required under the original rules, making such changes after the trial has begun may cause unfairness, as it creates delays and uncertainty for which the parties bear no responsibility.

[…]

My position, in this regard, is that a Chamber should only make changes to the rules on the conduct of the proceedings if it has been demonstrated that (i) the original rules, when properly applied, would significantly and negatively affect the fair and expeditious conduct of the trial, and (ii) that the only way to preserve the fairness and expeditiousness of the trial is by amending the rules on the conduct of proceedings.

In my respectful view, it would have been more prudent and in keeping with the Chamber's obligation under article 64(3)(a) of the Statute to withhold making changes until a demonstrated need for them had arisen during the trial. Moreover, and on the same basis, I think it would only have been fair to provide the parties with an opportunity to make informed submissions in this regard.

See No. ICC-02/11-01/15-498-Anx1, Trial Chamber I, Separate Opinion of Judge Henderson, 4 May 2016, paras. 3, 5, and 10.

The Chamber recalls its previous finding that, while properly covered by the powers of a chamber, reconsideration of its own decisions is an exceptional measure which will only be taken when a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice. The Chamber stresses that this is a high standard which will only be met in limited circumstances and advises the parties to bear this in mind when considering the submission of any future requests for reconsideration.

See No. ICC-01/04-02/06-1473, Trial Chamber VI, 3 August 2016, para. 4.

The Chamber observes that the jurisprudence of the Court establishes the '*commencement of the trial*' for the purposes of Article 61(9) of the Statute to occur at the time of the making of opening statements, prior to the calling of the first witness. The Chamber also considers the start of the hearing during which the Article 64(8)(a) procedure is followed and any opening statements are made to be the appropriate meaning of the phrase '*commencement of trial*' for the purposes of Article 19(4) of the Statute.

See No. ICC-01/04-02/06-1707, Trial Chamber VI, 4 January 2017, para. 17.

The Chamber notes that once the trial hearing commences (*i.e.* after the opening statements), a Trial Chamber is not obliged to conduct any further automatic reviews on detention pursuant to Article 60(3) of the Statute. Notwithstanding, the accused person may apply for interim release at any time pending trial as provided for in Article 60(2) of the Statute. Accordingly, in light of the 6 December 2016 Decision and the Defence's request for interim release, the Chamber will analyse whether: (a) there have been changed circumstances that would warrant a modification of its previous rulings on detention; and (b) whether interim release, as requested by the Defence, with or without conditions, is appropriate.

(a) Changed Circumstances

The Chamber notes that pursuant to Article 60(3) of the Statute, the Chamber must determine if there are changed circumstances vis-à-vis the last decision taken under Article 60(3), and if so, how they impact on the previous ruling under review (the Tenth Decision). The requirement of changed circumstances "*imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary*". Change in circumstances must be demonstrated on a concrete basis, considering all available information, not only the arguments of the detained person.

The Chamber also recalls its previous decisions in which it has established that it is not required to "*entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions*". The Chamber will thus not entertain arguments that have been raised previously, including before the Appeals Chamber, and that have been dismissed by judges as irrelevant to the assessment of [the Accused]'s detention under Article 60(3) of the Statute.

(b) Request for Interim Release

Notwithstanding the above, the Chamber notes that Rule 119 of the Rules provides that a Chamber may still grant conditional release, even if the Article 58(1) conditions are satisfied, on the basis of specific and enforceable conditions, provided these are available and negate or sufficiently mitigate any risks identified.

The Chamber notes, in this regard, that the Court does not have an obligation to make excessive expenditures in order to facilitate the conditional release of an accused.

See No. ICC-02/11-01/15-846, Trial Chamber I, 10 March 2017, paras. 10-12, and 21-22.

The Chamber notes that its findings as regards the ongoing existence of the risk factor pursuant to Article 58(1)(b) of the Statute, particularly the continuing existence of a pro-Gbagbo network, were confirmed by the Appeals Chamber.

However, the Chamber observes that the Appeals Chamber indicated, for the purpose of future decisions, that the Chamber should be "*more explicit in its reference to the material which it considered underpinned its decision*".

Moreover, it is important to note that the Appeals Chamber established that the enquiry as to whether the conditions under Article 58(1) of the Statute are met "*is not dependent only upon the new information provided by the parties, but is a review of the current circumstances as a whole which underpin detention*". The Appeals Chamber also stated that it is "*the Trial Chamber's obligation to look at those circumstances and be satisfied that continued detention is necessary*". It went further, indicating that "*a Chamber cannot simply refer to findings in prior decisions without being satisfied that the evidence of information underpinning those decisions still supports the findings made at the time of the review*".

The Appeals Chamber equally confirmed the Trial Chamber's finding that the gravity of the charges is an appropriate factor to consider in deciding whether or not the risks under Article 58(1)(b) of the Statute are established. The Appeals Chamber found no error in the Trial Chamber's reliance on the possible length of sentence in case of conviction as a factor that may increase [the Accused]'s incentive to abscond.

[…]

2. Age and Health

As regards age and health, the Appeals Chamber provided the following guidelines:

(a) age on its own is not per se a decisive factor,

(b) age shall be analysed along with other factors (*i.e.* ill-health condition); and (c) ill-health may be a factor to consider when making the risk assessment pursuant to Article 58(1)(b) of the Statute (*i.e.* ability to abscond) and as regards the duration of the detention (its reasonableness).

Accordingly, as noted by the LRV, although age is a factor that may potentially mitigate any possibility to abscond, said factor cannot overcome all other relevant factors. Age cannot be taken on its own.

[…]

As regards age, the Chamber recalls that age by itself is not incompatible with the pre-trial detention. The Rome Statute does not address the issue of chronological age of a detained person nor does it refer to age for the purposes of sentencing. Moreover, the Chamber notes that there is no universal standard of what is considered "*old*" or the factors that need to be evaluated to consider a person (in this case a detainee) as an "*elderly person*".

[…]

In relation to the compatibility of old age and imprisonment, the European Court of Human Rights has decided as follows:

> *"In the instant case the applicant relies essentially on his extreme old age, combined with his state of health. The Court notes that advanced age is not a bar to pre-trial detention or a prison sentence in any of the Council of Europe's member States. However, age in conjunction with other factors, such as state of health, may be taken into account either when sentence is passed or while the sentence is being served (for instance when a sentence is suspended or imprisonment is replaced by house arrest). While none of the provisions of the Convention expressly prohibits imprisonment beyond a certain age, the Court has already had occasion to note that, under certain circumstances, the detention of an elderly person over a lengthy period might raise an issue under Article 3. Nonetheless, regard is to be had to the particular circumstances of each specific case (see* Priebke v. Italy (dec.)*, no. 48799/99, 5 April 2001, unreported,* Sawoniuk v. the United Kingdom (dec.)*, no. 63716/00, 29 May 2001, unreported, and also,* mutatis mutandis, V. v. the United Kingdom [GC]*, no. 24888/94, §§ 97-101, ECHR 1999-IX). The Court has examined all the documentary evidence submitted by the parties. From these it emerges that, although the applicant is over 90 and has health problems which restrict his freedom of movement (in particular, heart problems as he has had a triple heart bypass operation and has had a pacemaker fitted), Dr Sicard describes his overall condition as* "good" *and finds that* "he is perfectly aware and lucid" *and shows no signs of dependence. Although the applicant objects to certain aspects of the medical treatment he is undergoing, the Court notes that he is under regular medical supervision and receives treatment both from the medical and paramedical staff in the prison and through hospital consultations and periods spent in hospital. The Court has also examined the conditions in which the applicant is being held. While it is certain that he is not enjoying the same quality of life as he would if he were still at liberty, the Court notes that the national authorities have made as much allowance as possible for his state of health and his age".*

3. Length of Detention

Pursuant to the Appeals Chamber Judgment, the Chamber will now analyse the length of detention together with other factors, in order to determine whether it continues to be reasonable, particularly *vis-à-vis*: (i) the aforesaid determinations on risk factors pursuant to Article 58(1)(b) of the Statute; (ii) factors that may have delayed proceedings; and (iii) the circumstances of the case as a whole (factual and case specific).

At the outset, it is important to point out that the Appeals Chamber determined that the lapse of time on its own cannot be considered as a changed circumstance under Article 60(3) of the Statute. Although Mr Gbagbo, as any accused person has the right to trial within a reasonable time, this right needs to be assessed on a case by case basis.

[…]

In relation to the duration of detention and the nature of the deprivation of liberty, the jurisprudence of the Inter-American Court of Human Rights can be of guidance, as it has established as follows:

In brief, it is not sufficient that every reason for deprivation or restriction of the right to liberty is established by law; this law and its application must respect the requirements listed below, to ensure that this measure is not arbitrary: (i) that the purpose of the measures that deprive or restrict liberty is compatible with the Convention. It is worth indicating that the Court has recognized that ensuring that the accused does not prevent the proceedings from being conducted or evade the judicial system is a legitimate purpose; (ii) that the measures adopted are appropriate to achieve the purpose sought; (iii) that they are necessary, in the sense that they are absolutely essential to achieve the purpose sought and that, among all possible measures, there is no less burdensome one in relation to the right involved, that would be as suitable to achieve the proposed objective. Hence, the Court has indicated that the right to personal liberty supposes that any limitation of this right must be exceptional, and (iv) that the measures are strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought. Any restriction of liberty that is not based on a justification that will allow an assessment of whether it is adapted to the conditions set out above will be arbitrary and will thus violate Article 7(3) of the [American] Convention.

Regarding the length of detention, the European Court has indicated:

> *The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty. Where such grounds are* "relevant" *and* "sufficient"*, the Court must also ascertain whether the competent national authorities displayed* "special diligence" *in the conduct of the proceedings.*

In the case at hand, and contrary to the submissions of the *Gbagbo* Defence, the duration of the judicial proceedings cannot be attributed solely to the Prosecution or to lack of diligence of the judicial authorities. Throughout this case there have been many factors that have affected the expeditiousness of proceedings, which the Chamber deems necessary to recapitulate upon for the purpose of the present review.

[…]

The reasonableness of the detention period has to be determined on a case by case basis, taking into consideration, *inter alia*, the level of complexity of the case, the gravity and the nature of the crimes charged, the number of accused, and the volume of the evidence.

[…]

The Defence argument that the prolonged detention of [the Accused] is contrary to the principle of presumption of innocence is thus unwarranted. Although the Chamber concurs with the Defence that the general principle is that the pre-trial detention should be the exception and not the rule, this is not an absolute principle that would render any pre-trial detention contrary to internationally recognised human rights. The right to the presumption of innocence cannot be in itself determinative in assessing whether provisional release should be granted. As noted above, pre-trial detention does not per se breach internationally recognised human rights or criminal law principles insofar it is justified on any of the grounds of Articles 58(1) and 60(2) of the Statute. As noted above, [the Accused]'s detention has been subject to careful judicial review throughout the pre-trial and trial proceedings and on every occasion his detention continued to be justified. The duration of detention in itself is not a determinative factor. Although it is an aspect to consider, it must be balanced with other factors, including the aforesaid risks pursuant to Article 58(1)(b) of the Statute, as well as the accused's personal circumstances (*i.e.* age and health) and the particularities of the criminal case.

[…]

4. Overall Assessment

Detention during trial proceedings is a precautionary measure which needs to meet the necessary requirements to restrict the right to personal liberty: if there are sufficient indicia to reasonably believe that the accused person is guilty and that such detention is strictly necessary to ensure that the accused will not impede the effective development of the investigations or evade justice.

The following finding of the Appeals Chamber has served as guidance for the present determination of the Chamber:

The duration of time in detention pending trial is factor that needs to be considered along with the risks that are being reviewed, in order to determine whether, all factors being considered, the continued detention 'stops being reasonable' *and the individual accordingly needs to be released. Such determination requires balancing the Article 58(1) risks that were found to still exists against the duration of detention, taking into account relevant factors that may have delayed the proceedings and the circumstances of the case as a whole. The potential penalty for the offence charged may be a factor to take into account in assessing whether the time in detention is reasonable. It cannot be factor assessed in isolation, but would need to be assessed in light of all of the circumstances of the case.*

[…]

As noted by the Appeals Chamber, the gravity of the crime, the possible lengthy prison sentence, and the international contacts of the detained person may be used in assessing the risk of absconding. […].

[…]

5. Conditional Release

[…]

[…] While the Defence states that [the Accused] would waive his right to attend trial, the Chamber recalls that his attendance is not only his right, but also his duty. Moreover, Rules 134 *bis* and 134 *ter* of the Rules allow the exceptional absence of the accused person, but in no way establish a rule. In fact, pursuant to Rule 134 *ter* of the Rules, the accused´s waiver of his right to attend trial is only one of the five cumulative requirements to apply this provision.

The Defence does not specify any of the following factors, without which the Chamber could not make a ruling on conditional release that would guarantee the expeditious and fair conduct of proceedings of this trial:

a. Conditions that would guarantee [the Accused]'s regular presence in trial in a manner that would not affect the fairness and expeditious conduct of proceedings (including bearing of costs and logistics of such conditions);

b. Bearing of costs and logistics to set out conditions that would guarantee that [the Accused] does not interfere with the on-going proceedings (*i.e.* control of communications and filtering of visits suggested by the Defence);

c. [REDACTED], housing, nutrition and care, transportation, security and safety of [the Accused] at the location of eventual conditional release [REDACTED], including bearing of costs and logistics;

d. Concrete application of Rule 134 *bis*, particularly (i) logistics and bearing of costs of video-link connection between the location of conditional release [REDACTED] and The Hague, (ii) communication between the accused and his counsel pursuant to Article 67(1)(b)(d) and (e) of the Statute; and (iii) specific part or parts of his trial in which this provision would apply, considering the subject matter of the specific hearings in question.

e. Concrete application of Rule 134 *ter* of the Rules, particularly (i) logistics and bearing of costs of communication between the accused and his counsel pursuant to Article 67(1)(b)(d) and (e) of the Statute; (ii)exceptional circumstances to justify [The Accused]'s absence given his fitness to attend trial and present state of health; (iii) reasons why alternative measures would be inadequate; and (iv) ways in which [the Accused]'s rights will be fully ensure in his absence.

See No. ICC-02/11-01/15-1038-Red, Trial Chamber I, 26 September 2017, paras. 13-15, 33-34, 39-40, 48, 50-52, 56, 59, 61-62, 65, and 72-73.

The Chamber rejected the request stating *inter alia* that the statutory framework only required that the document containing the charges, the decision confirming the charges, the list of the evidence relied upon by the Prosecutor and the witnesses' statements be made available to the accused in a language he or she fully understands and speaks for him or her to be informed in detail of the nature and content of the charges within the meaning of Article 67(1)(a) of the Statute. The Chamber also clarified that neither the statutory framework, nor the case-law of the ECHR supported the contention that failing to provide the translation of a document of the type of the pre-trial brief would amount to infringing the right set forth in that provision; even less so when – as it was and still is the case in these proceedings – the accused can rely on counsel able to function effectively in both working languages of the Court and therefore able to address any doubt or concern that the accused may have.

As noted by the Appeals Chamber in respect of a request for translation submitted by Counsel for [the Defence] at the pre-trial stage, "*there is no general requirement that filings of parties and participants submitted in English be translated into French, or vice-versa, or that time limits begin to run from the notification of decisions or orders in both working languages of the Court*", and this "*is also confirmed with respect to the language which a suspect fully understands or speaks by regulation 40(6) of the Regulations of the Court*". Regulation 40(6) of the Regulations makes it the responsibility of counsel to inform the accused of documents other than decisions and orders for which an obligation of translation exists.

In light of these principles, the Chamber takes the view that the Trial Brief does not qualify as a document for which the translation into French as the language which the accused fully understands and speaks is mandated by the need to meet the requirements of fairness under article 67(1)(a) and (f) of the Statute. This flows not only from the Chamber's own definition of the Trial Brief as "*an auxiliary tool to the benefit of both the Chamber and the parties and participants*", but also from the detailed and specific instructions imparted to the Defence to subsequently "*make written observations on the continuation of the trial proceedings*" (emphasis added).

Furthermore, the Chamber notes that, even assuming that the availability of the French version of the Trial Brief were essential for the subsequent steps of the proceedings (which is not the case, for the reasons indicated above), Counsel's professional duty to "*represent the client expeditiously with the purpose of avoiding unnecessary expense or delay in the conduct of the proceedings*" pursuant to Article 24(5) of the Code of Professional Conduct would have required the Defence for Mr Gbagbo to highlight any need for a translation at a much earlier stage.

See No. ICC-02/11-01/15-1141, Trial Chamber I, 27 March 2018, paras. 7-10. See also No. ICC-02/11-01/15-1177, Trial Chamber I, Single Judge, 7 June 2018, para. 3

The Chamber is mindful, in this regard, of the Appeals Chamber's decision in the *Ntaganda* case in relation to "*no case to answer*" motions. According to the Appeals Chamber, the parties cannot compel the Trial Chamber to entertain "*no case to answer*" motions and a Trial Chamber may "*decide to conduct or decline to conduct such a procedure in the exercise of its discretion*". The Appeals Chamber stressed that each case may be different and that it is the Trial Chamber's duty to balance expediency and fairness in light of the specific circumstances of the case, provided that the trial proceedings remain fair and expeditious pursuant to article 64(2) and 64(3)(a) of the Statute.

The Chamber is of the view that, as part of its responsibility to ensure the efficiency and fairness of these proceedings, it must ensure that the trial does not take longer than is needed. This requires the Chamber to devise appropriate procedural steps that have the "*potential to contribute to a shorter and more focused trial, thereby providing a means to achieve greater judicial economy and efficiency in a manner which promotes the proper administration of justice and the rights of an accused*".

Accordingly, the Chamber believes that, at this stage, the most appropriate and efficient way to proceed in light of its statutory duties is to authorise the Defence to make concise and focused submissions on the specific factual issues for which, in their view, the evidence presented is insufficient to sustain a conviction and in respect of which, accordingly, a full or partial judgment of acquittal would be warranted. More specifically, the Defence are invited to explain why there is insufficient evidence which could reasonably support a conviction. In order not to defeat their purpose, and in light of the stage reached by these proceedings, such submissions must be filed and resolved expeditiously.

The Chamber observes that, pursuant to rule 142(2) of the Rules, it shall decide separately on each charge and separately on the charges against each accused.

[…]

These submissions will assist the Chamber in determining whether the evidence presented by the Prosecutor suffices to warrant the continuation of the trial proceedings and hear evidence from the accused, or whether the Chamber should immediately make its final assessment in relation to all or parts of the charges.

See No. ICC-02/11-01/15-1174, Trial Chamber I, 4 June 2018, paras. 8-11, and 13.

In light of the above, the Single Judge takes the view that it is not necessary to take a position either as to the standards adopted by Trial Chamber V(a)or to the application of those principles in the final decision in that case. The Single Judge only notes that, the *Ruto and Sang* case being the only precedent in the jurisprudence of this Court to this day, the Prosecutor's statement to the effect that the standards enunciated in it are representative of the jurisprudence at the Court sounds far-fetched.

The Prosecutor is obviously entitled to think that "[i]*n the present case, there is sufficient evidence for the Defence to answer to, as the Prosecution submitted relevant and reliable evidence for each count both at the level of the perpetration of the crime through crime base witnesses and other actors on the ground, as well as linkage evidence demonstrating the conduct, knowledge and/or the intent of the Accused*". The Defence, however, is likewise entitled to challenge this view and to think that this is not the case, whether in whole or in part. The Chamber, having received the Defence responses to the Trial Brief, both pointing to the inadequacy of the evidence, issued the Second Order with a view to providing the Defence with an opportunity to explain and illustrate in detail the elements supporting their position. For the purposes of the submissions to be filed in compliance with the Second Order, and as stated in it, the Defence has the discretion "*to decide how their submissions will be organised*" and to identify and address "*the issues for which, in their view, the evidence presented by the Prosecutor is not sufficient to sustain a conviction*".

See No. ICC-02/11-01/15-1182, Trial Chamber I, Single Judge, 13 June 2018, paras. 13-14.

Relevant decisions regarding procedural matters in general

Decision on the Request for an Extension of the Deadline (Pre-Trial Chamber I), No. ICC-01/04-62-tEN, 12 July 2005

Decision on the Prosecutor's Motion for Clarification and Urgent Request for Clarification of the Time-limit Enshrined in Rule 155 (Pre-Trial Chamber II), No. ICC-02/04-01/05-18, 18 July 2005 (unsealed on 13 October 2005)

Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from Warrants of Arrest, Motion for Reconsideration and Motion for Clarification (Pre-Trial Chamber II), No. ICC-02/04-01/05-60, 28 October 2005

Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Pre-Trial Chamber I), No. ICC-01/04-135-tEN, 31 March 2006

Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-108-Corr, 19 May 2006

Decision on the Defence Motion concerning the ex parte hearing of 2 may 2006 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-119, 22 May 2006

Decision on the Prosecution Motion for Reconsideration (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-123, 23 May 2006

Decision on the prosecution motion for reconsideration and, in the alternative, leave to appeal (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-166, 23 June 2006

Decision on the Requests of the Defence of 3 and 4 July 2006 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-268, 4 August 2006

Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence" (Appeals Chamber), No. ICC-01/04-01/06-568 OA3, 13 October 2006

Decision on the "Submissions requesting a stay of proceedings in limine litis" filed by the Ad Hoc Counsel for the Defence (Pre-Trial Chamber I), No. ICC-02/05-25-tENG, 2 November 2006

Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006 (Appeals Chamber), No. ICC-01/04-01/06-772 OA4, 14 December 2006

Decision on Prosecutor's "Application to lift redactions from applications for Victims' Participation to be provided to the OTP" and on the Prosecution's further submissions supplementing such Application, and request for extension of time (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-209, 20 February 2007

Reasons for the "Decision on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007" issued on 16 February 2007 (Appeals Chamber), No. ICC-01/04-01/06-834 OA8, 21 February 2007

Decision on the Requests submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence (Pre-Trial Chamber I), No. ICC-01/04-373, 17 August 2007

Redacted version of "Decision on the prosecution's filing entitled 'Prosecution's provision of information to the Trial Chamber' filed on 3 September 2007" (Trial Chamber I), No. ICC-01/04-01/06-963-Anx1, 26 September 2007

Decision on the request for clarification by the OPCD (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-403, 3 October 2007

Decision on the procedures to be adopted for ex parte proceedings (Trial Chamber I), No. ICC-01/04-01/06-1058, 6 December 2007

Decision on the "Prosecution's Urgent Application for Extension of Time to File Document in Support of Appeal"(Appeals Chamber), No. ICC-01/04-01/07-115 OA, 18 December 2007

Decision on the Defence Request Concerning Languages (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-127, 21 December 2007

Decision on the "Demande du BPCV d'accéder au document confidentiel déposé par le Conseil des Fonds d'affectation spéciale au profit des victimes le 7 février 2008" (Pre-Trial Chamber I), No. ICC-01/04-456, 18 February 2008

Decision on the Joinder of the Cases against Germain Katanda and Mathieu Ngudjolo Chui (Pre-Trial Chamber I), No. ICC-01/04-01/07-257, 10 March 2008

Judgment on the appeal of Mr. Germain Katanga against the decision of Prc-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages" (Appeals Chamber), No. ICC-01/04-01/07-522 OA3, 27 May 2008

Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (Trial Chamber I), No. ICC-01/04-01/06-1401, 13 June 2008

Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of Proceedings" (Trial Chamber I), No. ICC-01/04-01/06-1467, 3 September 2008

Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008" (Appeals Chamber), No. ICC-01/04-01/06-1486 OA13, 21 October 2008

Decision on Defence Counsel's "Request for conditional stay of proceedings (Pre-Trial Chamber II), No. ICC-02/04-01/05-328, 31 October 2008

Reasons for Oral Decision lifting the stay of proceedings (Trial Chamber I), No. ICC-01/04-01/06-1644, 23 January 2009

Decision issuing Annex accompanying Decision lifting the stay of proceedings of 23 January 2009 (Trial Chamber I), No. ICC-01/04-01/06-1803, 23 March 2009

Public redacted version of the "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" of 20 November 2009 (ICC-01/04-01/07-1666-Conf-Exp) (Trial Chamber II), No. ICC-01/04-01/07-1666-Red-tENG, 3 December 2009

Redacted Decision on the Prosecution's Urgent Request for Variation of the Time- Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU (Trial Chamber I), No. ICC-01/04-01/06-2517-Red, 8 July 2010

Decision on the Participation of Victims in the Appeal against Trial Chamber I's Decision to Stay the Proceedings (Appeals Chamber), No. ICC-01/04-01/06-2556 OA18, 18 August 2010

Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU" (Appeals Chamber), No. ICC-01/04-01/06-2582 OA18, 8 October 2010

Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings" (Trial Chamber I), No. ICC-01/04-01/06-2690-Red2, 7 March 2011

Decision on the "Defence request for a permanent stay of proceedings" (Pre-Trial Chamber I), No. ICC-01/04-01/10-264, 1 July 2011

Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (Pre-Trial Chamber II), No. ICC-01/09-02/11-185, 20 July 2011

Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence" (Appeals Chamber), No. ICC-01/09-02/11-365 OA3, 10 November 2011

Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), No. ICC-02/05-01/09-139-Corr, 12 December 2011

Decision on the translation of the Article 74 Decision and related procedural issues (Trial Chamber I), No. ICC-01/04-01/06-2834, 15 December 2011

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Dissenting Opinion of Judge Ozaki (Trial Chamber V(b)), No. ICC-01/09-02/11-830-Anx2, 18 October 2013

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Sixth decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute (Pre-Trial Chamber I), No. ICC-02/11-01/11-668, 11 July 2014

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Decision on the Prosecution's revised cooperation request (Trial Chamber V(b)), No. ICC-01/09-02/11-937, 29 July 2014

Decision on "Prosecution Request for Extension of Page Limit" (Pre-Trial Chamber I), No. ICC-02/11-01/11-677, 29 July 2014

Decision on "Prosecution's Request for Measures under Regulation 101(2) of the Regulations of the Court" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-133, 28 August 2014

Decision on the "Defence request to amend the document containing the charges for lack of specificity" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-143, 1 September 2014

Decision on the Defence request for leave to appeal the "Decision on the Confirmation of Charges against Laurent Gbagbo" (Pre-Trial Chamber I), No. ICC-02/11-01/11-680, 11 September 2014

Decision on the "Defence request to amend the document containing the charges to exclude prejudicial facts" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-150, 11 September 2014

Decision on the "Defence request to amend the document containing the charges for violation of the rule of speciality" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-151, 11 September 2014

Decision on the Application of the Defence for Mr. Gbagbo of 23 September 2014 (ICC-02/11-01/11-685) (Presidency), No. ICC-02/11-01/11-690, 7 October 2014

Decision on the urgent request of the Defence for Mr Gbagbo to attend his mother's funeral (Trial Chamber I, No. ICC-02/11-01/11-711-Red, 29 October 2014

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Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute" (Appeals Chamber), No. ICC-01/04-01/06-3122 A4 A6, 1 December 2014

Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute (Trial Chamber V(b)), No. ICC-01/09-02/11-982, 3 December 2014

Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council (Pre-Trial Chamber I), No. ICC-01/11-01/11-577, 10 December 2014

Decision on the confirmation of charges against Charles Blé Goudé (Pre-Trial Chamber I), No. ICC-02/11-02/11-186, 11 December 2014

Decision on Prosecution requests to join the cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé and related matters (Trial Chamber I), No. ICC-02/11-01/15-1, 11 March 2015

Decision on requests for clarification concerning review of the case record and extension of time (Trial Chamber I), No. ICC-02/11-01/15-30, 13 April 2015

Decision on the Prosecution request for an extension of page limit for the Pre-Trial Brief (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-131, 10 July 2015

Decision on the Defence request on the suspension of time limits during the judicial recess (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-135, 14 July 2015

Decision on urgent Prosecution request for an extension of the word count limit for the Pre-Trial Brief matters (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-138, 15 July 2015

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Decision on the Prosecutor's request for an unredacted or less redacted version of the document in support of appeal (Appeals Chamber), No. ICC-02/11-01/15-159-Red OA6, 23 July 2015

Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court (Trial Chamber I), No. ICC-02/11-01/15-185, 19 August 2015

Decision on Defence requests relating to the Prosecution's Pre-Trial Brief (Trial Chamber I), No. ICC-02/11-01/15-224, 16 September 2015

Order to conduct an examination of Mr Gbagbo under Rule 135 of the Rules (Trial Chamber I), No. ICC-02/11-01/15-253, 30 September 2015

Decision on the Gbagbo Defence request for leave to appeal the 'Decision on Defence requests relating to the Prosecution's Pre-Trial Brief (Trial Chamber I), No. ICC-02/11-01/15-307, 21 October 2015

Decision on the Gbagbo Defence Request to hold opening statements in Abidjan or Arusha (Trial Chamber I), No. ICC-02/11-01/15-316, 26 October 2015

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Decision on the request from the authorities of Côte d'Ivoire to attend trial proceedings (Trial Chamber I), No. ICC-02/11-01/15-381, 8 January 2016

Decision on requests concerning site visits (Trial Chamber I), No. ICC-02/11-01/15-386, 12 January 2016

Public redacted version of 'Decision on Gbagbo Defence request for implementation of certain protective measures to facilitate its investigations', 30 November 2015, No. ICC-02/11-01/15-351-Conf (Trial Chamber I), No. ICC-02/11-01/15-351-Red, 13 January 2016

Decision pursuant to article 108(1) of the Rome Statute (The Presidency), No. ICC-01/04-01/07-3679, 7 April 2016

Decision on Defence's request seeking partial reconsideration of "Decision on Defence preliminary challenges to Prosecution's expert witnesses and request for leave to reply" (Trial Chamber VI), No. ICC-01/04-02/06-1282, 18 April 2016

Decision adopting amended and supplemented directions on the conduct of the proceedings (Trial Chamber I), No. ICC-02/11-01/15-498, and Separate Opinion of Judge Henderson, No. ICC-02/11-01/15-498-Anx1, 4 May 2016

Decision on Defence request for reconsideration of oral ruling on admission of a document for impeachment purposes (Trial Chamber VI), No. ICC-01/04-02/06-1473, 3 August 2016

Second Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (Trial Chamber VI), No. ICC-01/04-02/06-1707, 4 January 2017

Decision on Mr Gbagbo's Detention (Trial Chamber I), No. ICC-02/11-01/15-846, and Dissenting Opinion of Judge Cuno Tarfusser, No. ICC-02/11-01/15-846-Anx, 10 March 2017

Public redacted version of the Decision on Mr Gbagbo's Detention (Trial Chamber I), No. ICC-02/11-01/15-1038-Red and Dissenting opinion of Judge Cuno Tarfusser, No. ICC-02/11-01/15-1038-Anx, 25 September 2017

Decision on the request for suspension of the time limit to respond to the Prosecutor's Trial Brief submitted by the Defence for Mr Gbagbo (Trial Chamber I), No. ICC-02/11-01/15-1141, 26 March 2018

Second Order on the further conduct of the proceedings (Trial Chamber I), No. ICC-02/11-01/15-1174, 4 June 2018

Decision on Mr Gbagbo's Request for revised and corrected translation of the Trial Brief and related orders (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-1177, 7 June 2018

Decision on "Urgent Prosecution's motion seeking clarification on the standard of a 'no case to answer' motion" (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-1182, 13 June 2018

2. Stay of proceedings

The power to stay proceedings is *par excellence* a power assumed by the guardians of the judicial process, the judges, to see that the stream of justice flows unpolluted. As stressed, in the recent decision of the English Court of Appeal R. v. S (SP) it is a discretionary power involving "*an exercise of judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence*".

Instances of stay of proceedings on grounds of abuse of process are provided by cases involving a) delay in bringing the accused to justice, b) broken promises to the accused with regard to his prosecution, c) bringing the accused to justice by illegal or devious means.

[…]

Not every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial.

[…]

The doctrine of abuse of process as known to English law finds no application in the Romano-Germanic systems of law.

Does the principle or doctrine of abuse of process find application under the Statute as part of the applicable law and in particular under the provisions of article 21(1)(b) and (c). In the first place the answer would depend on whether the Statute and Rules of Procedure and Evidence leave room for its application within the framework of the Court's process. Jurisdiction apart, admissibility is the only ground envisaged by the Statute for which the Court may validly refrain from assuming or exercising jurisdiction in any given cause.

Abuse of process is not listed as a ground for relinquishing jurisdiction in article 17 of the Statute. The previous decision of the Appeals Chamber in *Situation in the Democratic Republic of the Congo* "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" is instructive on the interpretation of article 21(1) of the Statute, particularly whether a matter is exhaustively dealt with by its text or that of the Rules of Procedure and Evidence, because in that case no room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject. This is said without implying that if the Statute was not exhaustive on the subject, abuse of process would find its place as an applicable principle of law under either sub-paragraphs (b) or (c) of paragraph 1 of article 21 of the Statute.

The next question to be answered is whether power inheres in or resides with the Court to stop proceedings for abuse of process as the doctrine is understood and applied under English common law. The Appeals Chamber shall not examine the implications of article 4(1) of the Statute for under no circumstances can it be construed as providing power to stay proceedings for abuse of process. The power to stay proceedings for abuse of process, as indicated, is not generally recognised as an indispensable power of a court of law, an inseverable attribute of the judicial power. The conclusion to which the Appeals Chamber is driven is that the Statute does not provide for stay of proceedings for abuse of process as such.

The doctrine of abuse of process had *ab initio* a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of the litigant, the accused in the criminal process, such as delay, illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him/her to justice.

Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.

[…]

Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed.

Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.

See No. ICC-01/04-01/06-772 OA4, Appeals Chamber, 14 December 2006, paras. 28-30, 33-37, and 39. See also No. ICC-01/04-01/07-1666-Red-tENG, Trial Chamber II, 3 December 2009, para. 36.

It is not a necessary precondition, therefore, for the exercise of this jurisdiction that the prosecution is found to have acted *mala fides*. It is sufficient that this has resulted in a violation of the rights of the accused in bringing him to justice.

This is an international criminal court, with the sole purpose of trying those charged with the "*most serious crimes of concern to the international community as a whole*" and the judges are enjoined, in discharging this important role, to ensure that the accused receives a fair trial. If, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary – indeed, inevitable – that the proceedings should be stayed. It would be wholly wrong for a criminal court to begin, or to continue, a trial once it has become clear that the inevitable conclusion in the final judgment will be that the proceedings are vitiated because of unfairness which will not be rectified. In this instance, in its filing of 9 June 2008, the prosecution went no further than raising the possibility that the Chamber may be provided atsome stage in the future with no more than incomplete and insufficient materials. There is, therefore, no prospect, on the information before the Chamber, that the present deficiencies will be corrected.

[…]

Although the Chamber is not rendered without further authority or legal competence by this decision, it means that unless this stay is lifted (either by this Chamber or the Appeals Chamber), the trial process in all respects is halted. In the circumstances, a hearing will take place in order to consider the release of the accused.

[…]

Although the Chamber has no doubt that this stay of proceedings is necessary, it has nonetheless imposed it with great reluctance, not least because it means the Court will not make a decision on issues which are of significance to the international community, the peoples of the Democratic Republic of the Congo, the victims and the accused himself. When crimes, particularly of a grave nature, are alleged it is necessary for justice that, whenever possible, a final determination is made as to the guilt or innocence of the accused. The judicial process is seriously undermined if a court is prevented from reaching a verdict on the charges brought against an individual. One consequence is that the victims will be denied an opportunity to participate in a public forum, in which their views and concerns were to have been presented and their right to receive reparations will be affected. The judges are acutely aware that by staying these proceedings the victims have, in this sense, been excluded from justice.

See No. ICC-01/04-01/06-1401, Trial Chamber I, 13 June 2008, paras. 90-91, and 94-95.

Before lifting the stay in the proceedings, the Trial Chamber must be satisfied, first, that it can adequately review – on a continuing basis – the Documents [falling under article 54(3)(e) of the Statute] in question, in a way which is susceptible to a meaningful appeal, and, second, that there is some real prospect that the accused will be given sufficient access to any Documents which the Chamber considers to be exculpatory.

See No. ICC-01/04-01/06-1467, Trial Chamber I, 3 September 2008, para. 30.

A conditional stay of the proceedings may be the appropriate remedy where a fair trial cannot be held at the time that the stay is imposed, but where the unfairness to the accused person is of such a nature that a fair trial might become possible at a later stage because of a change in the situation that led to the stay.

If the obstacles that led to the stay of the proceedings fall away, the Chamber that imposed the stay of the proceedings may decide to lift the stay of the proceedings in appropriate circumstances and if this would not occasion unfairness to the accused person for other reasons, in particular in light of his or her right to be tried without undue delay (see article 67(1)(c) of the Statute).

See No. ICC-01/04-01/06-1486 OA13, Appeals Chamber, 21 October 2008, paras. 4-5.

Already at the status conference on 10 June 2008, the Presiding Judge of the Trial Chamber distinguished "*a final decision halting the proceedings ... forever*" from "*imposing a stay ... which doesn't terminate the proceedings once and for all but which recognizes [that] at present it is not possible for there to be a fair trial, but in due course, depending on changed circumstances, it may be possible for there to be a fair trial*" (ICC-01/04-01/06-T-89-ENG, page 40, lines 8 to 13). Thus, the Trial Chamber envisaged that the stay it imposed may not be irreversible and absolute.

[…]

If the unfairness to the accused person is of such nature that – at least theoretically – a fair trial might become possible at a later stage because of a change in the situation that led to the stay, a conditional stay of the proceedings may be the appropriate remedy. Such a conditional stay is not entirely irreversible: if the obstacles that led to the stay of the proceedings fall away, the Chamber that imposed the stay may decide to lift it in appropriate circumstances and if this would not occasion unfairness to the accused person for other reasons, in particular in light of his or her right to be tried without undue delay (see article 67(1)(c) of the Statute). If a trial that is fair in all respects becomes possible as a result of changed circumstances, there would be no reason not to put on trial a person who is accused of genocide, crimes against humanity or war crimes – deeds which must not go unpunished and for which there should be no impunity (see paragraphs 4 and 5 of the Preamble to the Statute).

At the same time, the right of any accused person to be tried without undue delay (article 67(1)(c) of the Statute) demands that a conditional stay cannot be imposed indefinitely. A Chamber that has imposed a conditional stay must, from time to time, review its decision and determine whether a fair trial has become possible or

whether, in particular because of the time that has elapsed, a fair trial may have become permanently and incurably impossible. In the latter case, the Chamber may have to modify its decision and permanently stay the proceedings. The Appeals Chamber notes in this context that in the Impugned Decision, the Trial Chamber did not make any finding that the right of the accused under article 67(1)(c) of the Statute had been breached.

[…]

Thus, the finding of the Trial Chamber that it could potentially lift the stay of the proceedings is not in itself an indication that the decision to impose a stay was incorrect. The reference to the power to lift the stay was merely an acknowledgement of the fact that the stay of the proceedings in the present case was conditional and therefore potentially only temporary.

A Trial Chamber ordering a stay of the proceedings enjoys a margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached. For the reasons summarised below, the Appeals Chamber in the present case is not persuaded that the conclusion of the Trial Chamber that the proceedings must be stayed exceeded this margin of appreciation and therefore was erroneous.

See No. ICC-01/04-01/06-1486 OA13, Appeals Chamber, 21 October 2008, paras. 75, 80-81, and 83-84.

The interpretation attached by the Trial Chamber to article 54(3)(e) of the Statute cannot be reconciled with its wording. In relation to stay, the gravamen of the Prosecutor's argument is that the possibility of disclosure at a future date was not explored to the degree necessary before concluding that it was unattainable. In such circumstances stay, which has a long-term perspective, was a premature and unwarranted measure; a fact also borne out by what the Trial Chamber itself visualises – that the lifting of the stay of the proceedings could not be ruled out. While he agrees that stay may be imposed if there is no prospect of a fair trial, this prospect had not vanished in this case.

[…]

The Trial Chamber attached no conditions to the order to stay the proceedings, whereas its foundation, impossibility of holding a fair trial, underlined the permanence of the order. Impossibility admits of no qualification. It derives from the judgment of the Appeals Chamber of 14 December 2006 that stay brings the proceedings to an end. This is the inevitable outcome of impossibility to piece together the constituent elements of a fair trial. Stay is therefore irrevocable.

See No. ICC-01/04-01/06-1486 OA13, Appeals Chamber, Separate Opinion of Judge Pikis, 21 October 2008, paras 23 and 50.

The Prosecutor has elected to act unilaterally in the present circumstances, and he declines to be "*checked*" by the Chamber. In these overall circumstances, it is necessary to stay these proceedings as an abuse of the process of the Court because of the material non-compliance with the Chamber's orders of 7 July 2010, and more generally, because of the Prosecutor's clearly evinced intention not to implement the Chamber's orders that are made in an article 68 context, if he considers they conflict with his interpretation of the prosecution's other obligations. Whilst these circumstances endure, the fair trial of the accused is no longer possible, and justice cannot be done, not least because the judges will have lost control of a significant aspect of the trial proceedings as provided under the Rome Statute framework. Whilst the stay of the proceedings is in place, the Chamber will deal with any application for leave to appeal on this or any related issue that is filed.

See No. ICC-01/04-01/06-2517-Red, Trial Chamber I, 8 July 2010, para. 31.

Sanctions under article 71 of the Statute are the proper mechanism for a Trial Chamber to maintain control of proceedings when faced with the deliberate refusal of a party to comply with its orders. Before ordering a stay of proceedings because of a party's refusal to comply with its orders, a Trial Chamber should, to the extent possible, impose sanctions and give such sanctions reasonable time to bring about compliance.

[…]

A stay of proceedings is a drastic remedy. It brings proceedings to a halt, potentially frustrating the objective of the trial of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Rome Statute. It is an exceptional remedy. The Appeals Chamber's judgment [of 14 December 2006] sets a high threshold for a Trial Chamber to impose a stay of proceedings, requiring that it be "*impossible to piece together the constituent elements of a fair trial*".

The Appeals Chamber should not substitute its judgment for that of the Trial Chamber but rather should review whether the Trial Chamber went beyond its margin of appreciation in determining that the threshold was met.

Recourse to sanctions enables a Trial Chamber, using the tools available within the trial process itself, to cure the underlying obstacles to a fair trial, thereby allowing the trial to proceed speedily to a conclusion on its merits. Doing so, rather than resorting to the significantly more drastic remedy of a stay of proceedings, is in the interests, not only of the victims and of the international community as a whole who wish to see justice done, but also of the accused, who is potentially left *in limbo*, awaiting a decision on the merits of the case against him by the International Criminal Court or another court. Accordingly, the Appeals Chamber finds that, to

the extent possible, a Trial Chamber faced with a deliberate refusal of a party to comply with its orders which threatens the fairness of the trial should seek to bring about that party's compliance through the imposition of sanctions under article 71 before resorting to imposition of a stay of proceedings.

In predicating the stay of proceedings on its perceived loss of control over proceedings from that point forward, the Trial Chamber did not conclude that a fair trial already had become irreparably impossible. To the contrary, the Trial Chamber considered that, if the circumstances changed, a fair trial could conceivably become possible once again. There was, as such, no obstacle to imposing sanctions and allowing them a reasonable opportunity to induce compliance and, therefore, to change the very circumstances which made a fair trial prospectively impossible. In the view of the Appeals Chamber, the Trial Chamber therefore exceeded its margin of appreciation when it found that it had lost control of the proceedings and that, consequently, a fair trial had become impossible and a stay of proceedings was required. It is the view of the Appeals Chamber that, before ordering the stay of proceedings, the Trial Chamber should have imposed sanctions and given such sanctions a reasonable time to bring about their intended effects.

See No. ICC-01/04-01/06-2582 OA18, Appeals Chamber, 8 October 2010, paras. 3, 55-56, and 60-61. See also No. ICC-01/04-01/10-264, Pre-Trial Chamber I, 1 July 2011, p. 5.

On the basis of the jurisprudence of the Appeals Chamber, this undoubtedly drastic remedy is to be reserved strictly for those cases that necessitate, on careful analysis, taking the extreme and exceptional step of terminating the proceedings (as opposed to adopting some lesser remedy).

[…]

The Chamber is persuaded that it will be able, at the end of the case, to review in detail the instances in which it is suggested the prosecution failed in its duty to ensure that it was submitting reliable evidence. If the Chamber concludes that this occurred in any of the instances relied on by the defence, the appropriate remedy will lie in the Court's approach to the evidence in question, and particularly the extent to which it is to be relied on. A failure to ensure that the Chamber has received reliable evidence, especially when the prosecution was on notice that significant doubts existed in relation to material in question, may affect the Chamber's conclusions on the relevant area or issue. On the facts advanced by the defence on this issue, the suggested failings on the part of the prosecution – including the suggestion that on occasion the Prosecutor deliberately avoided the process of verification – are not so egregious as to necessitate the termination of the trial.

See No. ICC-01/04-01/06-2690-Red2, Trial Chamber I, 7 March 2011, paras. 168 and 204.

CONSIDERING that, even if it were to be determined that the Prosecutor erred in characterizing the nature of the proceedings concerning the suspect pending before the German authorities at the time of the submission of the Application, such behaviour cannot be equated to the types of conduct that usually form a basis for a stay of proceedings due to an abuse of judicial process (which typically include delays in bringing the accused to justice, broken promises to the accused with regard to his prosecution and bringing the accused to justice by illegal or devious means);

CONSIDERING that, accordingly, such behaviour fails to reach the threshold of gravity which must be present in a purported violation of the rights of the accused for such violation to trigger the stay of the proceedings;

See No. ICC-01/04-01/10-264, Pre-Trial Chamber I, 1 July 2011, p. 6.

International criminal courts and tribunals have determined that they have the power to stay criminal proceedings, which stems from the concept of "*inherent jurisdiction*" of the international institutions in question.

The Chamber considers it important to clarify that "*inherent*" powers or jurisdiction in the context of ICC proceedings should be understood as meaning "*incidental jurisdiction*".

This interpretation of "*inherent jurisdiction*" is well-grounded in international law, which generally recognises that an international body or organisation "*must be deemed to have those powers which, though not expressly provided in the constitutive instrument, are conferred upon it by necessary implication as being essential to the performance of its duties*".

However, the Chamber wishes to stress that such inherent powers or incidental jurisdiction may only be invoked in a restrictive manner in the context of the ICC. This *caveat* is important for the reason, among others, that its proceedings are governed by an extensive legal framework of instruments in which the States Parties have spelt out the powers of the Court to a great degree of detail. This restrictive approach should particularly be adopted when considering a procedural step such as stay of proceedings. Not only is this procedural step not contemplated in the Rome Statute or its procedural instruments, as recognized by the Appeals Chamber, but it might appear contradictory to the object and purpose of the Court, as it may frustrate the possibility of administering justice in a case. Such a step should indeed be exceptional, when the specific circumstances of the case render a fair trial impossible.

In the view of the Chamber, to conceive of a stay of proceedings as a remedy in every case in which a claim of frustration of access to information or facilities needed for trial preparation has been made, would run contrary to the responsibility of trial judges to relieve unfairness as part of the trial process. As the Appeals Chamber has

noted, the stay of the proceedings is the necessary remedy only if (i) the "*essential preconditions of a fair trial are missing*", and (ii) there is "*no sufficient indication that this will be resolved during the trial process*".

[…]

Moreover, the Chamber notes that national jurisdictions also have been careful to avoid granting applications of stay of proceedings on grounds of speculative or vague claims of impeded defence investigations. The analysis requires scrutiny of what exactly the defence is impeded from advancing in light of the detail of the particular charges. With regard to missing evidence, allegations need to be specific as opposed to vague speculations that lost documents or unavailable witnesses might have assisted the defendants, and the Court should then critically examine how important the missing evidence is in the context of the case as a whole. The evidence must both possess an apparent exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Mere speculation for which there is no evidential support falls short of that mark.

[…]

The defence argues that it is a waste of time and resources to go through a trial that may possibly result in a stay of proceedings after all. That argument is unpersuasive. For one, the primary consideration for the existence of this Court is to do justice. Economy of time and money will always be kept highly in mind. But it is only a secondary consideration.

See No. ICC-02/05-03/09-410, Trial Chamber IV, 26 October 2012, paras. 74-79, 95, and 156.

To sum up, as I fully support the outcome of the Chambers decision and much of its reasoning, I am also of the separate opinion, first, that in view of the almost vanishing rareness of the possibility of prevailing on an application to stay proceedings before the completion of the evidence, there is much practical sense in a judicial policy that discourages applications for stay, or defers rulings on such applications, until the conclusion of evidence in the case. The procedural costs of such litigation do not justify a rampant system of judicial indulgence of counsel in wispy hopes of bagging the wild goose of stay at the stage prior to trial. A policy that discourages such applications or encourages deferment of their determination until the end of the evidence will enable the Trial Chamber to see not only the fullest scope of any prejudice resulting from obstacles to fair trial, but also that the unfairness in question had indeed defied the power of the Trial Chamber to relieve against such prejudice.

Second, as a matter of principle, fault on the part of the prosecution or the victim should be a factor to be considered in any inquiry on stay of proceedings. This is a matter of fairness and justice now largely accepted by pre-eminent national courts with great experience in the administration of criminal justice, and whose concerns for fair trial are no less keen than those of this Court. The approach is consistent with the view that fairness of trial is not a prerogative of defendants alone, but something in which prosecutors and victims have a share. And the good sense of that approach is evident with a judicial policy that favours deferring decisions on stay applications until the completion of the evidence, when the Trial Chamber is best able to take all factors of possible unfairness of trial, including their origins, into account in the ultimate outcome in the case – which may be a stay at that point or a verdict of acquittal on grounds of unfair trial.

Finally, there is a fundamental problem that confronts this particular Court as regards the idea of exercise of the power to stay proceedings. It is a problem of legitimacy that lies at the very root of that manner of jurisdiction. The problem centres on questions as to the source of that power, often described as "*inherent jurisdiction*". Its source cannot be the same as the fountain of unlimited reserve of residual power that common law superior courts are said to possess by virtue of their history and heritage. Nor is the problem of legitimacy of this "*inherent jurisdiction*" wholly resolved by embracing the humbler usage of the term as meaning "*incidental jurisdiction*". For, the proper meaning of incidental jurisdiction is logically inconsistent with its use to decline to engage in the exercise of the primary jurisdiction – which at the ICC is to inquire into properly confirmed charges of criminal conducts that shock the conscience of humanity.

See No. ICC-02/05-03/09-410, Trial Chamber IV, Concurring Separate Opinion of Judge Eboe-Osuji, 26 October 2012, paras. 131-133.

The *Lubanga* OA 4 Judgment thus clarifies that requests for a stay of proceedings based on alleged violations of the suspect's fundamental rights are not jurisdictional in nature. Accordingly, the Pre-Trial Chamber's decision to reject the suspect's request for a stay of proceedings was not a "*decision with respect to jurisdiction*" in terms of article 82(1)(a) of the Statute. Rather, it was a separate decision, contained in the Impugned Decision, which was unrelated to the question of the jurisdiction of the Court. It could therefore only be appealed with the leave of the Pre-Trial Chamber under article 82(1)(d) of the Statute. In the view of the Appeals Chamber, the fact that the decision on the request for a stay of proceedings was contained in the same Impugned Decision that rejected Mr Gbagbo's challenge to the jurisdiction of the Court does not render the decision on the stay request appealable under article 82(1)(a) of the Statute. If this were the case, parties to the proceedings could unduly expand their right to appeal under article 82(1)(a) of the Statute by attaching other requests to jurisdictional challenges, which, if the Chamber ruled on them in the same document, would render them directly appealable.

[…]

The Appeals Chamber also recalls that, in the cases of *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* and *Prosecutor v. William Samoei Ruto, Henri Kiprono Kosgey and Joshua Arap Sang*, it declined to consider the interpretation of a contextual element of article 7(1) of the Statute in appeals brought under article 82(1)(a) of the Statute, finding that those issues were not jurisdictional in nature and therefore not properly before it; consequently, the Appeals Chamber rejected the appeals as inadmissible.

See No. ICC-02/11-01/11-321 OA2, Appeals Chamber, 12 December 2012, paras. 101 and 103.

The Chamber observes that the Statute does not expressly provide for either a termination or stay of proceedings. However, the jurisprudence of this Court has consistently confirmed the availability of a stay of proceedings where violations of the rights of the accused make it impossible for a fair trial to take place. In addition, article 85(3) of the Statute, which governs compensation to detained or convicted persons, refers to a termination of proceedings for a "*grave and manifest miscarriage of justice*" thereby implying availability of termination in cases of serious violations of fair trial rights.

It is clear from the more recent jurisprudence of the Court that not every violation of fair trial rights will justify the imposition of a stay (conditional or unconditional) of the proceedings and that this is an exceptional remedy to be applied as a last resort.

See No. ICC-01/09-02/11-728, Trial Chamber V, 26 April 2013, paras. 74 and 77.

The Chamber notes that the Prosecution has requested it to adjourn the Accused's case until the [Kenyan Government] complies with its obligations. Although the Prosecution has not submitted any specific legal standard or authority applicable to its adjournment request, the Chamber observes that an adjournment is a discretionary remedy arising from the Chamber's responsibility to control the conduct of proceedings in a fair and expeditious manner. In particular, rule 132(1) of the Rules provides that "[t]*he Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may postpone the date of the trial*".

Adjournments of varying duration may be necessitated by a range of practical as well as legal factors. Chambers of this Court have granted adjournments to, for example, enable further investigations, enable consideration of an issue by another Chamber, including on appeal, permit an accused to be excused, including in order to deal with an urgent domestic matter relating to national security, and due to difficulties in scheduling witnesses.

Therefore, and in contrast to the more "*drastic*" remedy of a stay of proceedings, the decision of the Chamber on whether or not to grant the requested adjournment is based on a weighing of the interests of justice in this case, including the rights of the accused and the interests of victims.

In respect of the Defence Termination Request, the Chamber recalls that it previously found "*termination*" and an "*unconditional stay of proceedings*" to have the same essential "*effect of permanently halting the proceedings without prospect of recommencement*". The Chamber therefore considers that the applicable standard to be applied to a termination of proceedings would be that outlined in its previous jurisprudence – and summarised most recently in the Chamber's "Decision on the Defence application for a permanent stay of the proceedings due to abuse of process".

The Chamber is fully aware of its duty to ensure that any further adjournment in this case is compatible with the rights of the accused. In particular, the Chamber is mindful of its obligation pursuant to article 64(2) of the Statute to ensure that the proceedings are conducted in a manner which is fair and expeditious and fully respects the rights of the accused, as well as its obligation to interpret and apply the law in a manner consistent with internationally recognised human rights. The Chamber adverts, in particular, to the right of every accused to be tried without undue delay. It is noted that proceedings in this case have been on-going for approximately three years, and that the start of trial has already been adjourned on a number of occasions. The Chamber considers that any further adjournment without justifiable and compelling reasons could constitute undue delay contrary to the rights of the accused.

The Chamber notes that the Prosecution has stated that it does not at this stage have sufficient evidence to prove guilt beyond reasonable doubt. As a general principle, the Chamber considers that it would be contrary to the interests of justice for the Prosecution to proceed to trial in circumstances where it believes it will not be in a position to present evidence sufficient to reach this evidentiary threshold. In the Chamber's view, the appropriate course of action in most circumstances where the Prosecution's evidence falls below the required threshold would be the prompt withdrawal of charges, as envisaged by regulation 60 of the OTP Regulations. It is noted that, in this case, the Prosecution has indicated that should the Prosecution Requests be denied by the Chamber or the Records Request not yield sufficient relevant material, it would be required to withdraw the charges.

See No. ICC-01/09-02/11-908, Trial Chamber V(b), 31 March 2014, paras. 76-81.

The Chamber observes that, while not explicitly provided for in the Statute, various chambers of this Court have consistently confirmed the availability of the remedy of a permanent stay of proceedings where it would be '*repugnant or odious to the administration of justice to allow the case to continue, or where the rights of the accused have been breached to such an extent that a fair trial has been rendered impossible*'.

[…]

The Chamber observes that, unlike the provisions applicable at the *ad hoc* tribunals, the Court's statutory framework does not prohibit Article 70 proceedings from being initiated and conducted by the same Prosecution team as the one involved in the related main proceedings. This was confirmed in the *Bemba* et al. Appeals Chamber Decision, when the Appeals Chamber considered that in initiating investigations under Article 70, the Prosecution '*merely acted in compliance with the Court's legal framework*' and pursuant to its duties under Articles 42 and 54(1)(b) to investigate and prosecute crimes within the jurisdiction of the Court, including offences against the administration of justice under Article 70 of the Statute which '*will almost always be related to other cases that* [it] *is investigating or prosecuting*'. The Appeals Chamber further noted that Rules 162(2)(c) and 165(4) of the Rules allow for a joinder of charges under Article 70 with charges under Articles 5 to 8, which '*suggests that the drafters of the Rules of Procedure and Evidence envisaged that charges under Article 70 of the Statute may be dealt with in the same proceedings as charges for crimes under Articles 6 to 8, including by the same Prosecutor, without this necessarily giving rise to a conflict of interest*'.

The Appeals Chamber's finding that "*it is generally preferable that staff members involved in a case are not assigned to related Article 70 proceedings of this kind*" needs to be seen in light of the aforementioned considerations, and its applicability needs to be determined on a case-by-case basis, in light of the circumstances at hand.

See No. ICC-01/04-02/06-1883, Trial Chamber VI, 28 April 2017, paras. 20 and 30.

The Chamber notes that permitting [a no-case to answer] motion may contribute to a shorter and more focused trial, because an acquittal on one or more of the counts as a result of a (partially) successful motion would lead to greater judicial economy and efficiency in a manner that promotes the proper administration of justice and the rights of the accused. However, entertaining such a motion may also entail a lengthy process requiring parties and participants' submissions and evaluation of the evidence by the Chamber, and may thus not necessarily positively affect the expeditiousness of the trial, even if successful in part.

See No. ICC-01/04-02/06-1931, Trial Chamber VI, 1 June 2017, para. 26.

While the Court's legal tests do not explicitly provide for a '*no case to answer*' procedure in the trial proceedings before the Court, it nevertheless is permissible. A Trial Chamber may, in principle, decide to conduct or decline to conduct such a procedure in the exercise of its discretion.

The discretion of the Trial Chamber as to whether or not to conduct a '*no case to answer*' procedure was not limited by internationally recognized human rights or as a result of the adoption of an adversarial trial structure.

[…]

In the view of the Appeals Chamber, a '*no case to answer*' procedure is not inherently incompatible with the legal framework of the Court. A Trial Chamber may decide to conduct such a procedure based on its power to rule on relevant matters pursuant to article 64(6)(f) of the Statute and rule 134(3) of the Rules. A decision on whether or not to conduct a '*no case to answer*' procedure is thus discretionary in nature and must be exercised on a case-by-case basis in a manner that ensures that the trial proceedings are fair and expeditious pursuant to article 64(2) and 64(3)(a) of the Statute.

See No. ICC-01/04-02/06-2026 OA6, Appeals Chamber, 5 September 2017, paras. 1-2, and 44.

Relevant decisions regarding Stay of Proceedings

Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006 (Appeals Chamber), No. ICC-01/04-01/06-772 OA4, 14 December 2006

Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (Trial Chamber I), No. ICC-01/04-01/06-1401, 13 June 2008

Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of Proceedings" (Trial Chamber I), No. ICC-01/04-01/06-1467, 3 September 2008

Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008" (Appeals Chamber), No. ICC-01/04-01/06-1486 OA13, 21 October 2008

Public redacted version of the "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" of 20 November 2009 (ICC-01/04-01/07-1666-Conf-Exp) (Trial Chamber II), No. ICC-01/04-01/07-1666-Red-tENG, 3 December 2009

Redacted Decision on the Prosecution's Urgent Request for Variation of the Time Limit To Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU (Trial Chamber I), No. ICC-01/04-01/06-2517-Red, 8 July 2010

Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU" (Appeals Chamber), No. ICC-01/04-01/06-2582 OA18, 8 October 2010

Decision on the "Defence request for a permanent stay of proceedings" (Pre-Trial Chamber I), No. ICC-01/04-01/10-264, 1 July 2011

Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings" (Trial Chamber I), No. ICC-01/04-01/06-2690-Red2, 7 March 2011

Decision on the defence request for a temporary stay of proceedings (Trial Chamber IV), No. ICC-02/05-03/09-410, 26 October 2012

Judgement on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of proceedings, No. ICC-02/11-01/11-321 OA2 (Appeals Chamber), 12 December 2012

Decision on defence application pursuant to Article 64(4) and related requests (Trial Chamber V), No. ICC-01/09-02/11-728, 26 April 2013

Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date (Trial Chamber V(b)), No. ICC-01/09-02/11-908, 31 March 2014

Public Redacted Decision as to the Further Steps for the Trial Proceedings (Trial Chamber IV), No. ICC-02/05-03/09-590-Red, 14 July 2014

Warrant of arrest for Abdallah Banda Abakaer Nourain (Trial Chamber IV), No. ICC-02/05-03/09-606, 11 September 2014

Corrigendum – Dissenting Opinion of Judge Eboe-Osuji in the Decision on 'Warrant of arrest for Abdallah Banda Abakaer Nourain' (Trial Chamber IV), No. ICC-02/05-03/09-606-Anx-Corr, 15 September 2014

Decision on Defence request for stay of proceedings with prejudice to the prosecution (Trial Chamber VI), No. ICC-01/04-02/06-1883, 28 April 2017

Decision on Defence request for leave to file a 'no case to answer' motion (Trial Chamber VI), No. ICC-01/04-02/06-1931, 1 June 2017

Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion" (Appeals Chamber), No. ICC-01/04-02/06-2026 OA6, 5 September 2017

3. Jurisdiction and admissibility

Articles 5-20 of the Rome Statute
Rules 44-62 of the Rules of Procedure and Evidence

The suspect was promptly brought before the Congolese national authority which, because he was being detained at that time in relation to national proceedings before the Congolese Military Courts, was competent under Congolese law to conduct the proceedings in the custodial State provided for in article 59(2) of the Statute. In the view of the Chamber, no material breach of article 59(2) of the Statute can be found in the procedure followed by the competent Congolese national authorities during the execution of the Court's Cooperation Request.

[…]

The Defence is currently challenging the jurisdiction of the Court by stating that "*article 21(3) vests the Court with the obligation to consider whether its exercise of personal jurisdiction over the suspect is consistent with such general principles of human rights, or whether, given the serious violations of his human rights, it would be an abuse of process to exercise personal jurisdiction over him in such circumstances*". Article 21(3) of the Statute states that the "*application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights*"; and that, according to those standards, any violations of the suspect's rights in relation to his arrest and detention prior to 14 March 2006 will be examined by the Court only once it has been established that there has been concerted action between the Court and the Democratic Republic of the Congo (DRC) authorities. Whenever there is no concerted action between the Court and the authorities of the custodial State, the abuse of process doctrine constitutes an additional guarantee of the rights of the accused; to date, the application of this doctrine, which would require that the Court decline to exercise its jurisdiction in a particular case, has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal.

[…]

In the course of the present proceedings under article 19 of the Statute, no issues has arisen to any alleged act of torture against or serious mistreatment of the suspect by the DRC national authorities prior to the transmission of the Court's Cooperation Request on 14 March 2006 to the said authorities; and that therefore the issue before the Chamber is to determine whether there was concerted action between the Court and the DRC authorities in connection with the arrest and detention of the suspect prior to 14 March 2006. In this respect, there is no evidence indicating that the arrest and detention of the suspect prior to the 14 March 2006 was the result of any concerted action between the Court and the DRC authorities; and that the Court will therefore not examine the lawfulness of the arrest and detention of the suspect by the DRC authorities prior to 14 March 2006.

See No. ICC-01/04-01/06-512, Pre-Trial Chamber I, 3 October 2006, pp. 8-11. See also No. ICC-01/04-01/06-803, Pre-Trial Chamber I, 29 January 2007, paras. 164-166.

Pursuant to article 19(2) of the Statute, the jurisdiction of the Court or the admissibility of a case may only be challenged by certain States or by an accused or a person for whom a warrant of arrest or summons to appear has been issued under article 58; at this stage of the proceedings no warrant of arrest or summons to appear has been issued; and the *Ad Hoc* Counsel for the Defence has no procedural standing to make a challenge under article 19(2)(a) of the Statute.

See No. ICC-02/05-34, Pre-Trial Chamber I, 22 November 2006, pp. 3-4. See also No. ICC-01/04-93, Pre-Trial Chamber I, 9 November 2005, p. 4

The jurisdiction of the Court is defined by the Statute. The notion of jurisdiction has four different facets: subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction – *jurisdiction ratione loci* – and lastly jurisdiction *ratione temporis*. These facets find expression in the Statute. The jurisdiction of the Court is laid down in the Statute: article 5 specifies the subject-matter of the jurisdiction of the Court, namely the crimes over which the Court has jurisdiction, sequentially defined in articles 6, 7, and 8. Jurisdiction over persons is dealt with in articles 12 and 26, while territorial jurisdiction is specified by articles 12 and 13(b), depending on the origin of the proceedings. Lastly, jurisdiction *ratione temporis* is defined by article 11.

The Statute itself erects certain barriers to the exercise of the jurisdiction of the Court, those set up by article 17, referable in the first place to complementarity (article 17(1)(a) to (b)) in the second to *ne bis in idem* (articles 17(1)(c), 20) and thirdly to the gravity of the offence (article 17(1)(d)). The presence of anyone of the aforesaid impediments enumerated in article 17 renders the case inadmissible and as such non-justiciable. Abuse of process or gross violations of fundamental rights of the suspect or the accused are not identified as such as grounds for which the Court may refrain from embarking upon the exercise of its jurisdiction.

Article 19 of the Statute regulates the context within which challenges to jurisdiction and admissibility may be raised by a party having an interest in the matter, including a person in the position of the suspect against whom a warrant of arrest had been issued. Jurisdiction under article 19 of the Statute denotes competence to deal with a criminal cause or matter under the Statute. Notwithstanding the label attached to it, the application of the suspect does not challenge the jurisdiction of the Court. The conclusion to which the Appeals Chamber is driven is that the application of the suspect and the proceedings following do not raise a challenge to the jurisdiction of the Court within the compass of article 19(2) of the Statute. What the appellant sought was that the Court should refrain from exercising its jurisdiction in the matter in hand. Its true characterization may be identified as a *sui generis* application, an atypical motion, seeking the stay of the proceedings, acceptance of which would entail the release of the suspect. The term "*sui generis*" in this context conveys the notion of a procedural step not envisaged by the Rules of Procedure and Evidence or the Regulations of the Court invoking a power possessed by the Court to remedy breaches of the process in the interest of justice. The application could only survive, if the Court was vested with jurisdiction under the Statute or endowed with inherent power to stop judicial proceedings where it is just to do so.

See No. ICC-01/04-01/06-772 OA4, Appeals Chamber, 14 December 2006, paras. 21-24.

Article 19(1) of the Statute gives the Chamber discretion to make an initial determination of the admissibility of the case before the issuance of a warrant of arrest or a summons to appear. Such discretion should be exercised only if warranted by the circumstances of the case, bearing in mind the interest of the person concerned. The Chamber is of the view that for the case to be admissible, it is a condition *sine qua non* that national proceedings do not encompass both the person and the conduct which are the subject of the case before the Court. On the basis of the evidence and information provided, the Chamber finds that the case falls within the jurisdictions of the Court and appears to be admissible.

See No. ICC-02/05-01/07-1-Corr, Pre-Trial Chamber I, 27 April 2007, paras. 18, and 24-25.

Article 19(1), second sentence of the Statute vests "*the Court*" (*i.e.*, its Chambers in the exercise of their judicial functions) with a broad power: it "*may, on its own motion, determine the admissibility of a case in accordance with article 17*". The broadness of such power, and the wide discretion which presides over its exercise, are made apparent by the use of the term "*may*": the authority to decide whether the determination of admissibility should be made, and, in the affirmative, at what specific stage of the proceedings such determination should occur, resides exclusively with the relevant Chamber. The sole limit entailed by the lean wording of the provision appears to be that the proceedings must have reached the stage of a case (including "*specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects*"), as opposed to the preceding stage of the situation following the Prosecutor's decision to commence an investigation pursuant to article 53 of the Statute. Apart from this procedural boundary, the Statute and the other statutory texts are silent as to the criteria which may or should guide a Chamber in deciding whether and when to resort to the power vested in it by article 19(1), second sentence, of the Statute. Accordingly, it is for the Court, in the exercise of its judicial functions and when appropriate, to establish appropriate criteria for determining whether the actual exercise of this *proprio rnotu* power is warranted in a given case.

[…]

Article 17 is the statutory provision governing the assessment of the admissibility of a case. Pursuant to article 17(1), a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.

For the purposes of the Proceedings, the relevant provisions appear to be article 17(a) and (b), since there is no issue that the persons sought by the Court have already been tried at the national level, or that the relevant crimes attain the threshold of sufficient gravity, is at stake. Pursuant to article 17(a) and (b), the paramount criterion for determining the admissibility of a case is the existence of a genuine investigation and prosecution at the national level in respect of the case; the willingness and ability of a State to genuinely prosecute and investigate crimes falling within the jurisdiction of the Court are the two fundamental concepts around which the notion of admissibility and the very principle of complementarity revolve.

See No. ICC-02/04-01/05-377, Pre-Trial Chamber II, 10 March 2009, paras. 14, and 35-36.

The question for the Chamber is whether the Motion was filed prior to or after the "*commencement of the trial*", within the meaning of article 19(4) of the Statute. In order to respond to this question, it must define the meaning of this term. Indeed, it should be determined whether the trial commences as soon as the Trial Chamber is constituted pursuant to article 61(11) of the Statute, or only at a later stage in the proceedings, when the participants make their opening statements before the Chamber prior to the first witnesses testifying.

[…]

The actual wording of article 19(4) of the Statute does not enable the meaning of the term "*commencement of the trial*" to be determined. The Chamber cannot therefore base its consideration on a purely literal interpretation of paragraph 4 and to define this term and highlight the actual intentions of the States Parties on this point. It is thus necessary to refer to the context of this paragraph and to read it in the light of the other paragraphs of article 19 and all the provisions of the founding documents of the Court. On this point, the Permanent Court of International Justice clearly indicated that "*the meaning* [of a treaty] *is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense*". This approach was in fact later confirmed by the Vienna Convention, which even widened it by inviting anyone interpreting a treaty to refer to all relevant instruments if required.

The Chamber must therefore first of all examine the ordinary meaning and use of the term "*trial*", and, in particular, the expression "*commencement of the trial*" or the phrase "*prior to the commencement of the trial*" at each of their occurrences in the Statute, the Rules and the Regulations of the Court.

Firstly, article 19 of the Statute, read as a whole, does not allow this question to be answered, as the afore mentioned terms only appear in paragraph 4 thereof.

Secondly, the truth of the matter is that a certain number of the provisions of the Statute and the Rules are written in very general or ambiguous terms and that it is not possible to clearly answer the question, by simply reading them, in the French or English version, and referring to their ordinary meaning. Indeed, a purely literal reading of these provisions does not seem to allow either of the two solutions mentioned in paragraph 30 to be elevated over the other. This is the case, for example, for articles 31(3), 56(3)(a) and 56(4) and article 61(9) in that the latter provides the Prosecutor with the option of withdrawing the charges with the permission of the Trial Chamber after the commencement of the trial. The same goes for articles 62, 64(7), 65(3), 65(4)(b), 68(5) and 84(1)(a) of the Statute, rule 58(2) of the Rules, which sets out the procedure to be followed for the purposes of article 19 of the Statute, as well as for rules 80(1) and 122(4) of the Rules.

Thirdly, although a number of other provisions in the Statute and the Rules appear to favour the argument that the trial commences as soon as the Trial Chamber is constituted by the Presidency, others seem to support the idea that the trial commences with the opening statements.

Without prejudging a contrary interpretation arising from a more in-depth analysis that could be given by the Chamber or any other chamber having to rule on one of these provisions, the following provisions seem to fall into the first category: the actual title of article 61 of the Statute (Confirmation of the charges before trial) read in conjunction with the title of Part VI of the Statute and of the Rules ("The trial"); articles 63, 64(2), 64(3)(a), 64(3)(b), 64(7), 67(d), the French version of the title of article 68, articles 74(1), 93(10)(b)(i)(a), the French version of rule 39, 86 rule 137 and the title of rule 165 of the Rules. Lastly, the Chamber notes the wording of regulation 86(3) of the Regulations of the Court, which seems to draw a distinction of a procedural nature between the trial phase and the appeals phase.

It is permissible to conclude from a reading of the afore-mentioned provisions that the Statute divides the proceedings into three separate phases: the pre-trial phase (investigation and prosecution), which is within the jurisdiction of the Pre-Trial Chamber, the trial phase, which, in English, could be called the "*trial proceedings*", which is assigned to the Trial Chamber, and the appeals phase, conducted before the Appeals Chamber. In any event, it appears to the Chamber that, for the purposes of these provisions, the trial is not confined to the evidentiary phase following opening statements.

Other provisions, however, seem to indicate that the trial only commences after the opening statements. This is the case in the Statute, for example, for articles 61(5) and 61(9), in that the latter suggests that there is an intermediate phase between the confirmation of charges and the commencement of the trial, which is confirmed by the wording of rule 128(1) of the Rules, article 64(3)(c) of the Statute, the chapeau of article 64(6), articles 64(8)(b) and 64(10), the French version of rule 64(2) of the Rules, articles 74(2), 76(1), 83(2)(b), 84(1)(b) and rules 77, 78, 81(2), 81(4), 84, 94(2), 132(1), 134(1), 134(2), 135(4) and 138. Finally, the Chamber notes the wording of regulations 55(2) and 56 of the Regulations of the Court, which seems to offer a narrow definition of the term "*trial*", limiting it to the presentation of evidence and argument during the hearing.

Thus, a contextual interpretation of the founding documents of the Court highlights the concurrency of two conceptions of the expression "*commencement of the trial*": one, which seems to harken back to the inquisitorial system, has the trial commencing as soon as the matter is referred to the trial chamber following the investigations and/or preliminary investigation and is described as the case to be answered; the other, which is closer to the common law system, sees the trial as the *momentum* of justice, described in fact as follows by *Black's Law Dictionary*: "*a formal judicial examination of evidence and determination of legal claims in an adversary proceeding*". The Chamber is of the view that the drafters of the Statute, who deliberately adopted a hybrid procedure which borrows from different legal cultures and systems, intended the "*commencement of the trial*" to mean both the start of the proceedings before the Trial Chamber ("*trial proceedings*" in English) and the commencement of hearings on the merits ("*trial*" or "*hearing*" in English), depending on the provision to be applied and the context in which it was to be applied.

As a result, it is impossible to generally and definitively choose either of the two conceptions that may define the expression "*commencement of the trial*" and apply it uniformly to all the provisions of the Statute. It is worth recalling that the founding documents of the Court were drafted by different working groups during diplomatic conferences. The co-existence of several meanings for the expression "commencement of the trial" which may be recognised in this case is thus simply the consequence of a laborious harmonisation process of all the work carried out, in several languages moreover, at these diplomatic conferences. As a result, the Chamber considers that the meaning of the expression "*commencement of the trial*" must be determined in light of the provision to be applied, based on a logical interpretation which gives full effect to the said provision and adheres to the intent of the States Parties when they adopted it. For example, in the decision setting the date of the trial, the Chamber held that the expression "*date of the trial*" in rule 132(1) of the Rules meant the date of the commencement of the hearing on the merits. Called upon to interpret article 61(9) of the Statute, Trial Chamber I, for its part, held, in a decision of 13 December 2007, that the expression "*before the trial has begun*" had the following meaning: "*although no definition is provided as to when the trial is considered to have begun, the Bench is persuaded that this expression means the true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses*".

Accordingly, it now falls to consider the specific case of article 19 of the Statute and to interpret the expression "*commencement of the trial*" used therein in the light of all the provisions of said article, in order to determine the exact intent of the States Parties when they adopted it.

In this regard, the Chamber notes that the provisions of paragraphs 5 to 8 of this article are clearly aimed at avoiding challenges to admissibility needlessly hindering or delaying the proceedings, which means that they must be brought as soon as possible, preferably during the pre-trial phase. Such is the case in paragraph 4 of article 19, as well as for paragraph 5 thereof, which requires States to make their challenges "*at the earliest opportunity*". The same is also true of rule 58 of the Rules, which lays down the procedure to be followed for the purposes of article 19 and provides that a challenge may be considered in the context of a confirmation of charges hearing or a trial proceeding, "*as long as this does not cause undue delay*", with the determination of the time limits for submitting observations being in the discretion of the Chamber. This same concern is indirectly expressed in rule 122(2) of the Rules, which requires the Pre-Trial Chamber, when called upon to rule on a challenge made during the confirmation hearing, to ensure adherence to the diligence expressly prescribed by rule 58 of the Rules. Furthermore, it should be recalled that rule 60 of the Rules, which supplements article 19(6) of the Statute, allows challenges to jurisdiction or admissibility made after a confirmation of the charges to be addressed to the Presidency. The very existence of this procedure illustrates how much the drafters of the Statute and of the Rules wanted challenges of this nature to be submitted at the earliest opportunity. In fact, with respect to all other applications or requests, the parties and participants must wait for the relevant chamber to be designated.

This emphasis, in article 19 of the Statute and rule 58 of the Rules, that challenges to admissibility be heard as early as possible and without undue delay, can be explained by the principle of complementarity. The drafters of the Statute clearly intended the Court to complement national courts, not to compete with them. Consequently, they endeavoured to avoid parallel and competing proceedings. In this regard, article 19(7) of the Statute specifically provides for the suspension of investigations by the Prosecutor when the admissibility of a case is challenged. Furthermore, given that investigations into crimes falling within the jurisdiction of the Court are very costly in terms of time and resources, it is in the interests of all, and primarily the suspects who have been deprived of their liberty, that the court with jurisdiction to try the case be determined as quickly as possible.

[…]

In sum, the Chamber considers that the Statute provides a three-phase approach in respect of challenges to admissibility. During the first phase, which runs until the decision on the confirmation of charges is filed with the Registry, all types of challenges to admissibility are permissible, subject to the requirement, for States, to make them at the "*earliest opportunity*". In the second phase, which is fairly short, running from the filing of the decision on the confirmation of charges to the constitution of the Trial Chamber, challenges may still be made if based on the *ne bis in idem* principle. In the third phase, in other words, as soon as the chamber is constituted, challenges to admissibility (based only on the *ne bis in idem* principle) are permissible only in exceptional circumstances and with leave of the Trial Chamber.

Consequently, after the decision on the confirmation of charges is filed with the Registry, a case must be considered admissible unless breach of the *ne bis in idem* principle is alleged.

See No. ICC-01/04-01/07-1213-tENG, Trial Chamber II, 15 July 2009, paras. 30, 33-45, and 49-50.

The Chamber is well aware that the concept of complementarity and the manner in which it operates goes to the heart of States' sovereign rights. It is also conscious of the fact that States not only have the right to exercise their criminal jurisdiction over those allegedly responsible for the commission of crimes that fall within the jurisdiction of the Court, they are also under an existing duty to do so, as explicitly stated in the Statute's preambular paragraph 6.

However, it should be borne in mind that a core rationale underlying the concept of complementarity aims at "*strik*[ing] *a balance between safeguarding the primacy of domestic proceedings* vis-à-vis *the Court on the one hand, and the goal of the Rome Statute to* 'put an end to impunity' *on the other hand. If States do not investigate, the Court must be able to step in*".

Therefore, in the context of the Statute, the Court's legal framework, the exercise of national criminal jurisdiction by States is not without limitations. These limits are encapsulated in the provisions regulating the inadmissibility of a case, namely articles 17-20 of the Statute. Thus, while the Chamber welcomes the express will of the Government of Kenya to investigate the case *sub judice*, as well as its prior and proposed undertakings, the Chamber's determination on the subject-matter of the present challenge is ultimately dictated by the facts presented and the legal parameters embodied in the Court's statutory provisions.

[…]

The Chamber has previously stated that the admissibility test envisaged in article 17 of the Statute has two main limbs: (i) complementarity (article 17(1)(a)-(c) of the Statute); and (ii) gravity (article 17(1)(d) of the Statute).

With respect to the first limb (complementarity), the Chamber underscores that it concerns the existence or absence of national proceedings. Article 17(1)(a) of the Statute makes clear that the Court "*shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or Prosecution*".

In its judgment of 25 September 2009, the Appeals Chamber construed article 17(1)(a) of the Statute as involving a twofold test: in considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or Prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1)(d) of the Statute.

As to the second limb (gravity), since the Government of Kenya does not contest this element, the Chamber shall confine its examination to the subject-matter defined in the Application, namely whether there are actually ongoing domestic proceedings (complementarity).

The Chamber notes that throughout the entire Application and the Reply, the Government of Kenya argues that it is currently investigating crimes arising out of the 2007-2008 Post-Election Violence. Thus, the Chamber considers that the applicable test, which adheres to the facts presented in the Application and the Reply, is the one referred to in the first half of article 17(1)(a) of the Statute, namely whether "*the case is being investigated or prosecuted by a State which has jurisdiction over it*".

The Chamber is satisfied that the Republic of Kenya is a State which has jurisdiction over the present case. However, the remaining question is whether this case "*is being investigated or prosecuted*" by the State within the meaning of article 17(1)(a) of the Statute.

In this respect, the Government seems to have understood, only in part, the test consistently applied by the Chambers of the Court in interpreting the scope of a "*case*" for the purposes of article 17 of the Statute. In the Application, the Government of Kenya asserted that the admissibility of the case should be assessed against the criteria established by the Chamber in the 31 March 2010 Authorisation Decision, to the effect that "*national investigations must cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC*".

Although in the Application, the Government does not contest the fact that for the purposes of defining a "*case*", national investigations "*must cover the same conduct*", it seems that it either misunderstood or disagreed with the remaining limb of the test, which requires that those investigations must also cover the same persons subject to the Court's proceedings. The Government of Kenya purportedly relies on the test established by the Chamber in the 31 March 2010 Authorisation Decision, which referred to "*the groups of persons that are likely to be the object of an investigation by the ICC*", and thus, concluded that it was not necessary, to investigate the same persons. Rather, it is sufficient to investigate "*persons at the same level in the hierarchy*".

The Chamber considers that this interpretation is misleading. The criteria established by the Chamber in its 31 March 2010 Authorisation Decision were not conclusive but simply indicative of the sort of elements that the Court should consider in making an admissibility determination within the context of a situation, namely when the examination is in relation to one or more "*potential*" case(s). At that stage, the reference to the groups of persons is mainly to broaden the test, because at the preliminary stage of an investigation into the situation it is unlikely to have an identified suspect. The test is more specific when it comes to an admissibility determination at the "*case*" stage, which starts with an application by the Prosecutor under article 58 of the Statute for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified. At this stage, the case(s) before the Court are already shaped. Thus, during the "*case*" stage the admissibility

determination must be assessed against national proceedings related to those particular persons that are subject to the Court's proceedings.

The Appeals Chamber pointed out that the admissibility of the case must be determined "*on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge*". Thus, in the absence of information, which substantiates the Government of Kenya's challenge that there are ongoing investigations against the three suspects, up until the party filed its Reply, the Chamber considers that there remains a situation of inactivity. Consequently, the Chamber cannot but determine that the case is admissible following a plain reading of the first half of article 17(1)(a) of the Statute. It follows that there is no need to delve into an examination of unwillingness or inability of the State, in accordance with article 17(2) and (3) of the Statute.

The Government's Request must, therefore, be rejected.

> See No. ICC-01/09-01/11-101, Pre-Trial Chamber II, 30 May 2011, paras. 44-54, and 70. See also No. ICC-01/09-02/11-96, Pre-Trial Chamber II, 30 May 2011, paras. 43-54, and 66.

When the Court has issued a warrant of arrest or a summons to appear, for a case to be inadmissible under article 17(1)(a) of the Statute, national investigations must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court. The words "*is being investigated*" in this context signify the taking of steps directed at ascertaining whether this individual is responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses.

If a State challenges the admissibility of a case, it must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing.

Save for express stipulations in rule 58 of the Rules of Procedure and Evidence, a Chamber seized of an admissibility challenge enjoys broad discretion in determining how to conduct the proceedings relating to the challenge.

The Pre-Trial Chamber found that Kenya failed to submit information that showed that concrete investigative steps had been taken against the suspects in question. The findings of the Pre-Trial Chamber as to Kenya's proposal to submit additional reports must be seen in this light. Since the Chamber concluded that, on the basis of the information before it, there was no sufficient indication that Kenya was investigating the suspects, it was not erroneous for the Chamber to state that Kenya's proposal to submit additional reports was actually an acknowledgment that there were no such investigations at that time. In addition, contrary to the submissions of Kenya, the Pre-Trial Chamber did not infer that investigations had to be completed before an admissibility challenge could be raised. As correctly pointed out by the Prosecutor, the Pre-Trial Chamber merely required that concrete progressive investigative steps be taken and demonstrated at the time when an admissibility challenge is raised.

The Pre-Trial Chamber rejected the Admissibility Challenge not because it did not trust Kenya or doubted its intentions, but rather because Kenya failed to discharge its burden to provide sufficient evidence to establish that it was investigating the three suspects. In sum, no clear error in the Pre-Trial Chamber's treatment of Kenya's proposal to submit updated investigation reports can be identified. Nor can it be said that the Pre-Trial Chamber was biased against Kenya.

In essence, Kenya's argument is that the Pre-Trial Chamber should not have decided on the Admissibility Challenge at the time it did, but should have given Kenya more time to submit additional evidence. The Appeals Chamber recalls that under rule 58 of the Rules of Procedure and Evidence, the Pre-Trial Chamber had the discretion to regulate the proceedings on the Admissibility Challenge. Under that rule it was open to the Pre-Trial Chamber to allow the filing of additional evidence in respect of whom Kenya adduced some evidence that it was investigating.

Nevertheless, the question that the Appeals Chamber has to resolve is not what the Pre-Trial Chamber could have done, but whether the Pre-Trial Chamber erred in what it did. As stated above at paragraph 89, rule 58 vests the Pre-Trial Chamber with broad discretion. The Appeals Chamber will interfere only if the Pre-Trial Chamber's exercise of discretion amounted to an abuse. In the present case, the Appeals Chamber cannot find such an abuse. The Pre-Trial Chamber decided the Admissibility Challenge on 30 May 2011, almost two months after it was filed. The Pre-Trial Chamber accepted the Filing of Annexes of 21 April 2011, even though the filing of such additional material was not envisaged either in rule 58 of the Rules of Procedure and Evidence or in the Pre-Trial Chamber's Decision on the Conduct of the Proceedings of 4 April 2011. The Pre-Trial Chamber also granted Kenya's request to reply to the submissions filed by the suspects, the Prosecutor and the victims. In these circumstances, it cannot be said that the Pre-Trial Chamber did not give Kenya sufficient opportunity to make its arguments or to present supporting evidence. In this context, the Appeals Chamber underlines once more the discretionary character of the Pre-Trial Chamber's decision. While it would have been open to the Pre-Trial Chamber to allow the filing of additional evidence, it was not obliged to do so, nor could Kenya

expect to be allowed to present additional evidence. Rather, it was for Kenya to ensure that the Admissibility Challenge was sufficiently substantiated by evidence.

See No. ICC-01/09-01/11-307 OA, Appeals Chamber, 30 August 2011, paras. 1-3, 82-85, and 97-98. See also No. ICC-01/09-02/11-274 OA, Appeals Chamber, 30 August 2011, paras. 1-3, 95-99, and 108-112.

The territorial and temporal scope of a situation is to be inferred from the analysis of the situation of crisis that triggered the jurisdiction of the Court through the referral. Crimes committed after the referral can fall within the jurisdiction of the Court when sufficiently linked to that particular situation of crisis. The existence of this link is made necessary by the principles governing the relationship between the Court and the criminal jurisdictions of the States, whereby the primary responsibility for investigating and prosecuting the most serious crimes remains vested in States. The Statute cannot be interpreted as permitting a State to permanently abdicate its responsibilities by referring a wholesale of present and future criminal activities comprising the whole of its territory, without any limitation whether in context or duration. Such an interpretation would be inconsistent with the proper functioning of the principle of complementarity.

As regards the wording of the Referral, the Chamber notes that it makes explicit reference to the DRC country as a whole ("*situation qui se déroule dans mon pays*"). The reference to crimes which have been committed, using the past tense ("*il apparaît que des crimes relevant de la compétence de la Cour Pénale Internationale ont été commis*"), does not seem to be a deliberate temporal limitation to the situation referred to the Court. Conversely, the terms of the referral simply recite those of article 14(1) of the Statute and appear merely instrumental to explaining the reasons leading the DRC to seek the intervention of the Court. By saying that this language would make it clear that the DRC Government "*had no intention other than to confer jurisdiction over a specifically identifiable series of crimes which had been committed on DRC territory prior to the Date of Referral the Defence entertains an argument of a speculative nature, which does not appear justified by the relevant wording, which is* per se *neutral. Furthermore, other temporal expressions employed in the Referral clearly indicate the object of such referral to be an ongoing situation of crisis* ("situation qui se déroule dans mon pays depuis le 2 juillet 2002")".

In addition, the Chamber recalls that, pursuant to articles 13 and 14 of the Statute, a State Party may only refer to the Prosecutor an entire "*situation in which one or more crimes within the jurisdiction of the Court appear to have been committed*". Accordingly, a referral cannot limit the Prosecutor to investigate only certain crimes, *e.g.* crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated. In the case at hand, as the situation of crisis referred was ongoing at the time of the Referral ("*situation qui se déroule dans mon pays*"), the boundaries of the Court's jurisdiction can only be delimited by the situation of crisis itself.

The Defence's analysis of the authorities relied upon by the Chamber at the time of the issuance of the warrant of arrest, and the challenge thereto, relies on a mischaracterization of the jurisdictional test developed and adopted in the present case. The Chamber recalls that, according to that test, crimes committed after the time of a referral may also fall within the jurisdiction of the Court, provided only that they are sufficiently linked to the situation of crisis which was ongoing at the time of the referral and was the subject of the referral. It is the existence, or non-existence, of such link, and not the particular timing of the events underlying an alleged crime, that is critical in determining whether that crime may or may not fall within the scope of the referral. Accordingly, the Chamber's determination that the crimes underlying the charges against the suspect are indeed linked to the crimes which prompted the Government of the DRC to refer the country's situation to the Court is affected neither by the fact that ongoing events in the Kivus at the time of the Referral allegedly "*lacked the objective criteria*" necessary for them to be incorporated in the scope of the Referral, nor by whether or not the FDLR in particular was at that same time committing crimes which might have contributed to the crisis triggering the referral to (and hence the jurisdiction of) the Court. If this sufficient link exists, then it is irrelevant whether particular individuals or events subsequently charged by the Prosecutor could not have been charged at the time of the original referral for crimes within the jurisdiction of the Court. The Chamber believes that the events underlying the crimes against the suspect are sufficiently linked to the factual scenario of crisis which prompted the DRC Referral.

See No. ICC-01/04-01/10-451, Pre-Trial Chamber I, 26 October 2011, paras. 21, 26-27, and 41-43.

The Government of Libya initiated an admissibility challenge against the suspect. In order to conduct the proceedings efficiently and expeditiously, the Chamber considers it appropriate to appoint, under regulation 80 of the Regulations, the Principal Counsel of the OPCV to represent the victims who have communicated with the Court in relation to the case. Rule 59(2) of the Rules of Procedure and Evidence mandates that the Registrar provide the victims, in a manner consistent with the duty of the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence, with a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged. The Chamber holds that this rule will be satisfied if the OPCV is notified of the public redacted version of the article 19 application, together with its public annexes. In conclusion, the Chamber, among others : (i) APPOINTS the principal counsel of the OPCV as Legal Representative of victims who have already communicated with the Court in relation to the case; (ii) INSTRUCTS the Registrar to provide the OPCV with information about victims who have communicated with the Court, as well as with any necessary assistance to contact the victim applicants

as soon as possible; (iii) ORDERS the Registrar to notify the admissibility challenge together with its public annexes to the OPCV; (v) INVITES the OPCV to submit observations on the admissibility challenge.

See No. ICC-01/11-01/11-134, Pre-Trial Chamber I, 4 May 2012, paras. 13-15.

The OPCV requests the Chamber to order the notification to the OPCV of: (i) the un-redacted version of the admissibility challenge; (ii) three confidential annexes to the admissibility challenge; and (iii) any other document filed as confidential in the case record which the Chamber might identify as relevant to the admissibility proceedings. The OPCV further requests to be systematically notified of any document submitted by the parties, participants, the Government of Libya and the Security Council related to the admissibility challenge, which might be classified as confidential, on the same basis as the other parties and participants in the admissibility proceedings. The Chamber notes that Libya has no objection to the OPCV being provided with the requested confidential documents as well as with any other document filed confidentially in the record of the case which the Chamber might identify as relevant to the admissibility challenge. Accordingly, the Chamber deems it appropriate to grant the OPCV access to the confidential version of the admissibility challenge together with the annexes thereto. Conversely, the Chamber considers that the question as to whether the OPCV should be notified of future documents related to the admissibility challenge classified as confidential must be determined on a case-by-case basis at the time that the documents are filed. Therefore, the Chamber requests the parties and participants to assess whether access to their future confidential filings in relation to the admissibility challenge may be given to the OPCV and, if so, to include the OPCV in the notification page of such filings. In this respect, the Chamber also notes that it has, pursuant to regulation 23 *bis* of the Regulations, the power to review *proprio motu* the level of confidentiality of any documents filed in the record of the case. In conclusion, the Chamber ORDERS the Registrar to notify to the OPCV the confidential version of the admissibility challenge together with the annexes thereto.

See No. ICC-01/11-01/11-147, Pre-Trial Chamber I, 15 May 2012, paras. 6-8.

The Appeals Chamber notes that the question as to whether the Prosecutor has been able to establish, both in law and by producing sufficient evidence, that an "*organizational policy*" existed was a question pertaining to the merits of the case. It was one of the questions before the Pre-Trial Chamber at the confirmation hearing for the purposes of assessing whether or not to confirm the charges in the present case pursuant to article 61 of the Statute. The enquiry that the Defence allege should have been carried out on a challenge to jurisdiction was therefore carried out as part of the confirmation process as, indeed, it had to be. Pursuant to article 61(6) of the Statute, at the confirmation hearing a suspect may contest both matters of statutory interpretation and evidential aspects of the Prosecutor's case. The arguments that the Defence made in its challenge to jurisdiction before the Pre-Trial Chamber could be made as part of the case during the confirmation proceedings. The Pre-Trial Chamber was thereafter required, pursuant to article 61(7) of the Statute, to "*determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged*".

See No. ICC-01/09-02/11-425 OA4, Appeals Chamber, 24 May 2012, para. 33 and No. ICC-01/09-01/11-414 OA3 OA4, Appeals Chamber, 24 May 2012, para. 27.

According to the Appeals Chamber's jurisprudence on the participation of victims in appeals under articles 19(6) and 82(1)(a) of the Statute, victims who made observations according to article 19(3) of the Statute and rule 59(3) of the Rules of Procedure and Evidence in the proceedings before the Pre-Trial or Trial Chamber may submit observations before the Appeals Chamber. For the purpose of regulating and expediting the conduct of the proceedings arising from this appeal, the Appeals Chamber in these Directions determines that the victims who were represented by the OPCV in proceedings on the Jurisdictional Challenge before the Pre-Trial Chamber and made observations pursuant to article 19(3) of the Statute may also submit observations on the document in support of the appeal and the response thereto.

See No. ICC-02/11-01/11-236 OA2, Appeals Chamber, 31 August 2012, para. 3.

A decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance. The Appeals Chamber held in this regard:

Generally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17(1)(a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa, [article 19(10) of the Statute] is clear evidence that the Statute assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory. Furthermore, the chapeau of article 17(1) of the Statute indicates that the admissibility of a case must be determined on the basis of the facts at the time of the proceedings on the admissibility challenge. The chapeau requires the Court to determine whether or not the case is inadmissible, and not whether it was inadmissible.

The Chamber is thus of the view that it would be unreasonable to disregard the circumstances currently prevailing, by preventing Libya to address, at this point in time, any changes or developments in the factual circumstances underlying its Admissibility Challenge. Accordingly, Libya must be permitted to address any facts that are of relevance to the determination of the admissibility of the case against the suspect. The OPCD

request to impose limits upon Libya's right to submit evidence and present evidence that is relevant to the admissibility of the case must therefore be rejected.

The OPCD requests, in the alternative, that, should Libya present evidence that does not fall within the scope of the initial Admissibility Challenge, the OPCD must be permitted to have a further deadline in order to present any additional evidence which might be relevant to the evidence presented by Libya concerning such new matters. The Chamber is of the view that, at this stage, the request of the OPCD is premature and based on mere speculations, given that, pending the final date for Libya's submission of evidence, it cannot be foreseen whether, and to what extent, Libya will present evidence of such a nature that it would be appropriate to grant the OPCD a further opportunity to present evidence relevant to the admissibility of the case against the suspect. In this respect, it is the Chamber's view that it is impossible to define *in abstracto* which evidence, if any, Libya may present that falls within this category. A determination in this regard may only be conducted *in concreto* in relation to specific pieces of evidence once submitted. Accordingly, the OPCD alternative request must also be rejected.

See No. ICC-01/11-01/11-212, Pre-Trial Chamber I, 2 October 2012, paras. 9-11.

The limit of 100 pages that applies to challenges to the jurisdiction of the Court and responses thereto (see regulation 38(1)(c) of the Regulations of the Court) is not applicable to observations by victims under article 19(3) of the Statute. This is explained by the more limited role of victims in the proceedings than that of, for instance, the Prosecutor, the accused person or person in respect of whom a warrant of arrest or summons to appear was issued, or a State challenging the jurisdiction or the admissibility of a case. The Appeals Chamber notes in this context that regulation 38(2)(a) of the Regulations of the Court establishes a page limit of 50 pages for "*representations made by victims to the Pre-Trial Chamber under article 15 paragraph 3, and rule 50, sub-rule 3*". Thus, where a longer page limit for observations by victims appeared necessary, the Regulations of the Court specifically provide for it.

See No. ICC-02/11-01/11-266 OA2, Appeals Chamber, 16 October 2012, para. 14.

The Chamber is of the view that it would be of assistance for the current proceedings to clarify its understanding with respect to the kinds of evidence, which can be considered evidence demonstrating that Libya is investigating the case against the suspect.

In particular, it is worth clarifying that the concept of "*evidence*", within the context of admissibility proceedings, does not refer exclusively to evidence on the merits of the national case that may have been collected as part of the purported domestic investigation to prove the alleged crimes. In this context, "*evidence*" rather means all material capable of proving that an investigation is ongoing and that appropriate measures are being envisaged to carry out the proceedings.

Accordingly, the Chamber is of the view that evidence for the purposes of substantiating the Admissibility Challenge may also include, depending on the circumstances, directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions contained in the file arising from the Libyan investigation of the case, to the extent that they demonstrate that Libyan authorities are taking concrete and progressive steps to ascertain whether the suspect is responsible for the conduct underlying the warrant of arrest issued by the Court.

As for the evidence on the merits of the domestic case, provision to the Chamber of samples of such evidence is necessary, in the present case, to substantiate Libya's claim that an investigation into the case against Mr Gaddafi is ongoing. In particular, without taking any position at this stage on its probative value, the Chamber is of the view that this evidence includes the kinds of material that Libya mentioned having collected as part of the domestic investigation, in particular: witness statements, intercept evidence, speeches of the suspect, telephone calls of the suspect from February 2011 onward (including those between him and other officials), photographic material, flight manifests showing transport arrangements made by the suspect for the use of mercenaries against protesters and bank payment transaction records showing payments of funds to engage those mercenaries.

See No. ICC-01/11-01/11-239, Pre-Trial Chamber I, 7 December 2012, paras. 10-12.

The use of the words "*crimes referred to in article 5*" indicates that the term "*crime in question*" in article 12(3) of the Statute refers to the categories of crimes in article 5 of the Statute, *i.e.* genocide, crimes against humanity, war crimes and the crime of aggression, and not to specific events in the past, in the course of which such crimes were committed.

The Appeals Chamber also finds that, in the absence of a stipulation in the declaration under article 12(3) of the Statute, the acceptance of jurisdiction is not limited to a given "*situation*" in terms of article 13 of the Statute, as appears to have been the view of the Pre-Trial Chamber. The Appeals Chamber accepts that it could be argued that the reference point of a declaration under article 12(3) of the Statute has to be a specific "*situation*" because rule 44(2) of the Rules of Procedure and Evidence refers to "*the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation*'' (emphasis added). However, it must be recalled that the question of whether a "*situation*" exists only becomes relevant when the Court considers whether it may exercise its jurisdiction under article 13 of the Statute. Pursuant to articles 13(a) and (b) of the Statute, a State

Party or the Security Council may refer a "*situation*" to the Court and, pursuant to articles 13(c) and 15 of the Statute, the Prosecutor may initiate an investigation *proprio motu*.

In contrast, article 12 of the Statute addresses, according to its title, the "*Preconditions to the exercise of jurisdiction*". The acceptance of jurisdiction upon ratification of, or accession to, the Statute is general and is not limited to specific "*situations*". Likewise, subject to any stipulations made in the declaration of acceptance, if a State accepts the jurisdiction of the Court under article 12(3) of the Statute, the acceptance is general and the question of whether a "*situation*" exists becomes relevant only once the Court considers whether it may exercise its jurisdiction pursuant to article 13 of the Statute. In this context, the Appeals Chamber notes that the Statute also serves the purpose of deterring the commission of crimes in the future, and not only of addressing crimes committed in the past. This supports the interpretation that article 12(3) of the Statute does not prevent a State from accepting the jurisdiction of the Court prospectively, with the consequence that the Court has jurisdiction in respect of any future events that may fall within one or more of the categories of crimes in article 5 of the Statute, as applicable.

The Appeals Chamber therefore concludes that the phrase "*crime in question*" in article 12(3) of the Statute neither limits the scope of a declaration to crimes that occurred in the past nor to crimes committed in a specific "*situation*". A State may accept the jurisdiction of the Court generally. This is not to suggest that a State, when accepting the jurisdiction of the Court, may not further limit the acceptance of jurisdiction within the parameters of the Court's legal framework. However, unless such a stipulation is made, the acceptance of jurisdiction is neither restricted to crimes that pre-date the declaration nor to specific "*situations*".

See No. ICC-02/11-01/11-321 OA2, Appeals Chamber, 12 December 2012, paras. 80-84.

As recently held by this Chamber in another case, "*in the absence of a proper reason justifying the contrary, the OPCV should in principle be given access to the relevant material* [concerning the admissibility challenge]".

See No. ICC-02/11-01/11-406, Pre-Trial Chamber I (Single Judge), 18 February 2013, para. 9.

The Chamber considers that the ability of a State genuinely to carry out an investigation or prosecution must be assessed in the context of the relevant national system and procedures.

[…]

Although the authorities for the administration of justice may exist and function in Libya, a number of legal and factual issues result in the unavailability of the national judicial system for the purpose of the case against the accused. As a consequence, Libya is, in the view of the Chamber, unable to secure the transfer of the accused's custody from his place of detention under the Zintan militia into State authority and there is no concrete evidence that this problem may be resolved in the near future. Moreover, the Chamber is not persuaded that the Libyan authorities have the capacity to obtain the necessary testimony. Finally, the Chamber has noted a practical impediment to the progress of domestic proceedings against the accused as Libya has not shown whether and how it will overcome the existing difficulties in securing a lawyer for the suspect.

Various fair trial considerations have been discussed above in the context of the Chamber's determination as to Libya's ability genuinely to investigate or prosecute the case. The Chamber has assessed Libya's capacity to investigate in accordance with the Libyan Code of Criminal Procedure, Libya's Constitutional Declaration and various human rights instruments that have been ratified by Libya. This assessment has been pertinent because those issues impact on Libya's ability to carry out its proceedings in accordance with Libyan law.

See No. ICC-01/11-01/11-344-Red, Pre-Trial Chamber I, 31 May 2013, paras. 200, and 215-216.

In the view of the Chamber, the admissibility of a case must be determined on the basis of the factual situation in existence at the time of the admissibility proceedings. Pursuant to article 17(1)(a) of the Statute, the Court is required to determine that a case is inadmissible where "*the case is being investigated or prosecuted*". Thus, the investigation or prosecution must be ongoing at the time of the admissibility proceedings. Indeed, this has been the interpretation of the Appeals Chamber, which has provided guidance on the issue, as follows:

> *Generally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17(1)(a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time.*

Therefore, in considering whether the case is admissible under article 17(1)(a) of the Statute, the crucial question for the Chamber is whether active steps are being taken in relation to the alleged prosecution of the accused in relevant country at the time of the admissibility proceedings. To this end, tangible proof must have been presented which supports the assertion that a national investigation or prosecution is ongoing.

Although a prosecution for economic crimes may have been initiated against the accused and that some initial procedural steps may have been undertaken prior to the accused's surrender to the Court in November 2011, there has been no activity in relation to the suspect since that date. In the circumstances, it has not been demonstrated that the accused "*is being prosecuted*" in his home country, within the meaning of article 17(1)(a) of the Statute. As a result, it is unnecessary for the Chamber to examine the arguments of the parties and participants as to whether the alleged prosecution relates to the "*same case*". Similarly, it is unnecessary for the

Chamber to consider the submissions on whether relevant country is unwilling or unable genuinely to carry out the prosecution.

See No. ICC-02/11-01/11-436-Red, Pre-Trial Chamber I, 11 June 2013, paras. 23-24, and 28.

Article 95 of the Statute states that "[w]*here there is an admissibility challenge under consideration by the Court pursuant to article 18 and 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19* [of the Statute]".

In interpreting the scope of applicability of article 95 of the Statute, the Chamber previously held that the entire legal framework of the Statute, including its complementarity and cooperation regimes, applies also in the situations following a referral by the Security Council under article 13(b) of the Statute.

In addition, the Chamber already clarified that the execution of all requests for cooperation under Part 9 of the Statute, including requests for arrest and surrender, may be postponed pursuant to article 95 of the Statute pending the resolution of an admissibility challenge, with the only explicit exception of cooperation requests related to the collection of evidence that the Chamber, pursuant to articles 18 or 19 of the Statute, "*has specifically ordered that the Prosecutor may pursue*".

Accordingly, the Chamber considers that, in principle, article 95 of the Statute provides the applicable legal basis for the postponement of the execution of the Surrender Request in the present case.

On the basis of the arguments raised by the parties, the Chamber will hereunder determine: (i) if, and to what extent, a Chamber's prior authorization is necessary in order for a State to postpone the execution of a surrender request when an admissibility challenge is pending before the Court; and (ii) whether the conditions for the applicability of article 95 of the Statute are met in the case against the accused.

[…]

The provision at hand does not require a prior authorization on the part of the Chamber in order for a State to avail itself of a statutory prerogative, insofar as the necessary pre-requisites for its exercise are met. Nevertheless, when a dispute arises as to whether these pre-requisites for the application of article 95 of the Statute are met, such dispute cannot be unilaterally settled by the State. It is for the Chamber to determine whether an admissibility challenge has been duly made within the terms of the applicable statutory provisions. In this sense, the Chamber shares the view expressed by Libya to the effect that "[t]*he Court does not have any discretion in the matter, once a challenge is properly made and remains unresolved*".

The Chamber recalls that, in the present case, it has already held that "*the postponement of a surrender request pursuant to* [article 95 of the Statute] *can only be made* '[w]here there is an admissibility challenge under consideration'". On that occasion, the Chamber determined that Libya's submissions at that time were not "*sufficient to trigger the applicability of article 95 of the Statute and justify a postponement of the execution of the Surrender Request*", given the absence of a proper challenge to the admissibility of the case against the accused to be disposed of by the Chamber.

The Chamber therefore concludes that the postponement of the execution of a surrender request while an admissibility challenge is pending falls within the prerogatives of the requested State and does not require a Chamber's prior authorization. However, as stated above, it falls within the Chamber's powers and duties to verify that the pre-requisites for the exercise by a State of this prerogative are met, namely that a proper admissibility challenge pursuant to article 19 of the Statute is under consideration by the Court.

[…]

The Chamber observes that, according to article 19(5) of the Statute, a State shall make a challenge to the admissibility of a case "*at the earliest opportunity*". The Chamber understands this reference to indicate that a State shall seize the Chamber of an admissibility challenge as soon as there are grounds on the basis of which the case would be inadmissible before the Court. Indeed, a State is required to challenge admissibility without delay once in a position to demonstrate the inadmissibility of the case before the Court, given that, as held by the Appeals Chamber, it "*cannot expect to be allowed*" to amend or complement a challenge made prematurely.

See No. ICC-01/11-01/11-354, Pre-Trial Chamber I, 14 June 2013, paras. 19-23, 25-27, and 31.

Article 17(1)(a) of the Statute states that "*the Court shall determine that a case is inadmissible where* [t]*he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation*". Article 17(2) and (3) of the Statute provide further clarification on what is to be considered unwillingness and inability genuinely to carry out the domestic proceedings.

As observed by the Appeals Chamber, article 17(1)(a) of the Statute contemplates a two-step test, according to which the Chamber, in considering whether a case is admissible before the Court, shall address in turn two questions: (i) whether, at the time of the proceedings in respect of a challenge to the admissibility of a case, there is an ongoing investigation or prosecution of the case at the national level (first limb); and, in case the answer to the first question is in the affirmative, (ii) whether the State is unwilling or unable genuinely to carry out such investigation or prosecution (second limb).

A case is therefore inadmissible before the Court when both limbs of article 17(1)(a) of the Statute are satisfied. As held by this Chamber in the decision on the admissibility of the case against Saif Al-Islam Gaddafi, "*the challenging State is required to substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case*". Indeed, "[t]*he principle of complementarity expresses a preference for national investigations and prosecutions but does not relieve a State, in general, from substantiating all requirements set forth by the law when seeking to successfully challenge the admissibility of a case*". The Chamber further recalls its consideration that "[t]*hat said,* […] *an evidentiary debate on the State's unwillingness or inability will be meaningful only when doubts arise with regard to the genuineness of the domestic investigations or prosecutions*". The Chamber is of the view that these considerations equally apply to the case against Mr Al-Senussi and, accordingly, adheres to the same approach for the purposes of the present decision.

See No. ICC-01/11-01/11-466-Red, Pre-Trial Chamber I, 11 October 2013, paras. 2-27.

According to article 17(1)(a) of the Statute, the first determination that the Chamber is required to make concerns the question of whether the case against Mr Al-Senussi "*is being investigated or prosecuted*" by Libya.

In the context of the proceedings related to the admissibility of the case against Mr Gaddafi, the Chamber, mindful of the Court's previous jurisprudence, set out its interpretation of the requirement that "*the case is being investigated or prosecuted by a State which has jurisdiction over it*" within the meaning of article 17(1)(a) of the Statute. For the purposes of the present decision, the Chamber adheres to the same approach, and, more specifically, considers that the following principles form part of the legal framework also applicable to the present case:

(i) in accordance with consistent jurisprudence of the Court, a determination of admissibility is case-specific, the constituent elements of a case before the Court being the "*person*" and the alleged "*conduct*"; accordingly, for the Chamber to be satisfied that the domestic investigation covers the same "*case*" as that before the Court, it must be demonstrated that: a) the person subject to the domestic proceedings is the same person against whom the proceedings before the Court are being conducted; and b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court;

(ii) the expression "*the case is being investigated*" must be understood as requiring the taking of "*concrete and progressive investigative steps*" to ascertain whether the person is responsible for the conduct alleged against him before the Court; as held by the Appeals Chamber, these investigative steps may include "*interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses*";

(iii) the parameters of the "*conduct*" alleged in the proceedings before the Court in each individual case are those set out in the document that is statutorily envisaged as defining the factual allegations against the person at the phase of the proceedings in question, in the present case the Warrant of Arrest; consequently, "*the determination of what is '*substantially the same conduct as alleged in the proceedings before the Court*' will vary according to the concrete facts and circumstances of the case and, therefore, requires a case-by-case analysis*";

(iv) the assessment of the subject matter of the domestic proceedings must focus on the alleged conduct and not on its legal characterisation. Indeed, "[t]*he question of whether domestic investigations are carried out with a view to prosecuting '*international crimes*' is not determinative of an admissibility challenge*" and "*a domestic investigation or prosecution for '*ordinary crimes*', to the extent that the case covers the same conduct, shall be considered sufficient*";

(v) "*a decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance*" and "*for* [a State] *to discharge its burden of proof that currently there is not a situation of '*inaction*' at the national level, it needs to substantiate that an investigation is in progress at this moment*";

(vi) in the case of a challenge under article 17(1)(a) of the Statute, "*a mere assurance that the national ongoing investigation covers the same as the case before the Court cannot be deemed sufficient to discharge* [the] *burden of proof in this regard*"; indeed, as held by the Appeals Chamber, "*the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case*";

(vii) in its analysis on whether the evidence presented demonstrates that the State is investigating or prosecuting the same case that is before the Court, "*the Chamber is not called to determine whether* [the] *evidence is strong enough to establish the* [person's] *criminal responsibility*"; a finding that the domestic authorities are taking steps to investigate the person's responsibility in relation to the same case as the one before the Court "*would not be negated by the fact that, upon scrutiny, the evidence may be insufficient to support a conviction by the domestic authorities*";

(viii) the evidence that the State is requested to provide in order to demonstrate that it is investigating or prosecuting the case is not only "*evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged crimes*" but extends to "*all material capable of proving that an investigation is ongoing*", including, for example, "*directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions*

contained in the file arising from the [domestic] *investigation of the case, to the extent that they demonstrate that* [the national] *authorities are taking concrete and progressive steps to ascertain whether* [the person] *is responsible for the conduct* [alleged in the proceedings before] *the Court*".

See No. ICC-01/11-01/11-466-Red, Pre-Trial Chamber I, 11 October 2013, paras. 65-66.

For the purposes of the consideration on whether Libya's proceedings cover the same case as the one before the Court, the Chamber is not called upon to determine whether the evidence collected by Libya as part of its investigation is sufficient to prove Mr Al-Senussi's criminal responsibility for the conduct alleged in the Warrant of Arrest. What the Chamber must determine are the parameters of the facts that Libya is trying to ascertain by taking concrete, identifiable and progressive steps, *i.e.* whether there is activity on the part of Libya's judicial authorities and at what such activity is directed.

The Chamber considers that the evidence submitted by Libya is sufficient to conclude that concrete and progressive steps are being undertaken by the domestic authorities in the proceedings against the suspect, and to identify the scope and the subject-matter of such proceedings.

Indeed, the Chamber is of the view that adequate, tangible and progressive investigative steps have been taken by the investigative team at the Prosecutor-General's office, including conducting interviews of witnesses, obtaining documentary evidence (such as medical reports, death certificates and written orders), and requesting that external sources provide relevant information. In particular, it appears that multiple lines of investigation are being followed by Libya's judicial authorities in order to shed light on the repression of the demonstrations against the Gaddafi regime. Witnesses were asked to clarify and elaborate on certain parts of their testimony, and requested to comment on information provided by other witnesses and on documentary evidence in the investigative record. The investigators also inquired about aspects of a potentially exculpatory nature, and information of this character, when provided by the witnesses, has been duly recorded in the minutes of the relevant interviews. Victims reporting commission of crimes were also required to substantiate their assertions with documentary evidence.

The Chamber is satisfied that the evidence relied upon by Libya for the purposes of the Admissibility Challenge demonstrates the taking of identifiable, concrete and progressive investigative steps in relation to the suspect's criminal responsibility (ultimately resulting in the transfer of the evidence presented by Libya allows the Chamber to discern the contours of the domestic case against the suspect and, in turn, to meaningfully compare the alleged conduct of the suspect with the conduct attributed to him in the Warrant of Arrest issued against him.

[…]

The Chamber is satisfied that the facts that have been investigated by the Libyan authorities in relation to the suspect, as summarised above, comprise the relevant factual aspects of the suspect's conduct as alleged in the proceedings before the Court. Furthermore, the Chamber recalls that whether all or some of the narrower "*incidents*" or "*events*" mentioned in the article 58 Decision are encompassed in the national proceedings may constitute a relevant indicator that the case before the domestic authorities is the same as the one before the Court. In this regard, the Chamber observes that the evidence provided by Libya indicates that the domestic proceedings cover, at a minimum, those events that are described in the article 58 Decision as particularly violent or that appear to be significantly representative of the conduct attributed to the suspect. The fact that such events are referred to in the evidence submitted by Libya confirms that the same conduct alleged against the suspect in the proceedings before the Court is subject to Libya's domestic proceedings.

In light of the above, the Chamber is satisfied that the evidence placed before it demonstrates that the Libyan competent authorities are taking concrete and progressive steps directed at ascertaining the criminal responsibility of the suspect for substantially the same conduct as alleged in the proceedings before the Court. Accordingly, Libya has demonstrated that it is undertaking domestic proceedings covering the "*same case*" as that before the Court within the meaning of article 17(1)(a) of the Statute.

See No. ICC-01/11-01/11-466-Red, Pre-Trial Chamber I, 11 October 2013, paras. 159-168.

The Chamber observes that the determination in accordance with article 17(1)(a), (2) and (3) of the Statute on the State's "*willingness*" and "*ability*" must be conducted in relation to the specific domestic proceedings concerning the same case that is prosecuted before the Court, for which the Chamber is satisfied that there is no situation of inactivity. In this sense, the Chamber's analysis in the present case is limited to the determination of whether Libya is unwilling or unable genuinely to carry out its ongoing proceedings against the suspect for the same case that is before the Court.

[…]

The Chamber reiterates that the assessment of Libya's ability and willingness to carry out its proceedings against the suspect must be made with reference to Libya's own national law. Nonetheless, the Chamber emphasises that it is not just any alleged departure from, or violation of, national law that may form a ground for a finding of unwillingness or inability. The Chamber will take into account only those irregularities that may constitute relevant indicators of one or more of the scenarios described in article 17(2) or (3) of the Statute, and that are sufficiently substantiated by the evidence and information placed before the Chamber.

The Chamber observes that unjustified delay in the national proceedings is a factor which can ground, in accordance with article 17(2)(b) of the Statute, a finding on unwillingness, provided that such unjustified delay is, in the circumstances of the case, "*inconsistent with the intent to bring the person to justice*". This is in line with the rest of article 17(2) of the Statute, which mandates the Chamber to examine factual circumstances with a view to ultimately discerning the State's intent as concerns its ongoing domestic proceedings against the specific individual.

[…]

The Chamber is of the view that a period of less than 18 months between the commencement of the investigation in relation to the suspect and the referral of the case against him to the Accusation Chamber cannot be considered to constitute an unjustified delay inconsistent with an intent to bring the suspect to justice.

The Chamber finds it sufficient to observe that the suspect is yet to appoint (or to have appointed to him) a lawyer to represent him in the domestic proceedings in Libya, notwithstanding his entitlement, under article 106 of Libya's Criminal Procedure Code, to benefit from legal representation. The Chamber also recalls that, upon completion of the proceedings before the Accusation Chamber, the case against the suspect cannot proceed further without a lawyer to represent him at trial. The Chamber considers that these are relevant considerations for the purposes of its determination under article 17(2)(c) and (3) of the Statute and. accordingly, the Chamber will take these facts into account, together with all the other relevant circumstances, for its conclusion on whether Libya is unwilling or unable genuinely to carry out the proceedings against the suspect.

The Chamber emphasises that alleged violations of the accused's procedural rights are not per se grounds for a finding of unwillingness or inability under article 17 of the Statute. In order to have a bearing on the Chamber's determination, any such alleged violation must be linked to one of the scenarios provided for in article 17(2) or (3) of the Statute. In particular, as far as the State's alleged unwillingness is concerned, the Chamber is of the view that, depending on the specific circumstances, certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings that the Chamber is required to make, having regard to the principles of due process recognized under international law, under article 17(2)(c) of the Statute. However, this latter provision, identifying two cumulative requirements, provides for a finding of unwillingness only when the manner in which the proceedings are being conducted, together with indicating a lack of independence and impartiality, is to be considered, in the circumstances, inconsistent with the intent to bring the person to justice.

In conclusion, the Chamber recalls that the assessment of Libya's ability and willingness to carry out its proceedings against the suspect must be made with reference to Libya's national legal system is limited to those considerations that have the potential to bear upon any of the scenarios envisaged under article 17(2) and (3) of the Statute. For the considerations expressed above in relation to the facts alleged by the Defence, the Chamber concludes that the information available to it does not indicate that the domestic proceedings against the suspect are tainted by departures from, or violations of, the Libyan national law such that they would support, in accordance with article 17 of the Statute, a finding of unwillingness or inability on the part of Libya to carry out the proceedings against the suspect.

The Chamber considers that submissions in relation to the precarious security situation in Libya – which is not in itself disputed by Libya – may be relevant to the Chamber's determination of the admissibility of the present case only if they bear upon the domestic proceedings against the suspect. Indeed, the existence of certain constraints under which a national system may be acting does not per se render the State unwilling or unable genuinely to carry out the proceedings with respect to a specific suspect. More precisely, in relation to '*inability*' under article 17(3) of the Statute, the Chamber is of the view that not simply any "*security challenge*" would amount to the unavailability or a total or substantial collapse of the national judicial system rendering a State unable to obtain the necessary evidence or testimony in relation to a specific case or otherwise unable to carry out genuine proceedings. Accordingly, the Chamber will hereunder address the main submissions alleged to have a tangible impact on the proceedings against the suspect, namely Libya's lack of control over (certain) detention facilities, the security threats faced by the Libyan judicial authorities and organs, and the security concerns for witnesses and victims involved in the case against the suspect.

The Chamber is of the view that the fact that certain incidents of threats or violence against judicial authorities may have occurred across the country does not necessarily entail "*collapse*" or "*unavailability*" of the Libyan judicial system such that would impede Libya's ability to carry out the proceedings against the suspectwithin the meaning of article 17(3) of the Statute. Nevertheless, the Chamber considers that the existence of serious security concerns in Libya is an issue relevant to the final determination on Libya's ability to conduct its proceedings against the suspect, and will therefore take this fact into account, together with all the other circumstances, in its final conclusion on the matter.

First, the Chamber considers that there is no indication that the proceedings against the suspect are being undertaken for the purpose of shielding him from criminal responsibility for the crimes that are alleged in the proceedings before the Court, such that it would warrant a finding of "*unwillingness*" within the meaning of article 17(2)(a) of the Statute. Second, as expressly found above the Chamber is of the view that the national proceedings against the suspect cannot be considered as tainted by an unjustified delay that in the concrete circumstances is inconsistent with an intent to bring the suspect to justice, within the meaning of article 17(2)(b)

of the Statute. Third, the Chamber is satisfied that the two cumulative requirements that may ground a finding of unwillingness under article 17(2)(c) of the Statute are not present in relation to the domestic proceedings against the suspect.

Libya has provided persuasive information showing that the investigations into the suspect's case are not being conducted in a manner that is inconsistent with the intent to bring the suspect to justice. On this point the Chamber recalls that the investigation against the suspect, which has ultimately led to the transfer of the case to the Accusation Chamber, appears to have been adequately conducted. In the Chamber's view, the fact that the suspect's right to benefit from legal assistance at the investigation stage is yet to be implemented does not justify a finding of unwillingness under article 17(2)(c) of the Statute, in the absence of any indication that this is inconsistent with Libya's intent to bring the suspect to justice. Rather, from the evidence and the submissions before the Chamber, it appears that the suspect's right to legal representation has been primarily prejudiced so far by the security situation in the country. Accordingly, the Chamber concludes that Libya is not unwilling genuinely to carry out its proceedings against the suspect within the meaning of article 17(1)(a) and (2) of the Statute.

In relation to Libya's ability under article 17(1)(a) and (3) of the Statute, the Chamber considers that, given that the suspect is already in custody of the Libyan authorities, Libya is not "*unable to obtain the accused*". This ground, explicitly identified in article 17(3) of the Statute as one of the aspects that may warrant a finding of inability, is therefore not applicable to the present case.

The Chamber observes that Libya has provided a considerable amount of evidence collected as part of its investigation against the suspect. This evidence includes several relevant witness and victims' statements as well as pieces of documentary evidence, such as written orders, medical records and flight documents. In the Chamber's view, at least some of the evidence and testimony that necessary to carry out the proceedings against the suspect- which need not comprise all possible evidence – has therefore already been collected, and there is no indication that collection of evidence and testimony has ceased or will cease because of unaddressed security concerns for witnesses in the case against the suspect or due to the absence of governmental control over certain detention facilities.

Indeed, the Chamber observes that it appears that the domestic proceedings in the case against the suspect have so far not been prejudiced by these security challenges, as demonstrated by the progressive and concrete investigative steps taken to date and the fact that the judicial proceedings againstthe suspect are currently progressing and have recently reached the accusation stage. The Chamber also considers that despite these security challenges, other former officials of the Gaddafi regime are also subject to ongoing judicial proceedings, whether in the same case against the suspect or not. The Chamber is not persuaded that the same ongoing security challenges would have a more adverse impact on the continuation of the proceedings against the suspect.

Taking into account all the relevant circumstances, the Chamber, while reiterating its concerns about the lack of appropriate witness protection programmes in the proceedings against the suspect in the context of the country's precarious security situation, considers that this fact, in the concrete circumstances of the present case, does not result in Libya's inability genuinely to carry out its proceedings in the suspect's case on the grounds that Libya, as a result of a total or substantial collapse or unavailability of its national judicial system, is unable to obtain the evidence and testimony that is necessary for the proceedings against the suspect.

See No. ICC-01/11-01/11-466-Red, Pre-Trial Chamber I, 11 October 2013, paras. 202, 221, 223, 229, 233. 235, 243, 261, 281, 291-294, 298-299, and 301.

The Single Judge finds it regrettable that Côte d'Ivoire requested to be authorized to file additional documentation in support of its Admissibility Challenge only a few days before the expiration of the time limit for the parties and participants to provide their observations on the Admissibility Challenge. This is all the more so considering that at least some of the documents which Côte d'Ivoire intends to file in the record of the case have been in its possession since before the lodging of the Admissibility Challenge. Nevertheless, the Single Judge is of the view that the apparent tardiness of the Request does not per se justify its rejection, as this additional material may still be necessary for the proper disposal of the Admissibility Challenge.

The Single Judge recalls that, as repeatedly stated by the Chamber, "*a decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance*", in particular considering that, as observed by the Appeals Chamber, "*the Statute assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory*".

See No. ICC-02/11-01/12-35, Pre-Trial Chamber I, 20 February 2014, paras. 7 and 8.

In the *Ruto* Admissibility Judgment, the Appeals Chamber considered the interpretation of the term "*case*" in article 17(1)(a) of the Statute in the context of an admissibility challenge under article 19 of the Statute. The Appeals Chamber stated:

Article 17(1)(a) to (c) sets out how to resolve a conflict of jurisdictions between the Court on the one hand and a national jurisdiction on the other. Consequently, under article 17(1)(a), first alternative, the question is not merely a question of "*investigation*" in the abstract, but is whether the same case is being investigated by both the Court and a national jurisdiction.

The meaning of the words "*case is being investigated*" in article 17(1)(a) of the Statute must therefore be understood in the context to which it is applied. For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53(1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear. The relative vagueness of the contours of the likely cases in article 18 proceedings is also reflected in rule 52(1) of the Rules of Procedure and Evidence, which speaks of "*information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2*" that the Prosecutor's notification to States should contain.

In contrast, article 19 of the Statute relates to the admissibility of concrete cases. The cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61. Article 58 requires that for a warrant of arrest or a summons to appear to be issued, there must be reasonable ground to believe that the person named therein has committed a crime within the jurisdiction of the Court. Similarly, under regulation 52 of the Regulations of the Court, the document containing the charges must identify the person against whom confirmation of the charges is sought and the allegations against him or her. Articles 17(1)(c) and 20(3) of the Statute, state that the Court cannot try a person tried by a national court for the same conduct unless the requirements of article 20(3)(a) or (b) of the Statute are met. Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17(1)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.

Thus, the parameters of a "*case*" are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.

[…]

For the purposes of defining a "*case*" in article 17(1)(a) of the Statute, in situations such as the present, the Appeals Chamber considers that the conduct described in the incidents under investigation which is imputed to the suspect is a necessary component of the case. Such conduct forms the core of any criminal case because without it, there would be no case. At the same time, it is the conduct of the suspect him or herself that is the basis for the case against him or her: in the instant case, the crimes that were committed during the various incidents described in the Arrest Warrant Decision are imputed to the suspect because he allegedly used the Security Forces to commit these crimes. Therefore, the "*conduct*" that defines the "*case*" is both that of the suspect and that described in the incidents under investigation which is imputed to the suspect. "*Incident*" is understood as referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators. The exact scope of an incident cannot be determined in the abstract. What is required is an analysis of all the circumstances of a case, including the context of the crimes and the overall allegations against the suspect.

(b) Are the domestic and international cases the same?

The next issue that arises for determination is when it can be said that the cases under investigation by the Prosecutor and domestically are the same. As noted above, in the *Ruto* Admissibility Judgment, the Appeals Chamber stated that "*the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court*". As already stated, the question of the individual under investigation does not require further consideration as it is not in dispute that the same individualis being investigated by the Prosecutor and in Libya. As to the conduct under investigation, this was not a central issue in the *Ruto* Admissibility Judgment and the Appeals Chamber accordingly did not further define the phrase "*substantially the same conduct*".

[…]

The Appeals Chamber considers that, ultimately, what constitutes the same case, as referred to in article 17(1)(a) of the Statute, and in particular the extent to which there must be overlap, or sameness, in the investigation of the conduct described in the incidents under investigation which is imputed to the suspect, will depend upon the facts of the specific case. It is not possible to set down a hard and fast rule to regulate this issue. At the same time, the following may be said.

What is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating. The Appeals Chamber considers that to carry out this assessment, it is necessary to use, as a comparator, the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents.

In carrying out this assessment, a Chamber should consider any information provided by the State concerned as to why it is not investigating incidents that are being investigated by the Prosecutor and should take this into account in deciding whether the State in question is investigating substantially the same conduct. In addition, this judicial assessment should include a consideration of the interests of victims and the impact on them of any decision that a case is inadmissible at the Court despite not all of the incidents being investigated domestically.

[…]

The Appeals Chamber also considers, as the Defence notes, that "*complementarity*" does not mean that all cases must be resolved in favour of domestic investigation. Complementarity is regulated by article 17 of the Statute and the test prescribed therein; the Court's role is to ensure that it will not step in should a case be inadmissible under the relevant criteria. It is, however, not the case that all cases must be resolved in favour of domestic investigation. Therefore, as the Appeals Chamber has previously stated, "[a]*lthough article 17(1)(a) to (c) of the Statute does indeed favour national jurisdictions, it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level. If the suspect or conduct have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible*".

(c) The "contours of the case"

[…]

The Appeals Chamber does not consider it to be inherent in an on-going investigation that its contours are unclear. As noted by the Prosecutor, any investigation – irrespective of its stage – will have certain defining parameters, and it is an indication that there is no concrete case under investigation if those parameters are unclear. In this sense, in relation to what must be submitted by a State in its challenge to admissibility, it must be possible for a Chamber to compare what is being investigated domestically against what is being investigated by the Prosecutor in order for it to assess whether the same case (substantially the same conduct) is being investigated. To make this assessment, the contours of the case being investigated domestically (and indeed by the Prosecutor) must be clear.

Concerning the argument that article 19(5) of the Statute requires that a challenge to admissibility be submitted as early as possible, the Appeals Chamber does not agree that it follows from this that it is not possible for a domestic investigation to be at a stage where its "*actual contours*" and "*precise scope*" are clear. Article 19(5) provides that "[a] *State* […] *shall make a challenge at the earliest opportunity*". As found in the *Ruto* Admissibility Judgment in relation to the argument that a challenge needed to be made, pursuant to this provision, as soon as a summons to appear had been issued "*and therefore* [the State] *could not be* 'expected to have prepared every aspect of its Admissibility Application in detail in advance of this date'" (footnote omitted), the Appeals Chamber stated that "[a]*rticle 19(5) of the Statute requires a State to challenge admissibility as soon as possible once it is in a position to actually assert a conflict of jurisdictions*" (footnote omitted). Therefore, as soon as a State can present its challenge in such a way that it can show a conflict of jurisdictions, it must be submitted. To be successful, this challenge must be able to show what is being investigated by the State (the contours or parameters of the case) such that the Court is able to compare this against what is being investigated by the Prosecutor. It may be that those contours will develop as time goes on, but again, any investigation, irrespective of its stage, will have defining parameters. If a State is unable to present such parameters to the Court, no assessment of whether the same case is being investigated can be meaningfully made. In such circumstances, it would be unreasonable to suggest that the Court should accept that an investigation, capable of rendering a case inadmissible before the Court, is underway.

[…]

[I]n the *Ruto* Admissibility Judgment, the Appeals Chamber has confirmed as correct the assertion that "*a statement by a Government that it is actively investigating is not* […] *determinative. In such a case the Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations. In other words, there must be evidence with probative value*" (footnote omitted). This does not mean that a Chamber should not attribute any weight to statements by a government that it is investigating; the jurisprudence simply states that such statements should be supported and that they are not determinative. […].

[…]

The Appeals Chamber has found that "[a]*rticle 19(5) of the Statute requires a State to challenge admissibility as soon as possible once it is in a position to actually assert a conflict of jurisdictions*". It has also stated that "[t]*he State cannot expect to be allowed to amend an admissibility challenge or to submit additional supporting evidence just because the State made the challenge prematurely*". Effectively, this comes down to the principle that a State should, as a general rule, not challenge the admissibility of a case until it is in a position to substantiate that challenge. In this regard, admissibility proceedings should not be used as a mechanism or process through which a State may gradually inform the Court, over time and as its investigation progresses, as to the steps it is taking to investigate a case. Admissibility proceedings should rather only be triggered when a State is ready and able, in its view, to fully demonstrate a conflict of jurisdiction on the basis that the requirements set out in article 17 are met.

The Appeals Chamber accepts that there may be national legislation in existence or other impediments to a State being able to either disclose to the Court the progress of its investigations, or to take all the necessary steps to investigate. […] While accepting the reality that these situations can arise, the Appeals Chamber nevertheless considers that a State cannot expect that such issues will automatically affect admissibility proceedings; on the contrary, such issues should in principle be raised with the Prosecutor directly (prior to instigating admissibility proceedings), with a view to advising her as to the steps the State is taking, any impediments to those steps and allowing her to reach sensible decisions as to whether or not, in the circumstances, it is appropriate for her, at that time, to pursue a case, pending the progress of investigations by the State. It is, in principle, not the place for such issues to be raised with a Chamber in the context of admissibility proceedings.

[…]

Therefore, while it is open to Chambers, pursuant to rule 58, to permit the filing of additional evidence, they are "*not obliged to do so, nor could* [a State] *expect to be allowed to present additional evidence. Rather,* […] *it* [is for a State] *to ensure that the Admissibility Challenge* [is] *sufficiently substantiated by evidence*" and this at the time of the filing of the challenge.

See No. ICC-01/11-01/11-547-Red OA 4, Appeals Chamber, 21 May 2014, paras. 60-63, 71-74, 78, 83-86, 116, 164-165, and 167.

Since 2006, the "*same person/same conduct*" test has been developed in the abstract, mostly on the basis of cases in which the States at issue did not challenge admissibility and did not demonstrate that they had undertaken any steps or activities regarding investigations/prosecutions of the alleged crimes or suspects. The application of this test to the case at hand proves that, if this test is to be applied in order to compare a case before the Court with a domestic case, the Court will come to wrong and even absurd results, potentially undermining the principle of complementarity and threatening the integrity of the Court.

In interpreting article 17(1)(a) of the Statute, I will only address, as required by the ground of appeal under discussion, "*conduct*" as a determining criterion for comparing the case before the Court with the domestic case, thereby focusing on the concrete facts of this case and especially the investigations by Libya.

To begin with, I will concentrate on whether the term "*conduct*" may be used in comparing the "*case before the Court*" with the case before the domestic authorities. The term "*case*" in its legal meaning is applied throughout the Court's legal texts to refer to a criminal case before a Chamber of the Court. Cases before the Court concern the commission of crimes that fall within its jurisdiction as referred to in articles I and 5 of the Statute. Such crimes are defined by their relevant material and mental elements in articles 6 to 8 and 30 of the Statute. The Statute does not define the material elements of the crimes in general terms, but describes three main aspects "*conduct*", specific "*consequences*" and other "*circumstances*". Thus, "*conduct*" is an important material element of a "*crime*" and therefore also an element of a "*case*". "*Conduct*" may, however, also be understood as extending to the acts of the individuals who are held responsible for the commission of these crimes in accordance with articles 25 and 28 of the Statute. These individuals need not necessarily personally carry out the "*conduct*" that is the basis of a crime, but this conduct and the consequences of this conduct are attributed to them.

This leads to the conclusion that conduct might be one of several possible elements for the purposes of comparing the "*case before the Court*" with a domestic case. But, in my opinion, article 17(1)(a) of the Statute, applied in accordance with the principle of complementarity, does not require domestic authorities to investigate "*(substantially) the same*" conduct as the conduct that forms the basis of the "*case before the Court*". This means that, contrary to how I understand the Impugned Decision, I do not think that the domestic investigation or prosecution needs to focus on largely or precisely the same acts or omissions that form the basis for the alleged crimes or on largely or precisely the same acts or omissions of the person(s) under investigation or prosecution to whom the crimes are allegedly attributed.

Establishing such a rigid requirement would oblige domestic authorities to investigate or prosecute exactly or nearly exactly the conduct that forms the basis for the "*case before the Court*" at the time of the admissibility proceedings, thereby being obliged to "*copy*" the case before the Court. Instead of complementing each other, the relationship between the Court and the State would be competitive, requiring the State to do its utmost to fulfil the requirements set by the Court.

Such an approach would strongly intrude upon the sovereignty of States and the discretion afforded to national prosecutorial authorities, with the consequence that the Court would become a "*supervisory*" authority, checking in detail not only the "*scope*" and content of any investigative and prosecutorial steps, but also scrutinising the State's substantive and procedural law and how it relates to the crimes in the Rome Statute.

This approach not only disregards the many differences in the legal frameworks and in the practice of criminal justice between domestic jurisdictions and the Court, but also between the various domestic jurisdictions. National cases can differ from the "*case before the Court*" in respect of evidence, such as available witnesses, victims, and the number and locations of incidents that are under investigation or prosecution.

Further, such an approach could potentially preclude a State from focusing its investigations on a wider scope of activities and could even have the perverse effect of encouraging that State to investigate only the narrower case selected by the Prosecutor. […].

In addition, applying this strict approach raises a concern about timing, as the proceedings before the Court might have progressed further than the domestic proceedings or vice versa. Therefore, the "*case before the Court*" may already have many more concrete elements than a "*case*" which is still under investigation domestically. In the proceedings before the Court, the Prosecutor has wide discretion to determine the parameters of a case and also to decide which case to prosecute. The same is also true for many other legal systems. Therefore, domestic authorities could still be at a stage of their proceedings where the "*conduct*" is not yet as clearly defined as in the case before the Court, if at all. It also needs to be pointed out that the "*case before the Court*" is also subject to development at different stages of the proceedings. The conduct that is the basis of the crimes alleged in the warrant of arrest might be different from the conduct that is under scrutiny at the confirmation hearing or at trial.

The drafting history shows that the States were fully aware of differences in legal cultures and the difficulties that domestic legal systems may face in investigating and prosecuting the "*most serious crimes of concern to humanity*". In my opinion, the task imposed on the Court is to find the appropriate balance between respecting the sovereignty of States and ensuring an effective Court, within the framework of the overarching common goal of the Court and the States, which is to fight impunity.

As opposed to solely relying on the "*same person / (substantially) the same conduct*" test, I would prefer that the Court, in comparing a case before the Court and a domestic case, be guided by a complementarity scheme that contains multiple criteria that are assessed by reference to the concrete circumstances of each specific case. In the case at hand, "*conduct*" is one of the essential elements in deciding whether the "*case before the Court*" is being investigated or prosecuted by domestic authorities. In my view, contrary to the opinion of my colleagues, "*conduct*" should be understood much more broadly than under the current test. While there should be a nexus between the conduct being investigated and prosecuted domestically and that before the Court, this "*conduct*" and any crimes investigated or prosecuted in relation thereto do not need to cover all of the same material and mental elements of the crimes before the Court and also does not need to include the same acts attributed to an individual under suspicion.

[…]

In addressing the consequences of a finding of inadmissibility of a case before the Court, it should be noted that the Prosecutor has the power, according to article 19(10) of the Statute, to request the Chamber to review this decision if "*new facts have arisen which negate the basis on which the case has previously been found inadmissible under article 17*". There is no temporal limitation established in this provision. The Prosecutor may therefore continue her monitoring activities, *inter alia*, in relation to whether the State's investigation or prosecution is conducted with a genuine intent. Where a case is declared admissible by the Court upon a State's challenge to its admissibility, the State depends on the Court to "*grant leave*" if it considers that "*exceptional circumstances*" justify allowing a second challenge. Thus, it may be argued that in such a scenario, the State's right to challenge the admissibility of a case is effectively forfeited.

> See No. ICC-01/11-01/11-547-Anx2 OA4, Dissenting Opinion of Judge Ušacka, 21 May 2014, paras. 48-58, and 64.

The starting point for the interpretation of the term "*case*" in article 17(1)(a) of the Statute is indeed the *Ruto* Admissibility Judgment. In that judgment, the Appeals Chamber held:

> *Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17(1)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.*

I agree with the Pre-Trial Chamber that "*the determination of what is '*substantially the same conduct as alleged in the proceedings before the Court*' will vary according to the concrete facts and circumstances of the case and, therefore, requires a case-by-case analysis*". I also agree with the Pre-Trial Chamber that "*the conduct allegedly under investigation by Libya must be compared to the conduct attributed to the suspect in the Warrant of Arrest issued against him by the Chamber, as well as in the Chamber's decision on the Prosecutor's application for the warrant of arrest*". Finally, I consider that the Pre-Trial Chamber correctly summarised the conduct underlying the Warrant of Arrest and the Arrest Warrant Decision.

[…]

I consider that it is clear that overlap between the incidents is not a relevant factor for the purposes of determining whether the national investigation covers the same conduct as that alleged by the Prosecutor in the present case. […] In other words, the incidents are interchangeable and the non-investigation of one particular incident by the domestic authorities does not mean that they are investigating different conduct. To require that the national investigation must cover the same incidents would, in my view, set too onerous a standard for admissibility challenges in cases, like the one before us, where there are potentially hundreds of incidents to investigate and where, in addition, the person under investigation is not alleged to have physically committed any acts of murder and persecution. To put it simply: to require that the national investigation cover exactly the same acts of murder and persecution would make the national investigators' task impossible and, as a result, the complementarity principle, an essential element of the Statute – featuring prominently in both its Preamble and first article - would almost certainly become redundant.

[…]

I agree that, in order to determine "*inability*" within the meaning of article 17(3) of the Statute, it is necessary for a Chamber to consider both the "*unavailability*" of a State's national judicial system and whether that State "*is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings*" – and that the State must be unable "*due to*" this unavailability. However, contrary to Libya's submissions, I find that the Pre-Trial Chamber did consider the criterion of "*unavailability*" separately from that of inability – and considered that the latter was a consequence of the former.

[…]

The concept of "*unavailability*" is distinct from that of a "*collapse*". In order to determine inability in a particular case, the Court is required to find either "*a total or substantial collapse*" or the "*unavailability*" of the national judicial system. Furthermore, given that the Court was established "*to put an end to impunity for the perpetrators*" of "*the most serious crimes of concern to the international community as a whole*", it is consistent therewith for it to be sufficient for the system to be unavailable in respect of a particular case. Were the situation otherwise, perpetrators of such crimes would be able to escape investigation and prosecution merely because the system was potentially available to one or more other perpetrators, even if there were no prospect of it being available in their case.

See No. ICC-01/11-01/11-547-Anx1 OA4, Separate Opinion of Judge Song, 21 May 2014, paras. 3-4, 6, 24, and 26.

For a case to be admissible because the State is unwilling genuinely to investigate or prosecute in terms of article 17(2)(c) of the Rome Statute, it must be shown that the proceedings were not or are not being conducted independently or impartially and that the proceedings were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Taking into account the text, context and object and purpose of the provision, this determination is not one that involves an assessment of whether the due process rights of a suspect have been breached per se. In particular, the concept of proceedings "*being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice*" should generally be understood as referring to proceedings which will lead to a suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility, in the equivalent of sham proceedings that are concerned with that person's protection.

However, there may be circumstances, depending on the facts of the individual case, whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be "*inconsistent with an intent to bring the person to justice*".

[…]

The Appeals Chamber notes that the Pre-Trial Chamber correctly recalled that the conduct being investigated must be substantially the same, that the conduct alleged in the current case is set out in the Warrant of Arrest, read with the article 58 Decision, and that the determination of "*substantially the same conduct*" must be made based upon the specific facts of the case.

[…]

There was no need for Libya to charge the suspect with the international crime of "*persecution*" *per se*. As argued by Libya and the Prosecutor, there is no requirement in the Statute for a crime to be prosecuted as an international crime domestically. This is because, in line with the previous jurisprudence of the Appeals Chamber in relation to what constitutes the same case, what is required is that the crimes prosecuted at the domestic level cover "*substantially the same conduct*" as those charged by the Court. In determining whether they do, the Pre-Trial Chamber is required to assess whether the domestic case sufficiently mirrors the case before the Court. As argued by both Libya and the Prosecutor, it is the alleged conduct, as opposed to its legal characterisation, that matters.

[…]

For the reasons that follow, the Appeals Chamber is not persuaded by the Defence's arguments that the Pre-Trial Chamber erred when it proceeded to determine Libya's Admissibility Challenge even though the suspect had not had an opportunity to give instructions to the Defence. […].

The legal framework of the Court expressly provides for two participatory rights of the suspect in proceedings in relation to admissibility. First, pursuant to article 19(2)(a) of the Statute, "[a]*n accused person or a person for whom a warrant of arrest or summons to appear has been issued*" is entitled to challenge the admissibility of a case. Thus, the suspect himself or herself may trigger admissibility proceedings. Second, rule 58(3) of the Rules of Procedure and Evidence provides that "[t]*he Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and to the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons, and shall allow them to submit written observations to the request or application within a period of time determined by the Chamber*". Thus, under this provision, the suspect is entitled to participate in admissibility proceedings triggered by others, including States, by making written

submissions. The right to participate under rule 58(3) of the Rules of Procedure and Evidence, however, does not extend to any person in respect of whom a warrant of arrest or summons to appear has been issued; it only applies to suspects who have been either surrendered to the Court or who have appeared before it.

In this regard, the Appeals Chamber recalls its findings in the *Kony* Admissibility Judgment, which concerned the admissibility of the cases against four fugitive suspects. In relation to the "[p]*urported obligation of the Pre-Trial Chamber to appoint counsel to represent the four suspects*", the Appeals Chamber rejected the argument that such a right arose out of article 67(1) of the Statute and rule 121(1) of the Rules of Procedure and Evidence, finding that: (a) in relation to article 67(1)(d), it provides for the right to be present at the trial and to legal assistance; (b) the person referred to in rule 121 is the person appearing before the Pre-Trial Chamber and not someone yet to appear; (c) rule 121 is related to confirmation proceedings and not the issuance of a warrant or summons; and (d) rule 121(1) imports the rights in article 67 as confirmation proceedings are proceedings akin to a trial. It stated that "*internationally recognised human rights standards do not necessarily extend all the rights enshrined in article 67 of the Statute to persons who have not yet been surrendered to the Court or appeared voluntarily before it*". It concluded that the Pre-Trial Chamber was not obliged to appoint counsel to represent the four suspects.

[…]

Notwithstanding the above, the Appeals Chamber recalls that rule 58(2) of the Rules of Procedure and Evidence provides, in respect of admissibility proceedings, that the Pre-Trial Chamber "*shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings*". The Appeals Chamber has found that under this provision, "*the Pre-Trial Chamber enjoys broad discretion in determining how to conduct the proceedings relating to challenges to the admissibility of a case*". This includes the possibility to grant the suspect participatory rights that go beyond those provided for in rule 58(3) of the Rules of Procedure and Evidence. Indeed, in the above-mentioned admissibility proceedings in the case of *Joseph Kony* et al, the Pre-Trial Chamber appointed counsel to represent the interests of the defence; such counsel was not expected to receive instructions from the suspects in that case. Nevertheless, the Appeals Chamber underlines that the granting of participatory rights to the suspect that go beyond those stipulated in rule 58(3) of the Rules of Procedure and Evidence lies within the discretion of the Pre-Trial Chamber.

[…]

The Appeals Chamber finds the Defence's references to the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights as well as that of the UN Human Rights Committee to be of only very limited relevance. This is because the cited jurisprudence concerns the determination of complaints that an individual's human rights have been violated. In those proceedings, the State directly responds to the allegations of the complainant. The case at hand, in contrast, concerns the question of the admissibility of the case and is therefore primarily a question of forum – the relationship between States and the Court is the principal issue in these proceedings. While violations of human rights may, in specific and limited circumstances, play a role in the determination as to whether a case is inadmissible, admissibility proceedings are not primarily a mechanism to complain about human rights violations.

[…]

(i) Should lack of counsel in domestic proceedings have led to a finding of unwillingness?

The Appeals Chamber considers that denying a suspect access to a lawyer may, depending on the specific circumstances, be relevant to a finding that domestic proceedings "*are not being conducted independently or impartially, and they* […] *are being conducted in a manner which* […] *is inconsistent with an intent to bring the person concerned to justice*" (article 17(2)(c) of the Statute) and result in a finding of unwillingness. […] Nevertheless, the Appeals Chamber recalls that, in the context of admissibility proceedings, the Court is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated. Rather, what is at issue is whether the State is willing genuinely to investigate or prosecute. In the context of article 17(2)(c) of the Statute, the question is whether the failure to provide a lawyer constitutes a violation of the suspect rights which is "*so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the accused so that they should be deemed* […] *to be* 'inconsistent with an intent to bring [the suspect] to justice'".

In the view of the Appeals Chamber, even if one accepted that the lack of access to a lawyer during the investigation stage of the proceedings violated the suspect right to a fair trial and provisions of Libyan law (and may therefore give rise to remedies under both international and national law), and without wishing to downplay in any way the importance of the right to counsel during the investigation phase, which is indeed also provided for under the Statute, such violations would not reach the high threshold for finding that Libya is unwilling genuinely to investigate or prosecute the suspect.

[…]

(ii) Should lack of counsel in domestic proceedings have led to a finding of inability?

The Appeals Chamber notes that it is not in dispute between the parties and participants that the appointment of counsel is a prerequisite for the trial in Libya to take place.

The Appeals Chamber understands that these submissions relate not only to the question of unwillingness, but also to the question of inability to conduct genuine investigations or prosecutions. The Appeals Chamber considers, however, that these questions do not have to be determined in the context of this appeal. This is because even if the Libyan courts, in the further conduct of the proceedings, were to conclude that the proceedings in respect of the suspect must be terminated because of the lack of a lawyer during the early stages of the proceedings, this would not render Libya unable genuinely to prosecute him. This is because, even though it is one of the objectives of the Statute and indeed of the complementarity principle to end impunity, this does not mean that this objective is only attained if trials for the most serious crimes end with a conviction. Indeed, it is intrinsic to the notion of criminal justice that trials may end with an acquittal or have to be terminated because a fair trial is no longer possible. Should this occur, it cannot be said that the jurisdiction in question was unable genuinely to try the suspect; to the contrary, subject to the specific circumstances of the case, a genuine prosecution could have taken place.

[…]

The Appeals Chamber recalls that article 17 is designed to determine the circumstances in which a case shall be inadmissible before the Court by reference to the actions of a State which has jurisdiction over that case. In making that determination, regard is to be had to the fact that the Court is "*complementary to national criminal jurisdictions*" and the question to be resolved is whether the Court or the State is the proper forum to exercise jurisdiction over the case.

It is recalled that article 17(2) as a whole defines the circumstances in which a State is unwilling genuinely to carry out the investigation and/or prosecution. It makes an exception to the rule that a case is inadmissible before the Court if, as in the present case, it is being investigated or prosecuted by a State which has jurisdiction over it.

The purpose of this exception is to ensure that the principle of complementarity – which enables States to retain jurisdiction over cases and promotes the exercise of criminal jurisdiction domestically – is not abused, so that it would be contrary to the overall purpose of the Statute, which is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole.

The concept of being "*unwilling*" genuinely to investigate or prosecute is therefore primarily concerned with a situation in which proceedings are conducted in a manner which would lead to a suspect evading justice as a result of a State not being willing genuinely to investigate or prosecute. This is provided for most specifically in article 17(2)(a), which expressly states that, in order to determine unwillingness, the Court shall consider whether, "[t]*he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility*" (emphasis added). The fact that the other two sub-paragraphs of article 17(2) do not expressly refer to shielding or protecting the person concerned cannot detract from the fact that they are sub-paragraphs of a provision defining unwillingness. The primary reason for their inclusion is therefore likewise not for the purpose of guaranteeing the fair trial rights of the suspect generally.

Indeed, the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights. However, if the interpretation proposed by the Defence were adopted, the Court would come close to becoming an international court of human rights. A case could be admissible merely because domestic proceedings do not fully respect the due process rights of a suspect. This would necessarily involve the Court passing judgment generally on the internal functioning of the domestic legal systems of States in relation to individual guarantees of due process. Had this been the intention behind article 17, the Appeals Chamber would have expected this to have been included expressly in the text of the provision.

Article 17(2)(c) therefore cannot be understood to mean that violations of rights of the suspect per se are sufficient to amount to "*unwillingness*" within the meaning of article 17(2) of the Statute. That is not to say that concepts of due process are irrelevant to the Court's consideration of unwillingness. It is clear that regard has to be had to "*principles of due process recognized by international law*" for all three limbs of article 17(2), and it is also noted that whether proceedings were or are "*conducted independently or impartially*" is one of the considerations under article 17(2)(c). The concept of independence and impartiality is one familiar in the area of human rights law. Rule 51 of the Rules of Procedure and Evidence specifically permits States to bring to the attention of the Court, in considering article 17(2), information "*showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct*". As such, human rights standards may assist the Court in its assessment of whether the proceedings are or were conducted "*independently or impartially*" within the meaning of article 17(2)(c).

However, it must be borne in mind that the notions of independence and impartiality (a) are included within a provision which is primarily concerned with whether the national proceedings are being conducted in a manner that would enable the suspect to evade justice and must be seen in that light (in other words, the provision is not primarily concerned with whether the rights of the suspect are being violated); and (b) are only one of two cumulative criteria that need to be met before the requirements of article 17(2)(c) have been fulfilled. The second criterion is that of the proceedings "*being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice*". However, for the reasons stated above, this criterion cannot primarily be concerned with whether there have been violations of the rights of a suspect.

Furthermore, the Appeals Chamber observes that the same or very similar criteria that constitute unwillingness in article 17(2)(c) – that proceedings were not conducted independently or impartially and were "*conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice*" – are also reflected in article 20(3)(b) of the Statute in respect of an exception to the principle of *ne bis in idem*. As the two provisions contain such similar language it is reasonable to assume that they were intended to have the same meaning. The Appeals Chamber considers that the criteria used in article 20(3)(b) support giving them a meaning which primarily concerns proceedings that are not genuine in that they are akin to sham or other proceedings that unjustly benefit the accused: in such circumstances, for the purposes of putting an end to impunity, it is understandable why a person could still be tried at the Court notwithstanding that he or she has already supposedly been tried by another court. It is less easy to imagine that there was an intention for an accused to be tried again at this Court for the same conduct that had already been tried nationally on the basis that the domestic trial did not fully comply with international standards of due process.

[…]

The Appeals Chamber considers that article 17 was not designed to make principles of human rights per se determinative of admissibility. Yet, at the same time, the Appeals Chamber agrees with the Prosecutor that the fact that admissibility is not an enquiry into the fairness of the national proceedings per se does not mean "*that the Court must turn a blind eye to clear and conclusive evidence demonstrating that the national proceedings completely lack fairness*".

At its most extreme, the Appeals Chamber would not envisage proceedings that are, in reality, little more than a predetermined prelude to an execution, and which are therefore contrary to even the most basic understanding of justice, as being sufficient to render a case inadmissible. Other less extreme instances may arise when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice. In such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all. Whether a case will ultimately be admissible in such circumstances will necessarily depend upon its precise facts. However, in light of those matters considered above, the Appeals Chamber concludes that:

> *1) For a case to be admissible under article 17(2)(c) it must be shown that the proceedings were not or are not being conducted independently or impartially and that the proceedings were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.*
>
> *2) Taking into account the text, context, object and purpose of the provision, this determination is not one that involves an assessment of whether the due process rights of a suspect have been breached per se. In particular, the concept of proceedings* "being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice" *should generally be understood as referring to proceedings which will lead to an suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility, in the equivalent of sham proceedings that are concerned with that person's protection.*
>
> *3) However, there may be circumstances, depending on the facts of the individual case, whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be* "inconsistent with an intent to bring that person to justice"*.*

[…]

The Appeals Chamber notes that, in order to make a finding of inability under article 17(3) of the Statute, the Court must be satisfied that there is both a "*total or substantial collapse or unavailability*" of the national judicial system and that, as a result, "*the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings*".

> See No. ICC-01/11-01/11-565 OA6, Appeals Chamber, 24 July 2014, paras. 1-3, 101, 119, 145-147, 149, 169, 190-191, 198-199, 215-222, 229-230, and 265.

The Chamber recalls that rule 58(2) of the Rules of Procedure and Evidence provides the Chamber with the power to take the appropriate measures for the proper conduct of the admissibility proceedings. With a view to ensuring that any additional submission is effective and useful to the final determination of the Admissibility Challenge, the Chamber considers it necessary to recall in the present decision certain aspects of the applicable law and indicate the related information and clarifications requested from Côte d'Ivoire on issues of relevance to the admissibility of the case against the suspect before the Court.

The Chamber notes article 17 of the Rome Statute as well as the relevant jurisprudence of the Court on the test to be applied in considering an admissibility challenge and the related burden of proof, according to which: (i) in considering an admissibility challenge based on article 17(1)(a) of the Statute, the first determination to be made is on whether there is an ongoing investigation or prosecution at the national level of the same case that is before the Court; (ii) the expression "*the case is being investigated*" in article 17(1)(a) of the Statute must be understood as requiring the taking of "*concrete and progressive investigative steps*" to ascertain whether the person is responsible for the conduct alleged against him or her before the Court; (iii) a State challenging the admissibility of a case "*bears the burden of proof to show that the case is inadmissible*" and, to discharge this burden, "*the State must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case* [as] [i]*t is not sufficient to merely assert that investigations are*

ongoing"; (iv) the evidence that the State is requested to provide in order to demonstrate that it is investigating or prosecuting the same case that is before the Court is not only "*evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged crimes*", but extends to all material capable of proving that an investigation or prosecution is ongoing; (v) "[i]*n assessing admissibility, what is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating*" and, in order to carry out this assessment, it is necessary for a Chamber to know the contours or parameters of both the case before the Court and the case subject to the alleged domestic proceedings; (vi) a case before the Court is defined by the suspect against whom the proceedings before the Court are being conducted and the conduct giving rise to criminal liability under the Statute that is alleged in the proceedings; and (vii) "*the parameters of the* 'conduct' *alleged in the proceedings before the Court in each individual case are those set out in the document that is statutorily envisaged as defining the factual allegations against the person at the phase of the proceedings in question*".

[…]

This Chamber also previously found that a decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance, and that for a State to discharge its burden of proof that currently there is not a situation of "*inaction*" at the national level, it needs to substantiate that an investigation or prosecution is in progress at this moment.

See No. ICC-02/11-01/12-44, Pre-Trial Chamber I (Single Judge), 28 August 2014, paras. 6-7, and 10.

The Defence, pursuant to article 19 of the Statute, challenges the admissibility of the case against the suspect on the grounds that the case is not of sufficient gravity to justify further action by the Court within the meaning of article 17(1)(d) of the Statute.

The Chamber recalls that the parameters of a "*case*" are those set out in the document that is statutorily envisaged as defining the allegations against the person at a given stage of proceedings. In the present instance, it is the DCC, which contains the charges on which the Prosecutor requests the Chamber to commit the suspect to trial.

As made clear by rule 58(1) of the Rules, a determination of the admissibility or jurisdiction of a case is preliminary to the consideration of the merits of such case. Therefore, the Chamber must dispose of the challenge to the admissibility of the case prior to making its determination on whether to confirm or not the charges under article 61(7) of the Statute. Only if the case is found to be admissible, will the Chamber decide, on the basis of the available evidence, whether there are substantial grounds to believe that the suspect committed each of the crimes charged. In other words, the question with which the Chamber is confronted for the purposes of the present decision is whether the case against the suspect, as alleged by the Prosecutor, is of "*sufficient gravity*" to justify proceeding to determining whether the evidence is sufficient to commit the suspect to trial.

The Chamber is attentive to the Court's previous decisions in relation to the interpretation of the requirement of "*sufficient gravity*" within the meaning of article 17(1)(d) of the Statute. As held in the *Abu Garda* case, "*the gravity in a given case should not be assessed only from a quantitative perspective,* i.e. *by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration*". In another instance, Pre-Trial Chamber II added, in this regard, that "*it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave*". In this sense, factors such as the nature, scale and manner of commission of the alleged crimes, as well as their impact on victims, are significant indicators of the gravity of a given case.

Also, Pre-Trial Chambers have consistently held that certain factors which are listed in rule 145(1)(c) of the Rules for the purpose of sentencing may be of relevance to the assessment of gravity. This rule refers, *inter alia*, to "*the extent of the damage caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location*". For the purposes of determining whether a case is of sufficient gravity, reference has also been made to the existence of any of those aggravating circumstances listed in rule 145(2)(b) of the Rules, which mentions, *inter alia*, the "[c]*ommission of the crime where the victim is particularly defenceless*", the "[c]*ommission of the crime with particular cruelty or where there were multiple victims*" and the "[c]*ommission of the crime for any motive involving discrimination*".

III. Analysis

Prior to entering into the merits of the Admissibility Challenge, the Chamber addresses the Defence request to strike from the record of the case the annex to the written observations of the legal representative of victims on the grounds that the provision of this annex constitutes "*a flagrant abuse of the framework of an admissibility challenge*". As recalled above, this annex contains the views expressed by a number of individual victims in relation to the Admissibility Challenge. The Chamber recalls that pursuant to article 19(3) of the Statute and rule 59 of the Rules, victims are entitled to submit observations on the admissibility of those cases in relation to which they have already communicated with the Court. The fact that, in the present case, the victims participate in the proceedings before the Court through their common legal representative does not exclude that their individual views, when communicated to the Chamber, be taken into consideration. As recalled by the legal representative of victims, in a number of other cases before the Court, *verbatim* observations by the victims

collected by their legal representatives were provided to the different Chambers in the respective admissibility proceedings.

The Chamber notes the Defence argument that the making of "*substantive assertions*" by the victims "*is highly prejudicial, breaches the Suspect's right to the last word and impacts negatively on his entitlement to a fair trial pursuant to article 67 of the Statute*". However, as stated above, the proceedings related to the merits of the case are separated from those concerning the admissibility of the case, as recognised by the Defence itself which considers "*well established*" that the Chamber "*must not entertain any arguments at the jurisdictional phase that relate to the substantive merits of the case*".

The Chamber is aware that the confirmation of charges hearing has ended and that no other evidence may be introduced in relation to the charges brought against the suspect. Any factual submission made by the individual victims as part of their observations on the Admissibility Challenge is not taken into account for the purposes of the Chamber's determination under article 61(7) of the Statute, which is exclusively based on the confirmation of charges hearing and the evidence disclosed between the parties and communicated to the Chamber. In these circumstances, the Chamber is not persuaded by the Defence assertion that the annex provided by the legal representative of victims "*is* […] *nothing more than a brazen attempt to besmirch the Suspect, to re-litigate the substantive merits of the case and to adduce speculative and highly prejudicial evidence*". Accordingly, the Defence request to strike the annex from the record of the case must be rejected.

[…]

A determination of the admissibility of the case must be made by the Chamber before it proceeds to considering whether there is sufficient evidence to confirm the charges. Such determination is made on the basis of the case as brought by the Prosecutor without delving into consideration of the evidence put forward to sustain those charges. To do otherwise would conflate the Chamber's inquiry into admissibility with that into the merits of the case. In this sense, contrary to the submission of the Defence, the Chamber may not "*filter out*" aspects of the Prosecutor's allegations on the basis of a purported lack of evidence or consider what the evidence allegedly "*will show*", as this is predicated on an assessment of the available evidence and, therefore, is part of the determination on the merits of the charges presented by the Prosecutor. Rather, as clarified above, the Chamber will only take into account what the Prosecutor alleges against the suspect and not whether these allegations are sufficiently supported by the available evidence.

Second, on the discrete issue that the suspect cannot be considered as the "*most senior leader*", the Chamber is, in any case, also attentive to the jurisprudence of the Appeals Chamber, which specifically stated that the exclusion of categories of perpetrators from potentially being brought before the Court (including on the basis of whether they are to be considered the "*highest ranking perpetrators*") "*could severely hamper the preventive, or deterrent role of the Court which is a cornerstone of the creation of the International Criminal Court*". Indeed, according to the Appeals Chamber, "[h]*ad the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible they could have done so expressly*". The Appeals Chamber also considered "*flawed*" the reference to the procedural law and practice of the ICTY and ICTR on this matter in the context of the interpretation and application of article 17(1)(d) of the Statute.

Third, the determination of gravity of the present case must be based on all relevant aspects of the Prosecutor's allegations against the suspect considered as a whole, and is thus not limited to particular factors taken in isolation, like an allegedly low number of casualties or the purported limited temporal and geographical scope of the alleged crimes.

See No. ICC-02/11-02/11-185, Pre-Trial Chamber I, 12 November 2014, paras. 8-15, and 17-19.

Decisions rejecting challenges under article 19 of the Statute on the grounds that they do not challenge the jurisdiction of the Court are considered to be '*decisions with respect to jurisdiction*' within the meaning of article 82(1)(a) of the Statute and appeal against such decisions are admissible.

[…]

Challenges which would, if successful, eliminate the legal basis for a charge on the facts alleged by the Prosecutor may be considered to be jurisdictional challenges.

See No. ICC-01/04-02/06-1225, Appeals Chamber, 22 March 2016, paras. 1-3.

Having regard to the statutory framework, the Chamber does not consider that, in situations of armed conflict, rape and sexual slavery were intended to only be capable of prosecution as grave breaches or serious violations of Common Article 3. […] Indeed, if the Status Requirements were to apply to paragraphs 2(b)(xxii) and (e)(vi), the crimes contained therein would not be distinct from crimes which could be charged under (2)(a) and (c). In such a case, it would also render the word '*other*' in the chapeaux of the latter paragraphs meaningless on the context of (2)(b)(xxii) and (e)(vi). Moreover, while the chapeaux of paragraphs 2(a) and (c) contain references to specific victim status criteria, the Chamber notes that the chapeaux of paragraphs (2)(b) and (e) do not include such criteria. Only certain crimes listed in these paragraphs include specifications regarding the victim and/or perpetrator status. However, as the Chamber has previously noted, no particular victim status is explicitly mentioned for the crimes listed under (2)(b)(xxii) and (e)(vi).

With respect to the inclusion of the '*also*' in the wording of the crimes listed in (2)(b)(xxii) and (e)(vi), the Chamber considers that '*also*' is to be regarded as connecting the phrases '*any form of sexual violence*' and '*constituting a grave breach of the Geneva Conventions*' / '*constituting a serious violation of* [Common Article 3]'.This understanding is supported by the Elements of Crimes where a distinction is drawn between the enumerated and unenumerated crimes in (2)(b)(xxii) and (e)(vi). The Elements of Crimes for the unenumerated '*any other form of sexual violence*' contains an additional element, being that the conduct was '*of a gravity comparable to that of a* [grave breach of the Geneva Conventions]'. By contrast, the Elements of Crimes for rape and sexual slavery as war crimes make no mention of such a requirement, or of any particular victim status being required. By further comparison, the Elements of Crimes for the grave breaches and serious violations of Common Article 3 listed in paragraphs (2)(a) and (c) do specify a victim status requirement. […].

On the basis of the foregoing, the Chamber considers that the Court's statutory framework does not require the victims of the crimes contained in Article 8(2)(b)(xxii) and (e)(vi) to be protected persons in the (limited) sense of grave breaches or Common Article 3.

[…]

While most of the express prohibitions of rape and sexual slavery under international humanitarian law appear in contexts protecting civilians and persons hors de combat in the power of a party to the conflict, the Chamber does not consider those explicit protections to exhaustively define, or indeed limit, the scope of the protection against such conduct. In this regard, the Chamber recalls the Martens clause, which mandates that in situations not covered by specific requirements, '*civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience*'. The Chamber additionally notes that the fundamental guarantees provisions refer to acts that '*are and shall remain prohibited at any time and in any place whatsoever*' and as such apply to, and protect, all persons in the power of a Party to the conflict.

The Chamber further considers that limiting the scope of protection in the manner proposed by the Defence is contrary to the rationale of international humanitarian law, which aims to mitigate the suffering resulting from armed conflict, without banning belligerents from using armed force against each other or undermining their ability to carry out effective military operations. In doing so, international humanitarian law accepts that the parties' objective to overcome the opposition will result in certain suffering, damage and harm, but specifically determines that such consequences ought only to follow from actions that are militarily necessary or that will result in a definite military advantage. Raping and sexually enslaving children under the age of 15 years, or indeed any persons would never bring any accepted military advantage, nor can there ever be a necessity to engage in such conduct.

While international law allows combatants to participate directly in hostilities, and as part of this participation, to target combatant members of the opposing forces as well as civilians directly participating in hostilities, and further provides for certain justifications for conduct that results in damage to property or death of persons that may not be legitimately targeted, there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law.

[…]

The Chamber finds additional support for the interpretation that the scope of protection against sexual violence under international humanitarian law is not to be understood as being limited to only certain categories of persons, in the fact that sexual slavery has been recognised as constituting a particular form of slavery. In this regard, the Chamber recalls that the first element of the Elements of Crimes of the war crime of sexual slavery is identical to the Statute's definition of '*enslavement*', as set out in Article 7(2)(c), and is based on the definition of slavery as included in the Slavery Convention of 1926. As the prohibition of slavery has jus cogens status under international law, the prohibition of sexual slavery has the same status, and as such, no derogation is permissible. The Chamber further notes that rape can constitute an underlying act of torture or of genocide and that the prohibitions of torture and genocide are indisputably jus cogens norms. It has further been argued, and the majority of the Chamber accepts, that the prohibition on rape itself has similarly attained jus cogens status under international law.

As a consequence of the prohibition against rape and sexual slavery being peremptory norms, such conduct is prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status.

Having found that the protection against sexual violence under international humanitarian law is not limited to members of the opposing armed forces, who are hors de combat, or civilians not directly participating in hostilities, the Chamber does not need to address whether or not the persons alleged to have been '*child soldiers*' in the facts and circumstances underlying Counts 6 and 9, or any persons alleged to have been in sexual slavery by the UPC/FPLC, are to be considered as '*members*' of this armed force at the relevant time. However, to the extent these persons could be considered as having been conscripted or enlisted into the UPC/FPLC, the Chamber considers it appropriate to stress that, as a general principle of law, there is a duty not to recognise situations created by certain serious breaches of international law. It is further a recognised principle that one

cannot benefit from one's own unlawful conduct. It therefore cannot be the case that by committing a serious violation of international humanitarian law by incorporating, as alleged by the Prosecution, children under the age of 15 into an armed group, the protection of those children under that same body of law against sexual violence by members of that same armed group would cease as a result of the prior unlawful conduct.

The Chamber finds that members of the same armed force are not per se excluded as potential victims of the war crimes of rape and sexual slavery, as listed in Article 8(2)(b)(xxii) and (e)(vi); whether as a result of the way these crimes have been incorporated in the Statute, or on the basis of the framework of international humanitarian law, international law more generally. […].

See No. ICC-01/04-02/06-1707, Trial Chamber VI, 4 January 2017, paras. 40-41, 44, 47-49, and 51-54.

If customary international or conventional international law stipulates, in respect of a given war crime, an additional element of that crime, the Court cannot be precluded from applying it to ensure consistency of the provision with international humanitarian law, irrespective of whether this requires ascribing to a term in the provision a particular interpretation or reading an additional element into it. This does not violate the principle of legality recognised in article 22 of the Statute, which protects accused persons against a broad interpretation of the elements of the crimes or their extension by analogy; therefore, it does not impede the identification of additional elements that need to be established before an accused person can be convicted.

Having regard to the established framework of international law, members of an armed force or group are not categorically excluded from protection against the war crimes of rape and sexual slavery under article 8(2)(b)(xxii) and 2(e)(vi) of the Statute when committed by members of the same armed force or group. Nevertheless, it must be established that the conduct in question "*took place in the context of and was associated with an armed conflict*" of either international or non-international character. It is this nexus requirement that sufficiently and appropriately delineated war crimes from ordinary crimes.

See No. ICC-01/04-02/06-1962 OA5, Appeals Chamber, 15 June 2017, paras. 1-2.

The Chamber observes that, based on the material available in the record, the jurisdiction of the Court is clearly subject to dispute with Myanmar. According to 119(1) of the Statute, "[a]*ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court*". This provision has been interpreted as including questions related to the Court's jurisdiction. It follows that the Chamber is empowered to rule on the question of the jurisdiction set out in the Request in accordance with article 119(1) of the Statute. Consequently, the Chamber does not see the need to enter a definite ruling on whether article 19(3) of the Statute is applicable at this stage of the proceedings.

In addition, since the Prosecutor's Request is premised on a question of jurisdiction, the Chamber considers that it could also entertain the Request in accordance with the established principles of international law, pursuant to article 21(1)(b) of the Statute.

It is an established principle of international law that any international tribunal has the power to determine the extent of its own jurisdiction. This principle is commonly referred to as *la compétence de la compétence*, in French, or *Kompetenz-Kompetenz* in German, and has been recognized by numerous international courts and tribunals. As early as 1953, the International Court of Justice (the "ICJ") held that "*in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction*". It recognized this principle to be the '*rule of general international law*' which conferred upon it the competence to adjudicate on its own jurisdiction even in the absence of article 36(6) of its Statute. This principle has been reaffirmed by the ICJ in its subsequent jurisprudence.

Since then, the principle of *la compétence de la compétence* has been reaffirmed by several other judicial bodies, including the Inter-American Court of Human Rights (the 'IACtHR'), the Appellate Body of the World Trade Organization, tribunals or *ad hoc* committees constituted under the aegis of the International Centre for Settlement of Investment Disputes and elsewhere. International criminal courts and tribunals have made no exception. The International Criminal Tribunal for the former Yugoslavia (the 'ICTY') held in 1995 that this "*well-entrenched principle of general international law*",

*known as the principle of "*Kompetenz-Kompetenz*" in German or "*la compétence de la compétence*" in French, is part, and indeed a major part of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its "jurisdiction to determine its own jurisdiction". It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done.'*

The same approach was adopted also by the Special Tribunal for Lebanon.

There is no question that this Court is equally endowed with the power to determine the limits of its own jurisdiction. Indeed, Chambers of this Court have consistently upheld the principle of *la compétence de la compétence*. Pre-Trial Chamber II held in the *Situation in Uganda* in 2006 that '[i]*t is a well-known and fundamental principle that any judicial body, including any international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence*'. Later on, Pre-Trial Chamber II stressed – on different occasions and in different compositions – in the same line as the ICTY, that this power existed '*even in the absence of an*

explicit reference to that effect' as an '*essential element in the exercise by any judicial body of its functions*'. The same approach was followed by Pre-Trial Chamber III.

In light of the above, the Chamber considers that it also has the power pursuant to the principle of *la compétence de la compétence* to entertain the Prosecutor's Request. The Chamber does not consider it necessary to pronounce itself on the limits or conditions of the exercise of its *compétence de la compétence* for the purposes of the Request *sub judice*. Suffice it to note that, as highlighted by the Prosecutor herself, the jurisdictional question raised in the Request is not an abstract or hypothetical one, but it is a concrete question that has arisen in the context of individual communications received by the Prosecutor under article 15 of the Statute as well as public allegations of deportation of members of the Rohingya people from Myanmar to Bangladesh.

[…]

[…] [T]he objective legal personality of the Court does not imply either automatic or unconditional *erga omnes* jurisdiction. The conditions for the exercise of the Court's jurisdiction are set out, first and foremost, in articles 11, 12, 13, 14 and 15 of the Statute. Accordingly, the Chamber turns to the assessment of its jurisdiction in relation to the matter *sub judice*.

[…]

[…] [T]he Chamber considers that the preconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statue are, as a minimum fulfilled if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.

First, this finding is based on a contextual interpretation of article 12(2)(a) of the Statute, which takes relevant rules of international law into account. In this regard, the Chamber observes that public international law permits the exercise of criminal jurisdiction by a State pursuant to the aforementioned approaches.

[…]

Second, the Chamber's interpretation of article 12(2)(a) of the Statute finds further support in the object and purpose of the Statute.

[…]

[…] [T]he inclusion of the inherently transboundary crime of deportation in the Statute without limitation as to the requirement regarding destination reflects the intentions of the drafters to, *inter alia*, allow for the exercise of the Court's jurisdiction when one element of this crime or part of it is committed on the territory of a State Party.

[…]

The Chamber considers it appropriate to emphasise that the rationale of its determination as to the Court's jurisdiction in relation to the crimes of deportation may apply to other crimes within the jurisdiction of the Court as well. If it were established that at least an element of another crime within the jurisdiction of the Court or part of such crime is committed on the territory of a State Party, the Court might assert jurisdiction pursuant to article 12(2)(a) of the Statute. In this regard, the Chamber refers to the following two examples.

First, article 7(1)(h) of the Statute identifies, as a crime against humanity within the jurisdiction of the Court, "[p]*ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph* […]". The reference to '*any act referred to in this paragraph*' signifies that persecution must be '*committed in connection with any other crime within the jurisdiction of the Court*', which includes the crime against humanity of deportation, provided that such acts are committed pursuant to any of the grounds mentioned in article 7(1)(h) of the Statute.

See No. ICC-RoC46(3)-01/18-37, Pre-Trial Chamber I, 6 September 2018, paras. 28-33, 49, 64-65, 69, 71, and 74-75.

Relevant decisions regarding jurisdiction and admissibility

Warrant of Arrest for Vincent Otti (Pre-Trial Chamber II), No. ICC-02/04-01/05-54, 8 July 2005

Warrant of Arrest for Okot Odhiambo (Pre-Trial Chamber II), No. ICC-02/04-01/05-56, 8 July 2005

Warrant of Arrest for Dominic Ongwen (Pre-Trial Chamber II), No. ICC-02/04-01/05-57, 8 July 2005

Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005 (Pre-Trial Chamber II), No. ICC-02/04-01/05-53, 27 September 2005

Decision following the consultation held on 11 October 2005 and the Prosecution' s submission on Jurisdiction and admissibility filed on 31 October 2005 (Pre-Trial Chamber I), No. ICC-01/04-93, 9 November 2005

Warrant of Arrest [Thomas Lubanga Dyilo] (Pre-Trial Chamber I), No. ICC-01/04-01/06-2-tENG, 10 February 2006

Warrant of Arrest [Bosco Ntaganda] (Pre-Trial Chamber I), No. ICC-01/04-02/06-2-tENG, 22 August 2006

Decision on Thomas Lubanga Dyilo's Application for referral to the Pre-Trial Chamber/in the alternative, discontinuance of Appeal (Appeals Chamber), No. ICC-01/04-01/06-393 OA2, 6 September 2006

Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute (Pre-Trial Chamber I), No. ICC-01/04-01/06-512, 3 October 2006

Décision relative aux conditions aux fins d'exception d'incompetence et d'irrecevabilité (Pre-Trial Chamber I), No. ICC-02/05-34, 22 November 2006

Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006 (Appeals Chamber), No. ICC-01/04-01/06-772 OA4, 14 December 2006

Decision on the confirmation of the charges (Pre-Trial Chamber I), No. ICC-01/04-01/06-803-tENG, 29 January 2007

Decision on the Prosecution Application under Article 58(7) of the Statute (Pre-Trial Chamber I), No. ICC-02/05-01/07-1-Corr, 27 April 2007

Warrant of arrest for Ahmad Harun (Pre-Trial Chamber I), No. ICC-02/05-01/07-2, 27 April 2007

Warrant of arrest for Ali Kushayb (Pre-Trial Chamber I), No. ICC-02/05-01/07-3, 27 April 2007

Warrant of arrest for Germain Katanga (Pre-Trial Chamber I), No. ICC-01/04-01/07-1-tENG, 2 July 2007

Warrant of Arrest for Mathieu Ngudjolo Chui (Pre-Trial Chamber I), No. ICC-01/04-01/07-260-tENG, 6 July 2007

Warrant of Arrest for Jean-Pierre Bemba Gombo (Pre-Trial Chamber III), No. ICC-01/05-01/08-1-tENG-Corr, 23 May 2008 and No. ICC-01/05-01/08-15-tENG, 10 June 2008

Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), No. ICC-02/05-01/09-1, 4 March 2009

Decision on the admissibility of the case under article 19(1) of the Statute (Pre-Trial Chamber II), No. ICC-02/04-01/05-377, 10 March 2009

Summons to appear for Bahr Idriss Abu Garda (Pre-Trial Chamber I), No. ICC-02/05-02/09-2, 7 May 2009

Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute) (Trial Chamber II), No. ICC-01/04-01/07-1213-tENG, 15 July 2009

Summons to appear for Saleh Mohammed Jerbo Jamus (Pre-Trial Chamber I), No. ICC-02/05-03/09-2-RSC, 27 August 2009

Summons to appear for Abdallah Banda Abakaer Nourain (Pre-Trial Chamber I), No. ICC-02/05-03/09-3-RSC, 27 August 2009

Judgement on the Appeal of the Defence against the "Decision on the Admissibility of the Case under Article 19(1) of the Statute" of 10 March 2010 (Appeals Chamber), No. ICC-02/04-01/05-408 OA3, 16 September 2009

Judgement on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (Appeals Chamber), No. ICC-01/04-01/07-1497 OA8, 25 September 2009

Second Decision on the Prosecution's Application for a Warrant of Arrest (Pre-Trial Chamber I), No. ICC-02/05-01/09-94, 12 July 2010

Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), No. ICC-02/05-01/09-95, 12 July 2010

Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana (Pre-Trial Chamber I), No. ICC-01/04-01/10-1, 28 September 2010

Warrant of Arrest for Callixte Mbarushimana (Pre-Trial Chamber I), No. ICC-01/04-01/10-2-tENG, 28 September 2010

Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (Pre-Trial Chamber II), No. ICC-01/09-01/11-101, 30 May 2011

Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (Pre-Trial Chamber II), No. ICC-01/09-02/11-96, 30 May 2011

Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Appeals Chamber), No. ICC-01/09-01/11-307 OA, 30 August 2011

Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Appeals Chamber), No. ICC-01/09-02/11-274 OA, 30 August 2011

Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" – Dissenting Opinion of Judge Anita Ušacka (Appeals Chamber), No. ICC-01/09-01/11-336 OA, 20 September 2011

Decision on the "Defence Challenge to the Jurisdiction of the Court" (Pre-Trial Chamber I), No. ICC-01/04-01/10-451, 26 October 2011

Decision on the Conduct of the Proceedings Following the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute" (Pre-Trial Chamber I), No. ICC-01/11-01/11-134, 4 May 2012

Decision on the OPCV "Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya (Pre-Trial Chamber I), No. ICC-01/11-01/11-147, 15 May 2012

Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (Appeals Chamber), No. ICC-01/09-01/11-414 OA3 OA4, 24 May 2012

Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (Appeals Chamber), No. ICC-01/09-02/11-425 OA4, 24 May 2012

Directions on the submissions of observations (Appeals Chamber), No. ICC-02/11-01/11-236 OA2, 31 August 2012

Decision on OPCD requests in relation to the hearing on the admissibility of the case (Pre-Trial Chamber I), No. ICC-01/11-01/11-212, 2 October 2012

Decision on requests related to page limits and reclassification of documents (Appeals Chamber), No. ICC-02/11-01/11-266 OA2, 16 October 2012

Decision requesting further submission on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (Pre-Trial Chamber I), No. ICC-01/11-01/11-239, 7 December 2012

Judgement on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of proceedings, No. ICC-02/11-01/01-321 OA2, Appeals Chamber, 12 December 2012

Decision on the OPCV's "Request to access documents related to the 'Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut' filed by the Defence on 15 February 2013" (Pre-Trial Chamber I), No. ICC-02/11-01/11-406, 18 February 2013

Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Pre-Trial Chamber I), No. ICC-01/11-01/11-344-Red, 31 May 2013

Decision on the "Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut" (Pre-Trial Chamber I), No. ICC-02/11-01/11-436-Red, 11 June 2013

Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council (Pre-Trial Chamber I), No. ICC-01/11-01/11-354, 14 June 2013

Decision on the admissibility of the case against Abdullah Al-Senussi (Pre-Trial Chamber I), No. ICC-01/11-01/11-466-Red, 11 October 2013

Decision on Côte d'Ivoire's request to provide additional documents in support of its challenge to the admissibility of the case against Simone Gbagbo (Pre-Trial Chamber I), No. ICC-02/11-01/12-35, 20 February 2014

Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" (Appeals Chamber), No. ICC-01/11-01/11-547-Red OA4, 21 May 2014

Separate Opinion of Judge Sang-Hyun Song to the Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", No. ICC-01/11-01/11-547-Anx1 OA4, 21 May 2014

Dissenting Opinion of Judge Ušacka to the Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", No. ICC-01/11-01/11-547-Anx2 OA4, 21 May 2014

Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled Decision on the admissibility of the case against Abdullah Al-Senussi'' (Appeals Chamber), No. ICC-01/11-01/11-565 OA6, 24 July 2014

Separate Opinion of Judge Sang-Hyun Song on the Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled Decision on the admissibility of the case against Abdullah Al-Senussi'' (Appeals Chamber), No. ICC-01/11-01/11-565-Anx1 OA6, 24 July 2014

Separate Opinion of Judge Anita Usacka on the Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled Decision on the admissibility of the case against Abdullah Al-Senussi'' (Appeals Chamber), No. ICC-01/11-01/11-565-Anx2 OA6, 24 July 2014

Decision on further submissions on issues related to the admissibility of the case against Simone Gbagbo (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/12-44, 28 August 2014

Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity (Pre-Trial Chamber I), No. ICC-02/11-02/11-185, 12 November 2014

Judgment on the appeal of Mr Bosco Ntaganda against the 'Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9' (Appeals Chamber), No. ICC-01/04-02/06-1225, 22 March 2016

Second Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (Trial Chamber VI), No. ICC-01/04-02/06-1707, 4 January 2017

Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" (Appeals Chamber), No. ICC-01/04-02/06-1962, 16 June 2017

Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute' (Pre-Trial Chamber I), No. ICC-RoC46(3)-01/18-37, 6 September 2018

4. Issues related to appeal proceedings

Articles 81-83 of the Rome Statute
Rules 149-158 of the Rules of Procedure and Evidence
Regulations 57-65 of the Regulations of the Court

Applications by victims for participation in appeals must be filed as soon as possible and in any event before the date of filing of the response to the document in support of the appeal.

See No. ICC-01/04-01/06-1335 OA9 OA10, The Appeals Chamber, 16 May 2008, para. 12.

The Appeals Chamber considers that regulation 62 of the Regulations of the Court is not applicable to requests to add a new ground of appeal once a party has filed his or her document in support of the appeal pursuant to regulation 58 of the Regulations of the Court. Therefore, the Appeals Chamber must determine if a new ground of appeal can be added after the filing of the document in support of the appeal and, if so, pursuant to which provision of the Court's legal texts.

In this respect, the Appeals Chamber notes that regulation 61 of the Regulations of the Court addresses "*Variation of grounds of appeal presented before the Appeals Chamber*". Regarding whether a "*variation*" includes the addition of a new ground, the Appeals Chamber notes that the Appeals Chambers of the International Tribunals for the former Yugoslavia and for Rwanda (hereinafter: "ICTY/ICTR") interpret the term "*variation*" in their respective Rules of Procedure and Evidence to include both "*new or amended*" grounds of appeal, provided that good cause is shown why those grounds were not included or were not correctly phrased. The Appeals Chamber considers that the term "*variation*" in regulation 61 of the Regulations of the Court should be interpreted in the same manner.

[…]

The Appeals Chamber notes that, beyond the formal requirements cited above, regulation 61 of the Regulations of the Court contains no further guidance regarding any applicable standards for granting a request for variation. The Appeals Chamber therefore considers that it is within its discretionary authority to grant or deny the request.

See No. ICC-01/04-01/06-3057-Corr A5 A6, Appeals Chamber, 14 January 2014, paras. 6-7, and 10.

4.1. Appealable decisions

In the system of the Statute, interlocutory appeals are meant to be admissible only under limited and very specific circumstances. This is apparent both from the wording and from the drafting history of the Statute. Interlocutory Appeals against other decisions are permitted only upon leave by the Chamber and on the basis of the criteria enumerated in paragraph 1(d). Article 82, paragraph 1 thereby implies that the decisions by a Trial or Pre-Trial Chamber which do not fall under paragraph 1(a)(c), or which do not satisfy the requirements under paragraph 1(d), are not subject to interlocutory appeals. Article 82, paragraph 1(d) specifies that only decisions that involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial are subject to leave to appeal. Moreover, even if those two criteria satisfied, leave shall be granted only if an immediate solution by the Appeals Chamber may materially advance the proceedings. This wording reflects the intention of the drafters of the Statute to limit the scope of interlocutory appeals to issues of crucial importance to the fairness and expeditiousness of the proceedings or to the outcome of the trial. This *rationale* is further reflected in the drafting history of the provision. The aim of the discussion was to shape a provision that, whilst allowing interlocutory appeals when necessary to preserve fairness and expeditiousness in proceedings or when crucial for the outcome of the trial before the Court, would ensure that such appeals would not have paralysing effect. Accordingly, one could infer that the ultimate purpose was to limit interlocutory appeals to decisions involving issues with a bearing on the conduct of proceedings related to criminal responsibility for offences under the jurisdiction of the Court.

See No. ICC-02/04-01/05-90, Pre-Trial Chamber II, 10 July 2006, paras. 17-21 (reclassifed as public on 2 February 2007).

The drafters of the Statute intentionally excluded decisions confirming charges against a suspect from the categories of decisions which may be appealed directly to the Appeals Chamber. A ccording to the provisions of the Statute and to general principles of criminal law, an interlocutory decision can only be appealed in exceptional circumstances and to avoid irreparable prejudice to the appellant; greater emphasis should be placed on this principle with regards to a decision confirming the charges, as any appeal against such decision would significantly delay the start of the trial and thus the expeditious course of proceedings before the Court. Attention should be paid to the status of the accused, since allowing the parties to appeal the decision confirming charges when the suspect is under detention would cause avoidable delay in the procedure, which has to be carefully counterbalanced with the interests of the suspect to a fair and expeditious trial.

See No. ICC-01/04-01/06-915, Pre-Trial Chamber I, 24 May 2007, paras. 19, and 28-30.

If the drafters of the Statute intended to make decisions confirming or refusing confirmation of charges the subject of a distinct right of appeal they would have done so expressly, as they did with other decisions itemized as the subjects of appeal in articles 81 and 82 of the Statute.

See No. ICC-01/04-01/06-926 OA8, Appeals Chamber, 13 June 2007, para. 11.

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. Not every issue may constitute the subject of an appeal. It must be one apt to "*significantly affect*", *i.e.* in a material way, either a) "*the fair and expeditious conduct of the proceedings*" or b) "*the outcome of the trial*". The issue must be one likely to have repercussions on either of the above two elements of justice.

See No. ICC-01/04-168 OA3, Appeals Chamber, 13 July 2006, paras. 9-10. See also No. ICC-02/05-33, Pre-Trial Chamber I, 22 November 2006, p. 5; No. ICC-02/05-52, Pre-Trial Chamber I, 21 February 2007, pp. 4-5; No. ICC-02/05-70, Pre-Trial Chamber I, 27 March 2007, p. 3; No. ICC-02/04-112, Pre-Trial Chamber II (Single Judge), 19 December 2007, paras. 19-21; and No. ICC-02/11-01/11-265, Pre-Trial Chamber (Single Judge), 11Octobre 2012, para. 15.

By decision of 9 June 2011, the Chamber ruled on an application lodged by three people, who were detained in the Democratic Republic of the Congo and who had been transferred temporarily for the purposes of appearing before the Court as witnesses in accordance with article 93(7) of the Statute. The purpose of the application was to secure their presentation to the Dutch authorities for asylum as a protective measure within the meaning of article 68 of the Statute. After having noted that an application for asylum had already been filed with the Dutch authorities, the Chamber, *inter alia*, decided to suspend the immediate return of these three witnesses detained in the DRC pending a decision by the Dutch authorities on their asylum request and the adoption of satisfactory protective measures, within the meaning of the aforementioned article 68. It made it clear in this regard that in applying this article the Court was only required to assess the security risks faced by the witnesses because of their testimony before the Court, and that in no circumstances is it for the Court to assess the risk of persecution that they were facing within the meaning of the instruments governing the right to asylum and the principle of *non-refoulement*.

The Office of the Prosecutor, the Government of The Kingdom of the Netherlands and the Democratic Republic of the Congo sought leave to appeal the decision on the basis of article 82(1)(d) of the Statute. Since, irrespective of the grounds advanced, all three applications seek leave from the Chamber to appeal the Decision, it is worth considering whether an appeal against the said decision is in fact subject to the Chamber's leave. In this regard, the Chamber notes that article 82(1)(d) of the Statute is the sole provision pursuant to which it may grant leave to appeal.

The Chamber wishes to recall the analysis of this article by the Appeals Chamber and the power that it confers upon the Trial Chamber:

Article 82(1)(d) of the Statute does not confer a right to appeal interlocutory or intermediate decisions of either the Pre-Trial or the Trial Chamber. A right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber. This opinion constitutes the definitive element for the genesis of a right to appeal. In essence, the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue.

Whilst the provisions of article 82(1) of the Statute, taken as a whole, indicate that a Trial Chamber may grant leave to appeal all its interlocutory decisions, other than those which are expressly set out in paragraphs 1(a), (b) and (c) of the said article, the Chamber is of the view that the impugned decision must be interlocutory or intermediate within the meaning of article 82(1)(d) as interpreted by the Appeals Chamber.

The Chamber emphasises that the article deals with what is termed "*interlocutory appeal*", that is, appeals against decisions termed "*intermediate*" that may, in any event, generally be contested in an appeal on the merits. Recalling that the object of paragraph (d) of article 82(1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial, the Chamber considers that appeals against such decisions are subject to the leave of the Trial Chamber because only the Trial Chamber is in a position to determine whether an immediate resolution of an issue by the Appeals Chamber is necessary to advance the proceedings.

This mechanism ensures that appeals on issues that could be addressed, where necessary, only in an appeal against a final judgment, do not unduly delay the proceedings. Hence, this article unequivocally concerns decisions falling within the ambit of the conduct of the trial. However, in the view of the Chamber, the impugned decision does not fall directly within the ambit of the proceedings in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. In fact, it was rendered at the request of the witnesses – and not the parties who called them – in connection with the asylum claim proceedings addressed to the Dutch authorities. The application was undoubtedly submitted to the Chamber pursuant to article 68 of the Statute, which concerns issues intrinsic to the proceedings. However, it can only be underscored that in the Decision, the Chamber made a clear distinction between matters pertaining to the asylum claim and those pertaining to witness protection, which latter issue was not resolved in the Decision. Yet, the three applications for leave to appeal concern the part of the Decision dealing with the impact of the asylum proceedings taking place in the Netherlands on the return of the witnesses to the DRC. The application to appeal by the Netherlands certainly concerns the question of

whether "*under article 68 of the Statute, the ICC is only required to ensure the protection of the witnesses against risks in connection with their testimony, and that it is not otherwise required to evaluate the risks of violations of their human rights, including violation of the rule of* 'non-refoulement'".

However, the Chamber notes that the host State is not acting in the interest of the protection of the witnesses, but in fact raises the question of the respective jurisdiction of the Court and the Netherlands posed by the ongoing asylum proceedings, an aspect of the Decision that is not within the scope of the *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* proceedings. The Chamber therefore considers that it would overstep its vested powers in agreeing to examine applications for leave to appeal submitted in respect of decisions which, by their nature, do not fall under article 82(1)(d) of the Statute. Accordingly, the Chamber can only grant or refuse leave for such appeals if it considers, subject to their admissibility, that they can be lodged directly with the Appeals Chamber without its authorisation.

The three applications are therefore denied.

> See No. ICC-01/04-01/07-3073-tENG, Trial Chamber II, 14 July 2011, paras. 1, and 4-9.

On applications under article 82(1)(d) of the Statute, the Chamber's assessment of the merits of the proposed appeal is an irrelevant consideration. Instead, the Chamber must simply focus on whether a party to the proceedings has raised an "*appealable issue*", in the sense that the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Although the Statute does not define the term "*party*" to the proceedings, the fact that certain provisions in the Statute specifically enable a State to appeal particular decisions strongly suggests that the term "*party to the proceedings*" does not encompass a State Party. In addition, when dealing with an appeal concerning the participation of victims during the proceedings, the Appeals Chamber decided that the term "*parties*" in article 69 of the Statute refers to the Defence and the Prosecution only:

> *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".

It follows that the Netherlands and the DRC are not "*parties*" to the proceedings for the purposes of article 82(1)(d) of the Statute, and this provision is therefore unavailable to the Netherlands when it seeks to appeal a "*subset of proceedings concerning the witness under article 68 and article 93(7) of the Statute in which the witness raised human rights concerns*".

Although the obligation of the Chamber (under article 68 of the Statute) to consider protective measures for Witness 19 has arisen in the proceedings in the *Lubanga* case, the resolution of this issue will not affect the outcome of the trial.

[…]

The present Decision concerning Defence Witness 19 has considerable significance given, first, the position of the witness (*viz.* he is due to be returned directly into the custody of the authorities in the DRC where he awaits trial) and, second, it may have an impact on the cooperation agreements between the Court and the two states who are principally concerned, the Netherlands and the DRC. Indeed, this latter issue could affect cooperation in the future between the Court and members of the Assembly of States Parties. It is apparent that the drafters of the Statute endeavoured to ensure that when State Parties are seriously affected by proceedings before the Court they are able to appeal or to intervene in other ways. However, the particular critical situation currently facing the Court was not apparently contemplated by the drafters of the Statute, and as a result they did not include a specific provision enabling interested State Parties to appeal Decisions in the present context.

The impugned Decision raises issues that need to be reconciled between the regime for cooperation established by the Rome Statute and the ICC's human rights obligations, and in particular those based on article 21(3). The Chamber has a fundamental obligation under article 64(2) of the Statute to ensure that the trial is conducted with due regard for the protection of witnesses, whose well-being – indeed, whose lives – may be at risk. In order to discharge this responsibility in an appropriate manner, it is necessary for the Chamber to be able to grant permission to appeal when the matter at hand is of sufficient seriousness that a review by the Appeals Chamber is necessary. In the present situation, the DRC and the Netherlands raise critical issues (that are arguable) relating to the way in which Witness 19 is to be treated, in the context of his asylum claim to the Host State. There are a number of ancillary matters, such as whether he is to remain in the custody of the Court for the duration of any asylum application, that are of considerable importance and equally merit appellate determination.

In order to give full effect to article 64(2) of the Statute (and without attempting to provide an exhaustive definition of when leave to appeal an interlocutory decision should be granted outside the framework of article 82), the Chamber's authority to rule on any other relevant matters under article 64(6)(f) includes the ability to grant permission to appeal whenever an arguable and critical issue is raised that affects the protection

of witnesses. Similarly, leave to appeal should be granted on an interlocutory basis under article 64(6)(f) when it is arguable that a decision of a Chamber has placed a State Party in the position of having to resolve apparently conflicting obligations to the ICC, on the one hand, and to individuals in the custody of the Court who raise fundamental human rights concerns that require determination by the State Party, on the other

For these reasons, both applications for leave to appeal are granted.

> See No. ICC-01/04-01/06-2779, Trial Chamber I, 4 August 2011, paras. 10-24 (reclassified as public pursuant on 25 October 2011).

The Appeals Chamber has to assess whether the Impugned Decision is, or should be deemed to be, an "*order for reparations*", in which case recourse may be had to article 82(4) of the Statute, or whether it is a decision that may be appealed under article 82(1)(d) of the Statute.

The Appeals Chamber notes that the Impugned Decision, as is apparent from its title, consists of two parts. First, it establishes principles relating to reparations as referred to in article 75(1) of the Statute. Second, it sets out, in a comparatively short part, the "*procedure*" to be applied in relation to reparations. It is this latter part of the Impugned Decision that persuades the Appeals Chamber, for the reasons that follow, that the Impugned Decision should be deemed to be an order for reparations and recourse may therefore be had to article 82(4) of the Statute.

[…]

Turning to the Impugned Decision, the Appeals Chamber notes that, under the part on "*procedure*", the Trial Chamber addressed aspects that relate, under the statutory scheme for reparations, to the steps to be taken both before and after the issuance of an order for reparations.

[…]

The Appeals Chamber considers that the practical effect of this is that the Impugned Decision represents the final judicial decision in respect of reparations, apart from such monitoring and oversight required of the Trial Chamber under the Regulations of the Trust Fund after an order for reparations has been issued, such as the "*approval*" of the draft implementation plan under regulations 57 or 69 of the Regulations of the Trust Fund.

For the above reasons, and without prejudice to any final decision on the merits, the Appeals Chamber concludes that the Impugned Decision is deemed to be an order for reparations, which may be appealed pursuant to article 82(4) of the Statute.

> See No. ICC-01/04-01/06-2953 A A2 A3 OA21, Appeals Chamber, 14 December 2012, paras. 50-51, 58 and 63-64.

In line with the Appeals Chamber's recent departure from its previous jurisprudence on victim participation in appeals under article 82(1)(b) and (d) of the Statute, and in the interests of efficiency, it is appropriate for an appellant who wishes to reply to a participant's response to a document in support of the appeal to first seek leave of the Appeals Chamber under regulation 24(5) of the Regulations of the Court. Given the time limit set out in regulation 34(c) of the Regulations of the Court for the filing of a reply to a response, this procedure is found to be more efficient than that set out in regulation 28 of the Regulations of the Court.

In challenging the conditions justifying detention it is not enough to merely allege changed circumstances based solely on arguments that have already been determined to be of no relevance.

If participants in appellate proceedings are unable to respond to certain arguments of the appellant on account of not being given full access to them, those arguments are precluded from the scrutiny of the participants, which in turn may affect the Appeals Chamber's determination of the issues on appeal.

[…]

In its Reasons for the Decision on Victim Participation, the Appeals Chamber noted that "*regulation 24(2) of the Regulations of the Court provides for victims or their legal representatives to file a response to any document when they are permitted to participate*". The Appeals Chamber concluded that regulation 24(4) of the Regulations of the Court, which states that a response may not be filed to any document which is itself a response or reply, "*precludes the possibility of an automatic response by the parties to victims' responses, except with the leave of the Appeals Chamber, pursuant to regulation 24(5) of the Regulations of the Court*".

In relation to replies to responses to documents in support of the appeal, the Appeals Chamber is cognisant of its jurisprudence, according to which "*in appellate proceedings under rules 154 or 155 of the Rules of Procedure and Evidence, the appellant does not have a right to apply for leave to reply to the other participant's response to the document in support of the appeal*". The Appeals Chamber has further held:

> *This does not mean, however, that further filings by the participants will never be possible in such proceedings; should the arguments that are raised in a response to a document in support of the appeal make further submissions by the appellant necessary for the proper disposal of the appeal, the Appeals Chamber will issue an order to that effect pursuant to regulation 28(2) of the Regulations of the Court, bearing in mind the principle of equality of arms and the need for expeditious proceedings.*

In line with the Appeals Chamber's recent departure from its previous jurisprudence on victim participation in appeals under article 82(1)(b) and (d) of the Statute, and in the interests of efficiency, the Appeals Chamber deems it appropriate for an appellant who wishes to reply to a participant's response to a document in support of the appeal, to first seek leave of the Appeals Chamber under regulation 24(5) of the Regulations of the Court. Given the time limit set out in regulation 34(c) of the Regulations of the Court for the filing of a reply to a response, the Appeals Chamber finds this procedure to be more efficient than that set out in regulation 28 of the Regulations of the Court. Under these circumstances, [the Accused]'s request to recognise his "*automatic right*" to respond to any observation of the victims is dismissed.

[…]

At the outset, the Appeals Chamber recalls that it has previously indicated that in proceedings under article 60(3) of the Statute, although the Prosecutor does not have to re-establish circumstances that have already been established she must however show that there has been no change in those circumstances that previously justified detention and "[s]*he must bring to the attention of the Chamber any other relevant information of which [s]he is aware that relates to the question of detention or release*". Consequently, there can be no doubt that in proceedings under article 60(3) of the Statute the onus is on the Prosecutor to demonstrate that there has been no change in the circumstances justifying detention.

The Appeals Chamber has determined that in conducting a periodic review of detention under article 60(3) of the Statute, a Chamber "*does not have to enter findings on the circumstances already decided upon in the ruling on detention. It must, however, look at those circumstances,* […] *and determine whether they still exist*" in light of changed circumstances, if any. The requirement of 'changed circumstances' "*imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary*". Thus, the circumstances justifying detention may change over time.

[…]

The Appeals Chamber has previously stated that in conducting a periodic review of detention a Chamber is not required to "*entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions*".

The Appeals Chamber recalls that in carrying out a periodic review of a ruling on detention under article 60(3) of the Statute [a Chamber] must satisfy itself that the conditions under article 58(1) of the Statute, as required by article 60(2) of the Statute, continue to be met. In doing so, the Chamber must revert to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58(1) of the Statute.

It follows, that a periodic review of detention, necessarily involves an assessment of whether the conditions under article 58(1) of the Statute continue to be met at that time. In light of this, it cannot be said that [the Defence] was precluded from challenging the current existence of conditions justifying his detention. The Appeals Chamber notes, however, that in challenging the conditions justifying detention, it is not enough to merely allege changed circumstances based solely on arguments that have already been determined to be of no relevance.

[…]

The Appeals Chamber has held that when assessing the sufficiency of reasoning in a decision:

The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the […] Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.

[…]

The Appeals Chamber emphasises that its review is limited to the findings made in the Impugned Decision. Accordingly, to the extent that [the Defence] challenges findings made in decisions other than the Impugned Decision, the Appeals Chamber will not consider his arguments.

The Appeals Chamber has explained its approach to factual errors as follows:

> *The Appeals Chamber has held that a Pre-Trial or Trial Chamber commits such an error if it misappreciates facts, disregards relevant facts or takes into account facts extraneous to the* sub judice *issues. In this regard, the Appeals Chamber has underlined that the appraisal of evidence lies, in the first place, with the relevant Chamber. In determining whether the Trial Chamber has misappreciated facts in a decision on interim release, the Appeals Chamber will* "defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention"*. Therefore, the Appeals Chamber* "will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".

The Appeals Chamber has further held that mere disagreement with the conclusions that the first-instance Chamber drew from the available information or the weight it accorded to particular factors does not suffice to establish an error. [The Defence]'s arguments have been assessed against this standard of review.

[…]

The Appeals Chamber recalls that in its determination of the scope of information which [the Defence]was permitted to withhold from the Prosecutor and the victims, it was mindful of the sensitive nature of the information in issue and it had due regard to the level of confidentiality applied to the proceeding to which the information relates. The Appeals Chamber also took into consideration the scope of [the Defence]'s appeal. The Appeals Chamber recalls that pursuant to regulation 64(5) of the Regulations of the Court, participants are entitled to file a response to the document in support of the appeal. In order to be able to fully respond to the grounds of appeal set out in the document in support of the appeal, the participants must be provided with an unredacted version of the document, unless there are compelling reasons to withhold such information.

This is of particular significance in the present case, where the information which [the Defence]withheld from the Prosecutor and the victims relates to a procedure aimed at the imposition of conditions restricting liberty. Rule 119(3) of the Rules of Procedure and Evidence requires that before imposing such conditions the competent Chamber "*shall seek the views of the Prosecutor, the person concerned, any relevant State and victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or conditions imposed*". The Prosecutor's and the victims' ability to present such views, including in the appellate proceedings concerning conditional release, is restricted when the person concerned withholds relevant information from them.

By way of analogy, the Appeals Chamber recalls that while "[i]*t is commonly understood that the right to a fair trial/fair hearing in criminal proceedings, first and foremost, inures to the benefit of the accused*", the Prosecutor has duties with respect to the objective of establishing the truth and she may raise errors in appellate proceedings alleging that her ability to present her case has been violated. The Appeals Chamber further recalls that for purposes of the periodic review under article 60(3) of the Statute, the Prosecutor "*must* […] *provide information to enable the Chamber to satisfy itself that continued detention is warranted*". Her ability to provide information relevant to that review will be impeded if she is not given full access to the arguments made by the accused person within the framework of such review. The Appeals Chamber further notes that if participants in appellate proceedings are unable to respond to certain arguments of the appellant, those arguments are precluded from the scrutiny of the participants which in turn may affect the Appeals Chamber's determination of the issues on appeal.

In view of the foregoing, the Appeals Chamber considers that [the Accused]'s non-compliance with the Decision on Redactions significantly impeded the Prosecutor's and the victims' ability to file specific responses to some of the arguments he makes under the second ground of his appeal. Having regard to the fact that [the Accused] deliberately failed to comply with the Appeals Chamber's directions, the Appeals Chamber considers it appropriate to decline to consider arguments relying on information which [the Defence] withheld from the Prosecutor and the victims in contravention of the Decision on Redactions. The Appeals Chamber will only consider the remaining arguments.

See No. ICC-02/11-01/15-208 OA6, Appeals Chamber, 8 September 2015, paras. 1-3, 25-27, 36, 45, 51-52, 59, 71-73, and 85-88.

The Appeals Chamber recalls that article 108 falls within Part 10 of the Statute, dealing with enforcement. Rule 199 of the Rules (Organ responsible under Part 10) provides that, "[u]*nless provided otherwise in the Rules, the functions of the Court under Part 10 shall be exercised by the Presidency*". Rules 214 to 216, in a confined section of the Rules (Limitation on the prosecution or punishment of other offences under article 108) in Chapter 12 thereof (Enforcement), expressly regulate the procedure to apply to article 108 of the Statute. While it is the case that the nature of the Presidency's functions under this section of the Rules may differ from some of those in other parts of the Statute, including those that may be more administrative in nature, the States Parties, in adopting the Rules, have taken the decision that the Presidency shall exercise the functions under this article. […] [T]he Appeals Chamber would have expected States, in regulating the procedure relevant to article 108 of the Statute in such a detailed way, to have expressly provided for a right to appeal a decision thereunder if that had been their intention.

[…]

Although the Appeals Chamber considers that the Statute and the Rules do not expressly provide for appeals of decisions under article 108 of the Statute, decisions taken pursuant to that provision are important in nature and it may be, in light of the Presidency's approach to article 108 of the Statute, that a right to appeal such decisions is appropriate. In that respect, it notes that the Presidency considered issues that are of significance, namely the upholding of certain fundamental principles or procedures of the Statute and otherwise of the integrity of the Court, Requiring considerations relevant to *e.g. ne bis in idem*, the possible imposition of the death penalty and the possibility of holding a fair trial. The Appeals Chamber further notes that, where such issues are addressed in similar or comparable proceedings, an appeals mechanism is often in place. The Appeals Chamber therefore considers that there is merit in the Assembly of States Parties addressing whether the Court's underlying legal texts should be amended so as to permit appellate review in relation to the decision taken under article 108 of the Statute.

In conclusion, the Appeals Chamber finds that [the convicted person]'s appeal is inadmissible and accordingly dismisses it.

See No. ICC-01/04-01/07-3697 OA15, Appeals Chamber, 9 June 2016, paras. 13, and 16-17.

4.2. Interlocutory appeals lodged under article 82(1)(b) of the Rome Statute

Article 82(1)(b) of the Rome Statute defines succinctly the decisions subject to appeal, leaving no ambiguity as to the intentions of the drafters. The decision confirming the charges neither grants nor denies release. The wording of article 82(1)(b) of the Statute is explicit and as such it is the sole guide to the identification of decisions appealable under its provisions. There is no ambiguity as to its meaning, its ambit or range of application. It confers exclusively a right to appeal a decision that deals with the detention or release of a person subject to a warrant of arrest.

See No. ICC-01/04-01/06-926 OA8, Appeals Chamber, 13 June 2007, paras. 11, and 15-16.

4.3. Interlocutory appeals lodged under article 82(1)(d) of the Rome Statute

The Chamber believes that any determination of the Prosecutor's application for leave to appeal must be guided by three principles, namely: (i) the restrictive character of the remedy provided for in article 82, paragraph 1(d), of the Statute; (ii) the need for the applicant to satisfy the Chamber as to the existence of the specific requirements stipulated by this provision; and (iii) the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal. Moreover, article 82, paragraph 1(d), of the Statute reflects a general trend to narrow the grounds for interlocutory appeals, and in particular to deviate from the concept that an issue is subject to interim appeal because of its general importance to proceedings or in international law generally, as a previous formulation of the relevant rule in the ICTY Rules of Procedure and Evidence had allowed.

See No. ICC-02/04-01/05-20, Pre-Trial Chamber II, 19 August 2005, paras. 15-16. See also No. ICC-01/04-135, Pre-Trial Chamber I, 31 March 2006, paras. 21-23; and No. ICC-02/04-01/05-296, Pre-Trial Chamber II (Single Judge), 2 June 2008, pp. 7-8.

The only remedy of a general nature whereby participants can voice their concerns regarding a Chamber's decision is a request for leave to appeal under article 82(1)(d) of the Rome Statute.

See No. ICC-02/04-01/05-219, Pre-Trial Chamber II (Single Judge), 9 March 2007, p. 3.

For any leave to appeal pursuant to article 82(1)(d) of the Statute, the applicant must demonstrate that (i) the challenged decision involves an issue that would significantly affect (a) the fair and expeditious conduct of the proceedings or (b) the outcome of the trial and (ii) for which, in the opinion of the Pre-Trial Chamber or the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance proceedings. In the present case, the Chamber considers that the first requirement (i) having not been proved, there was no need to consider the second one. Any party wishing to appeal a decision under article 82(1)(d) of the Statute has imperatively five days running from the notification of that decision to make a written application setting out the reasons for the request for leave to appeal to the Chamber, considering the two requirements of that specific provision.

See No. ICC-01/04-14, Pre-Trial Chamber I, 14 March 2005, p. 3. See also No. ICC-01/04-168 OA3, Appeals Chamber, 13 July 2006, paras. 7-19; No. ICC-01/04-01/06-915, Pre-Trial Chamber I, 24 May 2007, paras. 21, 23, and 26; No. ICC-02/04-112, Pre-Trial Chamber II (Single Judge), 19 December 2007, para. 16; No. ICC-02/04-01/05-20, Pre-Trial Chamber II, 19 August 2005, para. 20; No. ICC-01/04-135, Pre-Trial Chamber I, 31 March 2006, para. 26; No. ICC-02/04-01/05-90, Pre-Trial Chamber II, 10 July 2006, para. 40 (reclassified as public on 2 February 2007); No. ICC-01/04-01/07-149, Pre-Trial Chamber I (Single Judge), 18 January 2008, pp. 3-4; No. ICC-02/05-118, Pre-Trial Chamber I (Single Judge), 23 January 2008, pp. 3-4; No. ICC-02/05-121, Pre-Trial Chamber I (Single Judge), 6 February 2008, pp. 3-4; No. ICC-01/04-01/06-1210-Corr, Trial Chamber I, 6 March 2008, paras. 6-7; No. ICC-01/05-01/08-75, Pre-Trial Chamber III (Single Judge), 25 August 2008, paras. 5-12; No. ICC-01/04-01/06-1313, Trial Chamber I, 8 May 2008, para. 7; and No. ICC-02/11-01/11-265, Pre-Trial Chamber (Single Judge)), 11 October 2012, para. 14. See No. ICC-02/11-01/11-649, Pre-Trial Chamber I, 12 May 2014, paras. 6-9.

The term "*fair*" in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1) and article 21(3)); making its interpretation and application subject to internationally recognized human rights. The expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial.

See No. ICC-01/04-168 OA3, Appeals Chamber, 13 July 2006, para. 11; No. ICC-02/04-01/05-90, Pre-Trial Chamber II, 10 July 2006, para. 24 (reclassifed as public on 2 February 2007). See also No. ICC-01/05-01/08-75, Pre-Trial Chamber III (Single Judge), 25 August 2008, paras. 13-16.

The term "*proceedings*" as encountered in the first part of article 82(1)(d) is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto.

The outcome of the trial is postulated as a separate and distinct consideration warranting the statement of an issue for consideration by the Appeals Chamber, where the possibility of error in an interlocutory or intermediate decision may have a bearing thereupon.

A crucial word in the second leg of article 82(1)(d) is "*advance*". The word cannot be associated with the expeditiousness of the proceedings, one of the prerequisites for defining an appealable issue.

The meaning conveyed by "*advance*" in the latter part of sub-paragraph (d) is "*move forward*"; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings.

See No. ICC-01/04-168 OA3, Appeals Chamber, 13 July 2006, paras. 12-13, and 15.

The term "*immediate*" underlines the importance of avoiding errors through the mechanism provided by sub-paragraph (d) by the prompt reference of the issue to the court of appeal. A corresponding duty is cast upon the Appeals Chamber to render its decision, the earliest possible.

See No. ICC-01/04-168 OA3, Appeals Chamber, 13 July 2006, para. 18. See also No. ICC-01/05-01/08-75, Pre-Trial Chamber III (Single Judge), 25 August 2008, paras. 19-20.

The Appeals Chamber finds these procedures adopted in respect of interlocutory appeals pursuant to article 82(1)(b) of the Statute [that victims shall file an application seeking leave to participate in appeals] to be equally applicable to the instant interlocutory appeals arising under article 82 (1) (d) of the Statute.

See. No. ICC-01/04-01/06-1335 OA9 OA10, Appeals Chamber, 16 May 2008, para. 13.

The Single Judge is of the view that the procedure proposed at the Hearing would be consistent with article 82(1)(d) of the Statute, rule 155 of the Rules and regulation 65(1) and (2) of the Regulations of the Court as long as the relevant party files, within the five day time limit provided for in rule 155 of the Rules, a short (one or two pages) written application for leave to appeal in which: (i) the issues for which leave to appeal is requested are identified; and (ii) the legal and/or factual reasons supporting the request for each of the issues for which leave to appeal is requested are specified *via* their enumeration. According to the Single Judge's Proposal, once an application has been filed, the party filing it shall have until five days after the receipt of the notification of the Chamber's decision confirming or not the charges to file an additional document in support of the application in which the reasons enumerated in the original application may be elaborated upon. Due to the fact that the reasons will be subsequently developed in the additional document in support of the original application, the Single Judge considers that, whenever this procedure is resorted to, the three day time limit to file a response provided for in regulation 65(3) of the Regulations of the Court shall only start running (i) upon the notification of the filing of the additional document in support of the original application; or (ii) absent such filing, upon the expiration of the time limit provided for in the previous paragraph for the filing of such additional document.

See No. ICC-01/04-01/07-601, Pre-Trial Chamber I (Single Judge), 17 June 2008, paras. 13-15, and 20-22.

The procedures adopted in respect of interlocutory appeals pursuant to article 82(1)(b) of the Statute are equally applicable to the interlocutory appeals arising under article 82(1)(d) of the Statute.

See No. ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, para. 37.

On an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules of Procedure and Evidence). Given that the Appeals Chamber has determined that the Pre-Trial Chamber applied the incorrect legal standard in addressing the facts of this case, the Appeals Chamber holds that it is appropriate for the Impugned Decision to be reversed in the specific circumstances of the case.

See No. ICC-01/09-02/11-365 OA3, Appeals Chamber, 10 November 2011, para. 71.

Article 82(1)(d) of the Statute sets out the following prerequisites to the granting of a request for leave to appeal: (a) the decision involves an issue that would significantly affect (i) the fair and expeditious conduct of the proceedings, or (ii) the outcome of the trial; and (b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

With respect to the particular question of the meaning of the term "*issue*" in the context of the first limb of the test under article 82(1)(d) of the Statute, the Appeals Chamber has stated:

> *An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.* […] *An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.*

[…]

The Chamber notes the OPCV's argument that article 82(1)(d) of the Statute cannot be the legal basis for "*requests concerning decisions granting or denying leave to appeal previously issued pursuant to the same provision*". The text of article 82(1)(d) of the Statute, however, does not contain such restriction, and applies to any

"*decision*". Accordingly, the Chamber will proceed to the analysis of the Application under article 82(1)(d) of the Statute.

The Chamber observes that the Application is premised on a claim that the Chamber has developed an erroneous definition of "*appealable issue*", which transforms an assessment under article 82(1)(d) of the Statute into a decision on the merits of the appeal, based on a determination by the Chamber of the existence of errors of law or fact in its own decision.

[…]

If an appealable issue is not clearly identified, the Chamber will simply be unable to carry out an assessment under article 82(1)(d) of the Statute as to whether the issue, if wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial.

See No. ICC-02/11-01/11-389, Pre-Trial Chamber I, 8 February 2013, paras. 22-23, 25-26, and 28.

Article 82(1)(d) of the Statute reads, in relevant part:

> *1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:* [...] *(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.*

In this regard, the Single Judge recalls the first decision on interlocutory appeals dated 19 August 2005, in which this Chamber, albeit with different composition, held that when examining an application for leave to appeal under article 82(1)(d) of the Statute, it must be guided by three main principles: a) the restrictive nature of the remedy provided in this provision; b) the need for the applicant to satisfy the Chamber as to the fulfilment of the requirements embodied in this provision; and c) the irrelevance of addressing arguments concerning the merits of the appeal. The Single Judge also recalls the Appeals Chamber's judgment of 13 July 2006, which considers that the object of the remedy provided in article 82(1)(d) of the Statute, is to "*pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial*". The Single Judge shall therefore assess the Defence's Application in light of these principles.

Having laid down the main principles underlying interlocutory appeals, the Single Judge turns to the requirements regulating the granting or rejection of an application for leave to appeal.

The Single Judge recalls that for leave to be granted, the following specific requirements must be met:

a) the decision must involve an "*issue*" that would significantly affect (i) both the "*fair*" and "*expeditious*" conduct of the proceedings; or (ii) the outcome of the trial; and

b) in the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.

According to established jurisprudence, an "*issue*" is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An "*issue*" is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination. Most importantly, the "*issue*" identified by the appellant must emanate from the relevant decision itself and cannot represent a hypothetical concern or abstract legal question.

"*Fairness*" in the context of article 82(1)(d) of the Statute "*is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1)) and article 21(3)*". "*Expeditiousness*", an "*attribute of a fair trial*", is closely linked to the concept of proceedings "*within a reasonable time*", namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned.

According to the jurisprudence of the Appeals Chamber, the "*outcome of the trial*" is affected "*where the possibility of error in an interlocutory or intermediate decision may have a bearing thereupon*". In deciding a request under article 82(1)(d) of the Statute, the Pre-Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence".

A determination that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial does not automatically qualify it as a subject of appeal. Pursuant to article 82(1)(d) of the Statute, the issue must be such "*for which, in the opinion of the Pre-Trial* […] *Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings*". To materially "*advance*" the proceedings has been identified by the Appeals Chamber as to "*move forward*" "*by ensuring that the proceedings follow the right course*". Whether this is the case, involves an assessment by the relevant Chamber as to whether the authoritative decision by the Appeals Chamber will rid "*the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial*".

Concerning the requirements set out in paragraph 10(a) and (b) above, the Single Judge recalls that they are cumulative. Failure in demonstrating that one of the requirements in (a) or (b) is fulfilled makes it unnecessary for the Single Judge to address the remaining requirements under article 82(1)(d) of the Statute.

See No. ICC-01/04-02/06-207, Pre-Trial Chamber II, 13 January 2014, paras. 7-15.

The Defence alleges that a large number of issues meet the criteria of article 82(1)(d) of the Statute and should be certified for appeal. The issues are laid out in the Request in varying degrees of detail, and with considerable overlap. In addition, the Defence does not make specific submissions on the criteria of article 82(1)(d) of the Statute, and limits itself to stating generally at the end of the submission that all issues raised need to be resolved immediately and they have the potential to affect fairness or the outcome of the trial.

Nevertheless, the Chamber has, to the extent possible, sought to give the Defence submissions an effective interpretation, rather than rejecting proposed issues for incompleteness of argument. The Chamber has concluded that none of the issues identified by the Defence meet the criteria of article 82(1)(d) of the Statute. […] [T]he Chamber has reached this conclusion mainly for the following reasons: (i) some issues proposed by the Defence are in fact extraneous to the Decision; (ii) other issues misrepresent the Decision or involve various disagreements with the Decision with no identifiable impact on the confirmation of charges against Laurent Gbagbo; (iii) other issues arise out of the Decision but, in the conclusion of the Chamber, do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

See No. ICC-02/11-01/11-680, Pre-Trial Chamber I, 11 September 2014, paras. 9-10.

In order to succeed in its request, the Defence must satisfy this Chamber that both requirements of Article 82(1)(d) have been met. This requires an analysis of the issues raised by the specific decision in the context of the specific circumstances of the case. The outcome of such an analysis should serve as the basis for this Chamber's consideration on whether to grant leave to appeal. It is insufficient to argue that the impugned decision was not correctly reasoned (that the impugned decision may be wrong) or that it involves an important area of law. A chamber ought not to grant leave to appeal on the basis that issues related to joinder a priori satisfy both requirements of Article 82(1)(d). It follows that a careful scrutiny of the issues raised by the Defence is required in order to make this assessment.

The Chamber notes that both Defence Requests rely, in part, on what the Chamber considers to be misconceptions of, and unfounded assumptions concerning, the Impugned Decision. Such misconceived and unfounded submissions cannot satisfy the leave to appeal criteria. […].

[…]

Having examined the Impugned Decision, the Chamber finds that none of the Issues would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, as required under the first limb of Article 82(1)(d) of the Statute. Indeed, unlike other legal issues that give rise to an automatic right of appeal at the Court, the fact that the Impugned Decision deals with the issue of joinder does not, in and of itself, satisfy the leave to appeal criteria. The Defence must demonstrate that the relevant criteria are met. It fails to do so. The Defence speculates, based on cumulative contingencies, as to the prejudice it may suffer if the Chamber fails to properly discharge its obligations under Article 64(2) of the Statute and Rule 136 of the Rules. Although joinder modified the procedural framework in which [the two Accused] would be tried and, by its very nature, contemplates minimal prejudices, the Defence does not demonstrate that this procedural modification, risk of minimal prejudice, or any other factor would have any significant impact on the fairness and expeditiousness of the proceedings or the outcome of the trial.

For the same reasons, the Chamber is also of the opinion that resolution of the Issues by the Appeals Chamber would not materially advance the proceedings. It is not sufficient for the Defence to argue that this is the first time that a Trial Chamber of this Court has joined charges and trials, or that the law relating to joinder is of general interest and may arise in future proceedings. After the most careful scrutiny of the Defence Requests, the Chamber has not identified any argument which shows that immediate appellate resolution of the Issues may materially advance the proceedings. The Chamber reiterates that it shall conduct the *Gbagbo and Blé Goudé* case in accordance with Article 64(2) of Statute and Rule 136 of the Rules.

The Chamber acknowledges that the legal interpretation of Article 64(5) of the Statute and Rule 136 of the Rules (in particular, whether a Chamber may join charges against accused which are not identical) may constitute a discrete and identifiable issue arising from the Impugned Decision. However, in light of its analysis above, the Chamber finds that the Defence fails to satisfy either of the cumulative Article 82(1)(d) criteria in relation to this, or any, Issue.

See No. ICC-02/11-01/15-42, Trial Chamber I, 22 April 2015, paras. 14-15, and 17-19.

The Appeals Chamber has determined that Article 82(1)(d) of the Statute does not confer an automatic right of appeal. Rather, a right of appeal will arise only if, in the Chamber's opinion, the impugned decision '*must receive the immediate attention of the Appeals Chamber*'. It has also further clarified that the '*Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue*'. Finally, the Appeals Chamber

has found that the second prong of the leave to appeal standard is intended to ensure that proceedings '*follow the right course*'.

[…]

In the Impugned Decision, the Chamber stated as follows: '*Article 64(5) of the Statue and Rule 136 of the Rules must be read together, the former establishing a broad, discretionary power of the Chamber to join charges, and the latter providing guidance as to the exercise of this discretion and the circumstances in which joinder is justified*'. Consequently, this issue clearly arises from the Impugned Decision and, as acknowledged by the Prosecution, constitutes an appealable issue.

The first criterion according to Article 82(1)(d) of the Statute is that the issue should significantly affect the fair and expeditious conduct of proceedings or impact on the outcome of the trial. As regards this first requirement, the Impugned Decision alters the procedural framework in which both Accused will be tried. In fact, it is significant to note that in a previous determination related to the Impugned Decision, the Single Judge acknowledged '*the crucial importance of the issue at hand* [the joinder request] *and the potential impact the Chamber's decision could have on the conduct of proceedings and the rights of the accused*'. Moreover, in the Impugned Decision the Chamber acknowledged that there could be prejudice to the Accused, even if minimal, '*in comparison to the overall benefits to the interests of justice addressed below*'.

The second alternate criterion under Article 82(1)(d) of the Statute, that the issue should affect the outcome of the trial, is also met. As noted by the *Blé Goudé* Defence, the Chamber concluded in the Impugned Decision that '*although* […] [the Accused] *alleged participation in and/or contribution to the conception and implementation of the common plan or purpose is not the same, the conduct of Mr. Gbagbo and Mr. Blé Goudé, as alleged in the Confirmation Decisions, is nevertheless closely linked*'. In this regard, it is clear that as a result of the Impugned Decision, this will be the first time in ICC history that the Chamber will have to decide on the individual criminal responsibility of two accused persons in a joint trial, despite having two separate confirmation of charges decisions, with slight yet significant differences.

In light of the above, the second requirement, of whether an immediate resolution by the Appeals Chamber may materially advance the proceedings, is met. An immediate resolution by the Appeals Chamber at the interlocutory stage would materially advance the proceedings, as the Impugned Decision impacts the manner in which the Chamber will conduct trial proceedings. The joinder will also have an effect on the manner in which the evidence in this joint trial will be produced and evaluated by the Chamber. Hence, if the Appeals Chamber would determine that the Trial Chamber erred in the Impugned Decision, any negative impact would be minimised if such a finding is made at this early stage of the proceedings.

See No. ICC-02/11-01/15-42, Trial Chamber I (Partly dissenting Opinion of Judge Herrera Carbuccia), 22 April 2015, paras. 9, and 14-17.

Accordingly, Article 82(1)(d) of the Statute does not confer an automatic right of appeal. In determining whether an issue identified by the parties meets the criteria of Article 82(1)(d), the Chamber will first consider whether the issue or issues identified by the party arise from the operative part of the impugned decision. For example, if an issue put forward by a party misstates or misapprehends the disposition of the Chamber, it cannot be said to have arisen from the decision as such and must be dismissed. Similarly, to the extent that an issue put forward by a party constitutes '*mere disagreement*' or simply a conflicting opinion, this also cannot form an appealable issue within the meaning of Article 82(1)(d) of the Statute.

It may be noted that in deciding on a request for leave to appeal, a Trial Chamber is not concerned with the correctness of the impugned decision, per se, determination of whether the Chamber erred is a matter for the Appeals Chamber should leave be granted. Rather, the role of the Trial Chamber is simply to determine whether any of the issues presented by the parties seeking leave meet the requirements as set out in Article 82(1)(d) of the Statute.

See No. ICC-02/11-01/15-117, Trial Chamber I, 2 July 2015, paras. 19-20.

In this regard, the Chamber notes that there is some disagreement among trial chambers as to the meaning of the phrase '*at any time during the trial*' in Regulation 55(2) of the Regulations. In addition, if the phrase '*at any time during the trial*' means that a Chamber may only give notice of the possibility that the legal characterisation is subject to change after commencement, then there could be no '*exceptional circumstances*' warranting giving notice now. Thus, if the timing of the Impugned Decision was in error, the related proceedings may continue on an unsound legal basis. In light of the above, the Chamber is satisfied that appellate resolution of these issues could '*ensur*[e] *that the proceedings follow the right course*', thereby removing any doubt that any consequences of the Impugned Decision – such as the additional investigations or changes in strategy the Defence claims to be necessary – are justified.

See No. ICC-02/11-01/15-212, Trial Chamber I, 10 September 2015, para. 12.

The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in previous decisions. In order to succeed in their request, the party seeking leave must satisfy this Chamber that both requirements of Article 82(1)(d) have been met. This requires an analysis of the issues raised by the specific decision complained of in the context of the specific circumstances of this case. The outcome of such an analysis serves as the basis

for this Chamber's consideration on whether to grant leave to appeal. A general reference to the '*accused's fundamental rights and how the alleged violation necessarily affects the fairness of the proceedings, without more, cannot satisfy the leave to appeal criteria, which requires the demonstration of a specific link between the issue which has been identified and a significant impact on the fair and expeditious conduct of the current proceedings*'.

[…]

While the Chamber acknowledges the plain language of Regulation 35(2) and the criteria set out therein, the Chamber also recognises that the Regulations which were made for the Court's routine functioning do not exist for their own sake, but for the purpose of the Chamber performing its duty under Article 64 of the Statute.

Regulation 1 of the Regulations provides that the regulations of the Court shall be read subject to the Statute and the Rules. Article 64 of the Statute which outlines the functions and powers of the Trial Chamber, provides that such functions and powers shall be exercised in accordance with the Statute and the Rules of Procedure and Evidence. In particular, Article 64(2) of the Statute provides that the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the Accused and due regard for the protection of victims and witnesses, and Article 64(8)(b) of the Statute gives the Chamber the authority to give directions on the conduct of proceedings, taking into consideration whether such directions are exercised fairly and impartially. The overall function and powers of the Trial Chamber must be borne in mind, both when interpreting and applying the Regulations. The factors may often pull in opposite directions, and it is the duty of the Chamber to strike the balance.

In the context of this case, the Chamber does not consider that granting leave to appeal on the factors a Chamber must take into consideration when considering a Regulation 35(2) request by allowing the Prosecution to disclose evidence to a party at a date later than that which was originally set by the Chamber, satisfies the leave to appeal criteria under Article 82(1)(d) of the Statute or would materially advance the proceedings.

See No. ICC-02/11-01/15-228, Trial Chamber I, 18 September 2015, paras. 24, and 29-31.

The Appeals Chamber observes that article 82(1)(d) of the Statute clearly vests power solely in the Pre-Trial and Trial Chambers to certify appealable issues and to determine whether appellate resolution will materially advance the proceedings. The Appeals Chamber concurs with [the Defence] that the Prosecutor has not identified any legal basis for the Appeals Chamber to conduct its own assessment of the criteria of article 82(1)(d) of the Statute. The Appeals Chamber also considers that, in making this submission, the Prosecutor appears to be attempting to directly appeal the Decision Granting Leave to Appeal, which is not permissible under the Statute.

Furthermore, the Appeals Chamber considers the Prosecutor's arguments as to the "*irrelevance*" of the remedy sought by [the Defence], namely, the reversal of the Impugned Decision, to be misplaced. The relief sought undoubtedly remains available. The Appeals Chamber finds no merit in the argument that [the Defence]'s appeal is somehow rendered inadmissible by the fact that the Trial Chamber may subsequently correct any erroneous determination in the Impugned Decision. Finally, the Appeals Chamber reiterates its disapproval of the Prosecutor raising substantive parts of her argument in a footnote, contrary to the Appeals Chamber's prior instructions to the Prosecutor that substantive arguments may only appear in the main text of filings.

In light of the above, the Appeals Chamber rejects the Prosecutor's request to dismiss the appeal *in limine*.

[…]

The Appeals Chamber concurs with the Prosecutor that several of [the Defence]'s arguments fall outside the scope of the issues that were certified by the Trial Chamber for appeal. [The Defence] raises arguments that challenge the validity of recharacterising the facts and circumstances under regulation 55(1) of the Regulations of the Court in the present case, as opposed to only challenging the actual timing of the notice of such a recharacterisation provided for in regulation 55(2) of the Regulations. In this respect, the Appeals Chamber observes that the core of [the Defence]'s appeal appears to be premised on the argument that it is legally impermissible for a Trial Chamber to recharacterise the facts and circumstances of a case to include modes of liability that were charged, but not confirmed, by the Pre-Trial Chamber.

The Appeals Chamber recalls that it may consider arguments "*intrinsically linked to the issue on appeal as certified by the* [relevant] *Chamber*". In determining whether [the Defence]'s arguments are "*intrinsically linked*", the Appeals Chamber recalls that, in the context of an appeal addressing a similar issue in its "Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons'" (hereinafter: "*Katanga* OA 13 Judgment"), it held that

> *[b]y issuing the [i]mpugned [d]ecision, the Trial Chamber has merely given notice pursuant to regulation 55(2) of the Regulations of the Court. The Appeals Chamber therefore has to review whether the Trial Chamber erred in relation to whether "*it appears […] that the legal characterisation of facts may be subject to change*", pursuant to regulation 55(2) of the Regulations of the Court. Hence, the review that the Appeals Chamber can undertake at this stage of the proceedings is a limited one, in that the [i]mpugned [d]ecision would be erroneous only if it were immediately apparent to the Appeals Chamber, at this stage, that the change in the legal characterisation contemplated by the Trial Chamber would exceed the facts and circumstances described in the charges.*

The Appeals Chamber considers that the issue raised by [the Defence] is intrinsically linked to the issues certified on appeal in the sense that, if the legal recharacterisation of the facts and circumstances cannot as a matter of law be based on modes of liability rejected in a decision confirming the charges, this would directly impact the reasonableness (or lack thereof) of the Trial Chamber's conclusion that "*it appears* […] *that the legal characterisation of facts may be subject to change*". Accordingly, the Appeals Chamber rejects the Prosecutor's request that [the Defence]'s arguments be disregarded.

In line with its finding in the *Katanga* OA 13 Judgment, the review that the Appeals Chamber can undertake in these circumstances is a limited one, in that the Impugned Decision would be erroneous only if it were immediately apparent to the Appeals Chamber, at this stage, that the change in the legal characterisation contemplated by the Trial Chamber is not legally permissible.

[…]

The Appeals Chamber recalls that, in its "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'" […], Mr Lubanga argued that regulation 55 of the Regulations of the Court did not permit recharacterisation of facts to add new offences or more serious offences than those listed in the charges, even if they are based on the facts and circumstances described in the charges. While declining to rule on the substance of Mr Lubanga's arguments, the Appeals Chamber nonetheless noted that, if it were to so decide, "*the particular circumstances of the case w*[ould] *have to be taken into account*".

In resolving the issue raised by Mr Gbagbo, the Appeals Chamber accordingly limits itself only to the specific circumstances of this case, which are that the Pre-Trial Chamber declined to confirm modes of liability pursuant to article 28 of the Statute, but did confirm the alleged facts upon which the Trial Chamber now bases its notice pursuant to regulation 55 of the Regulations of the Court.

In this regard, the Appeals Chamber recalls that, in the *Lubanga* OA 15 OA 16 Judgment, it held that failing to permit a trial chamber to re-visit the legal characterisation of facts that were confirmed by the Pre-Trial Chamber at the end of the confirmation procedure "*bears the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect* […]. *This would be contrary to the aim of the Statute to* 'put an end to impunity' *(fifth paragraph of the Preamble)*". Additionally, the Appeals Chamber held that article 74(2) of the Statute "*confines the scope of* [r]*egulation 55 to the facts and circumstances described in the charges and any amendment thereto. If applied with such limitation,* [r]*egulation 55 is consistent with article 74(2) of the Statute*". With respect to article 61(9) of the Statute, the Appeals Chamber noted that "*the text of* [r]*egulation 55 does not stipulate, beyond what is contained in sub-regulation 1, what changes in the legal characterisation may be permissible*".

In the circumstances of this case, the Appeals Chamber finds that there is no legal impediment to a Trial Chamber recharacterising facts and circumstances to include a mode of liability that was considered, but not confirmed by the Pre-Trial Chamber, so long as the facts and circumstances that could potentially be recharacterised were confirmed by that Pre-Trial Chamber. Therefore, the Appeals Chamber rejects [the Defence]'s argument in this regard.

[…]

On an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules of Procedure and Evidence). In the present case, having rejected both grounds of [the Defence]'s appeal, it is appropriate to confirm the Impugned Decision.

In issuing this judgment, the Appeals Chamber notes that rule 158 of the Rules of Procedure and Evidence read with article 83(4) of the Statute provides that judgments of the Appeals Chamber "*shall be delivered in open court*". The Appeals Chamber notes further that regulation 19 *bis* (1) of the Regulations of the Court provides that "[u]*nless otherwise determined by a Chamber, during the judicial recess hearings shall be limited to urgent issues and time limits shall not be suspended*". Noting that the Court is in judicial recess, the Appeals Chamber considers that it is appropriate in the circumstances of this case to forego convening a hearing for the delivery of its judgment. The Appeals Chamber considers that the publication of its judgment on the Court's website, coupled with the required notice to the participants in accordance with regulations 31 and 32 of the Regulations of the Court, adequately fulfils its obligation to publicise the delivery of its judgments.

See No. ICC-02/11-01/15-369 OA7, Appeals Chamber, 18 December 2015, paras. 18-20, 24-27, 29-32, and 74-75.

The Chamber emphasises that it is not obliged, under article 82(1)(d) of the Statute, to entertain applications for leave to appeal that do not present complete arguments under the requirements of said provision. As is clear from a previous decision of the Chamber, incomplete applications may be rejected for that reason alone. However, in light of the fact that the issues proposed for appeal are identified with sufficient clarity, the Chamber is prepared to address them, in the interest of achieving the purpose of article 82(1)(d) of the Statute, which is to identify issues that need immediate appellate attention in order to ensure the proper course of the proceedings.

See No. ICC-02/11-01/15-685-Red, Trial Chamber I (Single Judge), 27 September 2016, para. 6.

The Appeals Chamber has previously explained that a right to appeal interlocutory decisions under article 82(1)(d) of the Statute arises only if the Pre-Trial Chamber or the Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber. In essence, the Pre-Trial Chamber or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue. By the plain terms of article 82(1)(d) of the Statute, a Pre-Trial Chamber or Trial Chamber may certify such a decision on its own accord.

In addition, the Appeals Chamber has held that "*it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent*". More recently, the Appeals Chamber, with reference to this jurisprudence, declined to conduct its own assessment of the criteria of article 82(1)(d) of the Statute, noting the lack of a legal basis to do so. However, notwithstanding the aforementioned jurisprudence, the Appeals Chamber recalls that it has also found that it may consider arguments that are "*intrinsically linked to the issue on appeal as certified by the* [relevant] *Chamber*".

[…]

The Appeals Chamber recalls that it will not interfere with a Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.

With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.

With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Chamber's findings. The Appeals Chamber will not interfere with the factual findings of a first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts. Regarding the misappreciation of facts, the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.

See No. ICC-02/11-01/15-744 OA8, Appeals Chamber, 1 November 2016, paras. 12-13, and 21-23. See also No. ICC-02/11-01/15-915-Red OA9, Appeals Chamber, 31 July 2017, para. 55.

Article 82(1)(d) of the Statute provides that an interlocutory decision may be appealed if it "*involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings*".

Rule 155(1) of the Rules states that the party seeking to appeal an interlocutory decision "*shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal*". Regulation 65 of the Regulations of the Court then regulates the matter in further detail, and provides how the other participants in the proceedings can be heard.

It should go without saying, but circumstances nevertheless compel me to spell out that it follows from the above-cited provisions of the Statute and the Rules that the decision whether and what to appeal is exclusively in the hands of the parties, and not of the Chamber which made the impugned ruling. The parties have to identify an appealable issue and submit it to the Chamber for consideration. Then, the Chamber's role is to verify whether the requirements of article 82(1)(d) of the Statute are met with respect to the proposed issue.

At the same time, the provisions cited above show that the identification of the appealable issue is crucial for the interlocutory appeal as it sets the parameters of the jurisdiction of the Appeals Chamber. As put by the Appeals Chamber itself, "*it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent*". Indeed, the Appeals Chamber has previously declined to consider arguments going beyond the issue in relation to which leave to appeal had been granted.

On the basis of these considerations I am of the view that the Pre-Trial or Trial Chamber does not have the power to reformulate in substance the issue identified for appeal by the party seeking leave to appeal. If it does so reformulate, the Pre-Trial or Trial Chamber interferes with the parameters of the interlocutory appeal without the prospective appellant or the other parties being heard. This is in the final instance incompatible with the object and purpose of article 82(1)(d) of the Statute, which is to give the parties, in the specified circumstances, the right to appeal judicial decisions. As an illustration of how this practice does not guarantee

the right to appeal it may be mentioned that it has already occurred before this Court that an appeal was withdrawn after an issue was certified for appeal only after reformulation by the Chamber.

To be clear, I am not opposed to terminological corrections to the wording of issues identified for appeal, or to reformulations that are warranted by partial rejections of requests for leave to appeal, or to other reformulations which do not interfere with the substance of the proposed appeal. I am, however, strongly opposed in principle to substantive reformulations of the issues proposed for appeal under article 82(1)(d) of the Statute.

[…]

It would be wiser and more efficient to have the Chamber's evidentiary rulings reviewed as part of any final appeal against the judgment under article 74 of the Statute. At that time, the Chamber will have considered all the evidence submitted, made all necessary evidentiary rulings, and drawn its factual conclusions from the evidence. It is also at that time that it will be possible to conclusively determine the significance of specific evidentiary findings, and therefore the impact of any errors in their regard.

See No. ICC-02/11-01/15-901-Anx, Trial Chamber I, Partly Dissenting Opinion of Judge Tarfusser, 4 May 2017, paras. 2-7, and 24.

4.4. Suspensive effect

The request of the Defence to stay all proceedings pending before another Chamber by the Appeals Chamber is not known to the law applicable to proceedings before the Court and therefore the request of the appellant shall be dismissed. The request to stay proceedings before another Chamber is a relief wholly separate and distinct from the one envisaged in article 82(3) of the Rome Statute.

See No. ICC-01/04-01/06-844 OA8, Appeals Chamber, 9 March 2007, para. 4. See also No. ICC-02/04-01/05-92 OA, 13 July 2006, Appeals Chamber, paras. 3-5 (reclassified as public on 4 February 20008) and No. ICC-01/04-01/06-1347 OA9 OA10, Appeals Chamber, 22 May 2008, para. 1.

Article 82(3) of the Statute provides that an appeal shall not have suspensive effect "*unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence*". Rule 156(5) of the Rules of Procedure and Evidence provides that "*when filing an appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3*". The decision on such a request is within the discretion of the Appeals Chamber. Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances.

See No. ICC-01/05-01/08-499 OA2, Appeals Chamber, 3 September 2009, para. 11. See also No. ICC-01/04-01/06-1290 OA11, Appeals Chamber, 22 April 2008, para. 6.

Article 82(3) of the Rome Statute provides that an appeal shall not have suspensive effect "*unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence*". Rule 156(5) of the Rules of Procedure and Evidence provides that "*when filing an appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3 of the Rome Statute*". As neither article 82(3) nor rule 156(5) stipulate in which circumstances suspensive effect should be ordered, this decision is left to the discretion of the Appeals Chamber.

Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances. In light of the submissions of the appellant, the Appeals Chamber has considered in the present case whether the implementation of the Impugned Decision would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant. The Appeals Chamber is not persuaded that it would be appropriate to order that the appeal shall have suspensive effect because it does not consider that the implementation of the impugned decision would create such an irreversible situation and because there are no other apparent reasons for granting the request. Therefore, in the context of the present appeal, there is no need to protect the appellant from a potentially irreversible situation that could be caused by the disclosure of his lines of defence because the impugned decision did not oblige him to do so. Similarly, if the present appeal were successful and if this would lead to additional disclosure obligations of the Prosecutor prior to the commencement of the trial in respect of the identities of witnesses or the general use of child soldiers in the Democratic Republic of the Congo, the Trial Chamber could make any necessary adjustments at that time, in order to ensure the fairness of the proceedings. As the Appeals Chamber concludes that suspensive effect should not be ordered in the present case, it does not consider it necessary to address the question of whether the specific relief sought by the appellant, namely the suspension of all proceedings before the Trial Chamber pending the decision on appeal, would be appropriate.

See No. ICC-01/04-01/06-1290 OA11, Appeals Chamber, 22 April 2008, paras. 6-9.

Given the fact that the decision on release was under appeal and that leave to appeal the stay of proceedings had been granted and in light of previous findings of the Pre-Trial and Trial Chambers that his detention is necessary to secure his presence at trial, the Appeals Chamber found that the release of the accused at this point in time could potentially defeat the purpose of the present appeal as well as of the appeal that, in all

likelihood, would be mounted against the Decision to Stay the Proceedings. In such circumstances, the interest of the accused to be released immediately did not outweigh the reasons in favour of granting the request for suspensive effect.

See No. ICC-01/04-01/06-1444 OA12, Appeals Chamber, 22 July 2008, para. 10.

The Appeals Chamber does not accept the submission that, pursuant to rule 150(4) of the Rules of Procedure and Evidence, if an appeal is filed pursuant to article 82(4) of the Statute, the order for reparations is not final and is therefore automatically suspended. If that argument were correct, there would be no need to have a provision governing suspensive effect in relation to appeals under, *inter alia*, articles 82(1)(a), (b) or (c) of the Statute either, because rule 154(3) of the Rules of Procedure and Evidence makes rule 150(4) applicable to those appeals as well. Yet, article 82(3) of the Statute and rule 156(5) of the Rules of Procedure and Evidence provide for and regulate requests for suspensive effect in respect of those appeals and, indeed, the Appeals Chamber has addressed requests for suspensive effect in relation to such appeals. Furthermore, there is a difference between an order for reparations becoming final and the suspension of an order for reparations pending the outcome of an appeal against it. An order being final provides legal certainty in that it is known that it will not be the subject of a further appeal (and therefore will not potentially be reversed or amended). As the order for reparations is under appeal, there remains the possibility that it will be reversed or amended.

The Appeals Chamber notes that article 82(4) of the Statute, which provides for appeals against orders for reparations, appears within the same article of the Statute as article 82(3), which gives the Appeals Chamber power to order suspensive effect "*in accordance with the Rules of Procedure and Evidence*". The Rules of Procedure and Evidence contain, in rule 156(5), a provision on requests for suspensive effect. This provision, however, deals with appeals regulated by rules 154 and 155 of the Rules of Procedure and Evidence and is as such not applicable to appeals under article 82(4) of the Statute, which are regulated by rules 150 to 153 of the Rules of Procedure and Evidence. There is no other provision in the legal texts that specifically regulates suspensive effect in relation to appeals against orders for reparations, including article 81(4) of the Statute. Therefore, because of its placement in article 82 of the Statute and the need for the Appeals Chamber to be able to order suspensive effect when an order for reparations is appealed, the Appeals Chamber considers that it has the power to grant a request for suspensive effect under article 82(3) of the Statute and rule 156(5) of the Rules of Procedure and Evidence when seized of such a request in relation to an appeal under article 82(4) of the Statute. Accordingly, the legal basis for dealing with the convicted person's request for suspensive effect is indeed article 82(3) of the Statute.

See No. ICC-01/04-01/06-2953 A A2 A3 OA21, Appeals Chamber, 14 December 2012, paras. 79-80.

In exercising its discretion in the specific circumstances of the present case, the Appeals Chamber needs to weigh the delay that a suspension would cause against the impact that continuing the proceedings before the Trial Chamber based on the Impugned Decision could have, in particular, on the rights of the accused, should the Appeals Chamber eventually reverse or amend the Impugned Decision.

The Appeals Chamber finds that, in this appeal, which is directed against a decision that was rendered at the final stage of the trial proceedings; the need to preserve the integrity of the proceedings overrides any other consideration. In this regard, if the trial proceedings continued based on the Impugned Decision, and that decision were eventually reversed on appeal, any adverse effects on the overall fairness of the proceedings and the rights of the accused might be difficult to correct. Similarly, even if the Appeals Chamber were to confirm the Impugned Decision, the Appeals Chamber's judgment may have a significant impact on the further conduct of the trial proceedings. Therefore, the Appeals Chamber finds that the Trial Chamber should not proceed with the trial on the basis of the Impugned Decision and decides that the appeal shall have suspensive effect.

See No. ICC-01/04-01/07-3344 OA 13, Appeals Chamber, 16 January 2013, paras. 8-9.

The Chamber further notes that, in the Court's statutory instruments, the power to order suspensive effect is only given to the Appeals Chamber. However, the Chamber considers that Article 64(3)(a) of the Statute gives a Trial Chamber the power to suspend the proceedings if this is "*necessary to facilitate the fair and expeditious conduct of the proceedings*".

See No. ICC-01/05-01/08-3522, Trial Chamber III, 5 May 2017, para. 17.

Relevant decisions regarding issues related to the procedure of appeals

Decision on the Prosecutor's Application for Leave to Appeal (Pre-Trial Chamber I), No. ICC-01/04-14, 14 March 2005

Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58 (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005

Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Pre-Trial Chamber I), No. ICC-01/04-135-tEN, 31 March 2006

Decision on Prosecutor's applications for leave to appeal dated the 15th day of March 2006 and to suspend or stay consideration of leave to appeal dated the 11th day of May 2006 (Pre-Trial Chamber II), No. ICC-02/04-01/05-90, 10 July 2006 (reclassified as public on 2 February 2007)

Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006

Decision on the Prosecutor "Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's Application for Extraordinary Review (Appeals Chamber), No. ICC-02/04-01/05-92 OA, 13 July 2006

Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information on Electronic Version for their Presentation During the Confirmation Hearing (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-360, 28 August 2006

Décision relative à la requête sollicitant l'autorisation d'interjeter appel du conseil ad hoc pour la Défense (Pre-Trial Chamber I), No. ICC-02/05-33, 22 November 2006

Decision on the Ad hoc Counsel for the Defence's Request for leave to Appeal the Decision of 2 February 2007 (Pre-Trial Chamber I), No. ICC-02/05-52, 21 February 2007

Decision on the "Prosecution's Request for Leave to Appeal the Decision Denying the 'Application to Lift Redactions From Applications for Victims' Participation to be Provided to the OTP'" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-219, 9 March 2007

Reasons for "Decision of the Appeals Chamber on the Defence application 'Demande de suspension de toute action ou procédure afin on 20 February 2007" issued on 23 February 2007 (Appeals Chamber), No. ICC-01/04-01/06-844 OA8, 9 March 2007

Decision on the Request for Leave to Appeal to the Decision Issued on 15 March 2007 (Pre-Trial Chamber I), No. ICC-02/05-70, 27 March 2007

Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges (Pre-Trial Chamber I), No. ICC-01/04-01/06-915, 24 May 2007

Decision on the adnlissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges» of 29 January 2007" (Appeals Chamber), No. ICC-01/04-01/06-926 OA8, 13 June 2007

Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-112, 19 December 2007

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Decision on the "Demande d'autorisation d'interjeter appel de la décision orale rendue par la Chambre de première instance le 5 octobre 2017" (Trial Chamber I), No. ICC-02/11-01/15-1064, and Dissenting Opinion of Judge Henderson, No. ICC-02/11-01/15-1064-Anx, 10 November 2017

Decision on the "Demande d'autorisation d'interjeter appel de la 'Decision on Mr Gbagbo's Request for revised and corrected translation of the Trial Brief and related orders' (ICC-02/11-01/15-1177)" (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-1190, 26 June 2018

5. Issues related to disclosure

Articles 54(3)(e), 57(3)(c) and 67 of the Rome Statute
Rules 76-84 of the Rules of Procedure and Evidence

Disclosure aims at providing the Defence with sufficient information on the Prosecution case and potentially exculpatory materials in order to place the Defence in a position to prepare adequately for the confirmation hearing.

Communication to the Pre-Trial Chamber of certain evidence before the confirmation hearing aims at placing the Pre-Trial Chamber in a position to properly organise and conduct the confirmation hearing.

In the view of the Single Judge, the relationship between disclosure and communication of certain evidence to the Pre-Trial Chamber in the Court's criminal procedure is such that a clear understanding of the extent of such communication is needed to properly address the main features of the disclosure system.

The Single Judge considers that interpreting the provisions on communication of certain evidence to the Pre-Trial Chamber must take into consideration a number of elements.

First, the parties agree that the expression "*shall be communicated to the Pre-Trial*" in rule 121(2)(c) of the Rules means filing certain evidence in the record of the case. In the view of the Single Judge, this approach is supported not only by a literal interpretation of the expression "*shall be communicated*", but also by its contextual interpretation in light of rule 122(1) of the Rules. This last rule is drafted on the premise that the evidence to be presented at the confirmation hearing must previously have been filed in the record of the case, insofar as it establishes that, at the beginning of the confirmation hearing, the Presiding Judge "*shall determine how the hearing is to be conducted and, in particular, may establish the order and the condition under which he or she intends the evidence contained in the record of the proceedings to be presented*".

A teleological interpretation of rules 121(2)(c) and 122(1) of the Rules also supports this approach. These rules aim at placing the Pre-Trial Chamber in a position to properly organise and conduct the confirmation hearing, which is best achieved by the Chamber having advance access to the evidence to be presented at the hearing. Filing the evidence to be presented at the confirmation hearing in the record of the case will fulfil two additional important functions. First, it puts the victims of the case in a position to adequately exercise their procedural rights during the confirmation hearing by giving them prior access to the evidence that is going to be presented. Second, it ensures that no matter what shortcomings may have occurred in the disclosure process, the parties will have access to the evidence to be presented at the confirmation hearing before it commences.

Second, the Single Judge considers that access to all documents, materials and evidence filed in the record of the case is inherent to the jurisdictional functions of the Pre-Trial Chamber in the case against Thomas Lubanga Dyilo.

Finally, the Single Judge agrees with the Defence and the Registry that the latter is the only organ of the Court which, under rules 15, 121(10), 131 and 137 of the Rules, can give full faith and credit to the proceedings before the Court, including those in the present case, and is responsible for keeping the record of such proceedings.

Under these circumstances, the single judge considers that both parties are obliged, pursuant to rules 121(2)(c) and 122(1) of the Rules, to file the original statements, books, documents, photographs and tangible objects in the record of the case. It will then be the responsibility of the Registry, as the record keeper of the Court, to maintain the evidence in its original format, so that the parties shall only have to address matters relating to the chain of custody arising from events prior to the filing of the relevant evidence.

[…]

The Single Judge considers that, as a general rule, statements must be disclosed to the Defence in full. Any restriction on disclosure to the Defence of the names or portions, or both, of the statements of the witnesses on which the Prosecution intends to rely at the confirmation hearing must be authorised by the Single Judge under the procedure provided for in rule 81 of the Rules.

See No. ICC-01/04-01/06-102, Pre-Trial Chamber I (Single Judge), 16 May 2006, paras. 29-37, and 101.

Considering the recent deterioration of the security situation in some parts of the Democratic Republic of the Congo, non-disclosure of identity *vis-à-vis* the Defence for the purpose of the confirmation hearing is currently the only available and feasible measure for the necessary protection of many Prosecution witnesses.

[…]

Articles 61(5) and 68(5) of the Statute and rule 81(4) of the Rules allows the Prosecution to request the Chamber to authorise (i) the non-disclosure of the identity of certain witnesses on whom the Prosecution intends to rely at the confirmation hearing and (ii) the reliance on the summary evidence of their statements, the transcripts of their interviews and/or the investigators' notes and reports of their interviews.

See No. ICC-01/04-01/06-437, Pre-Trial Chamber I (Single Judge), 15 September 2006, pp. 7 and 9.

The notion of "*witness*" in rule 81(4) of the Rules must be understood as including not only those witnesses on whom the Prosecution intends to rely at the confirmation of the charges hearing but also those on whom the Prosecution may decide to rely at trial if the charges against the person are confirmed.

See No. ICC-01/04-01/06-455, Pre-Trial Chamber I (Single Judge), 20 September 2006, p. 8.

Non-disclosure to the person in respect of whom a confirmation hearing is held of the identity of the witnesses on whom the Prosecutor intends to rely at the confirmation hearing or portions of prior statements made by these witnesses is an exception to the general rule that the identity of such witnesses and their prior statements are to be disclosed. A Pre-Trial Chamber, when considering a request by the Prosecutor for such non-disclosure pursuant to rule 81(4) of the Rules of Procedure and Evidence, will take into account all relevant factors and will carefully appraise the Prosecutor's request on a case-by-case basis. A mandatory application by the Prosecutor to the Victims and Witnesses Unit for protective measures prior to a request to the Pre-Trial Chamber for non-disclosure of the identity of witnesses on whom the Prosecutor intends to rely at the confirmation hearing is not prescribed by the Statute or the Rules of Procedure and Evidence.

[…]

It is not incorrect to state that non-disclosure of the identity of the witnesses on whom the Prosecutor intends to rely at the confirmation hearing is an exception. Pursuant to rule 76(1) of the Rules of Procedure and Evidence, "*the Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses*". Rule 76 is part of Chapter 4 of the Rules of Procedure and Evidence, entitled "*Provisions relating to various stages of the proceedings*", which indicates that rule 76 is applicable to the confirmation hearing as well. This interpretation is consistent with article 61(3)(b) of the Rome Statute, which provides that the person in respect of whom a confirmation hearing is held "*be informed of the evidence on which the Prosecutor intends to rely at the hearing*". That exceptions to the principle that the names of witnesses and prior witness statements are to be disclosed may occur follows from rule 76(4) of the Rules of Procedure and Evidence, which states that "*this rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82*". Thus, reference is made to witness protection pursuant to rule 81(4) of the Rules of Procedure and Evidence.

[…]

The decision by the Pre-Trial Chamber that whenever an application pursuant to rule 81(2) and (4) of the Rules of Procedure and Evidence is filed *ex parte*, the other participant must be made aware in an *inter partes* filing of the fact that such an application was filed as well as of its legal basis and, with respect to an application under rule 81(4), of any request for *ex parte* proceedings that might be contained in such an application is erroneous to the extent that it does not provide for any exception.

See No. ICC-01/04-01/06-568 OA3, Appeals Chamber, 13 October 2006, paras. 1, 34-35, and 65.

A decision authorising the non-disclosure of the identities of witnesses of the Prosecutor to the defence has to state sufficiently the reasons upon which the Pre-Trial Chamber based its decision. The presentation by the Prosecutor of summaries of witness statements and other documents at the confirmation hearing is permissible even if the identities of the relevant witnesses have not been disclosed to the defence prior to the hearing, provided that such summaries are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[…]

Authorisation of non-disclosure of the identity of a witness pursuant to rule 81(4) of the Rules of Procedure and Evidence shall take into account the following three considerations: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and why the Pre-Trial Chamber considered that the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[....]

Pursuant to rule 81(4) of the Rules of Procedure and Evidence, a Chamber shall take *inter alia* "*necessary steps*" to protect witnesses and members of their families. The use of the word "*necessary*" emphasises the importance of witness protection and the obligation of the Chamber in that respect; at the same time, it emphasises that protective measures should restrict the rights of the suspect or accused only as far as necessary. Thus, if less restrictive protective measures are sufficient and feasible, a Chamber must choose those measures over more restrictive measures.

See No. ICC-01/04-01/06-773 OA5, Appeals Chamber, 14 December 2006, paras. 1-2, 21, and 33.

Rule 81(5) of the Rules of Procedure and Evidence does not address the introduction into evidence of summaries at the confirmation hearing pursuant to articles 68(5) and 61(5) of the Rome Statute. The provision regulates under what conditions the material and information on the basis of which the summaries were compiled may subsequently be introduced into evidence.

[…]

The presentation of summaries at the confirmation hearing without disclosure of the identities of the relevant witnesses to the defence is not *per se* prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The use of summaries may affect the ability of the suspect pursuant to article 61(6)(b) of the Rome Statute to challenge the evidence presented by the Prosecutor at the confirmation hearing in two respects: first, the Prosecutor is authorised to rely on witnesses whose identities are unknown to the defence (anonymous witnesses); secondly, the ability of the defence to evaluate the correctness of the summaries is restricted because the defence does not receive prior to the confirmation hearing the witness statements and other documents that form the basis of the summaries. However, this does not mean that the use of such summaries at the confirmation hearing is necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The Appeals Chamber considers that the analysis of the European Court of Human Rights on anonymous witnesses is relevant for the present appeal. In fact, the use of such summaries is permissible where the Pre-Trial Chamber takes sufficient steps to ensure that summaries of evidence are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial. This will have to be determined on a case-by-case basis, also bearing in mind the character of the confirmation hearing. The Pre-Trial Chamber will have to take into account *inter alia* that the ability of the defence to challenge the evidence presented by the Prosecutor at the confirmation hearing is impaired not only by the use of anonymous witnesses but also by the use of summaries without disclosure to the defence of the underlying witness statements and other documents.

See No. ICC-01/04-01/06-773 OA5, Appeals Chamber, 14 December 2006, paras. 48, and 50-51.

A decision pursuant to rule 81(2) of the Rules of Procedure and Evidence authorising disclosure prior to the confirmation hearing of witness statements or other documents to the defence with redactions must state how the Pre-Trial Chamber came to such a conclusion; the reasoning should also state which of the facts before it led the Pre-Trial Chamber to reach its conclusion. At the confirmation hearing, the Prosecutor, in principle, may rely on the unredacted parts of witness statements and other documents even if they were disclosed to the defence prior to the hearing with redactions authorised pursuant to rule 81(2) of the Rules of Procedure and Evidence.

[…]

Pursuant to rule 81(2) of the Rules of Procedure and Evidence, the Prosecutor may not introduce material or information in the possession or control of the Prosecutor into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused. The Appeals Chamber considers that rule 81(2) of the Rules of Procedure and Evidence does not dictate that redactions and/or disclosure must be determined inflexibly by the unit of the entirety of a "*statement*" or "*document*", such that the statement or document must either be disclosed in its entirety or not considered at the confirmation hearing at all. As a consequence, if only parts of a witness statement or document are not disclosed to the defence prior to the confirmation hearing, the Prosecutor, in principle, may rely on those parts that have been disclosed at the confirmation hearing. To what extent redactions may be authorised or maintained if the Prosecutor seeks to introduce information that is disclosed to the defence only in part will need to be determined upon the facts of the individual case, taking into account the interests of the defence and the need for a fair and impartial trial.

See No. ICC-01/04-01/06-774 OA6, Appeals Chamber, 14 December 2006, paras. 1-2, 31, and 44-46.

The test required in article 67(2) carries two main elements. The first element requires the prosecution to have evidence in its possession or control. Secondly, the Prosecutor must assess whether that evidence may affect the credibility of the prosecution evidence. If these two elements are met, it is the duty of the Prosecutor to disclose as soon as is practicable the information to the defence. It is the prosecution's obligation to assess whether an information or evidence may affect the credibility of a Prosecution's witness. If there is doubt on the issue, then the matter is to be referred to the court.

See No. ICC-01/04-01/06-963-Anx1, Trial Chamber I, 26 September 2007, paras. 12 and 36.

In order for any redaction in any given statement to be authorised, the Single Judge must, first and foremost, have reached the conclusion that there is a risk that the disclosure to the Defence – at least at this stage of the proceedings – of the information sought to be redacted could (i) prejudice further or ongoing investigations by the Prosecution (rule 81(2) of the Rules); (ii) affect the confidential character of the information under articles 54, 72 and 93 of the Rome Statute (rule 81(4) of the Rules); or (iii) affect the safety of witnesses, victims or members of their families (rule 81(4) of the Rules). Moreover, after ascertaining the existence of such a risk, the Single Judge will analyse whether (i) requested redactions are adequate to eliminate, or at least, reduce such a risk; (ii) there is no less intrusive alternative measure that can be taken to achieve the same goal at this stage; and (iii) the requested redactions are not prejudicial to or inconsistent with the rights of the arrested person and a fair and impartial trial. The Single Judge considers that only when these three additional questions have been answered in the affirmative she will authorise the redactions requested by the Prosecution.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, para. 4.

The risk of disclosing to the Defence the types of information for which authorisation for redactions have been requested must be assessed in light of several criteria, namely: (i) the current volatile situation in the Ituri and Kinshasa areas; (ii) the influence of the person in the custody of the Court in the Ituri and Kinshasa areas today, close connections to FNI and/or FRPI supporters currently living in these areas; (iii) the capabilities of the supporters of the person in the custody of the Court to interfere with ongoing and further Prosecution investigations and/or Prosecution witnesses, victims and members of their families; and (iv) the several precedents of interference with Prosecution witnesses by FNI and/or FRPI members.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, para. 22. See also No. ICC-01/04-01/07-249, Pre-Trial Chamber I (Single Judge), 5 March 2008, para. 14.

The redaction of the information that could identify the current whereabouts of those Prosecution witnesses who have been accepted in the Victims and Witnesses Unit's protection program is not only an adequate measure, but also a necessary measure, to minimize the risk posed by the disclosure of their identities to the Defence. The redaction of this information is not prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial, insofar as (i) the Defence will have access to the identities of the relevant Prosecution witnesses; and (ii) any contact with such witnesses is always subject to the restrictions and procedures established by the Chamber.

[…]

For the purpose of rule 81(4) of the Rules of Procedure and Evidence, the notion of "*members of the family*" of witnesses should be considered as including guardians. In this regard, the Single Judge points out that "*(i) guardians exercise parental powers and responsibilities over the minors under their guardianship and that consequently (ii) the risk to their safety and/or physical and psychological well-being as a result of disclosing to the Defence the identities of those Prosecution witnesses under guardianship is not less that the risk faced by close relatives of such witnesses*".

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, paras. 27 and 30. See also No. ICC-01/04-01/07-249, Pre-Trial Chamber I (Single Judge), 5 March 2008, para. 13.

The Single Judge considers that the redactions of the information that could lead to the identification of the current whereabouts of Prosecution witnesses' family members, particularly those currently located in the Ituri district or in the Kinshasa area, independently of whether the identities of these individuals are known or are not known to the Defence, are adequate to minimise the risk and/or physical well-being. According to the Single Judge, the redaction of this information is not prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial insofar as (i) the Defence will have access to the identities of the witnesses who gave the statements; and (ii) the family members are not referred to as having any knowledge of the crime set out in the warrant of arrest.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, paras. 36-37. See also No. ICC-01/04-01/07-160, Pre-Trial Chamber I, 23 January 2008, paras. 46-47; and No. ICC-01/04-01/07-361, Pre-Trial Chamber I (Single Judge), 3 April 2008, paras. 18-20.

In the proceedings leading to the confirmation hearing, only those individuals on whose statements the Prosecution intends to rely at the confirmation hearing can be considered '*witnesses*' within the meaning of rule 81(4) of the Rules of Procedure and Evidence. Any other individual who has already been interviewed by the Prosecution, or whom the Prosecution intends to interview in the near future, in relation to the case at hand is more appropriately characterised as a "*Prosecution source*" rather than as a "*Prosecution witness*" and therefore any redaction relating to their identities must be justified by the need to ensure the confidentially of information pursuant to rule 81(4) of the Rules or to avoid any prejudice to further or ongoing investigations pursuant to rule 81(2) of the Rules. As the individuals concerned by this category of redactions have been interviewed by the Prosecution, or are about to be interviewed by the latter, in relation to the case against the person or in relation to further Prosecution investigations, the Prosecution's further or ongoing investigations could be prejudiced if such individuals were to be threatened, intimidated or interfered with.

[…]

When acting pursuant to article 54(3)(f) of the Rome Statute, the Prosecution is not entitled to redact *proprio motu*, but can only request authorisation to do so from the competent Chamber pursuant to rule 81 of the Rules of Procedure and Evidence.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, paras. 41-42, and 52. See also No. ICC-01/04-01/07-249, Pre-Trial Chamber I (Single Judge), 5 March 2008, para. 26; and No. ICC-01/04-01/07-312, Pre-Trial Chamber I (Single Judge), 11 March 2008, p. 6.

Rule 81(4) of the Rules of Procedure and Evidence does not empower the competent Chamber to authorise redactions whose sole purpose is to protect individuals other than Prosecution witnesses, victims or members of their families.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, para. 54.

Redactions concerning individuals other than Prosecution witnesses, victims or members of their families may only be authorised (i) if they are needed to ensure the confidentiality of information pursuant to rule 81(4) of the Rules; or (ii) in order not to prejudice further or ongoing Prosecution investigations because such individuals are Prosecution sources pursuant to rule 81(2) of the Rules and that otherwise, the use of redactions is not a measure that is available to ensure the protection of these individuals.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, para. 55. See also No. ICC-01/04-01/07-249, Pre-Trial Chamber I (Single Judge), 5 March 2008, para. 30; No. ICC-01/04-01/07-312, Pre-Trial Chamber I (Single Judge), 11 March 2008, p. 8; No. ICC-01/04-01/07-361, Pre-Trial Chamber I (Single Judge), 3 April 2008, para. 30; and No. ICC-01/04-01/07-425, Pre-Trial Chamber I (Single Judge), 21 April 2008, para. 19.

Concerning the first group, the Single Judge considers that disclosing the place where the interviews with the witnesses were conducted, and the names, initials and signatures of current staff members of the Office of the Prosecutor and of the VWU as well as [REDACTED]who were present when the interviews were conducted could, in a few instances, prejudice to a certain extent the Prosecution's investigations. This can be particularly so if the interviews were conducted in small villages, when the staff members of the Office of the Prosecutor easily stand out from the local population or when the staff members of the Office of the Prosecutor repeatedly travel to small areas for lengthy periods of time. Logically, the risks increase in a context such as the one described above in section II.

The Single Judge is also of the view that the redactions requested by the Prosecution might, in certain circumstances, contribute to minimizing the above-mentioned risk. However, the Single Judge considers that there are less intrusive measures that can be taken in order to properly protect those staff members of the Office of the Prosecutor and the VWU present when the witness statements were taken to avoid any prejudice to the Prosecution's investigations, such as (i) avoiding to take statements in small villages or cities; (ii) making sure that such persons do not easily stand out from the local population; or (iii) rotating such persons once there are indications that their identification with the Court may endanger their security as well as the Prosecution investigation.

Nevertheless, the Single Judge acknowledges that these measures are not applicable [REDACTED] for the purpose of assisting in the process of interviewing witnesses and taking their statements. These individuals [REDACTED] cannot be easily rotated given the limited number of individuals who have the necessary qualifications to properly perform such a job.

Moreover, the Single Judge considers that the identification of, at least, the staff member of the Office of the Prosecutor and the VWU present when the witness statements were taken is a key guarantee of procedural propriety on the taking of the statements, as well as a formal requirement for their admissibility, and redacting this information would be prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, paras. 59-62. See also No. ICC-01/05-01/08-813-Red, Trial Chamber III, 20 July 2010, para. 71.

The notion of "*victim*" is the same both in respect of protection and participation in the proceedings. The Single Judge, however, recalls that the victim status in the proceeding is granted only upon meeting certain conditions (*e.g.* reasonable grounds to believe that they have suffered harm) and thus these alleged victims unrelated to the charges cannot, in principle, be considered as victims for the purpose of rule 81(4) of the Rules. The Single Judge adds that authorization for redactions cannot also be granted for them under rule 81(2) of the Rules because they are neither OTP sources nor involved in the Prosecution's investigations. Nevertheless, authorization for redaction is granted considering that the drafters of the Statute and the Rules included a number of provisions specifically governing the protection of alleged victims of sexual offences as a result of crimes within the jurisdiction of the Court and a systematic and teleological interpretation of rule 81(4) of the Rules – in light of the particular emphasis placed by the drafters of the Statute and the Rules on the protection of alleged victims of sexual offences resulting from crimes within the jurisdiction of the Court – leads to the conclusion that, on an exceptional basis and only for the purpose of their protection by means of the redaction of their names and identifying information, the notion of "*victim*" under rule 81(4) of the Rules would also cover alleged victims of sexual offences which are unrelated to the charges in the case at hand.

See No. ICC-01/04-01/07-160, Pre-Trial Chamber I, 23 January 2008, paras. 13-19. See also No. ICC-01/04-01/07-361, Pre-Trial Chamber I (Single Judge), 3 April 2008, para. 35.

Even if any prejudice is caused by the authorised redactions, this will not be inconsistent with the rights of the Defence and a fair and impartial trial because the redactions are only granted for the purpose of the proceedings leading up to the confirmation hearing – which is an early stage of the proceedings in the case characterised by a limited scope.

[…]

The redactions requested by the Prosecution, which are limited to the current whereabouts of the aforesaid individuals, or to information that could lead to the identification of such whereabouts, are (i) sufficient to minimize this risk and that, at this stage of the proceedings, there is no less intrusive alternative measure

that can be taken to achieve the same goal and (ii) necessary to guarantee that these individuals will not be identified. Furthermore, the need for protection for these alleged victims of sexual offences remaining in a serious situation overrides any prejudice that might be caused to the Defence at this stage by the redaction of information that could lead to the identification of their current whereabouts; and that even if any prejudice is caused, this will not be inconsistent with the rights of the Defence and a fair and impartial trial as (i) the Defence will have access to the identity of [the witness whose statement is concerned by the redactions]; (ii) the alleged victims of sexual offences were not victimised by the suspect and (iii) the alleged victims of sexual offences are not referred to in the interview notes and statement of the witness as having any knowledge of the crimes included in the warrant of arrest.

[…]

Authorisation for redaction are not granted since the Prosecution explicitly states in its application that none of the individuals referred to as "*innocent third parties*" is a Prosecution source or is in any way involved in any ongoing or further Prosecution investigation, and that the relevant redactions have been requested solely for their protection since they could erroneously be perceived as Prosecution sources or witnesses.

See No. ICC-01/04-01/07-160, Pre-Trial Chamber I, 23 January 2008, paras. 31, 35-36, and 55.

Those granted the procedural status of victim cannot be part of the disclosure process at the pre-trial stage of a case, and thus they have neither disclosure rights nor disclosure obligations.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, para. 114.

Rule 81(4) of the Rules of Procedure and Evidence should be read to include the words "*persons at risk on account of the activities of the Court*" so as to reflect the intention of the States that adopted the Rome Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons. While the non-disclosure of information for the protection of persons at risk on account of the activities of the Court is permissible in principle, pursuant to rule 81(4) of the Rules of Procedure and Evidence, whether any such non-disclosure should be authorised on the facts of an individual case will require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect. Non-disclosure of information that is required to be recorded pursuant to rule 111(1) of the Rules of Procedure and Evidence may be authorised by a Pre-Trial Chamber. Requests for non-disclosure of such information require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect.

See No. ICC-01/04-01/07-475 OA, Appeals Chamber, 13 May 2008, paras. 1-3.

The Prosecutor may apply to the Pre-Trial Chamber, pursuant to rule 81(2) of the Rules of Procedure and Evidence, for a ruling as to whether the identities and identifying information of "*potential prosecution witnesses*" must be disclosed to the Defence. Whether any such application for non-disclosure should be authorised requires a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect. In this appeal "*potential prosecution witnesses*" are individuals to whom reference is made in the statements of actual witnesses upon whom the Prosecutor wishes to rely at the confirmation hearing. They are individuals who have been interviewed by the Prosecutor or who the Prosecutor intends to interview in the near future, but in relation to whom the Prosecutor has not yet decided whether they will become prosecution witnesses.

See No. ICC-01/04-01/07-476 OA2, Appeals Chamber, 13 May 2008, paras. 1-2.

The Prosecutor may apply to the Pre-Trial Chamber, pursuant to rule 81(4) of the Rules of Procedure and Evidence, for a ruling as to whether the names, identifying information and whereabouts of alleged victims of sexual offences who are not connected to the charges in the relevant case and to whom reference is made in the statements of Prosecution witnesses must be disclosed to the Defence, so as to protect the safety of such alleged victims as "*persons at risk on account of the activities of the Court*". Whether any such application for non-disclosure should be authorised requires a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect.

See No. ICC-01/04-01/07-521 OA5, Appeals Chamber, 27 May 2008, paras. 1-2.

Inspection, as provided for in rules 77 and 78 of the Rules of Procedure and Evidence, relates only to the prosecution and the defense.

However, the Decision on victims participation does provide a mechanism whereby the victims who have been given the right to participate may be provided with "*any materials within the possession of the prosecution that are relevant to the personal interests of the victims*". The mechanism for the provision of this information shall operate, in the first instance, between the relevant victim's legal representative and the prosecution. The relevant victim's legal representative shall identify, first, the victim's personal interest and, second, the nature of the information that may be within the evidence in the possession of the prosecution which is material to the preparation of the victim's participation during a particular phase of the proceedings (*e.g.* material relating to involvement in particular events at a given time or location). This will enable the prosecution to identify whether material in its possession is relevant.

[…]

This provision for provision of material should be dealt with by the prosecution and victims legal representatives *inter se* and a filing before the Court should only be made in the event of disagreement.

In order to exercise their right to receive relevant material, the legal representatives of victims are instructed to set out in a document provided to the prosecution how material in the latter's possession is relevant to an individual victim's personal interests (*e.g.* material relating to involvement in particular events at a given time or location).

The prosecution shall thereafter identify and provide any material in its possession which satisfies the above criteria.

In order to participate at the trial, and once victims have received the above documents, they are instructed to file discrete applications before the Chamber, in accordance with paragraphs 103-104 of the Decision on victim participation [of 16 January 2008], specifying how their personal interests are affected at a given phase of the trial.

See No. ICC-01/04-01/06-1368, Trial Chamber I, 2 June 2008 , paras. 30-31, 34, and pp. 15-16.

In highly restricted circumstances, the prosecution is given the opportunity to agree not to disclose material provided to it at any stage in the proceedings. The restrictions are that the prosecution should receive documents or information on a confidential basis solely for the purpose of generating new evidence – in other words, the only purpose of receiving this material should be that it is to lead to other evidence (which, by implication, can be utilized), unless rule 82(1) applies.

[…]

The right to a fair trial – which is without a doubt a fundamental right – includes an entitlement to disclosure of exculpatory material.

[…]

In deciding whether non-disclosure is justified, human rights law suggests that it is the evidence and not summaries which should be provided to the court.

See No. ICC-01/04-01/06-1401, Trial Chamber I, 13 June 2008, paras. 71, 77, and 86.

The principle of analogous information is, for the purposes of the confirmation hearing, an adequate alternative measure to actual disclosure, pursuant to article 67(2) or rule 77, of article 54(3)(e) documents when requests for consent have been rejected or are still pending.

The transmission of summaries of article 54(3)(e) documents does not discharge the article 67(2) and rule 77 Prosecution's disclosure obligations for the purpose of the confirmation hearing.

See No. ICC-01/04-01/07-621, Pre-Trial Chamber I (Single Judge), 20 June 2008, p. 52.

The Chamber observes that in the Statute and the Rules reference is made to the process of disclosure between the parties, namely the Prosecutor and the defence. Regarding the modalities of disclosure, the Chamber notes the relevant provisions in articles 61(3) and 67(2) of the Statute and rules 76 to 83 and 121 of the Rules.

The Chamber further notes that the modalities of disclosure will be subject to any decision taken by the Chamber in respect of restrictions on disclosure pursuant to rules 81 and 82 of the Rules.

The Chamber observes that the provisions on disclosure, especially rule 121(2)(c) of the Rules, draw a clear distinction between "*disclosure*" which is *inter partes* and "*communication*" to the Chamber. Therefore, the Chamber is of the view that the concept of "*disclosure*" should not be confused with the concept of "*communication*" of evidence to the Chamber. The Chamber is not a party to the proceedings and does not take part in the disclosure process. Pursuant to rule 121(2)(b) of the Rules, the Chamber shall ensure that disclosure takes place under satisfactory conditions. Thus, for the Chamber to be in a position to ensure that proper disclosure takes place and to make an informed decision in accordance with its statutory mandate, as already set out in part I, the Chamber shall be informed by way of communication of all the evidence disclosed between the parties.

The Chamber notes that under rule 121(2)(c) of the Rules "*all evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber*". The reference to "*all evidence*" in rule 121(2)(c) of the Rules implies that communication to the Chamber comprises all the evidence disclosed between the parties and that it is not limited to the evidence which the parties intend to rely on or to present at the confirmation hearing. The "*travaux préparatoires*" of that rule indicate that it was first placed in the section of disclosure as draft rule 5.12, preceding rules concerning both disclosure *stricto sensu* and inspection which have now become rules 76 to 79 of the Rules. However, delegations decided that draft rule 5.12 would be better placed in the rule concerning the confirmation hearing. Without any modification, that draft rule was then transferred and incorporated into the present rule 121 of the Rules. In the Chamber's view, this is a further indication that the drafters intended rule 121(2)(c) of the Rules to cover all elements of disclosure referred to in what are now rules 76 to 79 of the Rules.

Furthermore, the Chamber notes that rule 121(2)(c) of the Rules is to be interpreted "*in accordance with article 61 paragraph 3*" of the Statute referring also to information which the Chamber may order to be disclosed pursuant to the second sentence of article 61(3) of the Statute. This allows the Chamber to have access to evidence other than that on which the parties intend to rely at the confirmation hearing.

The Chamber points out that Section II of Chapter IV of the Rules entitled «Disclosure» refers to two forms of disclosure according to the nature of the evidence, namely disclosure stricto sensu pursuant to rule 76 of the Rules, and disclosure by way of inspection either by the defence or by the Prosecutor pursuant to rules 77 and 78 of the Rules.

Furthermore, the Chamber notes that article 61(3) of the Statute does not follow this differentiation and encompasses both forms of disclosure as set out above.

Therefore, the Chamber considers that evidence previously inspected by the parties is to be communicated to the Chamber.

The Chamber observes that rule 77 of the Rules puts an obligation on the Prosecutor to disclose to the defence three types of evidence: any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, (i) which are material to the preparation of the defence or (ii) are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or (iii) were obtained from or belonged to the person charged.

The Chamber notes that rule 77 comprises material which may be of incriminatory, exculpatory or mixed nature. Therefore, in order to enable the Chamber to make its own assessment of the evidence inspected, all of it has to be communicated to the Chamber.

The above applies equally to the material in possession or control of the defence that is to be inspected by the Prosecutor in accordance with rule 78 of the Rules.

In light of the aforesaid, the Chamber will have access to the following disclosed evidence:

a) evidence pursuant to article 67(2) of the Statute, namely all evidence in the Prosecutor's possession or control which the Prosecutor believes to show or tend to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of the prosecution evidence.

b) evidence pursuant to rule 76 of the Rules, namely all names and statements of witnesses on whom the Prosecutor intends to rely at the confirmation hearing, regardless of whether the Prosecutor intends to call them to testify.

c) evidence in the possession or control of the Prosecutor, which is material to the preparation of the defence or is intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or was obtained from or belonged to the person charged and which are subject to inspection pursuant to rule 77 of the Rules.

d) evidence in the possession or control of the Defence, which is intended for use by the defence as evidence for the purposes of the confirmation hearing and is subject to inspection pursuant to rule 78 of the Rules.

e) evidence the Defence may present, in case it intends, pursuant to rule 79 of the Rules, to raise the existence of an alibi or to raise a ground for excluding criminal responsibility.

See No. ICC-01/05-01/08-55, Pre-Trial Chamber III, 31 July 2008, paras. 40-51.

Three particular issues of principle are engaged in the determination of this application. First, the accused has the right to a fair hearing (article 67(1) of the Rome Statute). Second, the Court has the various duties of protecting "*the safety, physical and psychological well-being, dignity and privacy of victims and witnesses*" (article 68(1) of the Statute), providing "*for the protection of the accused, victims and witnesses during the trial*" (article 64(6)(e) of the Statute), as well as taking "*the necessary steps to ensure the confidentiality of information to protect the safety of witnesses and victims and members of their families*" (rule 81(4) of the Rules). Third, the prosecution has the obligation to disclose to the defence copies of any statements made by those witnesses it intends to call, and to disclose to the defence evidence in its possession or control which the Prosecutor "*believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence*" (article 67(2) of the Statute). Furthermore, the prosecution shall "*permit the defence to inspect any books, documents photographs and other tangible objects in the possession or control of the prosecution, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence or were obtained from or belonged to the person*" (rule 77 of the Rules). This latter principle has been referred to generally by the Chamber and the Appeals Chamber as the disclosure of exculpatory material.

The resolution of this application is mainly dependent on the interrelationship between those three principles, against the background of the facts of this case. By way of general observation, the accused has a right to a fair hearing and, by clear implication, to a fair trial, which the Chamber has a duty to protect. The entitlement of victims and witnesses to appropriate protection by the Court (including as regards their safety and privacy) is also a matter of substantial importance, although determining the right course in each instance is an essentially fact-sensitive decision. As regards the third principle, the disclosure regime established by the Rome Statute

framework is imposed on the prosecution alone: in other words, no positive obligation is imposed on the other organs of the Court, the defence or the participants to disclose exculpatory material to the defence under article 67(2) of the Statute, rule 77 or rule 76 of the Rules.

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 the accused'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.

In all the circumstances, balancing and applying these three 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.

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.

See No. ICC-01/04-01/06-1637, Trial Chamber I, 21 January 2009, paras. 9-13.

The precise role of the intermediaries (together with the manner in which they discharged their functions) has become an issue of major importance in this trial. Contrary to the prosecution's argument, the defence submissions are not dependent on speculative assertions: they are, to an important extent, clearly evidence based. Given the extensive rehearsal of the relevant testimony and documents set out above, it is unnecessary to repeat in detail the particular facts on which defence counsel rely; instead, the Chamber needs to focus on the consequences of the material now before the Court.

The Chamber is alive to the potential risks to the intermediaries employed by the prosecution once their identities are revealed to the accused, as well as the possible adverse implications as regards their future usefulness, but there is now a real basis for concern as to the system employed by the prosecution for identifying potential witnesses. On the evidence, there was extensive opportunity for the intermediaries, if they wished, to influence the witnesses as regards the statements they provided to the prosecution, and, as just set out, there is evidence that this may have occurred. In the circumstances it would be unfair to deny the defence the opportunity to research this possibility with all of the intermediaries used by the prosecution for the relevant witnesses in this trial, where the evidence justifies that course.

On the basis of the history and the submissions set out extensively above, and applying the Rome Statute framework and the analysis just rehearsed, the Chamber has adopted the following approach:

a. Given the markedly different considerations that apply to each intermediary (or others who assisted in a similar or linked manner), disclosure of their identities to the defence is to be decided on an individual-by-individual basis, rather than by way of a more general, undifferentiated approach.

b. The threshold for disclosure is whether *prima facie* grounds have been identified for suspecting that the intermediary in question had been in contact with one or more witnesses whose incriminating evidence has been materially called into question, for instance by internal contradictions or by other evidence. In these circumstances, the intermediary's identity is disclosable under rule 77 of the Rules. Given the evidence before the Chamber that some intermediaries may have attempted to persuade individuals to give false evidence, and that some of the intermediaries were in contact with each other, the Chamber considers that in these circumstances the defence should be provided with the opportunity to explore whether the intermediary in question may have attempted to persuade one or more individuals to give false evidence. However, in each instance the Chamber has investigated, and will investigate, the potential consequences of an order for disclosure for the intermediary and others associated with him, and whether lesser measures are available. Applications in this regard will be dealt with by the Chamber on an individual basis.

c. The identities of intermediaries (or others who assisted in a similar or linked manner) who do not meet the test in b. are not to be disclosed.

d. Disclosure of the identity of an intermediary (or others who assisted in a similar or linked manner) is not to be effected until there has been an assessment by the VWU, and any protective measures that are necessary have been put in place.

e. The identities of intermediaries who did not deal with trial witnesses who gave incriminating evidence are not to be revealed, unless there are specific reasons for suspecting that the individual in question attempted to persuade one or more individuals to give false evidence or otherwise misused his or her position. Applications in this regard will be dealt with by the Chamber on an individual basis.

f. The threshold for calling intermediaries prior to the defence abuse submissions is that there is evidence, as opposed to *prima facie* grounds to suspect, that the individual in question attempted to persuade one or more individuals to give false evidence.

See No. ICC-01/04-01/06-2434-Red2, Trial Chamber I, 31 May 2010, paras. 135 and 138-140. See also No. ICC-01/04-01/06-2595-Red-Corr, Trial Chamber I, 17 November 2010, para. 60.

The Chamber notes that the Statute's framework does not provide for a reciprocal disclosure regime. The disclosure obligations of the Prosecution and the Defence differ significantly, because of the particular roles that these two parties have at trial. While the Prosecution bears the burden of proof and has to investigate both incriminating and exonerating circumstances pursuant to article 54(1)(a) of the Statute, the role of the Defence is largely reactive to the Prosecution's presentation of evidence. The Statute and the Rules impose on the Prosecution specific obligations of disclosure of incriminating and exculpatory material to the Defence, in time to allow the accused to adequately prepare its defence. Different and more limited disclosure obligations are imposed on the Defence by rules 78 and 79 of the Rules.

As stated by Trial Chamber I in the *Lubanga* case, the "*tension between the irreducible elements necessary for a fair trial (which include the right to silence) on the one hand, and the appropriate obligations of disclosure by the defence on the other, is not always easy to resolve*". It further held that "*the starting-point for consideration of [defence disclosure] is that the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence, or in any other way*". The Chamber has therefore "*acritical duty to uphold these protections, which are enshrined in the Statute*". However, the Chamber stresses that the Statute's framework contains important provisions which define the obligations that can be imposed on the defence in order to secure a fair and expeditious trial, while ensuring that the rights of the accused are not infringed. The Chamber considers, in particular, that an effective and meaningful application of the principle of *audita alteram partem* requires that the responding party has sufficient time to prepare its response.

Pursuant to rule 79(1) and (2) of the Rules, in fact, the Defence must notify the Prosecution of its intent to raise the existence of an alibi or to raise a ground for excluding criminal responsibility provided for in article 31(1) of the Statute together with the names of witnesses and any other evidence in support. These must be communicated sufficiently in advance to enable the Prosecution to prepare adequately and to respond. Furthermore, rule 78 provides that the Defence shall permit the inspection by the Prosecution of any books, documents, photographs and other tangible objects in its possession or control, which are "*intended for use as evidence at trial*".

In addition, there are other provisions envisaging disclosure that may go beyond the scope of rules 78 and rule 79(1), namely rule 79(4), regulation 54 of the Regulations of the Court and regulation 52 of Regulations of the Registry. However, these rules must always be read in light of the statutory rights of the accused; the Chamber has a "*duty to ensure that any discretionary order it makes regarding defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded*".

The Chamber notes that for the present case involving two accused and a number of victims authorised to participate in the proceedings with the modalities specified in its decision of 22 January 2010, the disclosure obligations of the Defence shall extend not only to the Prosecution, but also to the co-accused and the Legal Representatives of Victims.

The Chamber considered that challenging the testimony of a Prosecution witness by using documentary evidence triggers an obligation to disclose to the Prosecution such documents sufficiently in advance of the witness's testimony.

For this reason, and given the need to ensure procedural fairness and to promote efficiency in the trial, in its Decision on rule 140 the Chamber ordered, *inter alia* the Defence, to communicate to the parties and the participants, as well as the Chamber and the Court officer, the list of the documents it intends to use for the purposes of its cross-examination of Prosecution witnesses, at least three days in advance of the scheduled hearing. In this respect, the Chamber notes that the documents that the Defence may use during cross-examination are either documents originally disclosed to it by the Prosecution, and therefore already within the possession of the Prosecution, or documents obtained from or belonging to the accused or otherwise gathered by the Defence during its investigations, which are not in the possession of the Prosecution. Only the second category of documents, which are not yet in the E-court system, should be disclosed before using them during cross-examination.

Except for the defences referred to in rule 79(1)(a) and (b), and the material disclosed before its use during cross-examination of Prosecution witnesses, the scope and timing of the disclosure of other material by the Defence are to be determined by the Chamber on the basis of rule 78 and, where necessary. Pursuant to rule 79(4), the Chamber may order the Defence to disclose any "*evidence*" in its possession which requires, according to the Chamber, to be provided to the parties and participants.

The Chamber observes that rule 78, although it shares some similarities with rule 77, also contains some distinctive elements. The disclosure obligations of the Prosecution under rule 77 are more extensive. The Prosecution must permit the defence to inspect any tangible object it intends to use in trial, which is "*material to the preparation of the defence*". As mentioned above, the disclosure obligation on the part of the Prosecution under rule 77 is a consequence of the role and duties of the Prosecution, as well as the rights of the accused, and therefore is not mirrored in rule 78. The material to be disclosed by the Prosecution must be provided to the Defence sufficiently in advance for the accused to prepare his or her defence pursuant to article 67(1)(b) of the Statute. In the present case, the Chamber ordered the Prosecution to disclose all incriminatory and exculpatory evidence (with the possibility of differing disclosure of material for which redactions or other protective measures were still required) several months before the intended commencement of the trial.

The Chamber is of the view that the Defence has to disclose the material only when a decision has been made that it will be used at trial. For reasons of fairness and efficiency in the proceedings, disclosure should be made within a reasonable time prior to the hearing during which it will be presented, in order to allow the Prosecution an opportunity to adequately prepare. The Chamber therefore encourages the Defence to permit the Prosecution to inspect documents or other tangible objects falling under rule 78, as soon as it makes a decision to use them at trial.

In any case, the Chamber considers that the Defence shall permit the Prosecution to inspect all material in its possession or control, which it intends to use at trial pursuant to rule 78, not less than two weeks prior to the scheduled commencement of the Defence case.

Furthermore, the Chamber recalls that pursuant to paragraph 103 of the Decision on rule 140, the Defence must provide the Chamber, the parties and the participants with a list of documents which it intends to use for the purposes of its examination-in-chief of each witness. In order to allow the opposing party sufficient time to prepare for cross-examination, the list of documents shall be communicated well in advance of the day when the witness is scheduled to start giving his or her testimony. This may under no circumstances be less than three (3) days before the scheduled hearing.

As for the modalities for communicating Defence material to the other parties and participants, the Chamber notes that "*inspection*" under rules 77 has been interpreted by the Prosecution to include the disclosure of material in electronic format. The Chamber has endorsed this practice, and considers that it should also be extended to rule 78.

The Chamber is of the view that an obligation to disclose a document outlining the defences, as well as any information regarding the identification of Defence witnesses, their statements or summaries thereof, cannot be inferred from rule 79(4). Such material cannot be considered as "*evidence*" and does not therefore fall within the material which the Defence may be ordered to disclose pursuant to this rule.

The Chamber notes, however, that regulation 54 of the Regulations of the Court provides that "*at a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings*" on, *inter alia*, a summary of the evidence the participants intend to rely on; the length of the evidence to be relied on; the length of questioning of the witnesses; the number and identity (including any pseudonym) of the witnesses to be called; the production and disclosure of the Statements of the witnesses on which the participants propose to rely; the issues the participants propose to raise during the trial; the presentation of evidence in summary form; and the defences, if any, to be advanced by the accused.

While the Statute and the Rules do not provide for any specific indication concerning the timing for the provision of such material, the Chamber finds that communication of certain information concerning the Defence case, before it starts, will assist in ensuring a fair and expeditious trial. In particular, the Chamber finds that information about the nature of the accused's defence, the identity of witnesses the Defence intends to call as well as a summary of the facts these witnesses will testify about, will allow the Prosecution to adequately prepare for the Defence case. Such information would also be relevant for the co-accused in the preparation of his case, and would allow the Legal Representatives of Victims to effectively participate in the proceedings. Finally, this information, together with an estimated length of the evidence to be presented by each of the defence teams would allow the Chamber to ensure an efficient conduct of the proceedings.

The Defence shall therefore provide the Prosecution, the Chamber, the co-Accused and the Legal Representatives of Victims with a document outlining the legal and factual issues that it intends to raise during its defence case as well as the defences, if any, to be advanced by the accused.

Moreover, the Chamber recognizes that disclosure of information regarding the identification of Defence witnesses prior to their testimony will enable the Prosecution to conduct appropriate investigations about those witnesses and the evidence expected from them. For these reasons, the Defence should provide the parties and participants, as well as the Chamber, with the names, pseudonyms or other *alias*, addresses, unless the information on the whereabouts of the witness is protected, and dates of birth of all its witnesses, together with their anticipated order of testimony.

Additionally, in order to ensure an efficient and expeditious conduct of the trial, avoiding delays or adjournments of the proceedings, the Chamber orders the Defence to provide the Prosecution either with statements of the witnesses they intend to call to testify, or with a summary of the key elements that each witness will address during his or her testimony. These summaries should include a description as exhaustive as possible of the facts on which each witness will testify, including any relevant information on their personal history and background, which is available to the Defence. The Chamber is of the view that such summaries will allow the Prosecution to sufficiently prepare for the Defence case. To ensure efficiency in the proceedings, the statements and/or the summaries should also be provided to the Chamber, the co-Accused and the Legal Representatives of Victims.

Also, the Defence should specify the estimated length of questioning for each witness and whether the two Accused agree on the presentation of joint witnesses.

See No. ICC-01/04-01/07-2388, Trial Chamber II, 14 September 2010, paras. 36-43, 47-48, 50-53, and 55-61.

The Chamber reiterates the principles stated in its previous Decision of 7 July 2010 according to which: (1) the presumption is that the material to be disclosed will be served in full and redactions need to be justified individually; (2) once redactions imposed under rule 81(2) of the Rules are no longer necessary, disclosure does not require leave of the Chamber; and (3) the leave of the Chamber is necessary to lift redactions authorised in accordance with rule 81(4) of the Rules because these were imposed to protect witnesses and victims, their family members and other persons at risk on account of activities of the Court, for whom the Chamber has ultimate responsibility pursuant to article 68(1) of the Statute.

In making its determination on the Prosecution's Submission, the Chamber has considered whether or not there is a risk to the security of the third parties concerned and whether or not they may benefit from protective measures other than redactions to their identifying information in the related witness statements. As previously stated in its Decision of 7 July 2010, the relative stability of the Central African Republic ("CAR") is a factor that the Chamber has taken into account when assessing whether the requests to lift redactions will have an adverse impact on an individual's security.

See No. ICC-01/05-01/08-977-Red, Trial Chamber III, 26 January 2011, paras. 6 and 9.

The Chamber notes at the outset that the right to disclosure of documents for the three purposes identified by the Defence is not expressly set forth in the Statute or the Rules. However, the existence of a right to such disclosure for the purposes of applications for interim release was confirmed by the Appeals Chamber. In the case against Jean-Pierre Bemba Gombo, the Appeals Chamber held that: "*in order to ensure both equality of arms and an adversarial procedure, the Defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case*". In light of this ruling, the Chamber agrees with the Defence's assertion that it has the right of access to documents that are essential for the purposes of applying for interim release, which is one of the three purposes for which the Defence seeks disclosure. The Chamber recalls that on 25 January 2011, the Defence was granted access to such documents, following the reclassification of the annexes to the Prosecution's Application for the warrant of arrest.

As regards disclosure for the purposes of challenging the validity of the warrant of arrest, the Chamber notes that the grounds on which such a challenge can be made are similar to the grounds for seeking interim release and thus require access to the same documents. For this reason and in view of the fact that the Defence already has access to the materials supporting the Prosecutor's application for a warrant of arrest, the Chamber finds it unnecessary to examine the issue of whether or not the Defence is entitled to such documents.

[…]

The Chamber takes note of a decision of Pre-Trial Chamber II, whereby it ordered the disclosure of certain documents to the Defence for the purpose of making observations on the admissibility of the case. Pre-Trial Chamber II relied on the fairness of the proceedings in this connection. Similarly, Trial Chamber III held that the Prosecution has obligations with respect to the disclosure of certain documents to the Defence for the purposes of challenging the admissibility of the case. Trial Chamber III based its conclusion on rule 77 of the Rules. It held that documents relevant to the accused's admissibility challenge are "*material to the preparation of the Defence*" and the Prosecution should therefore permit inspection of them, as required by rule 77. The Chamber concurs with that view. The Chamber is also of the view that an effective exercise of the right to make a challenge to the admissibility of the case or the jurisdiction of the Court, a right which is expressly provided for in the Statute, requires access to relevant documents. For these reasons, the Chamber acknowledges that the Defence must have access to documents that are essential in order effectively to challenge the admissibility of the case or the jurisdiction of the Court.

See No. ICC-01/04-01/10-47, Pre-Trial Chamber I, 27 January 2011, paras. 10, 11, and 13.

The Chamber, whilst acknowledging the presumption that disclosure will be effected in full, must weigh the security concerns of the individuals and organisations referred to in the victims' application forms and the right of the accused to a fair trial, including his right, first, to exculpatory evidence under article 67(2) of the Rome

Statute and, second, to inspect material in the possession or control of the Prosecution that is relevant for preparation of the Defence under rule 77 of the Rules of Procedure and Evidence.

Since authorising the redactions contained in victims' application forms, the emerging evidence has led to a re-evaluation of the relevance of a number of issues in the trial. In particular, the true identities of a number of witnesses called by the Prosecution, the Defence and some participating victims have been extensively examined, and there is evidence before the Chamber that some false identities may have been provided to the Court. In addition, there is evidence which suggests that witnesses who have claimed they are former child soldiers, or those who claim to be their relatives, have not told the truth. As a result, information that hitherto was considered irrelevant may now have become disclosable under rule 77 of the Rules, because it is material to the preparation of the Defence if it is in possession of the Prosecution. The Chamber notes, however, that the information currently under consideration is in the hands of the Legal Representative and the Victims Participation and Reparations Section, and it is not with the Prosecution. However, to the extent that elements of this material have been used as the basis for questioning by the Legal Representative in court or may assist in determining the true identities of certain individuals who are relevant to this trial – whether as victims, witnesses or otherwise – the Chamber will review the redactions previously granted.

See No. ICC-01/04-01/06-2586-Red, Trial Chamber I, 4 February 2011, para. 4.

The Chamber recalls its "Second Decision on issues relating to Disclosure" in the *Abu Garda* case, whereby the Majority established (Judge Cuno Tarfusser partly dissenting) the following principles: a. disclosure is to be conducted *inter partes*, between the Prosecutor and the Defence; b. the duty of communication to the Pre-Trial Chamber of "*all evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing*" pursuant to rule 121(2)(c) of the Rules is aimed at placing the Pre-Trial Chamber in a position to properly organize and conduct the confirmation hearing. Such duty of communication requires the filing of the evidence to be presented at the confirmation hearing in the record of the case; c. based on the limited scope and purpose of the confirmation hearing, those materials subject to disclosure on which the parties do not intend to rely at the confirmation hearing (including materials of potentially exculpatory nature or otherwise material for the preparation of the Defence that the Prosecutor must disclose to the Defence or permit their inspection in accordance with article 67(1)(b) and (2) of the Statute and rule 77 of the Rules) need not be communicated to the Chamber; d. as a record of the *inter partes* exchanges, following any act of disclosure of materials under article 67(2) of the Statute, the Prosecutor is requested to file in the record of the case a disclosure note, signed by both parties and containing a list of the items subject to disclosure and their reference numbers; e. similarly, with respect to material under rule 77 of the Rules, the Prosecutor is requested to file in the record of the case a pre-inspection report, containing a list of the items made available to the Defence together with their reference numbers. Following any act of inspection of the originals of the documents identified by the Defence, the Prosecutor is requested to file in the record of the case an inspection report, signed by both parties, which must include a list of the items inspected, their reference numbers, a brief account of how the act of inspection took place and whether the Defence received the copies which it requested during the inspection.

See No. ICC-01/04-01/10-87, Pre-Trial Chamber I, 30 March 2011, para. 9.

The Single Judge notes articles 21(1)(a) and (3), 61(3) and 67(2) of the Statute and rules 77 and 121(2) of the Rules.

The Single Judge recalls that the scope of disclosure of evidence between the parties is regulated by various provisions of the applicable law. In this respect, it is worth clarifying at the outset that when a provision provides for an obligation of disclosure, any such items which may fall within its scope shall be disclosed to the Defence by virtue of that provision itself. For the purposes of the present decision, article 67(2) of the Statute and rule 77 of the Rules are of particular relevance. Article 67(2) of the Statute obliges the Prosecutor to disclose to the Defence such evidence in his possession or control which he or she believes shows or tends to show the innocence of the accused, to mitigate the guilt of the accused, or which may affect the credibility of Prosecution evidence; and rule 77 of the Rules requires the Prosecutor to permit the Defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are, *inter alia*, material to the preparation of the Defence. Consequently, if a piece of evidence is to be disclosed to the Defence by virtue of any such provision it is not necessary that an order to this effect be issued by the Chamber. Nevertheless, the principle that disclosure takes place pursuant to the Statute and the Rules and that no order by the Chamber is necessary to create disclosure obligations for the Prosecutor does not mean that the Chamber will never be able to issue orders compelling the Prosecutor to disclosure. To the contrary, in case that the Prosecutor fails to properly disclose evidence, the Chamber is called, pursuant to article 61(3) of the Statute and rule 121(2) of the Rules, to issue such orders as may be necessary for disclosure to proceed satisfactorily. Equally, pursuant to article 67(2), the Chamber shall decide in case of doubt as to the application of the said article. For this purpose, the Defence has to allege in concrete terms how the Prosecutor has violated his disclosure obligations. In the present instance, however, the Defence does not allege that any particular contravention of disclosure obligations occurred. Therefore, the Single Judge considers that the Request cannot be granted under article 61(3) of the Statute and rule 121(2) of the Rules.

See No. ICC-01/09-01/11-196, Pre-Trial Chamber II (Single Judge), 14 July 2011, paras. 7-9.

Under rule 77 of the Rules, the Prosecution is required to permit the Defence to inspect any books, documents, photographs and other tangible objects in its possession or control that (i) are material to the preparation of the Defence; (ii) are intended for use by the Prosecution as evidence for the purposes of the confirmation hearing or at trial; or (iii) were obtained from or belonged to the person. Here, the Requested Items did not come from the accused and the Prosecution does not intend to submit them as evidence in the trial. Thus, the question for the Chamber is whether the Requested Items are "*material to the preparation of the Defence*".

To this end, the Chamber begins by reviewing the relevant jurisprudence on the scope of rule 77's materiality requirement.

The Chamber is guided first and foremost by the Appeals Chamber's judgment in the *Lubanga* case. The Appeals Chamber held in that case that "*material relating to the general use of child soldiers in the DRC* [was] *material to the preparation of* [the accused's] *Defence, and was therefore subject to disclosure under rule 77*". Relying on jurisprudence from the ICTY and ICTR, the Appeals Chamber also delineated the scope of rule 77's materiality requirement, holding that "*the term '*material to the preparation of the Defence*' should be understood as referring to all objects that are relevant for the preparation of the Defence*".

Also instructive are decisions of Trial Chamber I in the *Lubanga* case and Trial Chamber II in the *Katanga and Ngudjolo* case. In the *Lubanga* case, Trial Chamber I ordered the Prosecution to disclose any material in its possession that "*is relevant and concerns Defence witnesses*", including material that the Prosecution intended to use in the questioning of Defence witnesses. In doing so, Trial Chamber I discussed the scope of rule 77's materiality requirement in the following terms:

> *The Prosecution' disclosure obligations under rule 77 of the Rules are wide, and they encompass,* inter alia, *any item that is relevant to the preparation of the Defence, and including not only material that may undermine the Prosecution case or support a line of argument of the Defence but also anything substantive that is relevant, in a more general sense, to Defence preparation. This means that the Prosecution is to communicate to the Defence any material in its possession that may significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case.*

In the *Katanga and Ngudjolo* case, Trial Chamber II was called upon to resolve a dispute with facts analogous to those now before this Chamber. The Defence sought, for the purpose of preparing its questioning of a Prosecution witness, the disclosure of audio recordings of the Prosecution's interviews of that witness. Trial Chamber II ordered disclosure of the recordings, reasoning that:

> *Preparing the cross-examination of a witness will inevitably prompt speculation as to his or her credibility or to any inconsistencies, and access to the audio records of the interview, in addition to the record of the statement, can only facilitate that task.*

As is apparent from the above jurisprudence, the Prosecution's disclosure obligations under rule 77's materiality prong are broad. Those obligations are not, however, unlimited. An item will be considered material for rule 77 purposes only if it is "*relevant for the preparation of the Defence*" in the sense that it would "*undermine the Prosecution case or support a line of argument of the Defence*" or "*significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case*".

In this case, the Prosecution chose not to disclose material obtained from one of its own witnesses. This, in the Chamber's view, appears to have been incompatible with the requirements of rule 77. In most situations, information obtained from a Prosecution witness will be material to the preparation of the Defence because it will provide the Defence with the foundation for its questioning of the witness.

[…]

For this reason, the Chamber starts from the premise that the Requested Items – with two possible exceptions were presumptively material to the preparation of the Defence, in the sense that they may have assisted the Defence to prepare its questioning of Witness 63, among other things.

The Chamber is unpersuaded by the Prosecution's argument that the Requested Items need not have been disclosed because the 52 disclosed material constitute "*a fair sample*" of the 895 material that the Prosecution obtained from Witness 63. Taking the Prosecution's representations at face value – as the Chamber must – the Chamber concludes that the "*fair sample*" standard advanced by the Prosecution is overly subjective. An assessment of what is cumulative and what is not will almost inevitably require an exercise of judgment, and there is an unacceptable risk that the Defence may be deprived of materials to which it is entitled as a result of incorrect judgment calls. This risk is heightened due to the fact that the Prosecution will seldom know the precise contours of the Defence strategy. Thus, items obtained from a Prosecution witness will presumptively be material to the Defence's preparation for that witness' testimony – and possibly for other purposes as well – unless those items (i) are truly repetitive in the sense that they are duplicates; or (ii) bear no connection to the events relevant to the charges, such as items of a purely personal nature.

[…]

Despite the tardiness of the Defence request, the Chamber nevertheless finds that the Defence has demonstrated that the Requested Items remain material to its preparation, even though Witness 63 has completed his testimony.

See No. ICC-01/05-01/08-1594-Red, Trial Chamber III, 29 July 2011, paras. 15-26.

In line with previous practice at this Court and for reasons of fairness, the Chamber will not permit victims to testify as witnesses or to present their views and concerns unless they relinquish their anonymity *vis-à-vis* the parties. However, the identity of victims need not be disclosed to the parties unless and until the Chamber grants them permission to testify and/or present their views and concerns. This approach reflects the security concerns expressed by victims and the fact that certain victims appear to have consented to their identities being disclosed only if the Chamber grants them permission to appear.

If the Relevant Victims' written statements contain identifying information that should not be disclosed to the parties prior to the Chamber's ruling on the merits of their applications, the Legal Representatives are to file the victims' written statements on an *ex parte* basis, with proposed redactions to the identifying information. Subject to any changes ordered by the Chamber, the redacted versions will be notified to the parties.

Once the supplemented Applications and written statements have been filed and the Chamber has decided on any proposed redactions, the Chamber will instruct the Victims Participation and Reparations Section to provide the parties with unredacted or lesser redacted versions of the victims' application forms for the Relevant Victims. In addition, the Chamber will provide the parties with the relevant portions of the *ex parte* annexes to the Chamber's victims' participation decisions in which the Relevant Victims were granted participating status in this case.

See No. ICC-01/05-01/08-2027, Trial Chamber III, 21 December 2011, paras. 19-21.

The Single Judge reiterates that disclosure of non-public information to the public must remain exceptional, to the extent that it proves to be necessary and inevitable for the preparation of the case by the parties. Accordingly, it should be resorted to only if other means of investigation are unsuccessful.

In relation to the investigating party's obligation to keep a detailed record of the information it has shared with the public, the Single Judge is of the view that such obligation should not apply to photographic material only. The Single Judge does not share the assumption that photographs, as opposed to other types of material, have a particular impact and may reveal the interaction of a given person with the Court in such as way as to justify a duty of the investigating party to keep a detailed record of photographs alone. While acknowledging that photographs may be, by their very nature, sensitive material, the Single Judge considers that the disclosure of other types of documents may also jeopardise the safety of witnesses.

The Single Judge considers that the prejudice, if any, that would arise for the Defence if the obligation to keep a detailed record of disclosure of non-public information to the Public was to be applied to all non-public information, is not of such a nature so as to prevail over the obligation to protect the safety of witnesses. Accordingly, this obligation should apply irrespective of the type of material used during the investigations.

See No. ICC-02/11-01/11-49, Pre-Trial Chamber III (Single Judge), 6 March 2012, paras. 20-22.

However, the Single Judge notes that specific time limits for the submission of redaction requests to the Chamber were set in order for the Defence to have evidence disclosed as soon as possible and on an ongoing basis.

Although the parties are under obligation to comply with such time limits, the latter do not have preclusive effect with respect, to the parties' ability to seek protective measures or to rely on evidence at the confirmation of charges hearing.

Any consequences of non-compliance with time limits for disclosure are to be determined by the Chamber, within its powers and obligations in relation to the disclosure process, as provided for by article 61(3) of the Statute and rule 121(2) of the Rules.

[…]

The Single Judge emphasises, for the sake of clarity, that for any redaction to be authorised pursuant to rule 81(2) and (4) of the Rules, she must first and foremost, reach the conclusion that the disclosure to the Defence of the information sought to be redacted, at this stage of the proceedings, could: (i) prejudice further or ongoing investigations by the Prosecutor (rule 81(2) of the Rules); (ii) affect the confidential character of the information under articles 54, 72 and 93 of the Statute (rule 81(4) of the Rules); or (iii) pose a danger to a particular person (rule 81(4) of the Rules). As specified by the Appeals Chamber, "*the alleged danger must involve an objectively justifiable risk*" to either the safety of the person concerned or to the Prosecutor's further or ongoing investigations. The Appeals Chamber further held that the "*circumstances of the individual suspect should be considered, including,* inter alia*, whether there are factors indicating that he or she may pass on the information to others or otherwise put an individual at risk by his or her actions*".

After having ascertained the existence of such risk, the Single Judge will assess whether the requested redactions are necessary namely that the redactions sought could overcome or reduce such risk and that at this stage there are no less intrusive alternative protective measures available.

The Single Judge will also determine whether the redactions are not prejudicial to or inconsistent with the rights of the suspect, including the right to a fair and impartial trial. In so doing, particular attention will be given to the relevance of the information sought to be redacted to the Defence as well as the stage of the proceedings,

and will ensure at all times that the non-disclosure of such information "*would not result in the confirmation of the charges, viewed as a whole, to be unfair to the suspect*".

The Single Judge will only grant the requested redactions if she is satisfied that the abovementioned conditions are met. The Single Judge also underlines that information that has been withheld may need to be subsequently disclosed, should circumstances change. The Prosecutor should therefore bring to the attention of the Chamber any factors that may warrant a variation of a ruling on non-disclosure.

[…]

The Single Judge recalls that rule 81(4) of the Rules – which provides a legal basis to seek redactions to "*protect the safety of witness and victims and members of their family*" – has also been interpreted by the Appeals Chamber as including the possibility to seek redaction to also protect "[other] *persons at risk on account of the activities of the Court*". Accordingly, non disclosure of information related to third persons at risk on account of the activities of the Court is also subjected to the demonstration that the disclosure of the information would expose them to an objectively justifiable risk and that redaction is a necessary and proportionate measure to reduce or overcome this risk.

For the sake of clarity, the Single Judge highlights that redactions are not authorised, on the mere reason that the names or identifying information of third persons are mentioned in the witness statements. Rather, the Single Judge takes into consideration, for the purposes of her assessment, the context in which such names or information appear and the justification provided by the Prosecutor. Such assessment will accordingly be done on a case-by-case basis. In light of these elements, redactions may be warranted if this third person may be wrongly perceived to be a Prosecutor witness, lead or to collaborate with the Court. The Single Judge will accordingly assess whether: (i) disclosure of the information sought to be redacted may expose these persons to an objectively identifiable risk; (ii) the redactions are limited to what is necessary to ensure their safety and are the adequate measure to minimise the risk to their safety; and (iii) there is no less restrictive alternative measure that can be taken to achieve the goal of protection.

See No. ICC-02/11-01/11-74-Red, Pre-Trial Chamber I (Single Judge), 27 March 2012, paras. 28, 56-59, and 78-79.

The Single Judge recalls that to grant requests for redactions pursuant to rule 81(4) of the Rules, she must first and foremost, reach the conclusion that the disclosure to the Prosecutor of the identities of these persons, at this stage of the proceedings, could pose a danger to their safety. It is recalled that the alleged risk to safety must be "*objectively justifiable*". After having ascertained the existence of any such risk, the Single Judge must assess whether the requested redactions are necessary, namely that the redactions sought could overcome or reduce such risk; and whether at this stage there are less intrusive alternative protective measures available.

[…]

The Single Judge underlines that the Protocols regulate the use of witnesses' names in the course of investigations and notably clearly specify that in cases where it becomes necessary to refer to the name of a person who is a witness to a third party, the party cannot disclose that the person is a witness or involved with the Court. Further safeguards are envisaged in the event that a third party becomes aware that a named person is involved with the Court and all parties are under the obligation to alert to the possible danger that their investigations may have for witnesses. Any reasonable suspicion that a witness may have been placed at risk should be brought to the attention of the VWU and the Chamber as soon as possible.

See No. ICC-02/11-01/11-195, Pre-Trial Chamber I (Single Judge), 26 July 2012, paras. 10 and 14.

Chambers of this Court have consistently emphasised the overriding principle that the presumption is that disclosable material will be served in full while redactions need to be justified and authorised individually under the provisions of the Rome Statute framework. It has been settled that "*it will be for the Prosecutor seeking redactions to establish that such redactions are warranted*", while it is the responsibility of the Chamber to rule upon such requests. The Appeals Chamber held that the requirements to authorise the non-disclosure of information are the following: (i) the existence of an "*objectively justifiable risk*" to the safety of the person concerned or which may prejudice further or ongoing investigations; (ii) the risk must arise from disclosing the particular information to the accused; (iii) the infeasibility or insufficiency of less restrictive protective measures; (iv) an assessment as to whether the redactions sought are "*prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*"; and (v) the obligation to periodically review the decision authorising the redactions should circumstances change.

Against this background, the Chamber is of the view that the adoption of a streamlined redaction procedure outlined in the Protocol (Annex A to this Decision) is appropriate to expedite the disclosure process. The procedure outlined in the Protocol is consistent with the rights of the accused. Under the Protocol, the Chamber's oversight role concerning the redactions will not be compromised, to the extent that (a) direct application of redactions is limited to those categories that are usually covered by common justifications ("Standard Justifications") and that are pre-approved by virtue of the present Decision; (b) the Protocol provides for a procedure to address disputes concerning the application of redactions covered by pre-approved categories on a case-by-case basis; (c) redactions that do not fall under the pre-approved categories will always be subject to

a case-by-case review by the Chamber. Under the Protocol, in contrast to the decision reversed by the Appeals Chamber, a case-by-case assessment is never foreclosed and careful procedures are put in place to ensure that every contested redaction can be analysed by the Chamber. The only times when the Protocol dispenses with an individualised assessment of redaction requests are situations where both parties are satisfied that such an assessment is unnecessary. In these circumstances, the Protocol allows for disclosure pursuant to the Standard Justifications which the Chamber has considered to be appropriate in the circumstances of this case.

The Chamber agrees with the defence that in some instances, it might be necessary for the preparation of the defence to obtain information that is covered by ongoing redactions or by redactions that are scheduled to be lifted at a later stage. In such cases, the receiving party shall raise the issue with the disclosing party. The parties shall then consult in good faith with a view to resolving the dispute and inform the Chamber of the outcome of the discussions. In cases of inability to reach agreement, the receiving party may seek the Chamber's intervention through a written application.

The Chamber considers that any request for delayed disclosure of witness identities must be addressed on a case-by-case basis. The Protocol provides that all requests for temporary non-disclosure of the identities of prosecution witnesses will be the subject of a case-by-case determination by the Chamber. The scope of the redactions applied by the prosecution to identifying information of any witnesses for whom delayed disclosure is granted should not exceed that which is strictly necessary to protect the identity of the individual in question. In relation to the identities of family members and "*other persons at risk as a result of the activities of the Court*", as a general rule, disclosure will take place 60 days prior to the commencement of the trial unless otherwise ordered by the Chamber on the basis of exceptional circumstances. On this basis the Chamber is satisfied that the defence will not be prejudiced by the temporary non-disclosure of this information.

See No. ICC-01/09-01/11-458, Trial Chamber V, 27 September 2012, paras. 9, 11-13, 15, 20-21, and 30; and No. ICC-01/09-02/11-495, Trial Chamber V, 27 September 2012, paras. 9, 11-13, and 15.

In the present case, it has now become clear that, for the time being, the two information providers do not consent to the disclosure of the documents in full to the defence. Pursuant to article 64(6)(c) of the Statute and rule 81(3) of the Rules, the Chamber does not have the power to order the disclosure of the material. Accordingly, it now needs to determine which counter-balancing measures can be taken to ensure that the rights of the accused persons are protected and that the trial is fair, in spite of the non-disclosure of the information. As indicated by the Appeals Chamber, especially in circumstances where only a small number of documents are concerned, appropriate counter-balancing measures may include identifying new similar exculpatory material, providing the material in summarised form, stipulating the relevant facts or amending or withdrawing the charges. The Chamber notes that several approaches have been proposed as regards the documents under consideration, namely (1) narrative summaries instead of the original documentation, including *verbatim* quotes of the relevant areas, (2) admissions of fact, and (3) alternative evidence.

The Chamber does not decide at this stage whether disclosure of the narrative summaries together with the alternative evidence are sufficient counterbalancing measures, in the sense that they ensure that the rights of the accused persons are protected and that the trial is fair. Instead, the prosecution is directed to reconsider the possibility of entering into admissions of fact, which should be as comprehensive as possible, with regard to the eight documents obtained from the First Provider.

[…]

The Chamber notes that the Second Provider still refuses to disclose the two documents in any form. However, the prosecution has advanced an admission of facts, which, when considered together with the alternative evidence, would dissipate any prejudice to the defence. The Chamber considers that this admission of facts assists in ensuring the fairness of the trial. The Chamber has assessed the undisclosed material and the suggested concession along with the alternative evidence, and it finds that the latter represents a sufficient counterbalance. The concession is sufficiently broad in scope and, together with the alternative evidence, does cover for the essential elements contained in the confidential documents. The defence should be able to rely on this admission from the prosecution rather than having to seek to establish the facts through the unavailable material. Indeed, and even though the admission is not binding on the Chamber, the defence is put in a more favorable evidential position than it would have been otherwise. Nonetheless, as proceedings move forward, the Chamber will continue to review the adequacy of these measures as necessary for purposes of protection of the rights of the accused.

See No. ICC-02/05-03/09-407-Red, Trial Chamber IV, 26 October 2012, paras. 8-20.

The Chamber, upon review of the approach adopted so far at the Court, notes that other Trial Chambers decided that disclosure of confidential information should remain exceptional and limited to the necessity of the investigative activities of a party. It is the view of this Chamber that the test of "*necessity*" should be specific. Adopting a broader terminology and allowing disclosure of confidential information as soon as it is "*necessary for the presentation and presentation of the* [parties'] *case*", as proposed by the defence, would jeopardise the exceptional nature of the disclosure of confidential information. The Chamber therefore favours the terminology chosen by the prosecution, namely that disclosure should take place only to a limited extent

and when "*directly and specifically necessary*" for the preparation and preparation of a party's case. The Protocol reflects this approach.

[…]

The Chamber follows the approach taken by Trial Chamber III and "*does not consider it appropriate to order a party to make a discrete application in advance, whenever a photograph is to be shown during the course of investigations. This proposal does not sufficiently reflect the exigencies of in situ enquiries which have a significant degree of unpredictability. In the circumstances of the present case, given the obstacles faced by the defence in conducting meaningful investigations, this additional requirement would pose a disproportional burden on it. However, the Chamber emphasises that a very high degree of care is to be taken to ensure that the use of photographs does not unnecessarily link the individuals depicted therein with the Court, and particularly the way in which they are involved with the ICC. They should only be used when no satisfactory alternative investigative avenue is available. As with all other confidential information, a detailed record of the disclosure shall be kept by the investigating party*".

See No. ICC-02/05-03/09-451, Trial Chamber IV, 19 February 2013, paras. 23 and 28.

The Chamber rejects the Prosecution's argument that it is not obligated to disclose full screening notes of all its trial witnesses. The Court's statutory scheme and jurisprudence take particular care to ensure that prior remarks of witnesses the Prosecution intends to call to trial are disclosed to the defence. Rule 76(1) of the Rules requires the Prosecution to disclose "*any prior statements made by those witnesses* [whom the Prosecution intends to call]". This indication is sufficiently broad, for purposes of disclosure, to include records of information provided by a trial witness during an interview, regardless of the question whether such a record would technically qualify as a "*statement*" of the witness for purposes of impeachment on the stand or submission under rule 68 of the Rules.

To the extent that screening notes of witnesses that the Prosecution intends to call at trial constitute records of information provided by the witness during an interview, they will most certainly qualify as "*documents material to the preparation of the defence*" within the meaning of rule 77.

The Chamber emphasises that even though the screening notes of trial witnesses are necessarily material to the preparation of the Defence, it does not follow that they must always be disclosed in full. The Prosecution is entitled to redact its work product and any other information falling within the scope of the Protocol, and the Defence itself acknowledges that the Prosecution is entitled to such redactions when justified in compliance with the Protocol.

The Chamber is of the view that Disclosable Information of the screening notes of other persons may be excerpted out, mindful of the need to include sufficient context to allow for the Defence to understand the excerpts. In this regard, the Chamber notes that Trial Chamber III has previously considered that disclosing relevant excerpts of screening notes may be sufficient disclosure in some circumstances.

The Chamber finds that: (i) the Prosecution has an obligation to disclose the full screening notes of its trial witnesses, (ii) these screening notes may contain redacted passages when justified and (iii) the Prosecution only has an obligation to disclose screening notes from other persons which contain Disclosable Information and may disclose this information by providing excerpts from its screening notes, mindful of the need to include sufficient context to allow for the Defence to understand the excerpts.

See No. ICC-01/09-01/11-743-Red, Trial Chamber V, 20 May 2013, paras. 20-24.

The Appeals Chamber reiterates that "[t]*he overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule*". In this respect, the Appeals Chamber recalls its jurisprudence that it is for the Prosecutor who is seeking redactions "*to establish that such redactions are warranted and, in particular, that disclosure of the information for which redactions are sought* 'may prejudice further or ongoing investigations'" and that, in order to demonstrate this, the Prosecutor has to "*establish that the potential prejudice to investigations is objectively justifiable*" and "*would result from disclosure to the Defence*". Furthermore, when the Prosecutor has met this initial burden, a Chamber then needs to assess whether the proposed redactions are "*prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*".

See No. ICC-01/04-01/06-3031 A5 A6, Appeals Chamber, 27 May 2013, para. 10.

The Chamber notes that on 24 July 2013, it authorised disclosure of victims' applications of five Prosecution witnesses. However, the Chamber authorised that limited redactions be kept vis-à-vis the defence, specifically redactions to the contact information of witnesses and other third parties.

The Chamber considers that the authorisation of Chamber mentioned above applies *mutatis mutandis* to the LRV Notification. Consequently, the LRV shall transmit to the parties the applications forms of the five dual status victims identified in the LRV Notification. Nevertheless, pursuant to article 68(1) of the Statute and Rule 81(4) of the Rules, redactions to the contact information of witnesses and other third parties shall be maintained *vis-à-vis* the defence.

See No. ICC-01/09-01/11-919, Trial Chamber V(a), 10 September 2013, paras. 4 and 5.

Identities and affiliations of all intermediaries:

The Chamber emphasises that, as held by the Appeals Chamber, a determination of materiality under rule 77 of the Rules depends upon the specific circumstances of each case. Categories of information which may have been found relevant in one particular set of circumstances will not automatically be relevant in other cases. Therefore, in making its determination the Chamber has focused upon the questions at issue, and evidence before it, in this case.

The identities and affiliations of intermediaries, whether as a category in themselves or on an individual basis, are required to be disclosed only to the extent that they fall within one of the established disclosure obligations in the Statute and Rules. For present purposes, the relevant inquiry pursuant to rule 77 of the Rules is whether such information is *prima facie* material to the preparation of the defence in this case. The Chamber does not consider that the information before it at this stage is sufficient to render the identity of all intermediaries, in and of themselves, material, even on a *prima facie* assessment. It is nonetheless recognised that the identity of one or more Prosecution intermediaries may be, or become, material as a consequence of additional factors. In such circumstances, determinations of materiality should normally be made on a case by case basis.

Consequently, the Chamber finds the identity and affiliation of all Prosecution intermediaries not to be *prima facie* material to the preparation of the defence in this case at this time. Having so concluded, the Chamber does not need to proceed to the second step of the rule 77 of the Rules analysis to determine whether the identity and affiliation of intermediaries falls within one, or more, of the restrictions on disclosure provided for in the Statute or rules 81 and 82 of the Rules.

List of witnesses with whom each intermediary has had contact and for what purpose

As discussed above, the existence of Prosecution intermediaries and their status as such, warrants separate consideration from the question of their identity. As recognised by the Redaction Protocol, knowledge of the existence of an intermediary, and their status as such, may in fact be material to defence investigations. For example, in combination with other information, knowledge of the involvement of an intermediary provides a context which could be used to guide certain lines of defence investigation. Similarly, the Chamber finds that knowing the number of witnesses with whom an intermediary had contact may provide an important context to the assessment of the testimony of those witnesses.

Therefore, the Chamber finds that a list of all Prosecution intermediaries, to be identified by pseudonym, who had contact with trial witnesses in this case an indicating for each intermediary the trial witness(es) with whom they had contact, is of *prima facie* materiality to the preparation of the defence in this case. Furthermore, in respect of the request for information concerning the purpose of the contact between the intermediary and the witness, the Chamber finds that an understanding of the general purpose, or purposes, for which such contact was made is similarly material to the preparation of the defence. In particular, such information could significantly assist in narrowing down the lines of inquiry to be pursued.

Having found the requested information to be *prima facie* material to the preparation of the defence, it is necessary to proceed to the second step of the rule 77 of the Rules analysis as set out by the Appeals Chamber. The Chamber considers that the information as specified in the preceding paragraphs should be disclosed.

Schedule of intermediary/witness contacts (including date, location, persons present, topics discussed):

The Chamber considers that, in respect of the date of contacts between Prosecution intermediaries and witnesses, similar considerations apply as were discussed in relation to the immediately preceding category of requested information. For example, the dates of contact – particularly where an intermediary has had contact with more than one witness – may reveal a pattern which would prompt certain lines of defence inquiry. The Chamber therefore finds that, to the extent that such information is in the possession or control of the Prosecution, it is *prima facie* material to the preparation of the defence.

Copies of all correspondence between the Prosecution and any intermediaries:

The Chamber does not consider that materiality has been established for this category of information and that, in fact, neither Defence submission addressed the category in any specific detail. The Chamber sees no reason, even at the low threshold of materiality, why such information consisting of correspondence between the Prosecution and the intermediaries, and to which the witnesses would not have been party, would fall within rule 77 of the Rules in this case.

See No. ICC-01/09-01/11-904-Red, Trial Chamber V(a), 8 October 2013, paras. 42-47, 48-54, and 65.

The Single Judge observes that no provision in the legal texts of the Court explicitly regulates time limits for disclosure and presentation of the amended list of evidence following an adjournment of the confirmation hearing under article 61(7)(c)(ii) of the Statute. Thus, the organisation of further proceedings is a matter falling within the discretion of the Chamber.

More specifically, the Single Judge considers that, in a procedural situation such as the present, a Pre-Trial Chamber has discretion to accept new evidence obtained after the time limits set by the Chamber for completion of the disclosure of evidence and submission of amended lists of evidence. This discretion must be exercised with due regard to the object and purpose of the confirmation of charges proceedings, and the general

procedural principles applicable at this stage. Rule 121(5) and (6) of the Rules, while not directly applicable, may provide guidance to the Chamber in the exercise of its discretion.

See No. ICC-02/11-01/11-632-Red, Pre-Trial Chamber I (Single Judge), 7 March 2014, paras. 11 and 12.

As is standard practice before the Court, disclosure of evidence between the parties shall take place through the Registry. For this purpose, the Registry shall file in the record of the case the latest version of the e-court protocol.

The determination of the appropriate level of classification of the items of evidence disclosed shall be the responsibility of the disclosing party. The parties are expected to determine the appropriate level of classification on an item-by-item basis, and to assign to those witnesses whose statements will be classified as "*confidential*" pseudonyms or codes to be used in public documents and during public hearings.

Pursuant to rule 121 of the Rules, "[a]*ll evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber*". In the view of the Single Judge, evidence disclosed "*for the purposes of the confirmation hearing*" must be understood as evidence on which the parties intend to rely at the confirmation of charges hearing. Disclosure of evidence pursuant to article 67(2) of the Statute and disclosure, by way of inspection, of items which are "*material to the preparation of the defence*" and items which were "*obtained from or belonged to the person*", pursuant to rule 11 of the Rules, does not constitute disclosure "*for the purposes of the confirmation hearing*" and evidence so disclosed does not fall within the duty of communication to the Chamber.

The Single Judge clarifies that the parties shall communicate to the Chamber the evidence disclosed for the purposes of the confirmation of charges hearing following each batch of disclosure. In addition, the Defence is expected to ensure the communication to the Chamber of any of the evidence disclosed to it under article 67(2) of the Statute or rule 11 of the Rules upon which it intends to rely at the hearing.

The Single Judge emphasises that in order to enable the parties to properly prepare for the confirmation of charges hearing, the disclosure of evidence must proceed without delay, and all disclosure by the parties must be completed at the latest by the time limit for the submission of their respective lists of evidence in accordance with rule 121 of the Rules.

See No. ICC-02/11-02/11-57, Pre-Trial Chamber I (Single Judge), 14 April 2014, paras. 4-8.

The Single Judge considers that it is in principle for the Prosecutor to assess whether material in her possession or control is to be disclosed pursuant to article 67(2) of the Statute or rule 77 of the Rules.

In addition, […] evidence disclosed and communicated to the Chamber as part of the proceedings before the Court does not remain within the exclusive competence of the disclosing party. Rather, the evidence comes within the authority of the Chamber which may reclassify the material as it deems appropriate, bearing in mind articles 57(3)(c) and 68(1) of the Statute.

See No. ICC-02/11-01/11-659, Pre-Trial Chamber I (Single Judge), 19 June 2014, paras. 5-6.

Turning to the merits of the Prosecution Request, the Single Judge notes that there is no indication that any person other than [the Accused] is a potential privilege holder with respect to the Material. The Defence does not claim any privilege on behalf of [the Accused] and leaves it to the discretion of the Chamber as to whether the Material is to be disclosed. Under these circumstances and on the basis of the Defence Submissions, the Single Judge decides that the Prosecution may proceed with its review of the Material in light of its disclosure obligations.

See No. ICC-02/11-01/15-121, Trial Chamber I (Single Judge), 6 July 2015, para. 3.

The Chamber recalls that the purpose of the Disclosure Deadline was to provide the Defence with sufficient time to prepare for trial. However, the Chamber notes that, in accordance with Rule 77 of the Rules and Article 67(2) of the Statute, the Prosecution has an ongoing obligation to disclose any items that may be considered material to the preparation of the defence or as potentially exculpatory.

Accordingly, the Chamber considers that the Prosecution shall disclose any material falling under Rule 77 of the Rules or Article 67(2) of the Statute as soon as it comes into its possession or as soon as it is assessed as disclosable, without seeking leave of the Chamber. However, the Chamber reminds the Prosecution of its obligation to be diligent in effecting disclosure in a thorough and timely manner.

In the future, when disclosing items under Rule 77 of the Rules or Article 67(2) of the Statute, the Prosecution shall clearly indicate the reason for the late disclosure in the Prosecution's communications of disclosure, as well as the date on which the disclosed material came into its possession.

[…]

Notwithstanding this, the Chamber recalls that in the First Disclosure Decision, it indicated that it would decide whether to authorise late disclosure and the addition of one of the Supplemental Reports" to the List of Evidence only when in possession of the report and taking into consideration concrete factors such as: '*(i) what*

findings will be presented in these reports; (ii) whether or not the findings made therein will go far beyond the existing body of evidence; or (iii)the length of these reports'.

[…]

e) Conclusion

The Chamber has considered the Defence submissions that the cumulative impact of late disclosure and addition to the List of Evidence must be taken into account when assessing the overall prejudice that it may cause to the Defence. The Chamber considers that, cumulatively, the delayed disclosure granted in the present decision and in the First Disclosure Decision as well as the amendments to the List of Witnesses an List of Evidence authorised do not unduly prejudice the accused persons. In teaching this conclusion, the Chamber has given due regard to the specific circumstances of the case including, notably, the commencement date for the evidentiary stage of trial and the volume of material sought to be disclosed after the Disclosure Deadline. Furthermore, the Chamber has also considered the counter-balancing measures provided for in the present decision, to remedy any prejudice that may be caused to the Defence as a result of the Prosecution's late disclosure and amendment of its List of Evidence and List of Witnesses.

See No. ICC-02/11-01/15-306, Trial Chamber I, 22 October 2015, paras. 17-19, 38, and 41.

As regards the Defence submission that the cumulative impact of late disclosure and additions to the List of Evidence must be taken into account, the Chamber considers that granting the First and the Second Requests, even when bearing in mind the previous Prosecutor's requests granted in the First, Second and Third Disclosure Decisions, does not unduly prejudice the Defence.

In reaching this conclusion, the Chamber has given due regard to the specific circumstances of the case: in particular, the fact that the volume of material sought to be disclosed after the Disclosure Deadline, if compared to the total volume of evidence timely disclosed, remains limited and the fact that the trial is still in its early stages, which amply allows the parties to adequately prepare in light of new developments.

See No. ICC-02/11-01/15-467, Trial Chamber I, 22 March 2016, paras. 13-14.

The Chamber takes note of the Prosecutor's confirmation of 24 March 2016 that she has now disclosed all the evidence in its possession that should be disclosed. Without prejudice to the Prosecutor's ongoing obligations under article 67(2) of the Statute and rule 77 of the Rules, the Chamber will no longer allow the addition of any further incriminating evidence. As the Chamber noted in its fourth decision on late disclosure, whereas there was some scope for flexibility and adjustment before the start of the trial, now that the trial has started. The Defence has the right to know the content of the Prosecutor's evidentiary case in its entirety. The Chamber has the obligation to ensure the fairness of the proceedings and especially the Defence's rights under article 67(1) of the Statute to have adequate time to prepare its defence and to be tried without undue delay.

The only possible exception is for entirely new, non-duplicative, evidence which was obtained by the Prosecutor after the disclosure deadline, but only if it can be shown that this new evidence could not reasonably have been obtained by a diligent Prosecutor before the disclosure deadline.

See No. ICC-02/11-01/15-524, Trial Chamber I, 13 May 2016, paras. 21-22.

So after our deliberation, our ruling is that the request to postpone cross-examination is rejected. And I, in reasoning, I'll be relatively brief. In fact, we agree with [Defence Counsel] only in one of his argument; the fact that even Legal Representatives of Victims ("LRV") has in such a case disclosure obligation because those testimonies could be used to prove charges, could be used against the accused. So LRV also has, in those cases, disclosure obligation, but our main conclusion is that he doesn't violate it, this obligation. According our conclusion, he doesn't hide anything – he didn't hide anything, he did not prevent this witness from providing further details which she did today spontaneously, so that is why we don't see any reasons to postpone cross-examination.

See Oral Decision, No. ICC-01/04-02/06-T-202-Red-ENG, Trial Chamber VI, 11 April 2017, p. 54, lines 4-13.

First of all, as concerns disclosure obligation for Legal Representatives of Victims for those three witnesses, again – and we, I think, said it already yesterday. Indeed, as [Defence Counsel] said, [the LRV's] obligations regarding those three witnesses are completely same as obligations of Prosecutor. So if possible, he should disclose everything. These summaries or statement should be as detailed as possible, but at the same time – and again I am repeating our opinion from yesterday, that according us, we haven't found any clear evidence or clue that [the LRV] would intentionally omit some topics.

See Oral Decision, No. ICC-01/04-02/06-T-203-Red-ENG, Trial Chamber VI, 12 April 2017, p. 31, lines 16-22.

The Chamber has carefully considered the Prosecutor's application [REDACTED]. While the Chamber recognises the Prosecutor's need to protect its ongoing investigations, it is not persuaded by the Prosecutor's general and unsubstantiated justification for the proposed redactions. In particular, the Chamber notes the lack of information regarding the present situation of the persons that were interviewed by the Prosecutor.

Moreover, the Prosecutor has not sufficiently explained why disclosing the identity of the persons to the Defence in these proceedings would jeopardise its other ongoing investigations. The Chamber recalls that both accused remain in detention and that their respective defence teams are bound by high standards of professional conduct. To the Chamber's knowledge, there have not been any substantiated incidences of unauthorised disclosure of confidential information by the Defence.

The Chamber is therefore of the view that the Prosecutor has not satisfied its burden to demonstrate that disclosure of the identity of the interviewed persons to the Defence would occasion an objectively justifiable risk of prejudice to its ongoing investigation. Notwithstanding this, and given the *ex parte* nature of this application, ordering the Prosecutor to provide additional information and further consideration of each application is not efficient and may produce unfairness because the Defence would not be able to comment. Moreover, it would imply further delaying the disclosure of information which the Prosecutor has deemed material to the preparation of its Defence. The Chamber notes, in this regard, that the Prosecutor had in its possession for some time the undisclosed screening notes containing information that is potentially material for the defence of the two accused in this case. In order to avoid additional delays, the Chamber authorises the Prosecutor to disclose the screening notes with the proposed redactions.

In the event of an inter partes application to lift the redactions so as to reveal the identity of any person or persons questioned by the Prosecution, it is incumbent upon the Prosecutor to properly substantiate the need for the redaction. In the alternative, where lifting such redactions may prejudice the Prosecutor's investigations, it is open to the parties to stipulate agreed facts that satisfy the interest of the both parties, failing which either or both parties shall bring the matter to the attention of the Chamber.

See No. ICC-02/11-01/15-1109-Red, Trial Chamber I, 2 February 2018, paras. 2-5.

Regulation 35(2) of the Regulations stipulates that an extension of a time limit can only be granted if the party seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside of his or her control.

[…]

Having carefully considered the Application, and the specific submissions made by the Prosecutor in respect of each of the documents, the Chamber is not satisfied that the Prosecutor has demonstrated the existence of good reasons either to extend the disclosure deadline or to use its own powers in respect of any of the documents for which she seeks late inclusion in her list of evidence. Statements to the effect that a document which has been in her possession for at least a year and a half (and, in the case of the First, Second and Third Document, for longer than three years) is now considered "*important*" by the Prosecutor, or suitable to "*corroborate*" or "*contribute to a better understanding*" of a particular point (including as a result of her looking back to some of the testimonies), cannot be regarded as adequate justification to the disruptive effects that any amendment to the list of evidence, no matter how apparently limited, is suitable to have on the preparation of the Defence; similar considerations can be made in respect of the justification adduced in support of the application to include in the list of evidence the Fourth Document, namely that one page of it was "*inadvertently*" included in another document previously submitted. As a whole, the Prosecutor's Application seems to originate from an ongoing process of review of her file, a "*re melius perpensa*" exercise resulting in the wish to modify the approach taken in respect of a number of issues, of varying degrees of importance; while this exercise may be internally appropriate (and possibly necessary with a view to adequately preparing for the subsequent stages of the proceedings), it can certainly not become a basis to deprive of any meaningful content a parameter as crucial to the preparation of the Defence and as instrumental to the overall fairness of the proceedings as the disclosure deadline set by the Chamber.

As stated in the 8 March 2017 Decision, the wish of the Prosecutor to use a document in a way other than originally foreseen is certainly not a factor beyond her control within the meaning of Regulation 35(2). Moreover, allowing the Prosecutor to modify her list of evidence simply on the basis of the fact that her appreciation of a given item changes over time would be tantamount to depriving not only the disclosure deadline, but even the list of evidence of any meaningful content, and would significantly compromise its very usefulness for the purposes of the preparation of the Defence.

See No. ICC-02/11-01/15-1120, Trial Chamber I, 2 February 2018, paras. 9, and 11-12.

Since the early stages of this trial, the Chamber has held that the paramount principles of the publicity and transparency of the proceedings require that any restriction to those principles must be viewed as an exception and therefore strictly limited to what is necessary to safeguard other interests also protected under the Statute. The Chamber agrees that effectiveness of investigations is one of the interests served by the principle. Accordingly, disclosable material should be served in full, redactions need to be justified and authorised under the provisions of the Statute, and the disclosing party is required to review and lift redactions applied should circumstances change. This principle has been reiterated and clarified in light of various circumstances having arisen at various stages of these proceedings: in particular, the Chamber recalls the Appeals Chamber's finding to the effect that "*given the paramount need to ensure full disclosure, the Trial Chamber itself, with the assistance of the Prosecutor, should keep such matters under review and a decision on redactions may be amended at a later date if*

circumstances change" and that, while the Defence should be given an opportunity to make submissions, it has no burden to meet in that regard.

See No. ICC-02/11-01/15-1194, Trial Chamber I, 2 February 2018, para. 7.

Relevant decisions regarding disclosure

Decision on the final system of disclosure and the establishment of a timetable (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-102, 16 May 2006

First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-437, 15 September 2006

Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-455, 20 September 2006

Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence" (Appeals Chamber), No. ICC-01/04-01/06-568 OA3, 13 October 2006

Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" (Appeals Chamber), No. ICC-01/04-01/06-773 OA5, 14 December 2006

Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" (Appeals Chamber), No. ICC-01/04-01/06-774 OA6, 14 December 2006

Decision issuing a redacted version of "Decision on the prosecution's filing entitled 'Prosecution's provision of information to the Trial Chamber' filed on 3 September 2007" and its annex entitled Redacted version of "Decision on the prosecution's filing entitled "Prosecution's provision of information to the Trial Chamber" filed on 3 September 2007" (Trial Chamber I), No. ICC-01/04-01/06-963, 26 September 2007

First Decision on the Prosecution Request for Authorisation to Redact Witness Statements (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-90, 7 December 2007

Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9 (Pre-Trial Chamber I), No. ICC-01/04-01/07-160, 23 January 2008

Corrigendum to the Third Decision on the Prosecution Request for Authorisation to Redact materials related to the statements of Witnesses 7, 8, 9, 12 and 14 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-249, 5 March 2008

Decision on the Prosecution requests for redactions pursuant to rule 81(2) and 81(4) of the Rules and for an Extension of Time pursuant to regulation 35 of the Regulations of the Court (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-312, 11 March 2008

Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witnesses 166 and 233 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-361, 3 April 2008

Sixth Decision on the Prosecution Request for Authorisation to Redact the Interviews Transcripts of Witness 238 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-425, 21 April 2008

Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008

Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" (Appeals Chamber), No. ICC-01/04-01/07-475 OA, 13 May 2008

Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" (Appeals Chamber), No. ICC-01/04-01/07-476 OA2, 13 May 2008

Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9" (Appeals Chamber), No. ICC-01/04-01/07-521 OA5, 27 May 2008

Decision on the legal representative's request for clarification of the Trial Chamber's 18 January 2008 "Decision on victims' participation" (Trial Chamber I), No. ICC-01/04-01/06-1368, 2 June 2008

Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (Trial Chamber I), No. ICC-01/04-01/06-1401, 13 June 2008

Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-621, 20 June 2008

Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties (Pre-Trial Chamber III), No. ICC-01/05-01/08-55, 31 July 2008

Decision on the defence application for disclosure of victims applications (Trial Chamber I), No. ICC-01/04-01/06-1637, 21 January 2009

Redacted Decision on Intermediaries (Trial Chamber I), No. ICC-01/04-01/06-2434-Red2, 31 May 2010

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Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents (Trial Chamber III), No. ICC-01/05-01/08-813-Red, 22 July 2010

Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)" (Trial Chamber II), No. ICC-01/04-01/07-2388, 14 September 2010

Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses (Trial Chamber I), No. ICC-01/04-01/06-2624, 12 November 2010

Redacted Decision on the Prosecution's Requests for Non-Disclosure of Information in Witness-Related Documents (Trial Chamber I), No. ICC-01/04-01/06-2597-Red, 3 December 2010

Public redacted decision on the lifting of redactions in witness statements (Trial Chamber III), No. ICC-01/05-01/08-977-Red, 26 January 2011

Decision on the Defence Request for Disclosure (Pre-Trial Chamber I), No. ICC-01/04-01/10-47, 27 January 2011

Redacted Decision on the disclosure of information from victims' application forms (a/0225/06, a/0229/06 and a/0270/07) (Trial Chamber I), No. ICC-01/04-01/06-2586-Red, 4 February 2011

Decision on issues relating to disclosure (Pre-Trial Chamber I), No. ICC-01/04-01/10-87, 30 March 2011

Decision on the Prosecution's applications for redactions pursuant to Rule 81(2) and Rule 81(4) (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/10-167, 20 May 2011

Decision on the "Defence Request for Disclosure of Article 67(2) and Rule 77 Materials" (Pre-Trial Chamber II), No. ICC-01/09-01/11-196, 14 July 2011

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Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims (Trial Chamber III), No. ICC-01/05-01/08-2027, 21 December 2011

Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-49, 6 March 2012

First decision on the Prosecutor's requests for redactions and other protective measures (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-74-Red, 27 March 2012

Decision on the "Requête de la Défense aux fins d'expurgation de deux attestations" and the "Demande aux fins de mesures de protection" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-195, 26 July 2012

Order convening a hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi (Pre-Trial Chamber I), No. ICC-01/11-01/11-207, 17 September 2012

Decision on the protocol establishing a redaction regime (Trial Chamber V), No. ICC-01/09-01/11-458, 27 September 2012

Decision on the protocol establishing a redaction regime (Trial Chamber V), No. ICC-01/09-02/11-495, 27 September 2012

Public Redacted version of the "Second Decision on Article 54(3)(e) documents" (Trial Chamber IV), No. ICC-02/05-03/09-407-Red, 26 October 2012

Decision on the Protocol on the handling of confidential information and contact of between a party and witnesses of the opposing party (Trial Chamber IV), No. ICC-02/05-03/09-451, 19 February 2013

Decision Setting the Regime for Evidence Disclosure and Other Related Matters (Pre-Trial Chamber II), No. ICC-01/04-02/06-47, 12 April 2013

Decision on Libya application for leave to appeal and request for reconsideration of the "Decision on the 'Urgent Defence Request'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-316, 24 April 2013

Decision on the conduct of the proceedings following the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute" (Pre-Trial Chamber I), No. ICC-01/11-01/11-325, 26 April 2013

Decision on defence application pursuant to Article 64(4) and related requests (Trial Chamber V), No. ICC-01/09-02/11-728, 26 April 2013

Corrigendum of Concurring Separate Opinion of Judge Eboe-Osuji (Trial Chamber V), No. ICC-01/09-02/11-728-Anx3-Corr2-Red, 2 May 2013

Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties (Pre-Trial Chamber II), No. ICC-01/04-02/06-64, 17 May 2013

Decision on Defence request to be provided with screening notes and Prosecution's corresponding requests for redactions (Trial Chamber V), No. ICC-01/09-01/11-743-Red, 20 May 2013

Decision on the Prosecutor's request for non-disclosure in relation to document "OTP/DRC/COD-190/JCCD-pt" (Appeals Chamber), No. ICC-01/04-01/06-3031 A5 A6, 27 May 2013

Order authorizing disclosure of lesser redacted versions of victims' applications (Trial Chamber V(a)), No. ICC-01/09-01/11-826, 24 July 2013

Order authorizing disclosure of a lesser redacted victim application of Witness 128 applications (Trial Chamber V(a)), No. ICC-01/09-01/11-835, 1 August 2013

Order authorizing disclosure of victims' applications (Trial Chamber V(a)), No. ICC-01/09-01/11-919, 9 September 2013

Public Redacted Version of Decision on Disclosure of Information related to Prosecution Intermediaries (Trial Chamber V(a)), No. ICC-01/09-01/11-904-Red, 8 October 2013

Decision regarding the non-disclosure of 116 documents collected pursuant to article 54(3)(e) of the Rome Statute (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-229, 27 January 2014

Decision on the "Prosecution's provision of 56 documents collected under article 54(3)(e)" (Pre-Trial Chamber II), No. ICC-01/04-02/06-247, 6 February 2014

Decision on the "Prosecution's request pursuant to Regulation 35 for an extension of time to add one statement to its Amended List of Evidence for the purposes of the confirmation of charges and, if granted, to be permitted to apply redactions to this item of evidence pursuant to Rule 81(2)" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-632-Red, 7 March 2014

Decision establishing a system for disclosure of evidence (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-57, 14 April 2014

Second decision on issues related to disclosure of evidence (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-67, 6 May 2014

Decision on the "Prosecution's request to disclose material in a related proceeding pursuant to Regulation 42(2)" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-659, 19 June 2014

Redacted Decision on the "Prosecution's Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses" (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-78-Red3, 3 July 2014

Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests ((Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-117-Red3, 3 July 2014

Decision on Defence Request for Disclosure of Information Relating to the Mungiki (Trial Chamber V(a)), No. ICC-01/09-01/11-1465, 25 August 2014

Decision on 'Prosecution's request in relation to potentially privileged material seized by the Office of the Prosecutor' (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-121, 6 July 2015

Second Decision on Prosecution's requests for variation of the time limit for disclosure of certain documents and to add some to its List of Evidence (Trial Chamber I), No. ICC-02/11-01/15-306, 21 October 2015

Fourth decision on matters related to disclosure and amendments to the List of Evidence (Trial Chamber I), No. ICC-02/11-01/15-467, 22 March 2016

Decision on request for leave to appeal the 'Fourth decision on matters related to disclosure and amendments to the List of Evidence' and other issues related to the presentation of evidence by the Office of the Prosecutor (Trial Chamber I), No. ICC-02/11-01/15-524, 13 May 2016

Oral Decision, No. ICC-01/04-02/06-T-202-Red-ENG (Trial Chamber VI), 11 April 2017

Oral Decision, No. ICC-01/04-02/06-T-203-Red-ENG (Trial Chamber VI), 12 April 2017

Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016 (Appeals Chamber), No. ICC-02/11-01/15-915-Red OA9, 31 July 2017

Decision on Prosecution application for non-standard redactions to material related to another and ongoing investigation in the Côte d'Ivoire situation (Trial Chamber I), No. ICC-02/11-01/15-1109-Red, 1 February 2018

Decision on the Prosecutor's request for an extension of time pursuant to regulation 35 of the Regulations of the Court and application to submit six documents under paragraph 43 of the Directions on the conduct of the proceedings, dated 21 December 2017 (Trial Chamber I), No. ICC-02/11-01/15-1120, 2 February 2018

Decision on Mr Gbagbo's Request for lifting of redactions and reclassification of documents in the record (confidential filing no. 1173) and related orders (Trial Chamber I), No. ICC-02/11-01/15-1194, 5 July 2018

5. Evidence

Articles 61(7), 68 and 69 of the Rome Statute
Rules 63-75 of the Rules of Procedure and Evidence

1. Evidence in general

The Defence has the right to access un-redacted versions of (i) the evidence on which the Prosecution intends to rely at the confirmation hearing and (ii) the materials in the possession or control of the Prosecution which are potentially exculpatory, have been obtained or belonged to the suspect or are otherwise material to the Defence preparation for the confirmation hearing. The Chamber is the ultimate guarantor of the Defence's timely access to the said evidence and materials.

See No. ICC-01/04-01/06-355, Pre-Trial Chamber I (Single Judge), 25 August 2006, pp. 3-4.

For the purpose of the confirmation hearing, the E-Court Protocol for the presentation of evidence, material and witness information in electronic format shall contain the following fields: (i) Author (ii) Author Organization (iii) Recipient (iv) Parties (v) Related to Witness (vi) Charge (vii) Element of Alleged Crime (viii) Incident (ix) Element of Statement of Facts and (x) Mode of Participation; and additional fields relating to witness information: (i) Disclosure Date (ii) Charge (iii) Element of Alleged Crime (iv) Incident (v) Element of Statement of Facts (vi) Mode of Participation and (vii) Person/Witness from whom the Document Emanated.

See No. ICC-01/04-01/06-360, Pre-Trial Chamber I (Single Judge), 28 August 2006, pp. 5-6.

Summary of evidence shall be provided in a language that the suspect fully speaks and understands and shall contain the following information: (i) a brief introduction of the relevance and probative value of the summary evidence without identifying the witness; (ii) any information on which the Prosecution intends to rely at the confirmation hearing, in particularly the information included in the paragraphs referred to in the Prosecution Charging Document and List of Evidence; and (iii) any information that could be potentially exculpatory or otherwise material for the Defence's preparation of the confirmation hearing.

See No. ICC-01/04-01/06-437, Pre-Trial Chamber I (Single Judge), 15 September 2006, p. 10.

The probative value of the unredacted parts of the said documents, witness statements and transcripts of witness interviews [*i.e.* materials which redaction have been authorised] may be diminished as a result of the redactions proposed by the Prosecution and authorised by the Chamber.

See No. ICC-01/04-01/06-455, Pre-Trial Chamber I (Single Judge), 20 September 2006, p. 10.

Under no circumstances may evidence not translated into one of the working languages of the Court at the time of commencement of the confirmation hearing be admitted into evidence insofar as the Chamber must be in a position to fully understand the evidence on which the parties intend to rely at the hearing; therefore, pursuant to article 69(4) of the Statute, video excerpts (i) which are not translated into one of the working language of the Court by the time-limit established by the Chamber and (ii) whose translation is not made available to the Chamber and the Defence by that time must be declared inadmissible.

See No. ICC-01/04-01/06-676, Pre-Trial Chamber I (Single Judge), 7 November 2006, p. 3.

The Chamber may rely on any evidence admitted for the purpose of the confirmation hearing whether or not the party proposing such evidence presents it at the confirmation hearing as long as the other party had the opportunity to respond to it at the confirmation hearing.

See No. ICC-01/04-01/06-678, Pre-Trial Chamber I (Single Judge), 7 November 2006, p. 5.

In the opinion of the Pre-Trial Chamber, the purpose of the confirmation hearing is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought. Pursuant to article 61(7) of the Statute, the Pre-Trial Chamber shall determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. To define the concept of "*substantial grounds to believe*", the Chamber relies on internationally recognised human rights jurisprudence. Accordingly, the Chamber considers that for the Prosecution to meet its evidentiary burden, it must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations. Furthermore, the "*substantial grounds to believe*" standard must enable all the evidence admitted for the purpose of the confirmation hearing to be assessed as a whole.

See No. ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, 29 January 2007, paras. 37-39.

The statutory and regulatory framework of the texts governing the Court undoubtedly establishes he unfettered authority of the Trial Chamber to rule on procedural matters and the admissibility and relevance of evidence, subject always to any contrary decision of the Appeals Chamber. The Trial Chamber should only disturb the

Pre-Trial Chamber's Decisions if it is necessary to do so and it should follow the Pre-Trial Chamber unless that would be an inappropriate approach.

[…]

In relation to the manner in which evidence shall be introduced, the Trial Chamber considers that] evidence heard before the Pre-Trial Chamber cannot be introduced automatically into the trial process simply by virtue of having been included in the List of Evidence admitted by the Pre-Trial Chamber, but instead it must be introduced, if necessary, *de novo*. The parties (and where relevant, the participants) can agree convenient mechanisms for the introduction of undisputed evidence.

See No. ICC-01/04-01/06-1084, Trial Chamber I, 13 December 2007, paras. 5-6, and 8.

E-court processes can greatly enhance courtroom and trial efficiency and as such should be embraced by the Court. The exponential increase in the volume of information, together with real problems that have emerged over information management, has meant that standardised protocols are necessary to govern how information can be prepared and presented. Important experience has demonstrated that a protocol which is drawn to capture purely objective information about documents or records related to each case is the most useful approach: this enables the exchange, search, retrieval and presentation of information in the easiest, as well as most precise and consistent way, on multiple occasions. These objectives cannot be met by the addition of subjective information: indeed, the inclusion of subjective fields works actively against them.

[…]

In order to maximise the utility and the coherency of the application of the E-Court Protocol, it should be applied to all exchanged materials, regardless of the particular stage in the proceedings at which they were disclosed. Moreover, the Protocol should cover all case information filed with the Registry or exchanged between parties/participants. This, by definition, extends equally to the incriminatory and potentially exculpatory material exchanged between the parties. An exception to this approach applies to the semi or completely illegible materials, given that there are a large amount of documents that are either written by hand or otherwise cannot be searched electronically. The principle reason for permitting this exception is the imminence of the trial and the difficulties at this point in time for the prosecution of revisiting each of the relevant documents to apply the relevant objective coding or typing the record in full for electronic searching.

[…]

For the purposes of the E-Court protocol, a unique number shall be allocated to each victim participant.

See No. ICC-01/04-01/06-1127, Trial Chamber I, 24 January 2008, paras. 19, 22-23, and 27.

Article 69(2) of the Rome Statute establishes a presumption in favour of live in-court-testimony. However, if the Chamber will authorize their use whenever necessary, it will issue its decision on a case-by-case basis regarding especially the security situation or the vulnerability of the witness. So as to be able to arrange for a video-link the parties and participants are ordered to inform the Chamber and the Victims and Witnesses Unit not less than 35 days before the testimony is due do be heard that they seek to introduce evidence via audio or video-link from a remote location. In case the technology shall be used at the seat of the Court the parties and participants are advised to inform the Chamber and the VWU at the earliest opportunity of a corresponding request. However, no strict time-limit is imposed, given that unforeseen circumstances may arise.

See No. ICC-01/04-01/06-1140, Trial Chamber I, 29 January 2008, paras. 41-42.

It seems clear that under the Rome Statute framework it is envisaged that an accused's right to a fair trial is not necessarily compromised by the imposition on him or her of an obligation to reveal in advance and in appropriate circumstances, details of the defences and the evidence to be presented, and the issues that are to arise.

See No. ICC-01/04-01/06-1235-Corr-Anx1, Trial Chamber I, 20 March 2008, para. 31.

Those granted the procedural status of victim at the pre-trial stage of a case (i) must confine their participation to the discussion of the evidence on which the Prosecution and the Defense intend to rely at the confirmation hearing; and (ii) do not have the right to introduce additional evidence.

[…]

The introduction of additional evidence on which neither the Prosecution nor the Defense intend to rely (and that therefore is not part of the record of the case kept by the Registry) by those granted the procedural status of victim would: (i) distort the limited scope, as well as the object and purpose, of the confirmation hearing as defined by article 61 of the Statute and rules 121 and 122 of the Rules, and (ii) inevitably delay the commencement of a confirmation hearing that, pursuant to article 61(1) of the Statute, must be held within a reasonable period of time after the suspect's surrender or voluntary appearance before the Court.

[…]

The introduction of additional evidence on which neither the Prosecution nor the Defense intend to rely at the confirmation hearing by those granted the procedural status of victim will infringe upon the Defense's rights not to rely on such material for the purpose of the confirmation hearing.

[…]

This, in the view of the Single Judge, prevents the Pre-Trial Chamber from authorising victims to introduce additional evidence, on which neither the Prosecution nor the Defence intend to rely at the confirmation hearing, under the general umbrella of article 69(3) of the Statute.

Those granted the procedural status of victim cannot introduce additional evidence at the confirmation hearing on the ground that "*victim participation 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 in this sense the Court has* 'requested' *the evidence*".

In light of the above, the Single Judge finds that the statutory framework provided for by the Statute and the Rules for the pre-trial stage of a case leaves no room for the presentation of additional evidence by those granted the procedural status of victim.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 17, 101, 103, and 111-113.

The provision of information, *inter partes*, of a non-public nature is governed by the twin requirements of necessity and witness-security. When the distribution of information to the public has been limited – for whatever reason – it is appropriate that its use should be carefully regulated so as to ensure compliance with those requirements. Once information has been characterised as being non-public (whether it is characterised as "*confidential*", "ex parte" or "*under seal*"), its use should be limited to the strict purposes of the disclosure and members of the public should only be shown those parts of it that are truly necessary for the preparation and presentation of the case of a party or participant.

See No. ICC-01/04-01/06-1372, Trial Chamber I, 3 June 2008, paras. 8-9. See also No. ICC-01/05-01/08-813-Red, Trial Chamber III, 20 July 2010, para. 87

Exculpatory material includes material, first, that shows or tends to show the innocence of the accused; second, which mitigates the guilt of the accused; and, third, which may affect the credibility of prosecution evidence.

See No. ICC-01/04-01/06-1401, Trial Chamber I, 13 June 2008, para. 59.

The right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence lies primarily with the parties, namely, the Prosecutor and the Defense. 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.

The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial. With these safeguards in place, the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is not inconsistent with the onus on the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial.

The Trial Chamber did not create an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation.

See No. ICC-01/04-01/06-1432 OA9 OA10, Appeals Chamber, 11 July 2008, paras. 3-4.

In order to ensure the expeditiousness of proceedings and proper case management, the parties shall submit the evidence in due time, in proper format and within the official filing hours as set out in regulation 33(2) of the Regulations of the Court.

The Chamber draws particular attention of all concerned to the fact that all evidence is to be registered into the record of the case by the Registry and that, for the registration, they are to accord the Registry a reasonable time. […].

[…]

The parties are reminded to include in their submission of evidence the following documentation: (i) a list of evidence enlisting all pieces of evidence enclosed with their respective document ID as defined in the e-Court protocol (see Annex) and (ii) a list of recipients including the level of confidentiality applicable to each item *vis-à-vis* any party.

In view of the principle of publicity of proceedings, the evidence submitted shall in principle be registered as public unless there is a need to classify it otherwise.

The Chamber observes that under article 61(5) of the Statute, the Prosecutor "*shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged*".

Furthermore, pursuant to article 67(1)(a) and (b) of the Statute, not only must the accused "*be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks*" but must also "*have adequate time and facilities for the preparation of the defence*".

Bearing in mind these objectives, the Chamber is of the view that the defence has to have all necessary tools to understand the reasons why the Prosecutor relies on any particular piece of evidence and that, consequently, the evidence exchanged between the parties and communicated to the Chamber must be the subject of a sufficiently detailed legal analysis relating the alleged facts with the constituent elements corresponding to each crime charged.

In the Chamber's opinion, the most important factor in both safeguarding the rights of the defence and enabling the Chamber to exercise its functions is not for the Prosecutor to disclose the greatest volume of evidence, but to disclose the evidence which is of true relevance to the case, whether that evidence be incriminating or exculpatory. In fact, disclosure of a considerable volume of evidence for which it is difficult or impossible to comprehend the usefulness for the case merely puts the defence in a position where it cannot genuinely exercise its rights, and serves to hold back the proceedings

See No. ICC-01/05-01/08-55, Pre-Trial Chamber III, 31 July 2008, paras. 54-55, and 62-67.

One of the relevant criteria in determining whether or not a witness should be allowed to give *viva voce* (oral) testimony by means of video technology is the witness's personal circumstances. Although personal circumstances have thus far been interpreted as linked to the well-being of a witness, the Chamber is not confined by the Statute in considering other types of personal circumstances which might justify a witness testifying by means of audio or video technology.

In the present case, the Chamber notes the specific commitments and particular profile of Witness 108. The Chamber notes the information provided by the witness preventing him from travelling outside the CAR. Furthermore, the Chamber observes that Witness 108 is ready and willing to cooperate with the Court. Due to the exceptional nature of the personal circumstances explained by the OPCV concerning this witness, the Chamber considers that the reasons that prevent him from travelling to The Hague to give live testimony in Court are well-founded.

See No. ICC-01/05-01/08-947-Red, Trial Chamber III, 12 October 2010, paras. 13-14.

CONSIDERING that, pursuant to article 69(5) of the Statute, the Court shall respect and observe privileges on confidentiality and that rule 73 of the Rules provides that privileged communications made in the context of certain specified relationships are not to be subject to disclosure;

CONSIDERING the right of the suspect to communicate freely with Counsel of their choosing in confidence, pursuant to article 67(1)(b) of the Statute and rule 121(1) of the Rules;

CONSIDERING that, consistently with articles 55, 57 and 67 of the Statute and rule 121(1) of the Rules, the Chamber has a responsibility for the protection of the rights of the suspect and it is therefore its duty to ensure that privileged communications of the suspect are not disclosed to the Prosecutor;

CONSIDERING that in order to enable the Prosecutor and members of his Office to continue the reviewing of the Seized Material without them gaining access to privileged communications, it is of importance that such communications be excluded from the material subject to the Prosecutor's review;

CONSIDERING that in order to exclude privileged communications from the material that has already been provided to the Prosecutor, the 72 Documents must be reviewed to determine whether or not they are privileged within the meaning of rule 73 of the Rules;

CONSIDERING that no provision of the Statute, the Rules and the Regulations of the Court precludes the Chamber from reviewing documents for the purpose of determining whether they are privileged under rule 73 of the Rules;

CONSIDERING, on the contrary, that there are provisions in the Statute that give specific powers to the Chamber to assess evidence and determine its admissibility (article 69(4) of the Statute) and its potential exculpatory nature (article 67(2)) without envisaging that, regardless of the outcome of such assessment, this could lead to the disqualification of the judges on grounds of bias;

CONSIDERING therefore that the mere fact that the Chamber has reviewed, for the specific purpose of determining whether the privilege set out in rule 73 of the Rules applies, communications between the suspect and his or her Defence counsel, or other persons referred to in rule 73, in no way leads to bias and does not preclude the Chamber from further conducting the pre-trial proceedings and ultimately deciding on whether or not the charges against that suspect should be confirmed, as in its future decisions the Chamber will not take into consideration the content of the documents found to be privileged;

CONSIDERING therefore that the Chamber is empowered to conduct a review of communications between a person and his or her legal counsel, or other persons referred to in rule 73, in order to assess whether or not they are privileged in accordance with rule 73 of the Rules;

CONSIDERING that the Chamber's review of such documents shall be limited to what is relevant and necessary to a determination of whether or not they are privileged.

FOR THESE REASONS,

ORDERS the Registry to ensure that only the Chamber has access to the 72 Documents.

See No. ICC-01/04-01/10-67, Pre-Trial Chamber I, 4 March 2011, pp. 5-8.

The material included in the lists of documents or other material to be used in Court shall be subject to the following procedure:

a. When submitting their respective lists of documents intended to be used during the questioning of each witness the parties shall identify the specific material intended to be submitted as evidence during the questioning of a witness.

b. Any objections as regards the relevance or admissibility of the material that the parties identify as intended to be submitted as evidence shall be provided with detailed reasons for preparation purposes by way of an email sent to the opposing party and participants and copied to the Chamber as soon as practicable and before the hearing at which the document is to be submitted as evidence. The objection shall then be formally raised in court at the time the material is submitted to the Chamber. The opposing party will be given an opportunity to respond to the objection orally. The fact that notice of any objection is to be provided by email in advance of the hearing for preparation purposes will not preclude a party from raising any issue related to the relevance or admissibility of the material at the time the evidence is submitted to the Chamber, in accordance with the Rules.

c. Whenever the parties do not raise an objection as regards the relevance or admissibility of an item which is submitted, it will be admitted into evidence and receive an EVD-T number, following consideration by the Trial Chamber. The Chamber will rule on any objections that are raised to the admission of items as evidence in due course. The procedure above does not preclude the parties from requesting the submission as evidence of any item, listed or not, either in the course of the questioning of a witness or at a later stage during the proceedings through a motion. The Chamber will decide, after giving the opposing party and participants the opportunity to raise any objections they may have.

When a party intends to submit as evidence the statement(s) of a witness called to testify, this intention and any subsequent objection should be made known in writing, pursuant to the conditions established above. The ensuing oral submissions should in principle take place at the beginning of the questioning and after having ensured that the witness does not object to the submission in accordance with rule 68(b) of the Rules. The statement(s) may be admitted as evidence and accordingly receive an EVD-T number following consideration by the Chamber of any objections raised in accordance with the Statute and the Rules. The Majority of the Chamber, Judge Ozaki dissenting, favours the submission into evidence of the entirety of the witnesses' statement(s), as opposed to excerpts, when considered necessary for the determination of the truth in accordance with article 69(3) of the Statute and to ensure that information is not taken out of context, and consistent with the relevant provisions of the Statute and the Rules. The Chamber will assess the admissibility of each statement considering any objection raised in accordance with, *inter alia*, article 69(4) of the Statute and rule 64(1) of the Rules and consistent with the rights of the accused. The Majority of the Chamber, Judge Ozaki dissenting, considers that in the event that a party does not submit into evidence the statement(s) of a witness called to testify, the Chamber may request the submission of the statement(s) that it considers necessary for the determination of the truth, in accordance with the Statute and the Rules. The parties will be given an opportunity to raise any objection to the potential admission of these statement(s) into evidence.

In accordance with the framework for the participation of victims at trial established in the present case, the victims authorised to participate in the proceedings ("*participants*") may submit evidence and raise issues relating to the relevance and admissibility of evidence when their interests are affected and upon leave being granted by the Chamber, in accordance with articles 69(3) and 68(3) of the Statute.

Therefore, the procedure set out in the present Decision will apply to the participants as follows:

a) When the participants wish to submit an item as evidence, they shall first file a written application setting out the reasons as to why the personal interests of the victims they represent are affected;

b) When the participants wish to raise an issue relating to the relevance or admissibility of evidence submitted by the parties, they shall first file a written application setting out the reasons as to why the personal interest of the victims they represent are affected.

The parties and participants are instructed to indicate the level of confidentiality of each item contained in the list of documents sent in advance of the testimony of each witness and, if a change of confidentiality level is requested, the reasons supporting such request. Any objections to a change in the level of confidentiality are to be raised forthwith. In addition, whenever there are several redacted versions of material to be submitted, the

parties and participants are required to refer to the available lesser redacted version unless there are justified reasons not to do so.

See No. ICC-01/05-01/08-1470, Trial Chamber III, 31 May 2011, paras. 7-8, and 10-15.

At the outset, the Chamber notes that the application forms in question relate to dual status individuals; those who testified at trial as prosecution witnesses and who were, at the same time, victims granted the right to participate in the proceedings.

The majority is of the view that victims' application forms may, in certain circumstances, be relevant to the questioning of dual status individuals. For example, it may be appropriate to admit the victim application form of a dual status individual if the application form is needed to properly understand his or her questioning as a witness. However, the majority is not persuaded that this is the case here.

Further, the majority is of the view that the probative value of the application forms is limited. Unlike evidence collected to support or challenge the substantive criminal charges in the case, the application forms are administrative in nature and are created through a relationship of confidence between a potential victim and the Registry of the Court. They are intended to serve a limited purpose: to provide the Chamber with a basis for determining whether individual victims should be permitted to participate in the proceedings pursuant to rule 89 of the Rules. For this reason, no formal requirements govern their creation, such as those applicable to the collection of "*formal statements*" under rules 111 and 112 of the Rules. Moreover, third parties often fill out the application forms on behalf of victim applicants or assist them in doing so; a process that may increase errors.

In addition, the majority rejects the prosecution argument that victims' application forms constitute "*prior statements*" to which rule 68 of the Rules applies. A victim's application form does not constitute "*testimony*" or a "*transcript or other documented evidence of such testimony*" under rule 68 because, as discussed above, the purpose of such forms is not to provide evidence to assist in the determination of the substantive issues and criminal charges in the case. Further, when submitting their application forms, applicants are not put on notice that the information they provide may be used as evidence in the proceedings, nor is there any suggestion that the applicant acts or is willing to act as a "*witness*". For these reasons, victims' application forms do not constitute "*testimony*" and are therefore not subject to the requirements of rule 68 of the Rules, as the Prosecution argues.

In terms of potential prejudice to the proceedings, the majority takes the view that admitting application forms as evidence may be perceived by victim applicants as an unfair use of documentation that was provided to the Court for a discrete purpose. As to the potential prejudice to the defence, rejecting the admission of the victims' application forms will not prejudice the defence because its questioning on potential inconsistencies is already reflected in the transcripts.

For these reasons, the majority finds that in applying the three part test, the application forms' limited relevance and probative value is outweighed by the prejudice that their admission would cause. Therefore, the majority, Judge Ozaki dissenting, denies the defence request for the admission into evidence of the victims' application forms for Witnesses 23, 68, 81, and 82.

See No. ICC-01/05-01/08-2012-Red, Trial Chamber III, 9 February 2012, paras. 98-103.

With regard, I cannot agree with the reasoning of, or the conclusion reached by, my Colleagues. A proper application of the three-stage test in the case of these four application forms shows that these documents are admissible as evidence.

First, I agree with the Majority's rejection of the prosecution's argument that the forms are inadmissible as they constitute prior-recorded testimony, without fulfilling the conditions of rule 68 of the Rules. Trial Chamber II has addressed the meaning of the term "*testimony*" in these words:

> *Clearly, statements made out of court can equally qualify as testimony. At the same time the Chamber considers that not every communication of information by an individual outside of the courtroom is testimony in this sense. A statement given to representatives of an intergovernmental organisation with a specific fact-finding mandate may be considered as testimony if the manner in which the statement was obtained left no doubt that the information might be used in future legal proceedings.*
>
> […]
>
> *The second key factor in determining whether an out-of-court statement qualifies as testimony in the sense of article 67(1)(e) and rule 68 is that the person making the statement understands, when making the statement, that he or she is providing information which may be relied upon in the context of legal proceedings. It is not necessary for the witness to know against whom his or her testimony may be used, or even for the witness to know which particular crime is being investigated or prosecuted. It is important, however, that the statement is formalised in some manner and that the person making the statement asserts that it is truthful and based on personal knowledge. A unilaterally prepared affidavit may thus also qualify as testimony if the person making it clearly had the intention of making factual assertions for the purpose of future or ongoing legal proceedings.*

This being said, to be a prior-recorded testimony under rule 68 of the Rules, a document must bear minimum qualities which enable it to become a suitable "*substitute for oral evidence in court*", for example, qualities such as those provided for in rule 111 of the Rules. These minimum qualities allow prior-recorded testimonies under rule 68 to be admitted for the truth of their content. However, victims' application forms do not have such

minimum requirements. As pointed out by the Majority, when filling out their forms, the victim applicants only aimed at being recognised as participating victims in the proceedings. Therefore, the application forms fall outside the scope of rule 68 of the Rules and should simply be assessed, like any other non-testimonial materials, through the three-stage test.

Second, as I already explained in my Partly Dissenting Opinion on the Order on the procedure relating to the submission of evidence, "*parties to criminal proceedings generally tender materials into evidence either: (1) to prove the truth of their content; or (2) to assess or test the credibility of a witness*". In this regard, Trial Chamber I ruled that "*not all information relating to the credibility [of a witness] is necessarily admissible*" and that the general requirements of the three-stage test should be applied before a determination on the admission into evidence. While I agree with this ruling, I would add that this distinction in the purpose of the admission into evidence inevitably leads to a distinction in the threshold of the three-stage admissibility test, depending on the nature of the materials considered, especially with regard to the evaluation of the probative value. Hence, the probative value of material merely admitted to test the credibility of a witness needs not be as high as that of materials admitted to prove the truth of their contents.

Finally, I cannot concur with the Majority's argument that rejecting the application forms will not cause prejudice to the defence because "*its questioning on potential inconsistencies is already reflected in the transcripts*".

In typical proceedings, if either party, during its questioning, refers to questionable materials, the Chamber, either *proprio motu* or following an objection of the opposing party, rules on the use of the materials and thereby decides on whether to admit such materials. In controversial cases, the Chamber may postpone its determination to a later stage, and such postponement will be reflected in the transcript. One possibility does not necessarily exclude the other. In properly applying the three-stage test to the application forms, it appears that the forms are relevant, as they all refer to the events charged and relate to the credibility of witnesses, which is also an issue to be determined by the Chamber.

Therefore, I would admit the victims' application forms, for the purpose for which admission was sought, namely to test the credibility of the related witnesses.

See No. ICC-01/05-01/08-2015-Red, Partly Dissenting Opinion of Judge Ozaki, Trial Chamber III, 14 February 2012, paras. 8-23.

II. Press and Audio Media Reports

The Majority of the Chamber has admitted into evidence seventeen press reports in full and one in part, and nine recordings of radio news programmes from *Radio France Internationale* ("RFI"). I am in agreement with the admission of two of these newspaper reports, one containing a transcribed speech and the other which was used during the questioning of Witness 15, for the reasons set out in the Decision. With regard to the remaining sixteen press reports and all nine audio media reports, I am of the view that the admission into evidence of newspaper articles and other media reports when their authors are not called to testify at trial must be approached with great caution, particularly when the prosecution seeks to rely on them to prove critical elements of its case. Even when media reports appear to describe contemporary events objectively, the authors of these reports often rely on hearsay, and there are no guarantees that the sources have been selected impartially. In most cases, therefore, media reports lack the minimum probative value necessary for admission into evidence.

In this regard, Trial Chamber I has held that "*generally, newspaper articles cannot usually be relied on to report with sufficient reliability the events they purport to address*" and declined to admit into evidence a newspaper article when the author was not called to testify at trial. Trial Chamber II similarly held that "[m]*edia reports often contain opinion evidence about events said to have occurred and rarely provide detailed information about their sources*". That Chamber highlighted that opinion evidence is only admissible when provided by an expert, and refused to admit into evidence several media reports where the prosecution had failed to satisfy the Chamber as to the objectivity of the reports. I would, in principle, adopt this approach in considering the press and other media reports currently at issue.

I cannot agree with the reasoning of the Majority that these reports are admissible because they "*may serve to corroborate other pieces of evidence*". In my view, the fact that a given item corroborates other evidence can be a factor in assessing its reliability and probative value. However, the mere possibility that certain items may corroborate other, as-yet unidentified evidence at a later stage has no impact on the item's present limited probative value. Although the Majority suggests that the admission of these reports is not prejudicial "*in light of the envisioned limited usage of the information contained in these documents*", it neglects to specify how this usage is to be limited, and at no stage does the Majority analyse the probative value of each item in light of the evidence it would be used to corroborate. Moreover, as discussed above, the press reports and RFI broadcasts' at issue in this Decision have very little probative value to begin with. On this basis, I do not consider the possibility of corroboration sufficient to justify their admission, particularly when balanced against the very real potential for prejudice if these media reports are admitted for the truth of their contents.

III. Reports from Non-Governmental Organizations

The Majority of the Chamber has admitted into evidence four NGO reports (three prepared by the Federation Internationale des Ligues des Droits de l'Homme ("FIDH") and one by Amnesty International ("AI"). The Majority holds that these reports "*contain sufficient details of their sources of information and methodology and therefore bear sufficient indicia of authenticity and reliability*". The reports contain information relevant to the crimes with which the accused is charged. However, the identities of the authors and the sources of the information relied on in the reports are not revealed with sufficient detail, and as a result it is not possible to fully investigate their reliability. The three FIDH reports and the AI report admitted into evidence by the Majority are based almost entirely on information obtained from other NGOs, journalists, or unidentified eyewitnesses, thus rendering it very difficult to adequately assess the reliability of the accounts contained therein.

Due to the lack of guarantees concerning the reliability of these reports' sources and without hearing the testimony of the authors of these reports, in my judgment their probative value is low. Considering in turn the high potential for prejudice to the defence if the reports are admitted, it is my view that these reports do not satisfy the test for admission.

IV. Reports from States

The Majority has also admitted into evidence a report from the United States Department of State, published on 31 March 2003. This report contains no information about its sources, nor does it explain the methodology relied on to compile and analyse the evidence that forms the basis of its factual assertions. If the author of the report is not called to testify, and in the absence of any other means for the Chamber and the defence to inquire into the information relied on in the report, I am of the view that its probative value is insufficient to outweigh its potentially prejudicial effect, and I would not admit this document, regardless of whether or not it may, in theory, be capable of corroborating other evidence.

See No. ICC-01/05-01/08-2300, Partly Dissenting Opinion of Judge Ozaki, Trial Chamber III, 6 September 2012, paras. 3-15.

At the outset, the Chamber observes that the Prosecution is not necessarily required to rely on entirely the same evidence at trial as it did at the confirmation of charges stage. There may be good reasons for the Prosecution to substitute, at trial, the evidence it used during the Confirmation Hearing to establish the charges (to the substantial grounds to believe standard) with other evidence, as long as this other evidence pertains to the same charges.

[…]

The Chamber stresses that it is the charges as confirmed by the Pre- Trial Chamber and subsequently set out in the Updated Document Containing the Charges (DCC), and not the information contained in the Pre-Trial Brief that serves as the basis for trial. The role of the Pre-Trial Chamber is to confirm or decline to confirm the charges as originally formulated by the Prosecution. In conducting the trial and rendering its final decision, the Chamber, whilst it cannot exceed the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber and framed in the Updated DCC, is not bound by the Pre-Trial Chamber's evidentiary assessments or its interpretation of the relevant provisions of the Statute. The Chamber will not permit the Prosecution, at trial, to presume to rely on facts and circumstances going beyond the confirmed charges. If the Prosecution intends to introduce any such new facts and circumstances, the appropriate course would be to seek an amendment of the charges, prior to the commencement of trial, in accordance with article 61(9).

[…]

The Chamber is concerned by the considerable volume of evidence collected by the Prosecution post-confirmation and the delays in disclosing all relevant evidence to the Defence. Whilst the Chamber does not consider that the Statute prohibits the Prosecution from conducting post-confirmation investigations, it is mindful of the Appeals Chamber's recent statement in *Mbarushimana* that the investigation should be "*largely completed*" by the Confirmation Hearing.

Although there may be no formal preconditions for the Prosecutor to continue investigating the same facts and circumstances after they have been confirmed, this is not an unlimited prerogative. In particular, the Majority of the Chamber is of the view that under the procedural framework of the Statute, the Prosecution is expected to have largely completed its investigation prior to the confirmation hearing. Article 54(1)(a) of the Statute requires the Prosecutor to "*extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally*". As the Appeals Chamber has pointed out, this obligation is specifically linked to the Prosecutor's responsibility to establish the truth. The Prosecutor is not responsible for establishing the truth only at the trial stage by presenting a complete evidentiary record, but is also expected to present a reliable version of events at the confirmation hearing. The Prosecutor should not seek to have the charges against a suspect confirmed before having conducted a full and thorough investigation in order to have a sufficient overview of the evidence available and the theory of the case.

This is not to say that the Prosecution is prohibited from conducting further investigations after the confirmation stage. Post-confirmation investigation may be appropriate when it pertains to evidence which the Prosecution could not with reasonable diligence have discovered or obtained prior to confirmation. It may also be appropriate when certain evidence that was available prior to confirmation, unexpectedly and through no fault

of the Prosecution, becomes unavailable for use at trial (*e.g.* a witness dies or otherwise becomes unavailable). Furthermore, if the Prosecution can establish that (a) it could not have taken a particular investigative step prior to confirmation without unduly endangering the security of particular individuals or (b) that it had justifiable reasons for believing that this situation would significantly change after confirmation, it may be appropriate for the Prosecution to postpone such an investigative step until after confirmation.

However, the Majority is of the view that the Prosecution should not continue investigating post-confirmation for the purpose of collecting evidence which it could reasonably have been expected to have collected prior to confirmation. If a Trial Chamber finds that this has occurred, it would need to determine the appropriate remedy based on the circumstances of the case. This could include the exclusion of all or part of the evidence so obtained as a remedy for the Prosecution's conduct as well as to allay any potential prejudice caused to the accused.

See No. ICC-01/09-02/11-728, Trial Chamber V, 26 April 2013, paras. 105, 107, and 118-121.

Notably, the Pre-Trial Chamber had indicated a view that "*hearsay evidence*" is encompassed within the meaning of "*indirect evidence*". In light of the Pre-Trial Chamber's own predisposition against confirmation "*based solely on one*" piece of indirect evidence, it is certainly arguable that confirmation based on more than one piece of indirect evidence remained a possibility for the Pre-Trial Chamber. That the Defence – or indeed another ICC judge – may dispute the wisdom of that possibility does not revive the fate of the Defence assertion that the Pre-Trial Chamber "*would not have*" confirmed the present case for trial had it known of the true nature of PW-4's evidence.

It might also be useful to consider the following related observation of the Pre-Trial Chamber:

In considering indirect evidence, the Chamber follows a two-step approach. First, as with direct evidence, it will assess its relevance and probative value. Second, it will verify whether corroborating evidence exists, regardless of its type or source. The Chamber is aware of rule 63(4) of the Rules, but finds that more than one piece of indirect evidence, which has a low probative value, is preferable to prove an allegation to the standard of substantial grounds to believe. In light of this assessment, the Chamber will then determine whether the piece of indirect evidence in question, when viewed within the totality of evidence, is to be accorded a sufficient probative value to substantiate a finding of the Chamber for the purposes of the decision on the confirmation of charges.

See Corrigendum of Concurring Separate Opinion of Judge Eboe-Osuji, No. ICC-01/09-02/11-728-Anx3-Corr2-Red, Trial Chamber V, 2 May 2013, paras. 60-61.

It is recalled that the drafters of the Statute established progressively higher evidentiary thresholds applicable in the course of the different stages of the proceedings. The evidentiary threshold of "*substantial grounds to believe*" required for the confirmation of charges is higher than the threshold required for the issuance of a warrant of arrest ("*reasonable grounds to believe*") but lower than the threshold required for the conviction of an accused ("*beyond reasonable doubt*"). With a view to giving concrete meaning to the term "*substantial grounds*", Pre-Trial Chamber I emphasized that "[a]*fter an exacting scrutiny of all the evidence, the Chamber will determine whether it is thoroughly satisfied that the* [Prosecutor's] *allegations are sufficiently strong to commit* [the person] *to trial*" . Pre-Trial Chamber II understood the term "*substantial*" to mean "*significant*", "*solid*", "*material*", "*well built*", "*real*" rather than "*imaginary*". Pre-Trial Chambers have consistently held that to meet the evidentiary burden of "*substantial grounds to believe*", the Prosecutor must "*offer concrete and tangible proof demonstrating a clear line of reasoning underpinning* [the] *specific allegations*".

The higher evidentiary threshold at this juncture of the proceedings accords with the gatekeeper function of the Pre-Trial Chamber according to which (i) only those cases proceed to trial for which the Prosecutor has presented sufficiently compelling evidence going beyond mere theory or suspicion; (ii) the suspect is protected against wrongful prosecution; (iii) and judicial economy is ensured by distinguishing between cases that should go to trial and those that should not.

As has been repeatedly held, the proposed charges are composed of the "*facts and circumstances*" and their legal characterization. It is incumbent on the Prosecutor to clearly define in the document containing the charges all the facts and circumstances and to propose therein their legal characterization. At the present stage of the proceedings, it is the Chamber's duty to evaluate whether there is sufficient evidence for each of the "*facts and circumstances*" advanced by the Prosecutor in order to satisfy all of the legal elements of the crime(s) and mode(s) of liability charged. The standard by which the Chamber scrutinizes the evidence is the same for all factual allegations, whether they pertain to the individual crimes charged, contextual elements of the crimes or the criminal responsibility of the suspect.

Article 74(2) of the Statute mentions the "*facts and circumstances as described in the charges*", which clearly refers to "*the charges as confirmed*" in the article 61(7)(a) decision. Any other general background information, albeit informative or helpful, will not be central to the charges as it will not "*support the legal elements of the crime charged*".

For example, the individual incidents alleged by the Prosecutor in support of her allegation that there was an "*attack directed against any civilian population*" are part of the facts and circumstances for the purposes of article 74(2) of the Statute and therefore must be proved to the requisite threshold of "*substantial grounds to believe*". This is especially so in this case in which the Prosecutor identifies particular incidents that constitute the attack against the civilian population. In other words, the incidents are "*facts*" which "*support the* [contextual] *legal elements of the crime charged*".

Taking into consideration that contextual elements form part of the substantive merits of the case, the Chamber sees no reason to apply a more lenient standard in relation to the incidents purportedly constituting the contextual element of an "*attack*" for the purposes of establishing the existence of crimes against humanity than the standard applied in relation to other alleged facts and circumstances in the case. Accordingly, each incident underlying the contextual elements must be proved to the same threshold that is applicable to all other facts. This is not to say that there is no difference between crimes that underlie a suspect's individual criminal responsibility and crimes being committed as part of incidents which only establish the relevant context. The crimes which are alleged to prove the suspect's individual criminal responsibility must be linked to the suspect personally, whereas incidents proving the contextual circumstances do not require such an individualised link. As such, the former set of crimes will inevitably need to be proven in greater detail than the latter. Indeed, in order to be considered relevant as proof of the contextual elements, the information needed may be less specific than what is needed for the crimes charged but is still required to be sufficiently probative and specific so as to support the existence of an "*attack*" against a civilian population. The information needed must include, for example, details such as the identity of the perpetrators, or at least information as to the group they belonged to, as well as the identity of the victims, or at least information as to their real or perceived political, ethnic, religious or national allegiance(s).

When alleging the existence of an "*attack directed against any civilian population*" by way of describing a series of incidents, the Prosecutor must establish to the requisite threshold that a sufficient number of incidents relevant to the establishment of the alleged "*attack*" took place. This is all the more so in case none of the incidents, taken on their own, could establish the existence of such an "*attack*".

The Chamber notes article 61(5) of the Statute, which provides that "*the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial*".

Even though article 61(5) of the Statute only requires the Prosecutor to support each charge with "*sufficient*" evidence at the confirmation hearing, the Chamber must assume that the Prosecutor has presented her strongest possible case based on a largely completed investigation. As the Appeals Chamber highlighted, "*the investigation should largely be completed at the stage of the confirmation of charges hearing. Most of the evidence should therefore be available, and it is up to the Prosecutor to submit this evidence to the Pre-Trial Chamber*". This approach ensures continuity in the presentation of the case and safeguards the rights of the Defence, which should not be presented with a wholly different evidentiary case at trial. It also ensures that the commencement of the trial is not unduly delayed and conforms with the right of the Defence to be tried without undue delay pursuant to article 67(1)(c) of the Statute.

In relation to the quality of individual items of evidence, the Chamber considers that it would be unhelpful to formulate rigid formal rules, as each exhibit and every witness is unique and must be evaluated on its own merits. Nevertheless, the Chamber does consider it useful to express its general disposition towards certain types of evidence.

As a general matter, it is preferable for the Chamber to have as much forensic and other material evidence as possible. Such evidence should be duly authenticated and have clear and unbroken chains of custody. Whenever testimonial evidence is offered, it should, to the extent possible, be based on the first-hand and personal observations of the witness.

Although there is no general rule against hearsay evidence before this Court, it goes without saying that hearsay statements in the Prosecutor's documentary evidence will usually have less probative value. Reliance upon such evidence should thus be avoided wherever possible. This is all the more so when the hearsay in question is anonymous, in the sense that insufficient information is available about who made the observation being reported or from whom the source (irrespective of whether the source is a witness interviewed by the Prosecutor or a documentary item of evidence) obtained the information.

Heavy reliance upon anonymous hearsay, as is often the basis of information contained in reports of nongovernmental organizations ("NGO reports") and press articles, is problematic for the following reasons. Proving allegations solely through anonymous hearsay puts the Defence in a difficult position because it is not able to investigate and challenge the trustworthiness of the source(s) of the information, thereby unduly limiting the right of the Defence under article 61(6)(b) of the Statute to challenge the Prosecutor's evidence, a right to which the Appeals Chamber attached "*considerable significance*". Further, it is highly problematic when the Chamber itself does not know the source of the information and is deprived of vital information about the source of the evidence. In such cases, the Chamber is unable to assess the trustworthiness of the source, making it all but impossible to determine what probative value to attribute to the information.

In relation to corroboration, it should be noted that it will often be difficult, if not impossible, to determine whether and to what extent anonymous hearsay in documentary evidence corroborates other evidence of the same kind. This is because it will usually be too difficult to determine whether two or more unknown sources are truly independent of each other, and the Chamber is not allowed to speculate in this regard. The Chamber does not exclude the possibility that in exceptional cases it may be apparent from the evidence that two or more anonymous hearsay sources in documentary evidence corroborate each other because they are clearly based on independent sources. However, since even in such cases the Chamber may still not have enough information about the trustworthiness of these sources, it will be extremely cautious in attributing the appropriate level of probative value.

The Chamber is mindful of the Prosecutor's right to "*rely on documentary or summary evidence and [that she] need not call the witness expected to testify at the trial*". However, the fact that during the confirmation process the Prosecutor is allowed to present most, if not all, of her evidence in documentary form, does not diminish the intrinsic shortcomings of the type of evidence discussed in the previous paragraphs.

The Chamber notes, in this regard, that the presentation of anonymous hearsay evidence that is contained in documentary evidence, such as press articles and NGO reports, must be clearly distinguished from the presentation by the Prosecutor of anonymous or summary witness statements at the confirmation hearing. In relation to the former, unless the Prosecutor conducts further investigations, there is no prospect of more information becoming available about the source of the evidence. However, in relation to the latter, the situation is different because the Chamber knows the identity of the witness and it may also be assumed that the witness will later be called at trial.

As stated by the Appeals Chamber, the "*Prosecutor's reliance on documentary or summary evidence in lieu of in-person testimony will limit the Pre-Trial Chamber's ability to evaluate the credibility of the witness*", and therefore any such evaluation will "*necessarily be presumptive*". The Appeals Chamber took pains to warn that Pre-Trial Chambers should "*take great care in finding that a witness* [whose statement was presented in summary or anonymous form] *is or is not credible*".

Moreover, in relation to (anonymous) summaries of witness statements, the Chamber must be sensitive to the fact that the Defence will regularly not be in a position to exercise its right to challenge such evidence, in particular its probative value. In this regard, the Chamber adopts a similar position to the one held by other Pre-Trial Chambers, according to which the Chamber may, in order to counterbalance the disadvantageous position of the Defence, decline to confirm allegations that are supported only by anonymous or summary witness statements.

In light of the above considerations, the Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1)(a) of the Statute. Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges.

See No. ICC-02/11-01/11-432, Pre-Trial Chamber I, 3 June 2013, paras. 17-35.

Firstly, I believe that the Majority's decision that the evidence is insufficient to make a determination on whether to confirm or decline to confirm the charges is based on an expansive interpretation of the applicable evidentiary standard at the confirmation of charges stage that exceeds what is required and indeed allowed by the Statute.

Secondly, I disagree with the conclusions of the Majority as to the facts and circumstances that need to be proven to the required evidentiary standard. I believe that the Majority's decision reveals a certain understanding of the applicable law with regard to crimes against humanity which finds, in my view, no support in the Statute. More specifically, I disagree with my colleagues' interpretation of how individual acts or "*incidents*" relate to the "*attack*" against the civilian population and the policy requirement under article 7 of the Statute. This interpretation, separately and in combination with the Majority's understanding of the evidentiary standard, appears to be central to the finding by the Majority that the evidence is insufficient, and that therefore an adjournment is necessary.

Thirdly, I disagree with the content of the request to the Prosecutor, both in relation to the list of "*issues*" or "*questions*" put forward by my colleagues and to the instruction to submit an amended Document Containing the Charges (DCC). I believe that the list is either not relevant or not appropriate to prove or disprove the charges and I consider the request for an amended DCC to be *ultra vires*, since it exceeds the role and functions assigned by the Statute to the Pre-Trial Chamber.

[…]

Indeed, even when the Prosecutor has completed an investigation, there is no legal requirement for her to submit to the Chamber all her evidence or to present to the Chamber "*her strongest possible case*".

There may be a number of good reasons for the Prosecutor not to rely on certain evidence, even where it is of particular importance. There may be reasons relevant to the protection of safety, physical and psychological well-being of victims, witnesses or other persons at risk on account of the activities of the Court, that, depending on the circumstances of the case, may warrant redactions of substantive parts of the statements, non-disclosure of the identities of witnesses or of sources of certain information appearing in documentary evidence or non-reliance on items of evidence because of particularly intrusive protective measures considered disproportionate until trial is certain.

Decisions to withhold certain pieces of evidence or to present them in summary form, for whatever reason, would be in line with article 61(5) of the Statute. Indeed, in the *Mbarushimana* decision, the Appeals Chamber reaffirmed that, in light of this provision, the Prosecutor "*need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe*". According to article 61(5) of the Statute, "*the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged*". The same provision also clarifies that for the purposes of the confirmation of charges hearing "*the Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at trial*".

The travaux préparatoires actually demonstrate that access by the Chamber to the entire file of the Prosecutor was not only not required but also not preferred as this would entail unnecessary delays "*if the evidence collected in the case was excessive*".

It is therefore clear that both the quantum and the quality of the evidence received by the Pre-Trial Chamber may differ from the evidence that will be presented at trial. Nothing in the legal system of the Court prevents the Prosecutor from relying at trial on evidence that has not been relied upon for the purposes of the confirmation of charges hearing. Accordingly, it is not for the Chamber to speculate on whether it has received all the evidence or the "*strongest possible*" evidence, but solely to assess whether it has sufficient evidence to determine substantial grounds to believe that the person has committed the crimes charged.

[…]

Indeed, the drafters of the Statute have deliberately opted for a flexible approach to evidence and avoided elaboration of specific evidentiary rules. Except for the limited exclusion of certain types of evidence under article 69(7) of the Statute, all types of evidence are admissible within the legal framework of the Court, including direct, indirect and circumstantial evidence. The respective probative value will depend on the concrete circumstances that surround each item of evidence. Indeed, rule 63(2) of the Rules grants the Chamber the authority to assess freely, *i.e.* without formal evidentiary rules, all evidence submitted, and rule 63(4) of the Rules prevents the Chamber from imposing a legal requirement of corroboration.

As said, the approach of my colleagues is particularly problematic at the confirmation hearing, both in light of article 61(5) of the Statute, which clearly states that the Prosecutor may rely exclusively on documentary and summary evidence, and, more generally, in light of the limited purpose of the confirmation hearing. I believe that at no point should pre-trial Chambers exceed their mandate by entering into a premature in-depth analysis of the guilt of the suspect, as was previously held. Furthermore, the Chambers should not seek to determine whether the evidence is sufficient to sustain a future conviction.

As rightly recalled by my colleagues, the evidentiary threshold of "*substantial grounds to believe*" needs to be understood in light of the gatekeeper function of the Pre-Trial Chamber, which serves to distinguish between cases that should go to trial and those that should not, thus ensuring, *inter alia*, judicial economy. I believe that Pre-Trial Chambers need to exercise this gatekeeping function with utmost prudence, taking into account the limited purpose of the confirmation hearing. An expansive interpretation of their role is not only unsupported by law. It affects the entire architecture of the procedural system of the Court and may, as a consequence, encroach upon the functions of trial Judges, generate duplications, and end up frustrating the judicial efficiency that Pre-Trial Chambers are called to ensure.

In this regard, I am troubled by the assumptions upon which my colleagues believe the mandate of Pre-Trial Chambers must be fulfilled, as well as by their approach to the evidence, as described above. In my view, they are likely to be understood as an implicit incentive for the Prosecutor to submit as much evidence as possible, including live witnesses, in order to secure confirmation, this in turn compelling the Defence to do the same.

Such an incentive runs counter to efforts deployed so far by Pre-Trial Chambers to discourage live evidence, including in the case at hand, and may result in an extension of the already too lengthy pre-trial proceedings by generating, *inter alia*, more complex processes of disclosure, redactions and protective measures, to the detriment of the right of the suspect to be tried without undue delay. In sum, the approach of my colleagues may end up reintroducing through the back door the "*mini-trial*" or "*trial before the trial*" that the drafters and other Chambers of this Court wished so much to avoid.

[…]

As repeatedly observed by other Chambers of the Court, in the framework of the Statute and the Rules, the "*charges*" are composed of facts and circumstances which are described therein (factual element) and their legal characterisation (legal element).

According to article 61(7) of the Statute, the Chamber must "*determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged*". Article 74 of the Statute provides that the decision of the Trial Chamber on the guilt or innocence of the accused "*shall not exceed the facts and circumstances described in the charges*".

What the Pre-Trial Chamber is therefore required to analyse, in accordance with article 61(7) of the Statute, is whether the available evidence, taken as a whole, sufficiently demonstrates that the facts and circumstances described in the charges are proven to the requisite threshold.

It is unquestionable that "*facts and circumstances described in the charges*" do not refer to all facts that are contained in the narrative of the DCC or discussed in some way at the confirmation of charges hearing. This has been confirmed by the Appeals Chamber, which has stated that the facts and circumstances described in the charges must be distinguished from the evidence put forward by the Prosecutor, as well as from background or other information contained in the DCC, although without determining "*how narrowly or how broadly the term '*facts and circumstances described in the charges*' as a whole should be understood*".

Facts and circumstances described in the charges must in particular be distinguished from the facts which are not described in the charges, but from which the facts and circumstances of the charges can be inferred. This distinction appears of significance especially in terms of the applicable standard of proof, as well as in relation to a clear determination of the factual parameters of the case. A clear line, based on the individual charges as presented by the Prosecutor, must indeed be drawn between the facts and circumstances which are "*described in the charges*" and the facts and circumstances that are not "*described in the charges*", as only the former must be proven to the requisite threshold of substantial grounds to believe.

[…]

In my view, the instruction of the Majority amounts to a request for the Prosecutor to amend the charges, something that the Chamber may only do to a limited extent under article 61(7)(c)(ii) of the Statute. Pursuant to this provision, the Chamber may indeed request the Prosecutor to consider amending the charges but only in relation to the legal characterisation of the facts. It does not allow the Chamber to involve itself in the Prosecutor's selection of which facts to charge. In sum, it is for the Prosecutor and not for the Chamber to select her case and its factual parameters. The Pre-Trial Chamber is not an investigative chamber and does not have the mandate to direct the investigations of the Prosecutor.

See Dissenting opinion of Judge Fernandez de Gurmendi, Pre-Trial Chamber I, No. ICC-02/11-01/11-432-Anx-Corr, 6 June 2013, paras. 3-5, 17-21, 24-28, 30-34, and 51.

The Chamber considers that, in principle, it will allow for the addition of evidence beyond the relevant deadlines for submitting such material when the terms of regulation 35(2) of the Regulations of the Court are met. However, the last sentence of regulation 35(2) of the Regulations only applies in exceptional circumstances, such as an incapacitating illness making counsel temporarily unable to complete his/her work, and the Chamber considers that this provision will generally not be satisfied when requesting to add evidence many months after the expiration of a deadline set in accordance with rule 84 of the Rules.

When the terms of this regulation are not met, the Chamber may still grant the proposed addition if it can be permitted in line with the Chamber's obligation under article 64(2) of the Statute to ensure that "*a trial is fair and expeditious and is conducted with full respect for the rights of the accused*". This is consistent with Trial Chamber V(a)'s jurisprudence and the Trial Chamber II decision relied upon by the Defence, which allowed for a witness to be added despite regulation 35(2) of the Regulations not being satisfied.

The Chamber considers that such decisions require a case-by-case assessment which balances the justifications for adding new evidence against the potential prejudice which may be caused to the other party. In particular, the Chamber must remain mindful of the impact on the right of the accused to have adequate time and facilities for the preparation of the defence, as set out in Article 67(1)(b) of the Statute. The Chamber may consider many factors, including: (i) the length of time that has elapsed since the deadline, (ii) whether the new witnesses bring to light a previously unknown fact which has a significant bearing upon the case, (iii) whether good cause exists for not seeking to add the witnesses at an earlier stage of the proceedings, (iv) whether the other party can be given adequate time to investigate the proposed new witnesses, bearing in mind the need to conduct the trial fairly and expeditiously and (v) whether it would be in the interests of justice to grant the request.

See No. ICC-01/09-02/11-832, Trial Chamber V(b), 23 October 2013, paras. 10-11.

The defence's right to submit evidence following the testimony of the Chamber's witnesses or the admission of evidence by the Chamber as stressed by the Appeals Chamber in its Judgement of 3 May 2011, the Chamber has discretion in deciding when admitting evidence at trial. Consequently, it may rule on the admissibility of evidence when the item is submitted or it "*may defer its consideration* […] *until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person*".

Further, as rightly pointed out by the prosecution, the Court's legal framework does not grant the accused the right to be the last to present evidence. The only two provisions relied upon by the defence in its Motion, rules 140(2)(d) and 141(2) of the Rules, do not grant the accused the right to be the last to present evidence. Rather, rule 140(2)(d) specifies that "*the defence shall have the right to be the last to examine a witness*" and rule 141(2) refers

to the right of the defence "*to speak last*" within the context of the parties' closing statements. Consequently, the defence has no statutory right to call evidence after the presentation of the Chamber's evidence or to expect the Chamber to decide on the admissibility of all evidence before the end of the defence's presentation of evidence.

Having said this, should the defence identify any specific and concrete prejudice requiring the submission of further evidence essential to the Chamber's determination of the truth, after hearing the evidence called by the Chamber and before the Chamber declares the submission of evidence to be closed pursuant to Rule 141(1) of the Rules, it may submit a substantiated motion, which will be decided upon by the Chamber in due course, after the prosecution and the legal representatives of victims have been given the opportunity to respond to it.

See No. ICC-01/05-01/08-2855, Trial Chamber III, 30 October 2013, paras. 14-17.

(f) Presenting evidence

The jurisprudence of the Appeals Chamber has confirmed the possibility for victims to "*bring to the Trial Chamber evidence that the Trial Chamber may consider necessary for the determination of the truth*". The Appeals Chamber has held that the exercise of a Chamber's discretionary power to request evidence is linked to the requirements of article 68(3) of the Statute such that the Chamber must be satisfied that the personal interests of the victim are affected.

40. […] It is only if the Trial Chamber is persuaded that the requirements of article 68(3) have been met, and, in particular, that it has been established that the personal interests of the victims are affected, that the Chamber may decide whether to exercise its discretionary powers under the second sentence of article 69(3) of the Statute "*to request the submission of all evidence that it considers necessary for the determination of the truth*". […].

The CLR may bring evidence to the attention of the Chamber during the trial proceedings. The Chamber will make its determination on a case by case basis.

(g) Challenging the relevance or admissibility of evidence

The Chamber considers that challenges to the relevance or admissibility of evidence do not fall within the realm of article 69(3) of the Statute, a provision which relates only to the submission of evidence. Instead, the Chamber considers that the legal basis upon which a victim may challenge the relevance or admissibility of evidence extends from the combined effect of: (i) the obligation to give effect to the spirit and meaning of article 68(3) of the Statute; and (ii) the Chamber's power to make rulings on the relevance or admissibility of evidence under articles 64(9) and 69(4) of the Statute. The Appeals Chamber has expressed support for this approach:

In relation to the right afforded to victims to challenge the admissibility or relevance of evidence, the Trial Chamber relied on its general powers under article 69(4) to declare any evidence admissible or relevant. The provision is silent as to who may challenge such evidence. Under article 64(9) of the Statute, the Trial Chamber has the power to rule on the admissibility or relevance of evidence on its own motion. These provisions must be seen in light of the provisions on victims' participation, in particular article 68(3) of the Statute and rules 89 and 91 of the Rules. In light of these provisions, nothing in articles 69(4) and 64(9) excludes the possibility of a Trial Chamber ruling on the admissibility or relevance of evidence after having received submissions by the victims on said evidence. The approach of the Trial Chamber in interpreting its powers, once again does not result in an unfettered right for victims but is subject to the application of article 68(3), which is the founding provision governing victim participation in the proceedings.

Accordingly, the Chamber may permit the views and concerns of victims to be presented and considered whenever the Chamber is called to determine the relevance or admissibility of evidence under article 69(4) or article 64(9) of the Statute, provided that all the requirements of article 68(3) of the Statute are met. The Chamber will request, as appropriate, the CLR to make submissions on the admissibility of evidence only if the victims' personal interests are affected.

See No. ICC-02/05-03/09-545, Trial Chamber IV, 20 March 2014, paras. 27-30.

The Single Judge considers that there is no basis in the Statute or the Rules to preclude the Prosecutor from relying on evidence obtained as a result of investigation insofar as it is disclosed within the applicable time limits. What is required by the applicable law is that the Defence is informed within a reasonable time before the hearing of the evidence on which the Prosecutor intends to rely (article 61(3) of the Statute) and that the Prosecutor provide no later than 30 days before the hearing a list of evidence which she intends to present at the hearing (rule 121(3) of the Rules). Accordingly, the Single Judge is of the view that the Prosecutor may rely on any evidence obtained as a result of further investigation.

See No. ICC-02/11-02/11-67, Pre-Trial Chamber I (Single Judge), 6 May 2014, para. 9.

In the present decision, the Chamber renders its determination under article 61(7) of the Statute on whether there is sufficient evidence to establish substantial grounds to believe that the suspect committed each of the crimes charged. According to the established jurisprudence of the Court, in order to meet this evidentiary threshold, the Prosecutor must "*offer concrete and tangible proof demonstrating a clear line of reasoning underpinning* [her] *specific allegations*".

The Chamber's determination is based on an assessment of the evidence relied upon by the Prosecutor and the Defence – and included for this purpose in their respective lists of evidence pursuant to rule 121(3) and (6) of the Rules of Procedure and Evidence – taking into account the oral and written submissions advanced by the parties as well as the legal representative of the victims admitted to participate at the confirmation of charges hearing.

The Chamber has assessed the probative value of the relevant evidence, bearing in mind that due to the nature of the confirmation of charges proceedings, such assessment is limited, and, as recognised by the Appeals Chamber with respect to the evaluation of the credibility of witnesses at the confirmation of charges stage, "*necessarily presumptive*". Indeed, the Chamber is mindful of the guidance of the Appeals Chamber that while a Pre-Trial Chamber may evaluate the credibility of witnesses, "*it should take great care in finding that a witness is or is not credible*". The Chamber notes that the Defence disputes the reliability of a number of items of evidence, including witness statements. Except for a few instances where the Chamber was in a position to dispose of the matter on the basis of all the evidence available, the Chamber has not taken a view with regard to all challenges, in particular with regard to the credibility of witnesses, as it considers they can only be properly addressed at trial.

The conclusions of the Chamber are based on all the available evidence, considered as a whole, regardless of which party originally tendered the evidence in the record of the case. Nevertheless, in light of the limited scope and purpose of the confirmation of charges proceedings, and consistent with the established practice of the Pre-Trial Chambers, the Chamber clarifies that the items of evidence referred to in the present decision are included for the sole purpose of providing the reasoning that underpins its determination. This is without prejudice to the relevance of other items of evidence than those referred to, which the Chamber has in any case considered thoroughly. A lack of explicit reference to an item of evidence may signify that the finding to which it relates is already sufficiently supported by other pieces of evidence, or, conversely, that a certain finding, satisfactorily established in light of the evidence taken as a whole, is not negated by one or more other discrete items of evidence.

The same applies to the arguments advanced by the parties and participants in their submissions, each of which has been carefully considered as part of the Chamber's determination. In light of the limited scope and purpose of the current proceedings and the large number of discrete factual and legal arguments placed before the Chamber, this decision does not explicitly address each and every submission of the parties and participants, but only those that are necessary to provide sufficient reasoning for the Chamber's determination under article 61(7) of the Statute.

See No. ICC-02/11-01/11-656-Red, Pre-Trial Chamber I, 12 June 2014, paras. 19-23.

The Chamber notes that the '*acts and conduct of the accused*' should be given its ordinary meaning and, as previously held, refers to the '*personal acts and omissions of the accused, which are described in the charges against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged*'.

See No. ICC-01/04-02/06-1730-Red, Trial Chamber VI, 18 January 2017, para. 5.

2. Issues related to the admissibility of evidence

In deciding on the admissibility of summary evidence in accordance with article 69(4) of the Rome Statute, the Single Judge must balance (i) the probative value that the Chamber could give to the summary evidence proposed by the Prosecution of the witnesses, against (ii) the grave risks to their security that are inherent to the disclosure of their identity to the Defence given the exceptional circumstances in the present case. In light of such criteria the adequate protection of the witnesses must prevail and therefore in application of article 69(4) of the Statute, the Single Judge considers (i) that, regardless of the format (unredacted versions, redacted versions or summary evidence), their statements, transcripts of their interviews and investigator's reports and notes of their interviews must be declared inadmissible for the purpose of the confirmation hearing; and (ii) that consequently the Prosecution cannot rely on them at the confirmation hearing.

See No. ICC-01/04-01/06-517, Pre-Trial Chamber I (Single Judge), 4 October 2006, pp. 5-6.

Pursuant to article 69(4) of the Statute, the Chamber "*may rule on the relevance or admissibility of any evidence, taking into account,* inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence*"; and that, pursuant to rules 63(1) and (2) ofthe Rules, a Chamber of the Court shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69 of the Statute.Any evidence referred to in the Prosecution List of Evidence and in the Defence List of Evidence shall be admitted into evidence for the purpose of the confirmation hearing, unless it is expressly ruled inadmissible by the Chamber upon a challenge by the Prosecution or the Defence, as the case may be, at the confirmation hearing.

See No. ICC-01/04-01/06-678, Pre-Trial Chamber I (Single Judge), 7 November 2006, p. 5.

Under article 21(1)(c) of the Statute, where articles 21(1)(a) and (b) do not apply, the Chamber shall apply general principles of law derived by the Court form national laws. The Chamber considers that the Court is not bound by the decisions of national courts on evidentiary matters. Therefore, the mere fact that a Congolese court has ruled on the unlawfulness of the search and seizure conducted by the national authorities cannot be considered binding on the Court. This is clear form article 69(8) of the Statute which states that "*when deciding on the relevance or admissibility of evidence collects by a State, the Court shall rule on the application of the State's national law*".

As the Defence's request is based on article 69(7) of the Statute, the Chamber must determine whether the evidence was obtained in violation of internationally recognized human rights.

[…]

There is nothing in this case to indicate that the national authorities allegedly used force, threats or any other form of abuse to gain access to [REDACTED]'s home.

As a result, the Chamber finds that […] the unlawfulness of the search and seizure conducted in [REDACTED]'s absence was a breach of a procedural rule, but cannot be considered so serious as to amount to a violation of internationally recognized human rights.

The Chamber will now determine whether the search and seizure conducted at [REDACTED]'s home adhered to the principle of proportionality.

[…]

The Chamber finds that the search and the seizure of hundreds of documents and items pertaining to the situation in the DRC conducted in order to gather evidence for the purpose of domestic criminal proceedings infringed the principle of proportionality sanctioned by the ECHR, first, because the interference did not appear to be proportionate to the objective sought by the national authorities and secondly, because of the indiscriminate nature of the search and seizure involving hundreds of items.

Accordingly, the Chamber finds that the infringement of the principle of proportionality can be characterized as a violation of internationally recognized human rights.

Having found that the Items Seized were obtained without regard to the principle of proportionality and in violation of internationally recognised human rights, the Chamber must now determine whether such a violation can justify the exclusion of the Items Seized.

Article 69(7) of the Statute rejects the notion that evidence procured in violation of internationally recognized human rights should be automatically excluded. Consequently, the Judges have the discretion to seek an appropriate balance between the Statute's fundamental values in each concrete case.

[…]

The Chamber endorses the human rights and ICTY jurisprudence which focuses on the balance to be achieved between the seriousness of the violation and the fairness of the trial as a whole.

Hence, for the purpose of the confirmation hearing, the Chamber decides to admit the Items Seized into evidence. Moreover, the Chamber recalls the limited scope of this hearing, bearing in mind that the admission of evidence at this stage is without prejudice to the Trial Chamber's exercise of its functions and powers to make a final determination as to the admissibility and probative value of the Items Seized from [REDACTED]'s home.

[…]

The Chamber notes that under article 69(4), it has the power to rule on the admissibility of any evidence and the probative value thereof. Moreover, nothing in the Statute or the Rules expressly states that the absence of information about the chain of custody and transmission affects the admissibility or probative value of Prosecution evidence.

Under the framework established by the Statute and the Rules, the Chamber notes that, at the stage of the confirmation hearing, the scope of which is limited to determining whether or not a person should be committed for trial, it is necessary to assume that the material included in the parties' Lists of Evidence is authentic. Thus, unless a party provides information which can reasonably cast doubt on the authenticity of certain items presented by the opposing party, such items must be considered authentic in the context of the confirmation hearing. This is without prejudice to the probative value that could be attached to such evidence in the overall assessment of the evidence admitted for the purpose of this confirmation hearing.

The Chamber also notes that there is nothing in the Statute or the Rules which expressly provides that evidence which can be considered hearsay from anonymous sources is inadmissible *per se*. In additions, the Appeals Chamber has accepted that, for the purpose of the confirmation hearing, it is possible to use certain items of evidence which may contain anonymous hearsay, such as redacted versions of witness statements.

Furthermore, ECHR jurisprudence evinces that the European Convention does not preclude reliance at the investigation stage of criminal proceedings on sources such as anonymous informants. Nevertheless, the ECHR specifies that the subsequent use of anonymous statements as sufficient evidence to found a conviction is a

different matter in that it can be irreconcilable with Article 6 of the European Convention, particularly if the conviction is based to a decisive extent on anonymous statements.

Accordingly, the Chamber considers that objections pertaining to the use of anonymous hearsay evidence do not go to the admissibility of the evidence, but only to its probative value.

[…]

However, mindful of the difficulties such evidence may present to the Defence in relation to the possibility of ascertaining its truthfulness and authenticity, the Chamber decides that, as a general rule, it will use such anonymous hearsay evidence only to corroborate other evidence.

> See No. ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, 29 January 2007, paras. 69-70, 77-79, 81-84, 89-90, 96-97, 101-103, and 106.

Relying on several grounds, the Defence challenged the credibility and reliability of the statements made by children on which the Prosecution relied to substantiate the charges against the suspect. However, the Chamber observes that a large number of these challenges actually proceed from matters of a peripheral nature which do not really go to the substance of the children's statements. In exercising its discretion in the light of article 69(4) and in accordance with the jurisprudence of the ICTR, the Chamber declares that it will attach a higher probative value to those parts of the children's evidence which have been corroborated, as is apparent from several sections of this decision.

> See No. ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, 29 January 2007, paras. 118-121, and in the operative part of the decision, p. 131.

There are four key factors arising from the provisions contained within the statutory framework which provide the necessary starting-point for an investigation of the Trial Chamber's general approach to this issue.

First, the chamber's statutory authority to request the submission of all evidence that it considers necessary in order to determine the truth: article 69(3).

Second, the Chamber's obligation to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused: article 64(2).

Third, although the Rome Statute framework highlights the desirability of witnesses giving oral evidence – indeed, the first sentence of article 69(2) requires that "*the testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or the Rules of Procedure and Evidence*" – the second and third sentence of article 69(2) provide for a wide range of other evidential possibilities: "*the Court may also permit the giving of* viva voce *(oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused*". Therefore, notwithstanding the express reference to oral evidence from witnesses at trial, there is a clear recognition that a variety of other means of introducing evidence may be appropriate. Article 68, which is expressly referred to in the first sentence of article 69(2) as providing instances when there may be a departure from the expectation of oral evidence, deals directly with the particular exigencies of trials before the ICC, and most particularly there is an express recognition of the potential vulnerability of victims and witnesses, along with the servants and agents of a State, which may require "*special means*" to be used for introducing evidence. The Court is enjoined to consider the range of possibilities that exist to afford protection, subject always to the rights of the accused and the need for the trial to be fair and impartial.

Fourth, article 69(4) of the Statute confers on the Chamber a broad power to make decisions as regards evidence: "*the Court may rule on the relevance or admissibility of any evidence, taking into account,* inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of witness, in accordance with the Rules of Procedure and Evidence*" and by article 64(9) the Trial Chamber has the power to "[r]*ule on the admissibility or relevance of any evidence*". Therefore, the Court may rule on the relevance or admissibility of evidence, and rule 63(2) provides that "[a] *Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9 to assess freely all evidence*". It follows that the Chamber has been given a wide discretion to rule on admissibility or relevance and to asses any evidence, subject to the specified issues of "*fairness*".

Therefore, summarising these four key factors, the drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited – at the outset – the ability of the Chamber to assess evidence "*freely*". Instead, the Chamber is authorised by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness. In ruling on admissibility the Chamber will frequently need to weigh the competing prejudicial and probative potential of the evidence in question. It is of particular note that rule 63(5) mandates the Chamber not to "*apply national laws governing evidence*". For these reasons, the Chamber has concluded that it enjoys a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly

egregious instances of armed conflict, when those involved will have been killed or wounded, and the survivors or those affected may be untraceable or unwilling – for credible reasons – to give evidence.

If a challenge is made to the admissibility of evidence, it appears logical that the burden rests with the party seeking to introduce the evidence – in this case the Prosecution. This has been the practice of the ICTY and there seems no reason to disturb this self-evidently sensible requirement.

Bearing in mind those key considerations, when the admissibility of evidence other than direct oral testimony is challenged the approach should be as follows.

First, the Chamber must ensure that the evidence is *prima facie* relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims. In this Decision, however, it is unnecessary to analyse further the meaning or the application of this expression, particularly since there has been no suggestion that this first test is not satisfied as regards the documents in question.

Second, the Chamber must assess whether the evidence has, on a *prima facie* basis, probative value. In this regard there are innumerable factors which may be relevant to this evaluation, some of which, as set out above, have been identified by the ICTY. The Appeals Chamber in *Aleksovski* stated that the indicia of reliability include whether the evidence is "*voluntary, truthful and trustworthy, as appropriate; and for this purpose the Trial Chamber may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is* 'first-hand' *or more removed, are also relevant*".

However, it is necessary to emphasise that there is no finite list of possible criteria that are to be applied, and a decision on a particular disputed piece of evidence will turn on the issues in the case, the context in which the material is to be introduced into the overall scheme of the evidence and a detailed examination of the circumstances of the disputed evidence. There should be no automatic reasons for either admitting or excluding a piece of evidence but instead the court should consider the position overall. Whilst the suggested test of the "*indicia of reliability*", as relied on by the prosecution and described by the ICTY, may be a helpful tool, the Chamber must be careful not to impose artificial limits on its ability to consider any piece of evidence freely, subject to the requirements of fairness.

It is necessary to observe that if, in the circumstances, it is impossible for the Chamber to conduct any independent evaluation of the evidence – if there are no adequate and available means of testing its reliability – then the court will need to consider carefully whether the party seeking to introduce it has met the test of demonstrating, *prima facie*, its probative value. Similarly, if evidence is demonstrably lacking any apparent reliability the Chamber must equally carefully decide whether to exclude the evidence at the outset or whether to leave that decision until the evidence overall is considered by the Chamber at the end of the case.

Third, the Chamber must, where relevant, weigh the probative value of the evidence against its prejudicial effect. Whilst it is trite to observe that all evidence that tends to incriminate the accused is also "*prejudicial*" to him, the Chamber must be careful to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber's fair assessment of the issues in the case.

It follows, that this will always be a fact-sensitive decision, and the court is free to assess any evidence that is relevant to, and probative of, the issues in the case, so long as it is fair for the evidence to be introduced.

> See No. ICC-01/04-01/06-1399, Trial Chamber I, 13 June 2008, paras. 19-32. See also No. ICC-01/04-01/06-2595-Red, Trial Chamber I, 17 November 2010, paras. 37-39.

Even though the Chamber is not bound by any evidentiary rulings made by the Pre-Trial Chamber, the Chamber will only depart from a previous ruling on a challenge to the admissibility of a particular item of evidence where there are compelling reasons to do so.

With regard to challenges pertaining to new items of evidence that were submitted by the Prosecution since the confirmation of charges, the Chamber wishes to emphasise that the evidentiary regime under the Statute and the Rules is neither one of complete freedom of proof, nor does it create any pre-defined categories of information that are systematically inadmissible as evidence. Rather, rule 63(2) of the Rules grants the Chamber full discretion to "*assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69*". This means that the Chamber must evaluate each challenge on its individual merits, taking into account the specific characteristics and provenance of the item of evidence that is being challenged. Only if the Chamber identifies serious problems with a particular item of evidence, which render it epistemologically unsound or prejudicial to the fairness or integrity of the proceedings, it may, under article 69(4) of the Statute, rule the item inadmissible. The Chamber stresses, in this respect, that it will not entertain general arguments based on the category to which a specific item of evidence allegedly belongs. Consequently, if a party wants to challenge the admissibility of a specific item of evidence, it must establish specific and substantial grounds that could reasonably lead the Chamber to find that the item of evidence in question is epistemologically unsound or that its admission would be prejudicial to the fairness or integrity of the proceedings in the sense of article 69(4) or (7).

The remaining question, therefore, is to determine the most appropriate moment for the Chamber to consider any questions relating to the admissibility of evidence. The Chamber notes, in this respect, that rule 64 determines that "*an issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to the Chamber*". The term "*submitted to the Chamber*" must be interpreted with respect to the Chamber's overall responsibility to ensure that the proceedings are fair and expeditious, in accordance with article 64(2). Therefore, in light of the large number of items of evidence in this case and in order to avoid the congestion of the trial proceedings, the Chamber considers that a reasonable and appropriate interpretation of rule 64(1) is that the inclusion of an item of evidence in the Table of Incriminating Evidence amounts to its being '*submitted*' to the Chamber within the meaning of rule 64(1) of the Rules. It follows from this interpretation that any issue relating to the relevance or admissibility of an item of evidence contained in the Table must be raised within a reasonable delay after the Table has been notified.

The Chamber hereby invites the parties to submit their observations on the possibility, outlined in the previous paragraph, to examine all issues of relevance and admissibility, which are already known to the parties, before the start of the trial on the merits.

See No. ICC-01/04-01/07-956, Trial Chamber II, 13 March 2009, paras. 34-37. See also No. ICC-01/04-01/06-1084, Trial Chamber I, 13 December 2007, para. 8.

The Statute and the Rules set out the principles to be applied to the admissibility of evidence, other than witness evidence, in various provisions. These provided the basis for the Chamber's general approach to the admissibility of documents, as described in its "Decision on the admissibility of four documents on 13 June 2008". The Chamber ruled that it will focus, first, on the relevance of the material (*viz*. does it relate to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims); second, on whether or not it has probative value (bearing in mind, for instance, "*the indicia of reliability*"); and, third, on the probative value of the evidence as against its prejudicial effect.

Both common law and Romano Germanic legal systems usually contain rules setting out specific principles that are to be applied when addressing illegally obtained evidence. Article 69(7) of the Statute expressly regulates the admissibility of evidence obtained by means of a violation of the Statute or internationally recognized human rights. This provision is *lex specialis*, when compared with the general admissibility provisions set out elsewhere in the Statute. Furthermore, artide 69(7) represents a clear exception to the general approach, set out above.

The Statute prescribes that evidence is inadmissible if it was obtained by means of a violation of the Statute or internationally recognized human rights, if particular criteria are met. Notably, the Statute does not "*quantify*" the violation of the Statute, or the internationally recognized human right, by reference to the degree of "*seriousness*". Therefore, even a non-serious violation may lead to evidence being deemed inadmissible, provided that one of the two limbs of the test in article 69(7) is satisfied (namely: (a) the violation creates doubts about the reliability of the evidence; or (b) the admission is antithetical to or would seriously damage the integrity of proceedings). It is only in the second limb of the test that a requirement of a degree of "*seriousness*" is introduced, although this is unconnected to the seriousness of the violation.

The Statute clearly stipulates that the violation has to impact on international, as opposed to national, standards on human rights. Furthermore, the Court "*shall not rule on the application of a State's national law*" (article 69(8) of the Statute), and the Court is not bound by the decisions of national courts on the admissibility of evidence. Instead, the Court shall apply the sources of law set out in article 21 of the Statute. Although he Court must take into account, under article 21(1)(c), "*the national laws of the States that would normally exercise jurisdiction over the crime, these take second (and third) place to "the Statute, the Elements of Crimes and its Rules of Procedure and Evidence*" and "*applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict*". Therefore, evidence obtained in breach of national procedural laws, even though those rules may implement national standards protecting human rights, does not automatically trigger the application of article 69(7) of the Statute.

The fact that a violation involved the right to privacy of a third party is not relevant when deciding whether the first step of the test for inadmissibility of evidence under article 69(7) is satisfied. The Statute states that "*evidence obtained by means of a violation of internationally recognized human rights shall not be admissible*". Accordingly, the identity of the person whose human rights were infringed is not a material consideration. In other words, evidence does not become admissible simply because the violation did not involve the human rights of the accused. The Statute establishes the benchmark that evidence obtained otherwise than in compliance with internationally recognized human rights standards (or in breach of the Statute) shall be excluded, if it is potentially unreliable or would undermine the proceedings.

Turning to the issue of the documents seized in the DRC, the Pre-Trial Chamber decided that the process of search and seizure infringed the right to privacy of the owner of the property and, as set out above, the national Court of Appeal ruled that the search and seizure was concluded in a manner that was contrary to national procedural law. Moreover, the Pre-Trial Chamber found that the conduct was disproportionate to the objective of the national authorities, as hundreds of documents were indiscriminately seized that were unrelated to the

purpose of the search. There is no reason for this Chamber to reach a different conclusion on these issues, and in particular that an unjustified violation of the individual's right to privacy occurred.

This violation of the right to privacy may have rendered the evidence inadmissible had the drafting history of the Statute concluded in 1994. The 1994 International Law Commission Draft Statute contained a rule that evidence obtained by means of a violation of rules of this Statute or other rules international law shall be automatically deemed inadmissible. However, after the extensive negotiations at the March and April 1998 sessions of the Preparatory Committee, the Rome Conference adopted a different formulation of this rule. Consensus was reached that evidence obtained by means of a violation of the Statute or internationally recognized human rights shall be inadmissible only if the violation casts substantial doubt on the reliability of the evidence or its admission would be antithetical to and would seriously damage the integrity of the proceedings (the dual test).

As described above article 69(7)(a) relates to the impact of the violation on the reliability of the evidence. The Pre-Trial Chamber found that the violation did not affect the reliability of the evidence in this case. If the search and seizure had been conducted in full adherence to the principle of proportionality the content of the items seized would have been the same.

Some scholars have suggested that any violation of internationally recognized human rights will necessarily damage the integrity of proceedings before the ICC. This argument does not take into account the fact that the Statute provides for a "*dual test*", which is to be applied following a finding that there has been a violation. Therefore, should the Chamber conclude that the evidence had been obtained in violation of the Statute or internationally recognized human rights, under article 69(7) it is always necessary for it to consider the criteria in a) and b), because the evidence is not automatically inadmissible. It is important that artificial restrictions are not placed on the Chamber's ability to determine whether or not evidence should be admitted in accordance with this statutory provision.

When deciding whether there has been serious damage to the "*integrity of proceedings*" as provided in article 69(7)(b), it has been stressed that "*the respect for the integrity of proceedings is necessarily made up of respect for the core values which run through the Rome Statute*". It has been suggested that applying this provision involves balancing a number of concerns and values found in the Statute, including "*respect for the sovereignty of States, respect for the rights of the person, the protection of victims and witnesses and the effective punishment of those guilty of grave crimes*". In respect of the latter, the effective punishment of serious crimes has been said to render it "*utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed*".

The Chamber considers that the probative value of the evidence in question cannot inform its decision on admissibility, if it has been obtained in violation of internationally recognized human rights or the Statute. This conclusion results, in part, from the aforementioned *lex specialis* nature of article 69(7) *vis-à-vis* the general admissibility provisions set out in the Statute. For instance, article 69(4) enables the "*probative value of the evidence*" to be weighed along with other considerations, such as the fair evaluation of a witness's testimony and, more broadly, any prejudice the evidence may cause to the fairness of the trial. However, when addressing the exclusionary criteria of article 69(7), it is impermissible to introduce this further factor, namely adding the probative value of the evidence as a criterion of admissibility. Therefore, arguments directed at its probative value (even that it alone provides proof of an element of the charges) are irrelevant.

Similarly, the seriousness of the alleged crimes committed by the accused is not a factor relevant to the admissibility of evidence under article 69(7). As set out in the Preamble and article 1 of the Statute, the Court has jurisdiction over the most serious crimes of international concern. Article 17(1)(d) of the Statute renders cases inadmissible that do not possess sufficient gravity to justify further action by the Court. Therefore, the core crimes and the cases which justify "*further action*" by the Court will always be of high seriousness, but the public interest in their prosecution and punishment cannot influence a decision on admissibility under this statutory provision. Indeed, there is no basis within the Rome Statute framework generally for an approach that would allow the seriousness of the alleged crimes to inform decisions as to the admissibility of evidence.

Particular consideration needs to be given to the presence of a member of the prosecution during the search and seizure exercise conducted by the Congolese authorities. The defence stressed during the Pre-Trial stage (in its filing of 7 November 2006) the significance of the presence of an investigator of the prosecution: "*the Prosecution was not merely the* 'fortunate recipient' *of the 'fruits of the poisoned tree': the Prosecution investigator was physically present at the scene*". This submission highlights one possible purpose of exclusionary rules of evidence: they have the effect, *inter alia*, of disciplining or deterring irregular or unlawful conduct by law enforcement officials. It is to be observed that it may turn out to be the case that this kind of evidence-gathering exercise is not normally carried out by investigators of the prosecution, particularly since the Court is said to be "*a giant without arms and legs*". It has not been endowed with an enforcement apparatus enabling it readily to obtain evidence in this way, but instead it must rely on the assistance of sovereign States. Whatever the future may hold in this regard, it is of note that the ICTY has held that the exclusionary rules contained in the framework of the Tribunal were not intended to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence in international proceedings. The ICTY Trial Chamber stated:

Domestic exclusionary rules are based, in part, on the principle of discouraging and punishing over-reaching law enforcement. […] *The function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence.*

In the current case, an investigator from the prosecution was in attendance during the search and seizure exercise, as opposed to performing a more active role, but it would seem that it any event mere presence at an event of this kind does not serve to engage this exclusionary rule. Deterrence and discipline, if they are to be given any sustainable meaning and purpose within the framework of exclusionary rules, should be directed at those in authority – the individuals who control the process or who have the power, at least, to prevent improper or illegal activity. In this case, the search was the sole responsibility of the Congolese authorities, and they carried it out; in contrast, the prosecution's investigator was only "*permitted to assist*". There are no indicators that the investigator controlled or could have avoided the disproportionate gathering of evidence, or that he acted in bad faith. Therefore, even if the purpose of this exclusionary rule is, *inter alia*, to discourage or discipline irregular activity, it would not apply in this instance as regards the prosecution.

By article 69(7) (b) of the Statute, it is for the Chamber to determine the seriousness of the damage (if any) to the integrity of the proceedings that would be caused by admitting the evidence. The Chamber notes particularly the following points as regards these documents: (i) the violation was not of a particularly grave kind; (ii) the impact of the violation on the integrity of the proceedings is lessened because the rights violated related to someone other than the accused; and (iii) the illegal acts were committed by the Congolese authorities, albeit in the presence of an investigator from the prosecution.

In all the circumstances, the Chamber has concluded that the breach of privacy in this instance does not affect the reliability of the evidence; nor should the material be excluded because of an argument that the breach was antithetical to, or damaged the integrity of proceedings. Put otherwise, applying article 69(7), the relevant documents obtained during the search and seizure exercise are admissible, notwithstanding the breach of the fundamental right to privacy.

Against that background, as regards the entirety of this material, the Chamber has applied a document-by-document approach. As outlined above, the probative value of the documents obtained during the search and seizure exercise carried out by the Office of the Prosecutor of the *Tribunal de Grande Instance* of Bunia is an irrelevant consideration for the reasons that have been extensively rehearsed. Otherwise, the Chamber has applied the test established in its Decision on the admissibility of four documents. In the Annex to the present Decision, the Chamber has addressed the admissibility of each of these documents, following the status conference on 7 May 2009, during which the prosecution supplied further information, at the Chamber's request, on a number of the individual annexes. The Chamber has particularly borne in mind the arguments of the defence, first, that the category (ii) documents (in relation to which it had previously reserved its position as regards their authenticity and evidential value) did not present sufficient guarantee of authenticity

and reliability to be admitted into the proceedings; second, that the category (iii) documents are inadmissible, on the basis of suggested lack of relevance to the charges or because the prosecution has failed to provide the best means of proof, together with the argument that the documents do not all emanate from the UPC or the FPLC; and, third, that some of those referred to in Annex 1 to the prosecution's application do not correspond to the contents of the documents provided, as described above.

See No. ICC-01/04-01/06-1981, Trial Chamber I, 24 June 2009, paras. 33-49.

The Majority of the Chamber is convinced that there is a sufficient legal basis provided in the ICC legal framework to consider *prima facie* admitting into evidence, before the start of the presentation of evidence, all statements of witnesses to be called to give evidence at trial. It is important to distinguish this from the Chamber's future determination of the probative value to be given to the evidence since the Chamber will evaluate, in accordance with rule 63(2) of the Rules, the probative value and appropriate weight to be given to the evidence as a whole, at the end of the case when making its final judgement.

Furthermore, the Majority is of the view that nothing in the ICC legal framework prevents the Chamber from *prima facie* admitting non-oral evidence, whether written, audio, visual. According to the Statute and the Rules, a Chamber can rely on all types of evidence, as several legal provisions facilitate evidence being given in writing, orally or by means of video or audio technology.

[…]

The Majority reiterates that the *prima facie* admission into evidence of the witnesses' written statements and related documents included in the prosecution's List of Evidence does not prevent the parties from challenging the admissibility of such evidence, or the Chamber from ruling, *proprio motu*, on its admissibility, pursuant to article 69(7) of the Statute.

See No. ICC-01/05-01/08-1022, Trial Chamber III, 19 November 2010, paras. 8-9, 13, and 19.

The Statute does not, contrary to the Majority's assertion, foresee an "*intermediate stage*" in the ruling on admissibility. In my view, materials presented to the Court must either be admissible, or not admissible, without the possibility of an interim status such as "prima facie *admissible*".

[…]

In fact, in-court, live testimony is arguably the best way for a Chamber to evaluate the credibility of a witness, through his/her demeanour, hesitations, facial expressions, etc and thus to gauge the reliability of his/her testimony.

[…]

In proceedings before the ICC, listening to and evaluating witness testimony is at the core of judicial functions, as clearly demonstrated by the wording of article 69(2) of the Statute.

See Dissenting Opinion of Judge Osaki annexed to the Decision No. ICC-01/05-01/08-1022, No. ICC-01/05-01/08-1028, Trial Chamber III, 23 November 2010, paras. 5, 7, and 10.

The Chamber's 13 June 2008 "Decision on the admissibility of four documents" set out the Chamber's general approach to admissibility of evidence other than direct oral evidence. The Chamber referred to the first sentence of article 69(2) of the Statute, noting that notwithstanding the desirability that witnesses should give evidence orally in accordance with article 69(2), there is "*a clear recognition that a variety of other means of introducing evidence may be appropriate*". The decision set out that the Trial Chamber's approach in this context is governed by (i) its authority pursuant to article 69(3) of the Statute to request the submission of any evidence that it considers necessary in order to determine the truth; (ii) its obligation pursuant to article 64(2) of the Statute to ensure that the trial is fair and expeditious; and (iii) the "*wide discretion to rule on admissibility or relevance of evidence*" conferred on the Chamber by article 64(9) of the Statute. In addition, rule 63(2) of the Rules provides that "*a Chamber shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69*".

Against that background, the Chamber established a three-stage, case-by-case approach to the admissibility of evidence other than oral evidence. First, the Chamber will determine whether the evidence in question is of *prima facie* relevance to the trial, in that it relates to matters that are properly to be considered by the Chamber in its investigation of the charges against the accused. Second, the Chamber must assess whether the evidence has, on a *prima facie* basis, probative value. The Chamber emphasises that "*a decision on [the] particular piece of evidence will turn on the issues in the case, the context with the material is to be introduced into the overall scheme of the evidence and a detailed examination of the circumstances of the disputed evidence*". Third, where relevant, the Chamber must weigh the probative value of the evidence against its potential prejudicial effet.

See No. ICC-01/04-01/06-2693-Red, Trial Chamber I, 7 March 2011, paras. 15-16. See also No. ICC-01/04-01/06-2694-Corr, Trial Chamber I, 9 March 2011, paras. 10-11, and 17; No. ICC-01/04-01/06-2664-Red, Trial Chamber I, 16 March 2011, paras. 1-3 and No. ICC-01/04-01/06-2702-Red, Trial Chamber I, 6 April 2011, paras. 1-3.

As discussed in the Chamber's Decision on the admission of 422 documents, rule 68 of the Rules – which addresses prior-recorded testimony, as an exception to the principle of live testimony – does not apply to post-testimony interview transcripts. Instead, they are potentially admissible under article 69(3) of the Statute, subject to considerations of fairness. The Chamber is of the view that the factors relevant to post-testimony interview transcripts equally apply to written statements compiled after witnesses have testified.

See No. ICC-01/04-01/06-2694-Corr, Trial Chamber I, 9 March 2011, para. 17.

It is clear from the articles 69(3), 64(8) and 74(2) of the Statute and rules 140 and 64(1) of the Rules, first, that evidence is "*submitted*" if it is presented to the Trial Chamber by the parties on their own initiative or pursuant to a request by the Trial Chamber for the purpose of proving or disproving the facts in issue before the Chamber. Second, the submission of evidence must conform to the directions of the Presiding Judge or the manner agreed upon by the parties. Accordingly, when the Prosecutor filed the Lists of Evidence, he did not do so with a view to submitting the items as evidence for the trial, but for the "*purpose of informing the Trial Chamber and the other parties and participants of the materials that [he] intends to use at trial*" and as a "*case management tool*". The actual submission of the evidence was to take place later in the proceedings, when the Prosecutor would call witnesses or tender documents.

While the Prosecutor may (and probably will) submit many of these items in the course of the trial, he has discretion, as the case unfolds, and subject to the Trial Chamber's powers under article 69(3) of the Statute, to rely on some and to abandon the rest. Nevertheless, by virtue of the Impugned Decision, the Trial Chamber admitted all items on the Revised List of Evidence into evidence. Thus, there is a potential that not all items that were admitted into evidence will have been submitted, bringing the Impugned Decision into conflict with article 74(2) of the Statute.

Rule 64(1) of the Rules of Procedure and Evidence entitles the parties to raise issues as to the relevance or admissibility of evidence at the time when the evidence is submitted to a Chamber. The rule ensures that the parties have the chance to raise objections to the evidence before it is admitted into evidence. The Trial Chamber has to give effect to this right and, therefore, cannot admit items into evidence without first giving the parties an opportunity to raise issues.

The Appeals Chamber is not persuaded by the Trial Chamber's reasoning that the parties would later on have the opportunity to raise issues relating to the relevance or admissibility of the evidence. Rule 64(1) allows for later objection only "*when those issues were not known at the time when the evidence was submitted*", and it is unclear whether the parties would always be able to rely on this exception in the situation created by the Impugned Decision. The scheme established by article 69(4) and (7) of the Statute and rule 71 of the Rules of Procedure and Evidence thus anticipates that a Chamber's determination of the relevance or admissibility of evidence be made on an item-by-item basis. The factors that will require consideration will not be the same for all items of evidence.

The Appeals Chamber is not persuaded by the Trial Chamber's reasoning that the "prima facie *admission of the evidence, without the need to rule on each piece of evidence as it is presented will save significant time during the proceedings and expedite matters*". While expeditiousness is an important component of a fair trial, it cannot justify a deviation from statutory requirements. Thus, if a Chamber decides to rule on the admissibility of evidence, it must do so correctly.

In conclusion, the Appeals Chamber is of the view that the Trial Chamber erred when it made a "prima facie *finding of the admissibility*" of the evidence listed on the Revised List of Evidence without assessing the evidence on an item-by-item basis.

See No. ICC-01/05-01/08-1386 OA5 OA6, Appeals Chamber, 3 May 2011, paras. 43-45, 48-49, 53, 55, and 57.

The direct import of the first sentence of this provision is that witnesses must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality. The importance of in-court personal testimony is that the witness giving evidence under oath does so under the observation and general oversight of the Chamber. The Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded.

Nevertheless, in-court personal testimony is not the exclusive mode by which a Chamber may receive witness testimony. The first sentence of article 69(2) also provides for exceptions, namely for measures taken under article 68 of the Statute or under the Rules of Procedure and Evidence "*to protect witnesses, victims or an accused*". In addition, under the second sentence of article 69(2), the Chamber may *inter alia* permit the introduction of "*documents or written transcripts*". This power is, however, subject to the Statute and must be exercised in accordance with the Rules of Procedure and Evidence. The most relevant provision in the Rules of Procedure and Evidence is rule 68 which provides that the "*Trial Chamber may allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony*". However, the introduction of such evidence is subject to strict conditions set out in the provision.

[…]

In deviating from the general requirement of in-court personal testimony and receiving into evidence any prior recorded witness testimony a Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally. In the view of the Appeals Chamber, this requires a cautious assessment. The Trial Chamber may, for example, take into account, a number of factors, including the following: (i) whether the evidence relates to issues

that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.

For these reasons, the Appeals Chamber concludes that the decision of the Trial Chamber to admit all prior recorded statements without a cautious item-by-item analysis was incompatible with article 69(2) of the Statute and with rule 68 of the Rules of Procedure and Evidence.

See No. ICC-01/05-01/08-1386 OA5 OA6, Appeals Chamber, 3 May 2011, paras. 76-78, and 81.

Although the Chamber is not bound to accept exhibits to which there are no objections, it will only decline doing so if there are compelling reasons. The Chamber finds there to be no such reasons in relation to the ten abovementioned documents. They are therefore admitted into evidence.

In dealing with the remainder of the documents, the Chamber will apply the criteria developed in the "Decision on the Prosecutor's Bar Table Motions" of 17 December 2010. As stated in that decision, the Chamber follows a three-step approach. First, the Chamber must assess whether a proffered item of evidence is relevant to a live issue in the case. If so, the Chamber must then determine whether it has sufficient probative value. Probative value is evaluated on the basis of two factors, reliability and significance. Finally, once it has been established that an item of evidence has sufficient probative value, the Chamber must still examine whether its admission would cause undue prejudice to the opposing party. If the Chamber finds that the prejudice is disproportionate to the probative value of the evidence, it must be excluded.

If the evidence tendered makes the existence of a fact at issue more or less probable, it is relevant. Whether or not this is the case depends on the purpose for which the evidence is adduced. Unless immediately apparent from the exhibit itself, it is the responsibility of the party tendering it to explain: (1) the relevance of a specific factual proposition to a material fact of the case; (2) how the item of evidence tendered makes this factual proposition more probable or less probable.

See No. ICC-01/04-01/07-3184, Trial Chamber II, 21 October 2011, paras. 14-16.

The Chamber considers that the maps may assist the Chamber, as well as the parties and participants in the proceedings, in appreciating the geographical location of relevant places discussed during the presentation of evidence. The Chamber considers that – in the absence of justification for non-disclosure provided by the Prosecution – the name of the entity should be disclosed to the Defence. The Chamber notes that the actual maps themselves do not appear to contain any information identifying their origin and/or which entity produced them. For the aforementioned reasons, the Chamber concludes that the maps as such may be admitted to the List of Evidence.

See No. ICC-01/09-01/11-762, Trial Chamber V(a), 3 June 2013, para. 59.

B. Whether the incomplete testimony of Witness D04-07 should remain on the case record

The Chamber notes that no specific guidance is provided by the Statute, the Rules, or the jurisprudence of the Court in the situation where a witness's testimony is only partially completed. In light of this, the Chamber is of the view that it should be guided in its determination by its overriding duty to ensure the fairness of the trial, as provided for in article 64(2) of the Statute.

In determining what is required by the principle of fairness in the present circumstances, the Chamber considers that its approach to the admission of evidence, derived from articles 64(9)(a) and 69(4) of the Statute, may be of guidance. Although used in a different context, the principles applied by the Chamber in this assessment determine when admitting evidence to the case record would be consistent with the fairness of the trial. As such, these principles may also be applied when determining whether keeping testimonial evidence on the case record would be prejudicial to the fairness of the trial.

In the present case, the Chamber considers that it must address two specific issues: (1) the relevance of Witness D04-07's testimony with regard to the crimes charged; and (2) whether the Chamber is in a position to assess the witness's testimony, including its credibility and reliability, in spite of it being incomplete. The Chamber considers that the most relevant factor to be considered in the present case is whether the Chamber will be in a position, at the end of the case, to assess Witness D04-07's testimony, including his credibility and reliability, in spite of it being incomplete. If the impact of the incompletion of Witness D04-07's testimony were to put the Chamber in a position where it could not make this assessment, it could not rely on the evidence in question, and would have to strike it from the record.

The Chamber considers that the question is whether the Chamber has sufficient information – taking into account the extent of the parties, the participants, and the Chamber's questioning of the witness, including questioning challenging his credibility and reliability – in the present case.

The Chamber notes that:

(i) the defence had a full opportunity to question Witness D04-07;

(ii) the prosecution, enjoyed a full opportunity, to question Witness D04-07 and challenge his evidence and credibility;

(iii) the Chamber partially questioned the witness; and

(iv) Maître Zarambaud partially questioned the witness;

whereas:

(i) the legal representatives were precluded from completing their questioning;

(ii) the Chamber was not afforded a full opportunity to question the witness; and

(iii) the defence did not have its final opportunity to question the witness.

In addition, the Chamber notes that the witness testified under oath, in person before the Chamber.

In light of the above, the Chamber considers that any prejudice to the fairness of the trial and to the fair evaluation of Witness D04-07's testimony that may have been caused by the witness's failure to complete his testimony is limited and does not require the exclusion of the testimony from the record of the case. The Chamber is of the view that it has sufficient information to be able to assess the witness's testimony, including its reliability and credibility, at the time it considers the evidence of the case as a whole. The Chamber stresses that the finding that Witness D04-07's testimony may be retained on the case record has no bearing on the Chamber's final determination of the credibility or reliability of Witness D04-07's testimony, or whether it will be afforded any weight at the end of the case. When making this determination, the Chamber will fully consider the parties and participants' submissions as to the weight to afford to the testimony of Witness D04-07 and the circumstances surrounding the witness's failure to complete his testimony.

Therefore, the Chamber decides that Witness D04-07's incomplete testimony should remain as part of the case record.

See No. ICC-01/05-01/08-2839, Trial Chamber III, 21 October 2013, paras. 17-25.

The Chamber recalls its general approach to the admission of evidence. In particular, for an item to be admitted into evidence it must satisfy the three-part test, according to which it must: (i) be relevant to the case; (ii) have probative value; and (iii) be sufficiently relevant and probative as to outweigh any prejudicial effect its admission may cause. Further, the Chamber reiterates that its determination on the admissibility of an item as evidence will have no bearing on the final weight to be afforded to it, which will only be determined by the Chamber at the end of the case when assessing the evidence as a whole.

[…]

Media Reports

The Chamber notes that the Majority of the Chamber, Judge Ozaki dissenting, previously set out its position on the admission of media reports. In this regard, the Majority stated that it would approach the admissibility of such materials with caution and held that such reports may be admitted for limited purposes to be determined on a case-by-case basis. In line with the Majority's approach, the submitted media report will be cautiously assessed to determine its relevance, its probative value, and whether any prejudice to a fair trial may be caused by its admission.

See No. ICC-01/05-01/08-2950, Trial Chamber III, 29 January 2014, paras. 7 and 22 (reclassified as public on 5 February 2014).

I have previously expressed my opinion that the admission into evidence of newspaper articles and other media reports must be approached with great care when their authors are not called to testify at trial. The fact that the content of such articles may serve to corroborate other pieces of evidence is a factor to be assessed in considering their reliability and probative value but is insufficient in itself to warrant admission. In this instance, I note that it has been submitted that certain elements of the content of the Article is corroborative of the testimony of witnesses in this case. However, as noted in the Decision, the Article was not used during the examination of any of the witnesses.

In the circumstances, I am of the view that the probative value of the Article is insufficient to outweigh the potential prejudice if it is admitted for the truth of its contents. However, I do not object to the admission of the article solely for the limited purpose of demonstrating that the events described therein were widely reported, which may, for example, be of relevance to the accused's knowledge of the alleged crimes.

See No. ICC-01/05-01/08-2950-Anx, Partly Dissenting Opinion of Judge Ozaki, 29 January 2014, paras. 2-3 (reclassified as public on 5 February 2014).

The Chamber recalls its general approach to the admission of evidence. In particular, for an item to be admitted into evidence it must satisfy the three-part test under which it must: (i) be relevant to the case; (ii) have probative value; and (iii) be sufficiently relevant and probative as to outweigh any prejudicial effect its admission may cause. Further, the Chamber underlines once more that its determination on the admissibility into evidence of an item has no bearing on the final weight to be afforded to it, which will only be determined by the Chamber at the end of the case when assessing the evidence as a whole.

See No. ICC-01/05-01/08-3019-Red, Trial Chamber III, 26 August 2014, para. 21.

The Chamber notes that the Statute and Rules does not expressly provide for a reopening of the case in order to permit the submission of additional evidence. However, in line with the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the Chamber finds that in exceptional circumstances a case may be reopened to permit the presentation of "*fresh*" evidence. The Chamber notes that "*fresh*" evidence includes not only evidence which was not available at the closing of the case but also evidence that was previously available but the importance of which was revealed only in light of new evidence.

In determining whether to reopen a case to allow for the admission of "*fresh*" evidence, the Chamber must first consider whether, with reasonable diligence, the evidence could have been identified and presented prior to the closing of evidence.

Further, in determining whether there are sufficient grounds to recall a witness, the Chamber shall consider whether good cause to recall the witness has been demonstrated. The Chamber has previously stated that "*judicial economy demands that recall should be granted only in the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature*".

See No. ICC-01/05-01/08-3154-Red, Trial Chamber III, 11 December 2014, paras. 25-27.

The Chamber notes Articles 64, 69, 74 of the Statute and Rules 63, 64 and 140 of the Rules, as well as the relevant case-law and practice of the Court.

Articles 64(8)(b) and 69(3) of the Statute stipulate that the parties may submit evidence relevant to the case in accordance with the provisions of the Statute and subject to any directions of the Presiding Judge. Article 69(3) of the Statute vests the Chamber with the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

Article 74(2) of the Statute provides that, in rendering its final judgment on the merits of the case, the Chamber '*may base its decision only on evidence submitted and discussed before it at the trial*'.

The Appeals Chamber has clarified that evidence must be regarded as '*submitted*' within the meaning and for the purposes of Article 74(2) of the Statute when '*it is presented to the Trial Chamber by the parties on their own initiative or pursuant to a request by the Chamber for the purpose of proving or disproving facts in issue*'.

Pursuant to Rule 64(1) of the Rules, an issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to the Chamber, or, exceptionally, immediately after the issue has become known. Whilst the Chamber retains the discretion ("*may*") to request that the issue be raised in writing, it is the Chamber's view that, as regards evidence presented during a hearing, issues of this nature should be immediately raised orally at the same hearing.

Articles 64(9)(a) and 69(4) of the Statute set forth the fundamental principles governing the Chamber's authority to rule on the admissibility or relevance of the evidence. Pursuant to Article 64(9)(a) of the Statute, the Trial Chamber '*shall have,* inter alia*, the power on application of a party or on its own motion to: (a)* [r]*ule on the admissibility or relevance of evidence*'. Pursuant to Article 69(4) of the Statute, '[t]*he Court may rule on the relevance or admissibility of any evidence, taking into account,* inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence*'.

The wording of both provisions (in particular, the reference to the Chamber's '*power*' and the use of '*may*') makes it clear that it falls within the discretion of the Chamber to decide whether and, in the affirmative, at what point in time a ruling on the admissibility or relevance of evidence shall occur. As clarified by the Appeals Chamber, '*the Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber*'. Accordingly, it may decide either (i) to make the ruling on relevance and/or admissibility of the evidence at the time of its submission and defer the determination of its probative value to the end of the trial, or (ii) to defer this ruling to the end of the proceedings, making it '*part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person*'.

However, the Chamber's discretion is limited by its need to comply with two fundamental principles: on the one hand, its obligation to ensure that the trial is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses; on the other hand, its duty not to omit the consideration of '*the relevance, probative value and potential prejudice to the accused of each item of evidence at some point in the proceedings – when evidence is submitted, during the trial, or at the end of the trial*'.

The parties and participants have expressed a preference for an approach whereby the Chamber would rule on the admissibility of a given item of evidence at the time of its submission.

Contrary to the arguments raised by the parties, the Chamber is not persuaded that this approach will be beneficial to the fairness and expeditiousness of the trial, or, even more fundamentally, effectively instrumental to its ultimate duty to determine the truth. Several factors militate instead in favour of a solution whereby, as a matter of principle, the assessment of both the admissibility and the relevance or probative value of the evidence is deferred until the moment when the Chamber will be deliberating its judgment, pursuant to Article 74(2) of the Statute.

First, it is only at the end of the trial, once the submission of the evidence will have been completed that the Chamber will be in the best position to meaningfully assess each item of evidence as submitted throughout the course of the proceedings. A determination on the admissibility or the relevance of a given item of evidence upon its submission would unduly restrict the Chamber's power to assess that particular piece of evidence in light of all the others pieces which are yet to be submitted, and to amend its assessment if and as required; as such, it would result in unnecessarily restraining the Chamber's right and duty '*to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69*' as provided in Rule 63(2) of the Rules.

Second, deferring the Chamber's determination of all of the issues concerning a given piece of evidence to the time of the judgment will prevent multiple determinations on one and the same item of evidence are made at different stages of the trial, including as a result of the need to resolve pending litigation. Intermediate rulings on the evidence, by their very nature based on a partial knowledge of the case, might themselves become the subject matter of additional interlocutory litigation, thereby further disrupting the course of the proceedings. Accordingly, deferral will prevent (or at least significantly circumscribe) the need for multiple – and possibly contradictory – rulings on one and the same item of evidence and thus contribute to the expeditiousness of the trial. The Chamber's obligation, as set forth in Article 74 of the Statute, to determine the guilt or the innocence of the accused in light of all of the evidence presented during the trial would make it always imperative for the Chamber to determine, at the end of the trial, whether the determination made at an earlier stage on a particular piece of evidence still stands, in particular in light of the evidence which has been presented after the

making of that initial ruling. It is not indeed exceptional that the relevance of a particular item only emerges in light of material submitted at a later stage.

Third, deferring the Chamber's determination to the time of the judgment as a general rule will also ensure that all the evidence submitted will be subjected to a uniform treatment; whether the Chamber decides or not to anticipate its ruling at an earlier stage will not depend on the fact that an issue has or has not be raised by one of the parties at a given moment, but rather on the Chamber's exercise of its discretion in light of its statutory obligations. The Chamber believes that this will contribute to the overall certainty and fairness of the proceedings as a whole.

The Chamber notes that a determination of admissibility and/or relevance upon the submission of an item of evidence might provide necessary and appropriate in a system where fact-finding is conducted by a jury, with a view to preventing that the proceedings be compromised by irrelevant or prejudicial material; this is not the case where decisions are taken by a bench of professional judges. The Chamber is not persuaded that the large nature of the case – and/or the large amount of evidence presented by the parties – is a factor per se requiring that evidentiary determinations be taken on a rolling basis. As stated at the opening of the trial, numbers (of items, of witnesses or of hours required for the presentation of the evidence) are just numbers, as such neutral in respect of the procedure to be followed for the admission of evidence.

This general principle is without prejudice to admissibility objections being considered by the Chamber upon submission of the relevant item whenever required by the Statute or the Rules (such as motions made under Article 69(7) of the Statute). Furthermore, the Chamber, in the exercise of its discretion, may rule on admissibility of certain items whenever this may be necessary or appropriate in order to preserve the expeditiousness and fairness of proceedings, including upon a request of the parties relating to a specific item of evidence, or categories of evidence. The continuous consideration of the submitted evidence by the Chamber throughout the trial will allow it to promptly determine the need, or the desirability, to advance a particular evidentiary determination to an earlier stage of the proceedings. It will also allow the Chamber to adequately exercise its authority to request the submission of all evidence it considers necessary for the truth.

In the view of the Majority, the need to ensure the impartiality of the proceedings does not allow the Chamber to assist the parties with their preparations for the case or, even less, to permit them to "*remedy*" any flaws which might affect their case, including their possible failure to satisfy their respective burden of proof. The Majority does expect that all the parties and participants will "*conduct their investigations and prepare their respective cases in light of all evidence submitted*" and that they will address the Chamber "*in such a manner so as to cover all eventualities*"; indeed, this appears to the Majority an essential component of the parties' professionalism.

Finally, the Chamber determines that only items presented and relied upon by the parties and, if applicable, the participants, for the purposes of the final judgment must be transmitted to the Chamber. Items disclosed inter partes or not submitted in trial proceedings are not to be transmitted to the Chamber. Consistently with the approach taken in the confirmation proceedings in this case, the Chamber considers it unnecessary to assign an 'EVD' number to submitted exhibits. These items will continue to be referenced by their pre-existing unique identification number ("ERN") which is stamped on each page of each item and which they will retain throughout the course of the proceedings. However, the Registry is to ensure that the e-court metadata clearly reflects which items have been formally submitted to the Chamber as the trial advances and whether an oral objection has been made. The Registry is also to ensure that any and all issues raised under rule 64(1), as well as any decision rendered by the Chamber, will be duly and promptly annotated in the e-court metadata pertaining to the piece of evidence to which they relate.

See No. ICC-02/11-01/15-405, Trial Chamber I, 29 January 2016, paras. 3-19.

While there is little dispute that a trial chamber may defer its consideration on the relevance and admissibility of evidence submitted by a party until the deliberations stage of proceedings, in exercising this discretion, and in the context of adversarial proceedings, due weight ought to be given to the unanimous views of the parties and LRV. A careful consideration of their concerns assists the Chamber in striking the right balance so as to ensure that the trial is both fair and expeditious, recognising that expeditiousness is an important component of a fair trial, but not the only one.

Although the legal architecture of the Court blends aspects of both civil and common law systems, as highlighted by my learned colleague in the Appeals Chamber, the Rome Statute provides for key aspects of the proceedings to be conducted in an adversarial nature, insofar as Articles 66(2) and Article 67(1)(e) of the Statute confine the discharge of the burden of proof to the Prosecutor and provide for the confrontation of the evidence by the accused. In accordance with this Chamber's 'Directions on the Conduct of Proceedings', this trial was also to be conducted on a basis more consistent with the practice and procedure of an adversarial trial, in which the phases of trial provide for each party to present its case and its evidence to the Chamber.

While the Chamber is empowered to request the submission of all evidence it considers necessary to determine the truth, it is the Prosecution that bears the burden of proving the guilt of the accused beyond a reasonable doubt. A decision that as a general rule defers the admission of the evidence to the deliberation stage hardly assists the Prosecution in determining whether it has discharged its evidential burden at the close of its case, let alone at the conclusion of the evidentiary stage of proceedings.

In my respectful view, the rights of the accused are also undermined where decisions on admissibility are deferred. The notion of a fair hearing goes beyond the terms catalogued in Article 67 of the Statute, which identifies those listed as minimum guarantees. At the close of the case for the Prosecution, the accused must make an informed decision on how he elects to proceed; options which include whether to stay silent or to give evidence and if so, to what he would wish to respond. In the context of adversarial proceedings, this requires a proper assessment of the evidence led and admitted, not what may be admitted. Lack of certainty impedes the ability of the accused to prepare their cases, undermining the fairness of the proceedings.

The parties and LRV have also identified the impact on their ability to make representations should the Chamber defer its decision on admissibility to the deliberation stage of the trial. Rule 141(2) of the Rules requires that, at the close of the evidentiary stage of proceedings, the Presiding Judge invite the parties to make closing statements. Counsel for each party is then entitled to address the Chamber in an attempt to persuade its members to its understanding of the facts and evidence and, in so doing, make reference to the most cogent parts of their respective cases, while at the same time identifying evidential gaps and weaknesses in their opponents' case. In particular, the accused, who have the last say, must know the evidence that has been admitted in the respective cases against them. Just how the parties can meaningfully achieve this objective in the absence of certainty as to what evidence is or is not being considered as admitted into evidence is questionable at the very least. Indeed, in the context of these proceedings, not only does such an approach undermine the effectiveness of the closing speeches, it renders them inefficient, as parties will be forced to address the Chamber in such a manner so as to cover all eventualities concerning the evidence.

In this respect, I also note that the Majority Decision creates an expectation that the parties and LRV will devote precious time and resources to conduct investigations and prepare their respective cases in light of all evidence submitted, even though such evidence may – after the conclusion of the trial – be considered inadmissible. Such a consideration has minimal impact where the anticipated body of evidence in a case is limited. However, in this trial, where the Prosecution's case alone anticipates approximately 138 witnesses and 5,376 exhibits, the benefit to the parties of admissibility decisions on a rolling basis and before the closure of the hearing cannot be underestimated. Such decisions enable a party to plan and focus their investigations, preparations, examinations, and submissions, and to identify the witnesses they will call and the evidence they will adduce. Thus, time and resources spent on preparations and submissions relating to evidence which is ultimately ruled inadmissible by the Chamber after the closure of the evidentiary hearing would have been diverted from preparation, examination and submissions in relation to other evidence that the Chamber ultimately finds admissible and relies upon in its judgment under Article 74 of the Statute.

I also consider that, in relation to procedural matters in international criminal cases of great scope and size, a Chamber should have due regard for the lessons learned from the ample experience and jurisprudence of the Court, as well as the *ad hoc* tribunals. With the exception of the *Bemba* et al. case (a case of limited scope and anticipated duration), issuing admissibility decisions before the closure of evidence has been the settled and uncontroversial practice in international criminal proceedings, both at the Court and the *ad hoc* tribunals. This includes both those international and hybrid courts founded on the common law tradition, as well as those applying a primarily inquisitorial system.

Nowhere in the Majority Decision is there any assessment as to why the *Gbagbo and Blé Goudé* case is unique from the dozens of other international cases where admissibility decisions have been issued before the closure of evidence. Nor is there any discussion as to how such practice is misguided, let alone an assessment of the impact on the respective parties' ability to efficiently and adequately prepare (issues specifically raised in the parties' submissions).

I must emphasise that, in my view, deferring inadmissibility rulings to the Chamber's final judgment as a general rule unfairly forecloses the opportunity for the submitting party to seek the admission of other evidence in place of that which was excluded. In such circumstances, there is a risk arising primarily from the admissibility regime adopted by the Majority of either the Chamber and parties wasting valuable time and resources on duplicative evidence, as explained in more detail below, or the Chamber rendering a perverse verdict.

By way of illustration, I note that Chambers at the Court and *ad hoc* tribunals have declined to admit, or have provisionally admitted, evidence absent, *inter alia*, sufficient indicia of reliability, such as information concerning their provenance or authenticity, adequate translations, or attestations. If such decisions had only been made after the closure of the evidentiary stage of proceedings, the parties in those cases would have been prevented from the possibility to remedy such defects by providing the Chamber the information required in order for it to properly consider those items. While parties certainly have a responsibility to be fully prepared for all eventualities, the Chamber also has an obligation under Article 64(2) of the Statute to take such decisions that ensure that the Chamber does not deprive itself of the best chances of learning the truth. A Chamber acting pursuant to its statutory obligations cannot threaten the impartiality of the proceedings, a position the Majority appears to have taken.

In making its determination that, as a matter of principle, it was appropriate to defer until deliberation the assessment of both admissibility and the relevance or probative value of evidence, the Majority identified five considerations: (1)the Chamber is best able to assess the relevance and probative value of a given item of evidence at the end of the proceedings ('First Consideration'); (2) not having to assess relevance and probative

value until the end of the proceedings would prevent multiple determinations on the same item of evidence at different stages of the trial and is therefore more expeditious ('Second Consideration'); (3) deferral of admissibility decisions will ensure that all evidence is subjected to uniform treatment ('Third Consideration'); (4) there is no reason for the Chamber to make admissibility assessments in order to screen itself from considering materials inappropriately ('Fourth Consideration'); and (5) the Chamber may always decide to consider admissibility issues up front when appropriate ('Fifth Consideration'). In the circumstances of this case, it is my view that none of these considerations justify deferral of admissibility decisions to the judgment as a general rule.

In relation to the First Consideration, I cannot but agree with the Majority that an item's ultimate relevance and probative value cannot be assessed until the conclusion of the trial and in light of the totality evidence. However, this does not detract from the Chamber's ability to determine *prima facie* relevance and probative value for purposes of admissibility, or to determine at the outset that an item of evidence is patently irrelevant or unreliable.

Indeed, as noted by Trial Chamber V(a), an '*assessment of items of evidence for the purposes of admissibility is a distinct question from the evidentiary weight which the Chamber may ultimately attach to the admitted evidence in its final assessment once the entire case record is before it*'. For the same reasons, the Third Consideration is, in my view, unfounded as decisions on admissibility of and ultimate weight to be afforded to evidence do not risk inconsistent treatment of such evidence, as the standards are distinct.

Having said this, I also note with concern that this Chamber has already ruled, as follows:

> *Pursuant to Article 69 of the Statute and Rule 63(2) of the Rules, the Chamber shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility. In accordance with Rule 64(3) of the Rules, the Chamber will not admit evidence that it considers is* prima facie *without relevance or probative value. In line with Article 69(4) of the Statute, in ruling on the admissibility of evidence, the Chamber will also take into account any prejudice that such evidence may cause to a fair trial or the fair evaluation of the testimony. Likewise, the Chamber will not admit evidence where a determination has been made under Article 69(7) of the Statute. It is for the submitting party to demonstrate the admissibility of the evidence and proffer reasons why it is relevant to and probative of the facts in issue.*

These directions provided for a procedure during the trial whereby the Chamber may exclude evidence where a *prima facie* assessment determined that the evidence was without relevance or probative value. Therefore, I cannot agree that a significant departure from these directions issued on the eve trial – when the parties have prepared on the basis of these directions – is commensurate with this Chamber's obligation to ensure that the trial is fair, expeditious, and conducted with full respect for the rights of the accused.

The Second Consideration is founded on expeditiousness. However, rather than expediting proceedings, I consider that the effect of the Majority Decision on the ability of the parties and LRV to prepare. As a corollary, I note that, without admissibility decisions on a rolling basis, the Chamber, parties and LRV are inhibited in any effort to limit the overall amount of evidence presented. Some of the items of evidence on the Prosecution's list of evidence may be repetitive and cumulative of other items of evidence. Similarly, the Prosecution may not be certain as to exactly which items of evidence it will ultimately submit. As the Appeals Chamber has acknowledged, this is consistent with the Prosecution's '*discretion, as the case unfolds, to rely on some* [of this evidence] *and to abandon the rest*'. Such a discretionary right, as they are the chiefs of their respective cases, applies with even more force to the defence and, to a certain extent, the LRV. However, a party or participant cannot be expected to whittle down their evidence lists, to identify and abandon repetitive, unduly cumulative or other items of evidence, if they are uncertain as to which items of evidence will be admitted.

In addition, this lack of certainty concerning the evidence, in my view, compromises the Chamber's authority to request the submission of all evidence it considers necessary for the truth (Article 69(4) of the Statute) in a timely fashion, because it would only know at the deliberations stage whether it will declare evidence inadmissible. Should the Chamber be aware that other evidence of a similar nature is available after it has declared one item inadmissible for whatever reason, it would have to re-open the trial to hear the evidence and have it '*discussed*' and '*confronted*' for the purposes of Articles 67 and 74 of the Statute. While this may appear speculative, in my view its possibility carries with it the risk that either efficiency or the Chamber's truth finding function may be compromised, and cannot be remedied, by simply keeping the evidence under '*continuous consideration*'. If this phrase means that the Chamber will be assessing admissibility throughout the proceedings, then it is not actually deferring its consideration until deliberations and its decisions on admissibility ought to be made known to the parties for the reasons I have set out above. In such circumstances, I cannot understand why such assessments would not be shared with the parties, considering the obvious impact they could have on fairness and expeditiousness.

The only discernible benefit of the Majority Decision to the expeditiousness of the proceedings would be the time the Chamber saves in not having to devote resources to issuing admissibility decisions and the fact that proceedings are not impeded by any time spent preparing such decisions or any attendant leave to appeal litigation. However, as already noted, the Majority also indicates that it will keep the entire body of submitted evidence under '*continuous consideration*' and that it will consider party requests to decide upon the admissibility of a given item or category of evidence at an earlier stage of the proceedings. Although the Majority Decision has, in principle, eliminated interlocutory admissibility decisions, the Chamber will still, as it must and should,

devote resources and time to a new category of filings and decisions, namely requests for early admissibility decisions. Of course, the Chamber must still assess the entirety of the evidence during deliberations. Therefore, in seeking to strike the correct balance, I remain unpersuaded by the line of reasoning that concludes that expeditiousness has been enhanced by postponing a reasoned decision that still must be made without examining the prejudicial impact of such an approach on the accused, an issue directly raised in the parties' submissions. The limited benefit of the Majority Decision to the expeditiousness of the proceedings, if any, on balance, cannot justify the prejudice caused, or the risk thereof, to the parties, LRV, and overall fairness and expeditiousness of the proceedings.

In relation to the Fourth Consideration, I acknowledge that, in many domestic, common law jurisdictions, one benefit of rendering admissibility decisions prior to the conclusion of the trial is screening irrelevant or unduly prejudicial evidence from the jury and that no such risk arises in these proceedings. In this respect, the Majority Decision acknowledges the statutory admissibility criterion of potential prejudice, but only in passing. Nowhere in the Majority Decision is there discussion as to why this criterion is best considered after the closure of the evidentiary hearing. It is clear to me, however, that potential prejudice is best assessed before the trial concludes. Indeed, this is the only way that such potential prejudice can be averted or, depending on the circumstances, adequately remedied. After the conclusion of the hearing, exclusion is the most readily available remedy. However, exclusion cannot change the course of the trial once it has concluded.

Finally, the Fifth Consideration concerns the ability of the Chamber to exceptionally rule on admissibility matters before the conclusion of the trial. Indeed, I note that the '*general rules*' adopted so far by the Chamber in relation to the preparation and submission of evidence in the *Gbagbo and Blé Goudé* case safeguard the discretion of the Chamber, above all else. However, the discretion of the Chamber is never unfettered. It must be exercised subject to the Chamber's obligations under the Statute, in particular, Article 64(2). For this reason, even assuming arguendo that I otherwise agreed with the Majority's approach to the admissibility of evidence – which I respectfully do not – I still could not join the unlimited and undefined '*general rule*' adopted.

Despite the Majority's hint that the Chamber may still assess objections made under Article 69(7) of the Statute before the conclusion of the evidentiary hearing, there is no certainty that would allow the parties to properly prepare their cases, or at least with any real foresight as to which items may be assessed prior to the conclusion of the trial. This is especially true in light of its statement that a '*determination on the admissibility or the relevance of a given item of evidence upon its submission would unduly restrict the Chamber's power to assess that particular piece of evidence in light of all the others pieces which are yet to be submitted*' and, '*would result in unnecessarily restraining the Chamber's right and duty* "to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69" *as provided in Rule 63(2) of the Rules*'. Nevertheless, the Majority indicates that it may also '*rule on admissibility of certain items whenever this may be necessary or appropriate*', '*including upon a request of the parties relating to a specific item of evidence, or category of evidence*'. Yet, the Majority does not identify any relevant criteria or the applicable procedure governing such circumstances. This, in my view, creates further uncertainty and ambiguity about the procedure to be followed in respect of the evidence. Similarly ambiguous '*general rules*' have already created uncertainty in these proceedings.

IV. Conclusion

Accordingly, I would have granted the unanimous request of the parties and LRV that the Chamber rule on the admissibility of evidence on a rolling basis and before the close of the evidentiary stage of the proceedings

See No. ICC-02/11-01/15-405-Anx, Trial Chamber I, Dissenting Opinion of Judge Henderson, 1 February 2016, paras. 6-27.

In relation to the applicable law, the Chamber recalls that it may allow the introduction of previously recorded testimony coming from a person who has died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally, provided that: i) the introduction is not prejudicial to or inconsistent with the rights of the accused; ii) the necessity of measures under Article 56 of the Statute could not be anticipated; and iii) the prior recorded testimony has sufficient indicia of reliability. These requirements must be met in addition to the standard admissibility criteria. Exhibits associated are also admissible so long as the witness uses or explains them in the prior recorded testimony.

See No. ICC-01/04-02/06-1205, Trial Chamber VI, 22 March 2016, para. 7.

The Chamber has considered the list of agreed facts. It regrets that the parties have failed to reach agreement on a more meaningful number of facts pertaining to the merits of the case. Nevertheless, the Chamber will henceforth consider the agreed facts as proven in accordance with rule 69 of the Rules and will not permit the parties to present further evidence in this regard.

See No. ICC-02/11-01/15-524, Trial Chamber I, 13 May 2016, para. 23.

While the Directions on the Conduct of Proceedings allow for the partial introduction of prior recorded testimony (the rest of the testimony to be provided orally), neither the text of the aforesaid directions nor Rule 68(3) of the Rules provide a basis to preclude the parties from requesting the introduction of prior recorded testimony in its entirety. In fact, any such interpretation of the Directions on the Conduct of Proceedings would be contrary to Rule 68 of the Rules and therefore impermissible.

[…]

First, it must be stated, in general, that a rule that documents can only be submitted "*through a witness*" has no basis in the Statute or the Rules and does not form part of the Court's applicable law. In any case, the Chamber notes that the annexes in question are referred to in the witness statements themselves and therefore need to be joined in order to allow the Chamber and the parties to properly appreciate the content of the witness statements. As regards the disputed documents annexed, the Chamber notes that as per the Directions on the Conduct of Proceedings, documentary evidence can be submitted by way of direct application to the Chamber, and not only during the course of witness examination. Therefore, there is no risk that the Prosecutor would use the relatively more stringent procedure of Rule 68(3) of the Rules instead of the relatively less stringent procedure for introduction of documentary evidence other than through a witness. In case of introduction of written statements under Rule 68 of the Rules, any documentary evidence annexed is also to be considered submitted. The Chamber will then consider, in the appropriate context, the witness statement and its annexes, and determine their relevance and probative value.

II. Introduction of prior recorded testimony under Rule 68(2)(b) of the Rules

The conditions for the introduction of prior recorded testimony under Rule 68(2)(b) of the Rules are that the prior recorded testimony "*goes to proof of a matter other than the acts and conduct of the accused*", and that it is accompanied by a declaration confirming the veracity of its content under certain formal requirements. Importantly, after finding that these conditions are met, the Chamber must not automatically allow the introduction of the prior recorded testimony, but must determine whether this is appropriate in the particular circumstances. Rule 68(2)(b)(i) of the Rules provides examples of factors that the Chamber may take into account for its determination. The Chamber must also always bear in mind the general condition of Rule 68(1) of the Rules, which prohibits introduction of prior recorded testimony where this would be prejudicial to or inconsistent with the rights of the accused.

Contrary to the argument of the Defence of Laurent Gbagbo, Rule 68(2)(b) of the Rules does not require the applicant, in this case the Prosecutor, to show that the witness is not available for a legitimate reason. The essence of Rule 68(2)(b) of the Rules is to allow for streamlining of the evidentiary proceedings by not calling some witnesses in person, even if they are available. For unavailable witnesses, Rule 68(2)(c) of the Rules provides for introduction of prior recorded testimony under comparatively easier conditions.

[…]

III. Introduction of prior recorded testimony under Rule 68(3) of the Rules

Rule 68(3) of the Rules posits the following conditions for the introduction of prior recorded testimony: (i) that the witness is present before the Trial Chamber; (ii) that the witness does not object to the introduction of the prior recorded testimony; and (iii) that the Prosecutor, the Defence and the Chamber have the opportunity to examine the witness during the proceedings. As always under Rule 68 of the Rules, the Chamber must also be attentive to the requirement that the introduction of prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused. In this regard, the Chamber considers that introduction of prior recorded testimony under Rule 68(3) of the Rules typically carries a lower risk of interfering with the fair trial rights of the accused, because the witness still appears before the Chamber and is available for examination, including by the Defence. As concerns the principle of orality under Article 69(2) of the Statute, which has been emphasised by the Defence, the Chamber notes that this principle is not absolute, and that the Statute explicitly envisages exceptions to be provided by the Rules. It is therefore inappropriate to effectively deprive Rule 68(3) of the Rules of its object and purpose merely by invoking the principle of orality.

In any case, the decision to allow the introduction of prior recorded testimony under Rule 68(3) of the Rules is within the powers of the Trial Chamber. While the Chamber needs to ensure that the proceedings do not unduly infringe on the abovementioned statutorily protected interests, a decision authorising the introduction of testimonial evidence via Rule 68 of the Rules instead of *viva voce* will be based on the criterion of good trial management, which includes considerations of expeditiousness and streamlining the presentation of evidence. This criterion will be applied on a case-by-case basis, taking into consideration the importance of the evidence for the case, the volume and detail of the evidence, among other factors. It is the duty of the Chamber to ensure that the trial unfolds in a focused and expeditious manner, while respecting the procedural rights of the parties and participants. Rule 68(3) of the Rules must be understood as a tool in the exercise of this duty.

See No. ICC-02/11-01/15-573-Red, Trial Chamber I, 9 June 2016, paras. 7, 9-11, and 24-25. See also No. ICC-02/11-01/15-722-Red, Trial Chamber I, 11 October 2016, para. 5; No. ICC-02/11-01/15-789, Trial Chamber I, 2 February 2017, para. 4 and No. ICC-02/11-01/15-870, Trial Chamber I, 7 April 2017, para. 7.

[…] First, I disagree that a decision under rule 68 of the Rules can be limited to simply considering the prior recorded testimony as being merely '*submitted*' instead of formally admitted in the sense of article 64(9)(a) and 69(4) of the Statute. Second, I disagree that it is appropriate to apply rule 68 of the Rules to (parts of) prior recorded testimony that are based on anonymous hearsay or the opinion of the witness. Third, I am of the view that the Chamber should adhere to the guidance provided by the Appeals Chamber regarding the application of rule 68(3) of the Rules. Fourth, I disagree with the meaning my colleagues give to the concept of '*issues that are materially in dispute*'. Fifth, I disagree with my colleagues' interpretation of the notion of '*indicia of reliability*'.

Sixth, I do not think it is appropriate to apply rule 68 of the Rules to the prior recorded testimony of witnesses P-217 and P-230. Finally, I disagree that it is possible to admit documentary evidence on the basis of rule 68 of the Rules, without applying the proper admissibility test of article 69(4) of the Statute, simply because prior recorded testimony that is admitted under rule 68 of the Rules makes reference to such evidence.

I. Rule 68 of the Rules relates to the admission of prior recorded testimony

Although the wording of rule 68 of the Rules is not particularly clear in this regard, there is little doubt that it gives Chambers the power to formally admit prior recorded testimony. Support for this view is found in the jurisprudence of all other trial chambers of this Court, as well as the amended text of rule 68(1) of the Rules, which specifically mentions article 69(4) of the Statute. Such reference would be incongruous if the prior recorded testimony would not be formally admitted.

I am, of course, aware that this Chamber, by majority, has elected, as a general rule, to defer formal admissibility decisions until the end of the trial proceedings. However, I note that this decision made express provision to rule on admissibility and relevance sooner "*when an intermediate ruling is required under the Statute or otherwise appropriate*". Since a decision under rule 68 of the Rules constitutes a formal exception to the principle of orality enshrined in article 69(2) of the Statute, it is, in my view, inappropriate to defer the decision on whether or not the prior recorded testimony will be formally admitted for the truth of its contents until the end of the trial. Such an approach would create unnecessary uncertainty for the parties. First, the calling party would not know whether it can rely on what is contained in the prior recorded testimony of a witness until it is too late for it to still call the witness. Second, the non-calling party would not know whether it should devote its limited time and resources to challenging the evidence, by way of cross-examination (in the case of rule 68(3) of the Rules) or otherwise (in the case of rule 68(2) of the Rules), until the end of the trial.

It is worth noting, in this regard, that Trial Chamber VII, which adopted a similar general approach to admissibility as the majority of this Chamber, nevertheless decided that it would rule on the admissibility of requests under rule 68 of the Rules immediately6 and has in fact done so in practice.

II. Rule 68 of the Rules cannot be applied without having regard to the general rules of admissibility under article 69(4) of the Statute.

The starting point of my analysis is that prior recorded testimony should, to the extent possible, be treated in the same way as in-court testimony. Accordingly, if it is impermissible for a witness who is not an expert testifying in court to provide opinion evidence or to speculate, it follows that similar opinion or speculative evidence contained in a prior recorded statement admitted under rule 68 of the Rules, should in like manner be excluded. The application of rule 68 of the Rules should thus generally be limited to those parts of the prior recorded testimony that would have been permissible had the witness been examined by the calling party in court. I am therefore of the view that admission under rule 68 of the Rules is not necessarily an all-or-nothing decision and that it is possible to use the provision to admit only parts of a prior recorded testimony that are admissible.

Apart from excluding opinion and speculative testimony under rule 68, it is also of the greatest importance to only admit prior recorded testimony when the record of this testimony (be it a signed statement or a transcript) clearly indicates the source of the witnesses' knowledge of the facts they testify about. This is particularly important when the witness provides hearsay evidence.

I am fully aware that there is no general exclusionary rule against hearsay, nor would I advocate introducing such an indiscriminate rule. However, in the same manner that hearsay should not be systematically excluded from the Chamber's consideration, it does not follow it should be systematically admitted. Indeed, rule 68 of the Rules does not permit the Chamber to circumvent the requirements of article 69(4) of the Statute, which lays down the general admissibility test before this Court. Article 69(4) provides:

The Court may rule on the relevance and admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.

This provision when properly construed requires the Chamber, when determining admissibility, to first consider whether the evidence has any probative value. Provided that the evidence has some probative value, the chamber ought to admit provided that the prejudicial effect does not outweigh its probative value. This assessment is particularly important in the context of rule 68 of the Rules, which makes major inroads into the general principle of orality that is enshrined in article 69(2) of the Statute and which makes personal testimony the rule. As the Appeals Chamber stressed, the importance of the principle of orality is directly related to the accused's right under article 67(1)(e) of the Statute to cross-examine witnesses as well as to the overall fairness of the proceedings. The potential for prejudicing the accused's rights by admitting prior recorded testimony of dubious probative value is thus considerable.

As I have already stated elsewhere, I am of the view that this Chamber must exercise the greatest care to prevent the receipt of anonymous hearsay, as there is no rational basis upon which the Chamber can evaluate the probative value of this evidence. It follows that the Court should be even more vigilant to prevent such evidence from being admitted under rule 68 of the Rules, specially (but not only) when the witness will not be available for cross-examination, as is the case with rule 68(2)(b), (c) and (d) of the Rules. Accordingly, I would not allow

anonymous hearsay to be admitted under rule 68 of the Rules, unless there are truly exceptional circumstances that may justify it.

However, the fact that hearsay is not anonymous does not *ipso facto* imbue the evidence with greater reliability. Indeed, simply knowing the name or identity of a witness's source does not automatically provide the Chamber with greater insight about the trustworthiness of this source.

It is worth stressing, in this regard, that trustworthiness (and therefore probative value) can never be presumed but must be established on the basis of evidence. Article 66(2) of the Statute clearly provides that the onus of proof rests on the Prosecutor. This burden includes the obligation to establish the trustworthiness of the evidence proffered in support of the charges.

Therefore, if the Chamber were to allow the admission of hearsay evidence under rule 68(3) of the Rules, without any information as to the reliability of the source, the Chamber would be imposing the onus of rebutting the trustworthiness of the evidence on the Defence, which is expressly prohibited by article 67(1)(i) of the Statute. Indeed, if the Chamber were to admit prior recorded testimony that is based on (quasi-)anonymous hearsay evidence, it would fall onto the Defence to elicit information about the trustworthiness of the source from the witness during cross-examination. Not only would such an approach sacrifice much of the very efficiency that justifies reliance on rule 68(3) of the Rules, it would also effectively shift the burden on the defence, forcing them to take the risk of establishing the trustworthiness of incriminating evidence. This is clearly antithetical to the principle that the accused has no obligation to assist the Prosecutor in any way to meet her burden of proof.

It is no answer to suggest that trustworthiness and probative value can best be assessed at the end of the case, when all the evidence is in, and that the Defence is under no obligation to test the trustworthiness of the Prosecutor's evidence because it can rely on the Chamber's professionalism. First, no responsible defence counsel should be expected to ever take the risk of not challenging (quasi-)anonymous hearsay evidence against their client in the hope that the Chamber could not reasonably attribute any level of evidentiary weight to such evidence. Second, if it is left until the end of the trial to assess probative value in light of all other evidence (on the assumption that some of it might be corroborated or contradicted by other evidence), the Defence might have to recall certain witnesses to question them about the identity and trustworthiness of their sources.

In short, I am of the view that the Court may admit prior recorded testimony that is based on hearsay only if sufficient information is available about the source so as to permit the Chamber to form an educated view as to its trustworthiness. Any parts of a prior recorded testimony containing factual propositions about which the Chamber does not have adequate information as to the trustworthiness of the source should therefore not be admitted under rule 68 of the Rules, for the straightforward reason that it falls foul of the requirements of article 69(4) of the Statute.

III. The Chamber should follow the guidance provided by the Appeals Chamber in regard of the application of rule 68(3) of the Rules.

I have noted with unease that my colleagues appear to have completely disregarded the guidance provided by the Appeals Chamber with regard to the application of rule 68(3) of the Rules. In the *Bemba* case, the Appeals Chamber took a principled position with regard to rule 68 of the Rules and made it very clear that article 69(2) of the Statute makes "*in-court personal testimony the rule*" for the very good reason that this allows the Chamber to hear "*directly from the witness and is able to observe his or her demeanour and composure, and is able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded*".

The Appeals Chamber was clear that exceptions to the principle of live testimony should be assessed cautiously and suggested that Trial Chambers consider the following three factors: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.

My colleagues now propose an entirely different criterion for the application of rule 68(3) of the Rules. Indeed, their approach is to decide "*on the basis of the criterion of good trial management, which includes considerations of expeditiousness and streamlining the presentation of evidence. This criterion will be applied on a case-by-case basis, taking into consideration the importance of the evidence for the case, the volume and detail of the evidence, among other factors*".

With respect, I cannot agree. Rule 68 requires careful and appropriate application as it constitutes an exception to the principle of orality. It is not merely a trial management tool to be used to expedite the proceedings or to streamline the testimony. I am alive to the fact that the Assembly of States Parties amended rule 68 of the Rules to a large extent for the purpose of giving Chambers more discretion to introduce transcripts or previously recorded reliable testimony in certain circumstances, in order to expedite proceedings. However, it is equally plain from reading the travaux of the amendment, that States Parties were concerned that prior recorded testimony would only be introduced when this could be done without unduly prejudicing principles of fairness and the rights of the accused. It is thus wrong to view the amendments to rule 68 of the Rules simply as a trial management tool that overrides the principle of orality in order to shorten the trial, without making a careful proportionality assessment of how this may impact the fairness of the trial and the rights of the accused.

IV. The circumvention of the criterion that prior recorded testimony should not relate to 'issues that are materially in dispute' by focusing on the notion of 'system of evidence'

Rule 68(2)(b) states unequivocally that, in deciding whether or not to admit prior recorded testimony, the Chamber must take into consideration whether the testimony "*relates to issues that are not materially in dispute*". As noted above, the Appeals Chamber has also made this a consideration under rule 68(3) of the Rules. I agree with my colleagues that, with the exception of the testimony of witness P-0590, all the prior recorded testimonies which the Prosecutor wishes us to admit under rule 68 of the Rules somehow touch upon core issues of the case that are strenuously contested by the parties.

Despite this, my colleagues appear to take the view that the fact that a witness' evidence does in fact pertain to facts that are materially in dispute can somehow be disregarded or given minor weight on account of the "*relative importance of the witness within the system of evidence that has been and is expected to be presented to the Chamber*".

My colleagues seem to justify this approach by making a qualitative distinction between witnesses who have "*insider or quality knowledge of the planning and overall conduct of the FDS operation during the events*", on the one hand, and witnesses who, "*while not individually of great importance, together with other evidence* […] *form a web of evidence which will allow the Chamber to appreciate how the events unfolded on the ground*", on the other. I respectfully disagree with this approach, which is unsupported by either the text of the rule or the court's jurisprudence thereon. In particular, I have difficulty with this approach because it seems to suggest that when there is a '*web*' of evidence in relation to a particular important issue, it does not really matter so much how good or bad the individual pieces of evidence are. However, as the 18th Century philosopher Thomas Reid already taught:

A system of this kind resembles a chain, of which some links are abundantly strong, others very weak. The strength of the chain is determined by that of the weakest links; for if they give way, the whole falls to pieces, and the weight, supported by it, falls to the ground.

The witnesses whose testimony the Prosecutor wants to introduce under rule 68 of the Rules all testify about different events and there is no overlap between their testimonies. Their testimony is therefore the only piece of evidence in support of the factual propositions contained in their statements. Each testimony thus constitutes a link in the proverbial chain (or a thread in the majority's web), the strength of which must be thoroughly examined.

V. Indicia of reliability cannot be merely formal

In the context of rule 68(2)(b) of the Rules, the Chamber was obliged to consider whether the prior recorded testimony of Witness P-0590 had "*sufficient indicia of reliability*". My colleagues appear to have adopted a rather formalistic approach in this regard. Indeed, their analysis seems to have limited itself to a finding that the prior recorded testimony "*was taken by the Office of the Prosecutor pursuant to Rule 111 of the Rules and under all applicable guarantees, including Article 54(1) of the Statute*".

With respect, these elements can, at best, be an indication that the record of the prior recorded testimony is accurate and faithful to what the witness said.

However, I fail to see how this helps in establishing whether or not the actual content of the prior recorded testimony is *prima facie* reliable.

There can be little disagreement, at least in my view, about the fact that rule 68(2)(i) of the Rules requires the Chamber to make at least a preliminary assessment of the reliability of the content of the testimony. This is apparent from the text of the provision itself, but also from the reference to article 69(4) of the Statute in rule 68(1).

I do not propose to outline a set of criteria for the evaluation of the reliability of prior recorded testimony. Reliability can depend on a multiplicity of factors, which in my view are better left open to recognition than excluded by a narrow definition. Notwithstanding this, I would say that there are some central indicia of reliability which must be considered in every case: First, the witness' competence to testify about the facts must be ascertained. If the witness was not in a position to accurately observe and/or understand the information she is testifying about, this would obviously militate against admitting the prior recorded testimony. Second, the Chamber has to be able to form an opinion about the witness' credibility. This evaluation may cover a broad range of issues, including potential bias on the part of the witness, his or her (in)sincerity, but also the possibility of honest mistake. Third, the reliability of any proposition contained in prior recorded testimony must be assessed in light of whether it coheres with other available evidence as well as with the Chamber's own understanding of the general context and circumstances of the case.

In order not to be misunderstood, I am not advocating that the Chamber make a full-fledged reliability assessment at the Rule 68 stage. This should be reserved for the end of the trial. However, I do think that, before admitting a prior recorded testimony under Rule 68, the Chamber must first be satisfied that sufficient information is available about the above-mentioned reliability indicators so as to allow the Chamber to make an informed decision about the weight of the evidence when the time comes. Moreover, the Chamber should already make a preliminary assessment of whether it could ever see itself relying on the prior recorded

testimony, based on a *prima facie* assessment of the indicia of reliability. If this is not the case, one might be forgiven for wondering what the point is of admitting the prior recorded testimony at all.

[…]

VII. It is not possible to admit documentary evidence solely on the basis of rule 68 of the Rules

The majority takes the view that any documents referred to by a witness in a prior recorded testimony is to be considered as submitted. I understand this to mean, in accordance with the majority's Decision on the submission and admission of evidence, that the Chamber has not taken a formal position on whether or not such documents are admitted into evidence or not. Leaving aside whether or not it is appropriate to postpone ruling on admissibility in the context of bar table motions, I have a fundamental problem with my colleagues' willingness to admit any form of documentary evidence under rule 68 of the Rules, regardless of whether it is produced by the witness to whose statement the evidence is attached.

I want to state clearly that I do not consider it legally possible to admit documentary evidence into the trial record through an application under rule 68 of the Rules. To be clear, I agree with my colleagues that it may be necessary and appropriate to consider documents referred to in prior recorded testimony in order to better understand the prior recorded testimony. However, the document itself can only be relied upon for the truth of its content, after the Chamber has first ruled on its admissibility in accordance with the admissibility test of article 69(4) of the Statute. This presupposes that the Chamber has been given all the necessary information that is required for the introduction of documentary evidence, in accordance with paragraph 44 of the Chamber's amended and supplemented directions on the conduct of the proceedings.

In some instances, it may well be that the prior recorded testimony will provide all this information and the Chamber may then consider ruling on the admissibility of annexed documentary evidence. This will often be the case when the annexed documentary evidence has been produced by the witness him- or herself. However, if this is not the case, the proffering party must provide information indicating the item's relevance, its probative value (including authenticity), as well as the date on which it was disclosed to the other parties. This can be done under a separate heading in the Rule 68 application, or in a distinct filing that is filed separately. Whatever the timing or the format, the Chamber must be provided with this information and rule 68 of the Rules makes no exception to this.

It is therefore misleading to say, as my colleagues do, that the procedure under rule 68 of the Rules is more stringent than the procedure to submit evidence over the bar table. The criteria under rule 68 of the Rules differ from those contained in article 69(4) of the Statute, as they apply to a different issue. Rule 68 of the Rules deals with the question whether an exception can be made to the principle of orality, whereas article 69(4) of the Statute deals with the issue of whether the trial record should contain evidence of no probative value or, indeed, evidence that may be prejudicial to the fairness of the trial proceedings or the fair evaluation of the testimony of a witness.

VIII. Concluding remarks

In conclusion, I am not opposed to applying rule 68 of the Rules, where this can be done in accordance with the statutory and procedural framework of the Court and its jurisprudence and with full respect for the rights of the accused and the principle of fair and open justice. I would therefore only allow prior recorded testimony when it relates to the witness' own direct observations or when it is based upon trustworthy sources. This requires that the Chamber properly evaluate the prior recorded testimony paragraph by paragraph and apply Rule 68 only to such portions that are admissible evidence. However, even if these conditions are met, it must still be considered whether it would be appropriate to admit prior recorded testimony in light of the significance of its content. In this regard, I adhere to the view that, if the testimony involved does not satisfy the criteria set out by the Appeals Chamber, it is more appropriate to hear their evidence *viva voce*.

See No. ICC-02/11-01/15-573-Anx-Red, Trial Chamber I, Dissenting Opinion of Judge Henderson, 13 June 2016, paras. 2-28, and 31-35.

In these circumstances, the Chamber is of the view that the fact that the statements of the four witnesses concerned pertain to issues which are contested and which are of importance for the Prosecutor's case is no impediment to their being introduced through Rule 68(3) of the Rules. Provided that the Defence is given adequate opportunity to examine the witnesses, there is therefore no overriding reason preventing the streamlining of the presentation of evidence by allowing the introduction of the witness statements pursuant to Rule 68(3) of the Rules.

See also No. ICC-02/11-01/15-722-Red, Trial Chamber I, 11 October 2016, para. 16.

The statements of P-0106 and P-0107 clearly pertain to issues that are materially in dispute and which are central to the case. Moreover, a large portion of the statements is based upon what may amount to anonymous hearsay. As I have stated in my partially dissenting opinion of 13 June 2016, I am of the view that these are highly relevant considerations in deciding whether or not to allow the admission of prior recorded testimony under rule 68(3) of the Rules.

The statement of P-0117 effectively consists of two parts. The first part essentially relates her personal experiences during the March on the RTI of 16 December 2010. The second part consists almost entirely out of hearsay evidence. For that reason, I do not think it is appropriate to admit it pursuant to apply rule 68(3) of the Rules. The probative value of this part of her evidence is simply too limited to be admissible pursuant to article 69(4) of the Statute.

Regarding the first part of P-0117,s prior recorded testimony, it contains a number of allegations which implicate one of the accused. Under those circumstances, I believe it is appropriate to hear the testimony from the witness in person. It is also significant to note that the Prosecutor envisages only a two hour gain in terms of reduced examination-in-chief. Such a small advantage cannot justify the curtailment of the principle of orality that is enshrined in article 69(2) of the Statute.

I would also like to express my disagreement with my colleagues' view that making use of rule 68 of the Rules "*cannot come into conflict with the Statute because the latter instrument explicitly states in Article 69(2) that witnesses shall give testimony in person, except, inter alia, to the extent provided for in the Rules*". With respect, I do not think it is correct to state that, because there are possible exceptions to a principle, the principle ceases to exist. The Majority's approach amounts to saying that there is no legal difference between in person testimony and the admission of prior recorded testimony. I do not subscribe to such a view, as I think there is great value in hearing incriminating evidence from the witness him or herself under oath and in front of the accused, the judges and the public. A feature of these proceedings has been the emergence of inconsistencies between the oral evidence of the witness when examined and what they may have said in their statement to the investigators. Exploring such inconsistencies is a legitimate approach in assessing the credibility of such witnesses.

Similarly, as I already pointed out earlier, I do not adhere to the view that, because rule 68(3) of the Rules provides for the right to cross-examine witnesses, there is *ipso facto* no serious risk of negatively affecting the rights of the accused. The right to examine witnesses is enshrined in article 67(1)(e) of the Statute and the fact that rule 68(3) of the Rules restates this right does not compensate for the fact that the witness does not provide his or her incriminating testimony under oath in the presence of the accused and the judges.

See also No. ICC-02/11-01/15-722-Anx, Trial Chamber I, Dissenting Opinion of Judge Henderson, 13 October 2016, paras. 3-7.

A Trial Chamber may take good trial management into account when making a determination under rule 68(3) of the Rules of Procedure and Evidence.

The factors referred to in the *Bemba* OA5 OA6 Judgment are not requirements but, rather, factors that may be considered in assessing whether the introduction of prior recorded testimony under rule 68(3) of the Rules is prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally.

The Appeals Chamber considers that, in their assessment of indicia of reliability under rule 68(2)(b)(i) of the Rules of Procedure and Evidence, Trial Chambers are not obliged to consider factors beyond formal requirements. This is because an assessment of '*indicia of reliability*' under rule 68(2)(b)(i) of the Rules of Procedure and Evidence can be more cursory in nature so that, even if some factors, such as the witness's competence to testify about the facts, the internal consistency of the statement and potential inconsistencies with other evidence in the record, are not taken into account during this assessment, they may still be considered when assessing the probative value of the evidence.

[…]

The Appeals Chamber also notes that, although the amendment to rule 68 of the Rules in 2013 did not substantially alter the wording of rule 68(3) of the Rules, the reasoning behind the amendment explained that it intended to reduce the length of proceedings before the Court and streamline the presentation of evidence and considered these to be the principal reasons for the adoption of the amendment. In the resolution adopting the proposed amendment, the Assembly of States Parties recalled "*the need to conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court* […]".

The Appeals Chamber finds that the fact that it did not refer in the relevant part of its previous judgment to the need for expeditiousness is not decisive. The factors set out by the Appeals Chamber in that judgment were in a non-exhaustive list that may be considered in assessing whether the introduction of prior recorded testimony is prejudicial to or inconsistent with the rights of the accused or the fairness of the trial more generally (see further below). It is also not surprising to conclude that expeditiousness is a factor relevant to the implementation of rule 68(3) of the Rules, since its use in principle aims at reducing the amount of time devoted to hearing oral testimony in court.

In principle, therefore, the Appeals Chamber can find no error in the Trial Chamber taking good trial management into account in its decision-making under rule 68(3) of the Rules. However, the requirements set out in that provision must also be observed and the introduction of the prior recorded testimony in question must not be prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial more generally (see article 67 of the Statute and rule 68(1) of the Rules). In this regard, the Appeals Chamber notes that it stated in the *Bemba* OA5 OA6 Judgment, albeit in a slightly different context, that "[w]*hile expeditiousness is an important component of a fair trial, it cannot justify a deviation from statutory requirements*".

[…]

The Appeals Chamber notes that, in considering article 69(2) of the Statute in that judgment, the Appeals Chamber held that "[t]*he direct import of the first sentence* […] *is that witnesses must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality*". It went on to state that, "[n]*evertheless, in-court personal testimony is not the exclusive mode by which a Chamber may receive witness testimony*". In relation to the second sentence of article 69(2) of the Statute, the Appeals Chamber held that "*a Chamber has the discretion to receive the testimony of a witness by means other than in-court personal testimony, as long as this does not violate the Statute and accords with the Rules of Procedure and Evidence*". It further stated that "[t]*he most relevant provision* [in respect of the introduction of documents or written transcripts] *in the Rules of Procedure and Evidence is rule 68*" but that it is subject to the strict conditions set out in the provision. The Appeals Chamber held that, "[i]*n deviating from the general requirement of in-court personal testimony and receiving into evidence any prior recorded witness testimony, a Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally*", citing to the last sentences of articles 68(5) and 69(2) of the Statute. It stated:

> *In the view of the Appeals Chamber, this requires a cautious assessment. The Trial Chamber may, for example, take into account, a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.*

The Appeals Chamber noted the difference between confirmation of charges proceedings and proceedings at trial and, with respect to the latter, stated that "*the Trial Chamber must respect article 69(2)*" and "[w]*itness statements may only be introduced under rule 68 of the Rules of Procedure and Evidence if the strict conditions of that rule are met*". It found "*that the decision of the Trial Chamber* [in that case] *to admit all prior recorded statements without a cautious item-by-item analysis was incompatible with article 69(2) of the Statute and with rule 68 of the Rules*".

[…]

The Appeals Chamber notes that no significant amendment was made to rule 68(3) of the Rules, while the aforementioned factors referred to in the *Bemba* OA 5 OA 6 Judgment were specifically inserted into the new rule 68(2)(b) of the Rules. In the Appeals Chamber's view, this implies that greater discretion was intended to be accorded in respect of the application of rule 68(3) of the Rules.

In addition, the Appeals Chamber notes that the factors referred to in the *Bemba* OA5 OA6 Judgment are not requirements but, rather, factors that may be considered in assessing whether the introduction of prior recorded testimony under rule 68(3) of the Rules is prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally. In this respect, the Appeals Chamber, in its previous judgment, did not per se preclude the introduction of prior recorded testimony under rule 68(3) of the Rules which related to issues that were materially in dispute, central to core issues of the case or were uncorroborated. The factors listed were factors that the Appeals Chamber stated may be taken into account by a Chamber in reaching its decision. While no one factor is, as a matter of principle, determinative, the Appeals Chamber considers, in particular, that where statements relate to issues that are materially in dispute, central to core issues of the case or are uncorroborated, a Chamber must be extra vigilant that introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally. This must be the Chamber's overriding concern, in particular bearing in mind "*the general requirement of in-court personal testimony*". Whether such testimony may be introduced under rule 68(3) of the Rules will, therefore, depend upon the circumstances of the case. In addition, the extent to which such testimony may be introduced solely in writing, will be a matter for the discretion of a Chamber, bearing in mind that rule 68(3) of the Rules provides for the possibility for the Prosecutor, the defence and the Chamber to have the opportunity to examine the witness during the proceedings – this de facto includes the calling party, which in the instant case is the Prosecutor. What is most important in this exercise is, as was stated by the Appeals Chamber, that the Chamber carries out a "*cautious item-by-item analysis*". This assessment, sufficiently reasoned and explained, should be made on a case-by-case basis where the factors to be considered may vary per case and per witness.

[…]

As stated above, the Appeals Chamber considers that, in order to make its determination under rule 68(3) of the Rules, a Trial Chamber inevitably needs, and indeed must, carry out an individual assessment of the evidence sought to be introduced under that provision based on the circumstances of each case. In carrying out this individual assessment, the Trial Chamber must also necessarily analyse the '*importance*' of each witness statement in light of the charges and the evidence already presented or intended to be presented before it. In the Appeals Chamber's view, this assessment is part and parcel of the analysis a Chamber must undertake in determining whether it is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally, to allow for the evidence in question to be introduced under rule 68(3) of the Rules. Indeed, the more important the Chamber assesses the evidence in question to be, the more likely it is that the Chamber will have to reject any application under this provision. Therefore, making such an assessment cannot per se be contrary to rule 68.

In the Appeals Chamber's view, rule 68(3) of the Rules requires a Chamber to carry out a preliminary assessment of the evidence in question in order to determine whether its introduction under that provision is appropriate. This assessment, which includes an analysis of the relative importance of the evidence, is without prejudice to the weight that the Trial Chamber will ultimately attach to a witness's evidence, which indeed can only be determined once the Trial Chamber has heard all of the evidence.

The Appeals Chamber recalls that the third factor referred to in the *Bemba* OA5 OA6 Judgment that a Chamber may take into consideration in determining potential prejudice to an accused is "*whether the evidence is corroborative of other evidence*". The Appeals Chamber is of the view that the existence of corroborating evidence may go towards ensuring that the introduction of the evidence in question is not prejudicial to or inconsistent with the rights of the accused. Nevertheless, it again recalls that corroboration is not a requirement for the introduction of statements under rule 68(3) of the Rules and, as such, [the Defence]'s argument in this regard must be dismissed.

[…] The introduction of prior recorded testimony pursuant to rule 68 of the Rules does not relieve the Prosecutor of her obligation to prove the charges beyond reasonable doubt in order to obtain a conviction; this obligation is clearly set out in article 66 of the Statute. The Prosecutor still needs to prove the guilt of the accused person beyond reasonable doubt on the basis of the evidence presented, be it oral or written.

[....]

The Trial Chamber stated that "*the principle of orality is not absolute and that the Statute explicitly envisages exceptions to be provided by the Rules*". This is indeed the case, as was acknowledged by the Appeals Chamber in the *Bemba* OA5 OA6 Judgment. Exceptions to the principle of orality are explicitly provided for in article 69(2) of the Statute and the introduction of prior recorded testimony in accordance with rule 68(3) of the Rules is one of them. As has been stressed previously in this judgment, however, introduction of prior recorded testimony under this provision is subject to the strict conditions set out in that rule in addition to the overriding factor that it must not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally.

The Appeals Chamber considers that respect for the principle of orality cannot be reduced to a purely mathematical calculation of the percentage of witnesses providing their entire evidence orally. However, in reaching a decision under rule 68(3) of the Rules, the principle set out in article 69(2) of the Statute must always be borne in mind.

The Appeals Chamber further recalls that, pursuant to rule 68(3) of the Rules, "*the Prosecutor, the defence and the Chamber have the opportunity to examine the witness*" in Court. In this sense, the testimony cannot be considered to be exclusively written as it is not necessarily intended to replace oral testimony but, rather, complement it. As the ICTY Appeals Chamber has held, in such a case, "[t]*he testimony of the witness constitutes a mixture of oral and written evidence*".

The Appeals Chamber does not consider that the necessary implication of the Trial Chamber's reasoning is that the evidence of all crime-base witnesses may be introduced under rule 68(3) of the Rules. Indeed, as previously stated, a careful case-by-case assessment is required in each instance. While the nature of certain crime-base evidence may make it more conducive to introduction under rule 68(3) of the Rules, no general conclusions can be drawn on that basis alone. Many of the reasons warranting the hearing of testimony *viva voce* in its entirety, may apply equally to crime-base evidence. Such reasons may include issues regarding the credibility of the witness, whether direct oral testimony is likely to provide additional information or whether the witness in question is considered to be a key witness.

The Trial Chamber was cognisant of the requirements set out in rule 68(1) and (3) of the Rules and the Appeals Chamber can discern no error in the Trial Chamber's consideration of good trial management and the relative importance of the witnesses as relevant factors in its decision. The fact that the evidence in question may have been materially in dispute, related to facts central to the case and may have been uncorroborated does not necessarily require rejection of the Prosecutor's request.

[…]

The Appeals Chamber notes that the wording of rule 68(2)(b) of the Rules, as set out above, does not provide any indication as to the factors that a Trial Chamber may or should consider in deciding whether prior recorded testimony "*has sufficient indicia of reliability*". It simply cites this factor as one which the Chamber shall consider. Rules 68(2)(c) and (d) of the Rules also refer to indicia of reliability. Rule 68(2)(c)(i) of the Rules reads:

> *Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability.*

Rule 68(2)(d)(i) of the Rules provides:

> *Prior recorded testimony falling under sub-rule (d) may only be introduced if the Chamber is satisfied that* […] *the prior recorded testimony has sufficient indicia of reliability.*

The Appeals Chamber notes that, while under rule 68(2)(b)(i) of the Rules, the provision under consideration in this appeal, indicia of reliability is a factor that must be considered by the Trial Chamber but does not necessarily need to be present, rules 68(2)(c)(i) and (d)(i) of the Rules establish it as a requirement for the introduction of prior recorded testimony.

As explained above, rule 68(2) of the Rules is a provision which was adopted by the Assembly of States Parties on 27 November 2013 in accordance with the proposal submitted by the Working Group on Lessons Learnt. In its report, the Working Group on Lessons Learnt indicated that rule 68(2)(b) of the Rules corresponds to rule 92 *bis* of the ICTY Rules. Unlike rule 68(2)(b) of the Rules, rule 92 *bis* of the ICTY Rules does not require a Chamber to consider reliability. However, it lists it as one possible factor against the admission of prior recorded testimony, stating that such factors "*include but are not limited to whether:* […] *(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value*". No further information can be found in the provision as to how a party would demonstrate unreliability.

The Appeals Chamber notes that, in its report, the Working Group on Lessons Learnt stated that "[t]*he fifth factor, which calls for consideration of whether the prior recorded testimony* 'has sufficient indicia of reliability', *is without prejudice to the fact that judges of the Court have discretion to determine the probative value of evidence in accordance with article 69(4) of the Statute*".

The Appeals Chamber has not yet had the opportunity to consider rule 68(2) of the Rules. However, Trial Chambers of this Court have applied it. In this regard, the Appeals Chamber notes that the concept of '*indicia of reliability*' provided for under rules 68(2)(b), (c) and (d) of the Rules has been applied in different ways. While one Trial Chamber has limited itself to considering formal criteria only, others have taken into consideration factors beyond formal criteria.

While bearing in mind the non-binding nature of the jurisprudence of the ICTY, the Appeals Chamber finds it useful to consider the relevant jurisprudence of that tribunal given that the wording of rule 68(2)(b) of the Rules is based on the wording of rule 92 *bis* of the ICTY Rules. At the outset, the Appeals Chamber notes that rule 92 *bis* of the ICTY Rules provides for the "*Admission of Written Statements and Transcripts in Lieu of Oral Testimony*". As the ICTY Appeals Chamber has explained, although rule 92 *bis* of the ICTY Rules is lex specialis to rule 89(C) of the ICTY Rules, "*the general propositions which are implicit in Rule 89(C) – that evidence is admissible only if it is relevant and that it is relevant only if it has probative value – remain applicable to Rule 92 bis*". It follows that, when considering the possible application of rule 92 *bis* of the ICTY Rules, Trial Chambers at the ICTY also analyse whether the general requirements for admission of evidence, including probative value, are met. It is noted that the ICTY has interpreted reliability under rule 92 *bis* of the ICTY Rules in different ways. While on some occasions, Trial Chambers have considered only formal requirements, others have also taken into account factors beyond formal criteria.

The jurisprudence of the Court and of the ICTY shows that, in assessing whether a statement bears '*sufficient indicia of reliability*', Trial Chambers retain discretion to consider those factors that may be relevant to its determination on a case-by-case basis.

The Appeals Chamber considers that, in their assessment of indicia of reliability under rule 68(2)(b)(i) of the Rules, Trial Chambers are not obliged to consider factors beyond formal requirements. This is because an assessment of '*indicia of reliability*' under rule 68(2)(b)(i) of the Rules can be more cursory in nature so that, even if some factors, such as the witness's competence to testify about the facts, the internal consistency of the statement and potential inconsistencies with other evidence in the record, are not taken into account during this assessment, they may still be considered when assessing the probative value of the evidence. The Appeals Chamber underlines, however, that, in looking at '*indicia of reliability*' for the purposes of rule 68(2)(b)(i) of the Rules, Trial Chambers are not precluded from looking beyond formal requirements if they consider it to be appropriate in a particular case.

[…]

The Appeals Chamber notes that in relation to hearsay evidence, the ICTY Appeals Chamber has held that whether the hearsay is "*first-hand*" or more removed, are also relevant to the probative value of the evidence. The fact that the evidence is hearsay does not necessarily deprive it of its probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence.

See No. ICC-02/11-01/15-744 OA8, Appeals Chamber, 1 November 2016, paras. 1-3, 60-62, 65-66, 68-69, 71-74, 77-81, 97-104, and 106.

The Chamber decided in the Decision of 28 January 2016 that, as a matter of principle, it would postpone making any rulings on the relevance or admissibility of evidence submitted by the parties until the end of the trial. Accordingly, the Chamber will not entertain general submissions made by the parties seemingly seeking reconsideration of its previous decision. Evidence must not be evaluated in isolation, but as a whole, in the system of evidence presented in a case. Unless a preliminary evaluation of the evidence is required (such as under Article 69(7) of the Statute or Rule 68 of the Rules), the Chamber will not as a general rule decide on its relevance or admissibility before having heard the entirety of the case.

Similarly, the Chamber has not attached consequence to the general arguments presented by the Defence teams as regards the submission of evidence other than through a witness. Recently, the Appeals Chamber reiterated that the principle of orality is not absolute. Bearing in mind good trial management, the Chamber, in its Directions on the Conduct of Proceedings, unambiguously encouraged the parties to introduce documentary evidence whenever feasible and indicated that they may do so without producing it by or through a witness. As noted by the Appeals Chamber, the "*expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial*". Accordingly, the introduction of evidence other than through witnesses must not be regarded as extraordinary, but as common practice that this Chamber has urged the parties to use in order to expedite proceedings, insofar as this is not prejudicial to the rights of the accused. It has done so bearing in mind that the introduction of evidence other than oral testimony may ultimately reduce the amount of time devoted to hearing evidence in court.

Although the Chamber may take the discretionary decision to rule on relevance or admissibility of evidence at the time of its submission, there is no indication in the present instance that this is necessary or appropriate. The evidence introduced should be evaluated as a whole. Although some items of evidence may currently not clearly appear relevant or lack *prima facie* probative value, the situation may change as other evidence is presented to the Chamber. Thus, making an authoritative affirmative finding or excluding some items of evidence at this stage of the proceedings would be premature, as it would be based on a partial knowledge of the evidence in the case. As previously stated, this would prevent the Chamber from assessing freely all evidence submitted.

See No. ICC-02/11-01/15-733, Trial Chamber I, 9 December 2016, paras. 33-35.

The statutory framework is deliberately flexible and permits the Trial Chamber to defer its consideration on the relevance and admissibility of evidence submitted by a party until the deliberations stage of the proceedings. However, in doing so, and as cautioned by the Appeals Chamber, "*the Trial Chamber must balance its discretion to defer consideration of* [relevance and admissibility] *with its obligations under* [Article 64(2) of the Statute]". In other words, even though postponing ruling on relevance and admissibility is not prohibited per se, it is only permissible if doing so does not affect the fairness and expeditiousness of the proceedings. Whether or not this is the case largely depends on how the trial is actually being conducted. The more the presentation of evidence is driven by the parties, the greater need there is for the Chamber to intervene to ensure that only relevant and probative evidence is submitted on the record.

[…]

Despite the postponement of the Chamber's admissibility rulings until the deliberation stage of the trial, under Rule 64(1) of the Rules, the parties themselves are nevertheless expected to fully litigate any issues relating to relevance or admissibility at the time of submission of the evidence to the Chamber. This can only be done in a meaningful manner if the party opposing the admission is sufficiently informed about the purpose for which the tendering party intends to introduce the evidence. This is why the Chamber, under paragraph 44 of the Amended and supplemented directions on the conduct of proceedings ('Directions'), specifically requires that the introduction of any item of documentary evidence be accompanied by "*succinct information*" on the relevance and probative value (including authenticity) of the item. This direction is intended to provide a safeguard for the party opposing the submission of evidence through a bar table motion, as it allows the party to be better placed to make informed responses on admissibility. It also imposes a level of rigour and discipline on the submitting party that ensures that what is submitted for the Chamber's consideration, meets a minimum threshold of relevance and reliability.

[…]

As I explained in a previous decision regarding the procedural framework of this trial, these proceedings are essentially party driven. Notwithstanding the Chamber's own power to call for the submission of evidence, in practice it has been the Office of the Prosecutor who decided which witnesses to call and which documents it wished to submit. Both the Defence and the Chamber are therefore placed in a reactive position. As far as the Defence are concerned, they are required by rule 64(1) of the Rules to raise any issues relating to relevance or admissibility at the time an item of evidence is first submitted to the Chamber. The normal expectation in such a scenario is that the court immediately informs the parties of whether it considers the evidence as relevant and admissible or not.

Why is this so? Simply put, ruling an item inadmissible for lack of relevance or probative value saves everyone valuable time by keeping the case record focused on the charges. More importantly, it allows the Defence to know which evidence they should focus their limited time and resources on. Further, it also assists the Defence in knowing what the state of the evidence is at the close of the Prosecutor's case and whether and what may be considered important to respond to. This is a fundamental right of the accused. One that cannot be restricted, let alone abrogated by blanket appeals to expeditiousness and efficiency or the flexible nature of the Court's procedural framework.

[…]

Because no admissibility decision has been taken by the Chamber, the Prosecution will not know until the Chamber's Article 74 decision whether those items, which the Chamber initially allowed to be submitted, are subsequently ruled inadmissible for their failure to fulfil the minimum indicia of reliability or authenticity, though the parties and the Chamber are cognizant of such failure at this stage due to the Majority Decision. It may well be that the Prosecution does not have a right to be told of any flaws in their case, which may affect their ability to satisfy their burden of proof. However, this does not prevent Chambers from ruling on the relevance and admissibility of evidence. Such rulings are not intended to provide the Prosecution with assistance or guidance about how well they are doing in terms of meeting their burden of proof of proving the guilt of the accused but rather to provide clarity as to which items of evidence the Chamber deems worthwhile taking into consideration for the final judgment.

The approach taken by the Majority would appear to consider, without any appropriate filter, anything and everything that the parties submit to them. Such an approach disincentives rigour in the process of submission, which in a party driven trial, may result in the evidential record being flooded with evidence of dubious or no relevance. This is in no one's interest, and is certainly not conducive to efficiency, especially in a case of such considerable scale and magnitude. Indeed, the Chamber has an obligation to ensure that the case record remains focused and free from evidence that lacks relevance or probative value.

As for the much touted efficiency gains, given that these requests have been litigated in writing, it is questionable whether deferring the admissibility decisions has actually resulted in any meaningful efficiency as identified by the Majority and, if so, how. By its decision to defer admissibility, the Trial Chamber has simply postponed a decision that it is still required to make. The Appeals Chamber has stated unequivocally that, irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings. Even if the Chamber waits till the end, it will still have to revisit these submissions that were made by the parties for this decision. There is nothing to suggest that the time required for deliberating and ruling on the relevance and admissibility of the individual documents during Article 74 deliberations will be any less than if we ruled now. In my respectful view, this decision amounts to little more than an instance of '*kicking the can down the road*' at the expense of both the Prosecution and the Defence.

See No. ICC-02/11-01/15-733-AnxI, Trial Chamber I, Dissenting Opinion of Judge Henderson, 13 December 2016, paras. 2, 5, 8-9, and 14-16.

Depending on the circumstances, the authenticity of a given document may be further elucidated by other evidence, be it evidence specifically adduced for that purpose or evidence otherwise submitted in the course of the trial.

Rule 64(1) of the Rules requires, in principle, the non-tendering party to raise any objections to the relevance or admissibility of evidence at the time of its submission to the Chamber. The second sentence of rule 64(1) of the Rules specifically provides that "[e]*xceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known*". If additional information is adduced on the relevance or admissibility of documents previously submitted, the Defence will not be precluded from making additional submissions pursuant to rule 64(1) of the Rules.

[…]

The appeals at hand concern the exercise of the Trial Chamber's discretion to rule on the admissibility of documentary evidence.

The Appeals Chamber recalls that it will not interfere with a Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.

With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.

With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Chamber's findings. The Appeals Chamber will not interfere with the factual findings of a first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts. Regarding the misappreciation of facts, the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the

facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.

[…]

The Appeals Chamber recalls that it has previously held that, by virtue of articles 64(9)(a) and 69(4) of the Statute, Trial Chambers have discretion to "*rule or not on relevance or admissibility when evidence is submitted to the Chamber*". Nevertheless, the Appeals Chamber has cautioned that a Trial Chamber must always ensure that the trial "*is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses*". In particular, if a party raises an issue regarding the relevance or admissibility of evidence, the Trial Chamber must balance its discretion to defer consideration of this issue with its obligations under [article 64(2) of the Statute].

[…]

It is clear that, depending on the circumstances, the authenticity of a given document may be further elucidated by other evidence, be it evidence specifically adduced for that purpose or evidence otherwise submitted in the course of the trial.

[…]

The Appeals Chamber does not consider that the Trial Chamber's decision not to rule on the admissibility of the items in respect of which it had concerns as to their authenticity is incompatible with the right of the non-tendering party to raise objections, as stipulated in rule 64(1)of the Rules. This provision requires, in principle, the non-tendering party to raise any objections to the relevance or admissibility of evidence at the time of its submission to the Chamber. It is precisely for that reason that the Amended Directions require the tendering party to submit sufficient information; thus, the right to challenge the evidence is preserved as well as the discretion of the Trial Chamber to rule on admissibility.

Nevertheless, if the tendering party fails to submit sufficient information, this does not mean that the non-tendering parties' right to raise objections is violated. The second sentence of rule 64(1) of the Rules specifically provides that "[e]*xceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known*". […] In the view of the Appeals Chamber, in situations where the tendering party failed to provide sufficient information at the time of submission of the evidence, this provision allows for the protection of the rights of the non-tendering parties and must be applied accordingly. In other words, the Appeals Chamber would expect the Trial Chamber to accept the existence of "*exceptional circumstances*" in terms of rule 64(1) of the Rules more easily if the original submissions of the tendering party were deficient. What is important is that the parties are able to raise issues on relevance or admissibility in light of all the information, either at the time of submission or subsequently within the confines of rule 64(1) of the Rules.

The Appeals Chamber also finds unpersuasive [the Defence]'s contention that the Defence are prevented from making a "*founded objection*" at the time of submission as "*it will not know whether there will be additional arguments on this issue*". Rule 64(1) of the rules requires the non-tendering party to found its issues on relevance or admissibility on the information known and available at the time of submission regardless of whether additional information would be forthcoming.

Thus, while it is generally desirable and in the interests of fairness and efficiency for all known information regarding relevance or admissibility to accompany the submission of evidence, ruling on admissibility in such circumstances is not the "*only remedy consistent with* [a Trial Chamber's] *obligations under article 64(2) of the Statute*" if a party fails to do so.

[…]

As noted above, evidence adduced and discussed during trial may impact on the assessment of evidence already submitted, including in respect of its authenticity. When viewed in this light, the Trial Chamber did not err by not restricting the Prosecutor's opportunity to submit further information relating to the authenticity of the documents tendered.

See No. ICC-02/11-01/15-955 OA12, Appeals Chamber, 24 July 2017, paras. 1-2, 11-14, 52, 55-58, and 62.

It might be objected that one should not be too demanding in terms of the quality and precision of the evidence in relation to the contextual elements. However, if, as in this case, the Prosecution attempts to prove the existence of an attack against a civilian population on the basis of a limited number of small-scale incidents that took place at different locations over a relatively extended period of time, it is imperative that the evidence for each incident meets the requisite standard of proof.

I note, in this regard, that the majority casually – and without providing any real reasons – find that the exhibits tendered by the Victims' Legal Representative "*would contribute to the determination of the truth*". As explained, I have serious doubts that this is indeed the case. This is significant, because victims do not have a statutory right to submit evidence in trial proceedings. As the Appeals Chamber has held, victims may, in the context of presenting their views and concerns in accordance with article 68(3) of the Statute, "*bring to the Trial Chamber evidence that the Trial Chamber may consider necessary for the determination of the truth*". However, in order for

such evidence to be submitted, the Trial Chamber must "*exercise its discretionary powers under the second sentence of article 69(3) of the Statute*". In other words, this requires an affirmative finding by the Trial Chamber, which would, in my view involve, as an absolute minimum, a finding that the evidence suggested by the victims passes the admissibility test.

See No. ICC-02/11-01/15-1188-Anx, Trial Chamber I, Dissenting Opinion of Judge Henderson, 19 June 2018, paras. 7-9.

3. Witnesses

3.1. Witnesses in general

The Chamber may put questions to a witness before, during or after the witness is examined by the Defence or the Prosecutor, as the case may be.

See No. ICC-01/04-01/06-678, Pre-Trial Chamber I (Single Judge), 7 November 2006, p. 7.

If witnesses are housed or travel together, regardless of the extent to which their accounts overlap, they should be warned with appropriate regularity that they must not discuss their impending evidence with each other (or anyone else). If a party considers that witnesses with overlapping accounts should be kept apart, they have an obligation to inform the VWU as to which witnesses fall into this category. The presumption will be that the VWU is to implement this separation unless it can show the party or, in case of dispute, the Chamber good reason as to why it is either unnecessary or impractical.

[…]

It is likely that a number of the witnesses in this case will also participate as victims. In all probability this group will have the benefit of legal representation, and in most – if not all – instances it will be appropriate for their advisers to be supplied with copies of their witness statements and any related materials, which as a result will be available to the witnesses they represent. It would be unfair on those witnesses who are without representatives to deny them, as a matter of course, a similar opportunity of gaining access to this documentation. However, the argument is well-founded that some witnesses could be put significantly at risk if they retain their statements because if this material is seen by a third party, it clearly establishes a level of cooperation with the ICC generally, and with the prosecution in particular. Since there is no established "*right*" to be given or to keep copies of this documentation within the Rome Statute framework, once again fact sensitive decisions will need to be made, which take into account the circumstances of each witness. If there are grounds for concluding, because of an individual's vulnerability (particularly if the witness is unrepresented), that supplying copies would place him or her in danger, they should be withheld.

In these circumstances, steps should be taken to allow the witness the opportunity to look at, but not retain copies of, the statement(s) and any relevant documents if a request is made. On the other hand, if their personal circumstances are such that no identifiable danger exists (*e.g.* with witnesses living in areas of stability within the DRC or abroad) then, on request, copies should be provided. In these circumstances, the witness should be given an explanation of the need to protect themselves by ensuring that the written materials remain private. Where a witness does not have legal representation, a copy of his or her statement should be provided by the relevant party by way of the VWU. The witnesses should not bring any of this material into court; if it becomes necessary for reference to be made to one or more of the statements or related material, then (subject to objection) copies can be made available during the witness's testimony.

See No. ICC-01/04-01/06-1351, Trial Chamber I, 23 May 2008, paras. 32-35.

The provision of information, *inter partes*, of a non-public nature is governed by the twin requirements of necessity and witness-security. When the distribution of information to the public has been limited – for whatever reason – it is appropriate that its use should be carefully regulated so as to ensure compliance with those requirements.

Once information has been characterised as being non-public (whether it is characterised as "*confidential*", "*ex parte*" or "*under seal*"), its use should be limited to the strict purposes of the disclosure and members of the public should only be shown those parts of it that are truly necessary for the preparation and presentation of the case of a party or participant. With regard to permitting contact between a party or a participant and the witnesses to be called by the other party or a participant, the overarching consideration is the consent of the witness. Once a witness consents, unless the Chamber rules otherwise, contact should be facilitated. If the party or participant who intends to call a witness objects to the meeting, it shall raise the matter with the Chamber by way of an application in advance of the interview. The party or participant calling the witness is entitled to have a representative present during the interview, unless – again, following an application – the Chamber rules otherwise.

The Chamber hereby orders that whenever information, which is characterised in manner more restrictive than "*public*", is provided to a party or participant by another party or participant, the party or participant receiving the material should make its content available to the public only to the extent that is truly necessary for the preparation of its case. Whenever information protected by this principle is made available to a member of the

public, the party making the disclosure must keep a detailed record thereof. The information shall be made available to only identified members of the public, who shall give a written and signed undertaking not to reproduce or publicise its content, in whole or in part, or to show or disclose it to any other person. If written material covered by this principle is made available to a member of the public, it must be returned to the party or participant who disclosed it once that person no longer needs it for case-preparation. For the purposes of this order, the term "*public*" includes all persons, governments, organisations, entities, associations and groups. It does not include the judges of the Court, members of the Registry, the Prosecutor and his representatives, the Accused, the defence team, victims granted the right to participate in the proceedings and their Legal Representatives.

Any member of the legal teams of the prosecution, the defence or a participating victim shall, upon no longer being part of those teams, return all "*non-public*" material in their possession to the relevant person within the team.

A party or a participant wishing to interview a witness whom the other party or a participant intends to call, shall first inform the party or the participant of the proposal, setting out the suggested time and location of the interview. If the witness consents, the party or participant shall make such contact through the Victims and Witnesses Unit, which shall make the necessary arrangements for the interview. A representative of the Victims and Witnesses Unit shall be present during the interview and the party or participant intending to call the witness may also attend the interview, unless the Chamber has, on an application, ruled otherwise.

> See No. ICC-01/04-01/06-1372, Trial Chamber I, 3 June 2008, paras. 8-14. See also No. ICC-01/04-01/06-2192-Red, Trial Chamber I, 20 January 2010, paras. 47-48.

Although there may be important practical differences that the Chamber must take into account between the positions of the prosecution and the defence in the implementation of this rule (as discussed below), there are no sustainable reasons in principle for distinguishing between prosecution and defence witnesses for these purposes: neither party "*owns*" the witnesses it intends to call, and there are many reasons why a discussion with some individuals in advance of their testimony may assist in the efficient management of the proceedings, and assist the Chamber in its determination of the truth. For instance, irrelevant lines of questioning may be identified and discarded; lines of further enquiry may become clear, enabling their timely investigation prior to the witness giving evidence; and the opposing party may decide that the witness's evidence is not in dispute and, in consequence, it may be possible to agree his or her statement, along with any relevant documents (thereby obviating the need to bring the witness to court). Important considerations of this kind apply whoever is calling the witness, such as to justify, in principle, discussions in advance of a witness's evidence, so long as the latter consents. Additionally, it is open to the party calling the witness to raise any discrete objections with the Chamber.

Although the position in principle is, therefore, relatively easy to explain, its application in practice will be infinitely various. Whenever a request of this kind is made, and if the witness consents to the meeting, the party calling him or her will have to consider the circumstances of the proposed meeting and whether there are any significant adverse security implications; it will have to ensure there are no identifiable issues of concern as regards the individual witness's mental or emotional stability; and it will need to assess the resource implications of the proposal. It follows there must be close liaison between the party calling the witness, the party seeking the meeting and the VWU, and, on occasion, it may be necessary to ask the Chamber to rule on specific requests, or aspects of them.

In the present circumstances, the prosecution must identify each of the witnesses it seeks to meet; it must suggest in writing dates, times and locations for the interviews; and for those witnesses who agree to participate, contact is to be established through the VWU. A representative of the VWU shall be present during each interview, and the defence may attend (unless the Chamber has ruled otherwise). Depending on the financial implications of any requests that are made, the Registry may have to consider providing additional funding to enable the defence to attend each of these interviews. It is conceivable that this exercise may involve unexpected and significant additional cost on the part of the defence, which is solely due to a request from the prosecution and which the defence is obliged to meet. Particular difficulties that cannot be resolved through sensible discussions, along with any objections to proposed meetings with particular witnesses, are to be raised with the Chamber (save in situations of emergency) by way of written applications.

> See No. ICC-01/04-01/06-2192-Red, Trial Chamber I, 20 January 2010, paras. 49-52.

The Appeals Chamber finds that the possibility for the Victims to testify on matters including the role of the accused in the crimes charged against them, grounded on the Trial Chamber's authority to request evidence necessary for the determination of the truth, is not *per se* inconsistent with the rights of the accused and the concept of a fair trial. However, and as the Appeals Chamber held previously in the *Lubanga* case, the Trial Chamber must ensure, on a case-by-case basis, that the right of the accused to a fair trial is respected. Therefore, whether a victim will be requested to testify on matters relating to the conduct of the accused will depend on the Trial Chamber's assessment of whether such testimony: (i) affects the victim's personal interests; (ii) is relevant to the issues of the case; (iii) contributes to the determination of the truth; and (iv) whether the

testimony would be consistent with the rights of the accused, and in particular the right to have adequate time and facilities to prepare his defence (article 67(1)(b) of the Statute), and a fair and impartial trial.

See No. ICC-01/04-01/07-2288 OA11, Appeals Chamber, 16 July 2010, para. 114.

When the Prosecutor records the questioning of a person in accordance with rule 112 of the Rules of Procedure and Evidence, he or she is not required to create an additional record of the person's statements under rule 111 of the Rules of Procedure and Evidence.

The audio- or video-record of the questioning of a person in accordance with rule 112 of the Rules of Procedure and Evidence and the transcript thereof are records of statements that are potentially subject to disclosure pursuant to rule 76 of the Rules of Procedure and Evidence where the Prosecutor intends to call the person to testify as a witness.

See No. ICC-02/05-03/09-295 OA2, Appeals Chamber, 17 February 2012, paras. 1-2.

Both parties and the Legal Representative(s) of victims, if any, are all equally under the obligation, albeit based on distinct provisions, to respect witnesses in the course of their investigations. Moreover, it is of importance to recall that the same obligation applies in respect of the parties' own witnesses.

With regard to the issue as to whether the category of Public should encompass victims' teams who have been allowed to participate in the proceedings and their Legal Representatives, the Single Judge recalls that, to date, no victims have been admitted as participants at the pre-trial stage and, consequently, no decision has yet been taken as to their rights.

See No. ICC-02/11-01/11-49, Pre-Trial Chamber I (Single Judge), 6 March 2012, paras. 27-28.

At the outset, the Chamber stresses that although not specifically regulated in the Court's legal framework, prior contact between a party or a participant and the witnesses to be called by the other party or a participant has been consistently permitted in the jurisprudence of the Court. With regard to the purpose of this contact, Trial Chamber I stated that it "*may assist in the efficient management of the proceedings, and assist the Chamber in its determination of the truth*". In addition, Trial Chamber I noted that through holding such meetings, "*irrelevant lines of questioning may be identified and discarded* [and] *lines of further enquiry may become clear, enabling their timely investigation prior to the witness giving evidence*".

See No. ICC-01/05-01/08-2293, Trial Chamber III, 4 September 2012, paras. 7-8. See also No. ICC-01/04-01/06-2192-Red, Trial Chamber I, 20 January 2010, paras. 47-52; and No. ICC-01/04-01/06-1372, Trial Chamber I, 3 June 2008, para. 11.

This Chamber has also permitted contact between one party and the witnesses called to testify by another party, adopting the practice followed by Trial Chamber II, subject to the clarification that the consent of the witness is to be sought by the party or participant calling the witness.

See No. ICC-01/05-01/08-2293, Trial Chamber III, 4 September 2012, para. 13. See also No. ICC-01/05-01/08-813-Red, Trial Chamber III, 20 July 2010, para. 68.

The Chamber considers it sufficient to stress the obligation incumbent on the calling party not to try to influence the witness's decision in any way when seeking consent. More specifically, the information to be provided by the calling party to the witness should be limited to explaining: (i) the nature of the interview; (ii) the fact that such interviews are accepted common practice; and (iii) the requirement of the witness's consent. The calling party should raise no other issues with the witness that could affect his or her decision to consent or not to participate in such a meeting. That notwithstanding, should the interviewing party have any concerns regarding the manner in which the calling party has sought the witness's consent, it may raise such concerns in the course of the witness's testimony in court the Chamber considers that once consent has been given, the calling party, the interviewing party and the VWU, where necessary, should liaise and take all reasonable steps to facilitate contact between the interviewing party and the witness. In cases where the calling party objects to a meeting, the Chamber encourages the parties to liaise in order to find a mutually agreeable solution and, in case agreement cannot be reached, the parties should promptly raise the matter with the Chamber. The presence of the calling party at interviews between the witnesses it has called and another party is not a pre requisite to the conduct of such interviews.

That notwithstanding, the Chamber recognises the calling party's interest in being present at such meetings and stresses that its presence should be facilitated and ensured where possible. In cases where the attendance of the calling party is not possible or practicable, for any reason, the parties may agree for the meeting to take place once the witness has arrived in The Hague. Where agreement to meet in The Hague is not reached, the interviewing party must either arrange for the calling party to be able to observe any interview by video-link, or, at a minimum, provide the calling party with a copy of an audio/video recording of the full interview as soon as practicable after the meeting is concluded. The Chamber considers that caution must be exercised by all parties and participants during their investigations in relation to all witnesses of other parties and participants. The Chamber further notes that the calling party is entitled to "*be present*" or to "*attend*" such interviews, not

to participate in them. It is therefore not for the representative of the calling party to actively participate or intervene in such meetings.

> See No. ICC-01/05-01/08-2293, Trial Chamber III, 4 September 2012, paras. 16-17, 19-20, 24-26, 28-29, and 32.

The Chamber notes that the parties and participants do not "*own*" the witnesses they call to testify. Indeed, the witnesses do not "*belong*" to parties or participants witnesses "*are the property neither of the Prosecution nor of the Defence and* […] *should therefore not be considered as witnesses of either party, but as witnesses of the Court*".

> See No. ICC-01/05-01/08-2293, Trial Chamber III, 4 September 2012, para. 23. See also No. ICC-01/04-01/06-2192-Red, Trial Chamber I, 20 January 2010, para. 49.

The Chamber notes, at the outset, that some aspects of the parties' contacts with the opposing party's witnesses were regulated at the pre-trial stage. Among the conditions restricting the suspects' liberty, Pre-Trial Chamber II included a prohibition of direct or indirect contacts with "*any person who is or is believed to be a victim or a witness of the crimes for which the suspects have been summoned*". Subsequently, the Pre-Trial Chamber set out the modalities of the defence's contacts with persons willing to give their account of the alleged facts as follows:

- such a person must give his or her consent voluntarily and knowingly, and the parties to the proceedings are prohibited from trying to influence that person's decision as to whether or not to agree to be contacted by the defence;
- before such contact takes place, the defence is ordered to communicate the name and necessary contact details to the VWU, which is to advise the defence, within two weeks, on whether such contact may put the person at risk.

In its decision of 12 May 2011, Pre-Trial Chamber II further decided that the above modalities only applied to the defence and not to the Office of the Prosecutor, which has "*significant duties as well as powers, related to the protection of victims and witnesses, which the Defence does not have*".

The Chamber takes note of the relevant jurisprudence of other Chambers. The Chamber will follow the principles enunciated by those Chambers, subject to modifications resulting from (i) the acceptance of some of the suggestions of the parties, the Legal Representative of victims and the VWU in the present case, and (ii) the specific circumstances of the present case.

The Chamber considers that the final protocol, included as an Annex to the present decision, fully supersedes the procedure which applied to the defence at the pre-trial stage. The Chamber points out that it has given considerable weight to the parties' agreements on various issues, notwithstanding that the Chamber is not bound by such agreements. Where there is no disagreement, the Chamber has generally accepted the proposed procedure in the form presented in the Draft Protocol, at times with minor modifications. As regards issues on which agreement was not reached and more than one option was presented to the Chamber, it chose the option which, in its view, best accords with the Chamber's sense of justice, having particular regard to the above-mentioned principles.

The Chamber finds these definitions of witness proposed by the Defences too broad in that they may extend to persons who are unlikely to ever be called as witnesses, for example persons whom a party met, as part of its investigation, for the sole purpose of obtaining information on the whereabouts of a person whom the party intends to call as a witness. The prosecution's definition of a witness will therefore be adopted for the purposes of the final protocol, with some modification. For the same reasons, the Chamber will not include in the final protocol the definition of the "*calling party*" proposed by the defence.

The Chamber notes that the Draft Protocol contains proposed provisions pertaining to victims. As the Chamber has not yet ruled on the system of processing applications for participation and modalities of participation of victims, the final protocol will not deal with matters relating to victims. The relevant parts of the Draft Protocol shall apply until the Chamber rules on these matters.

The Chamber does not agree with the proposal of the prosecution that no notification of the other party should be required when the witness herself takes the initiative of contacting the non-calling party. Such an exception is not consistent with the general requirement of transparency in parties' contacts with witnesses whom the opposing party intends to call. The Chamber is therefore of the view that witnesses who contact the non-calling party should be dealt with in the same way as where a party contacts the other party's witness, including the requirement of obtaining the witness' consent.

> See No. ICC-01/09-01/11-449, Trial Chamber V, 24 August 2012, paras. 3-8; and No. ICC-01/09-02/11-469, Trial Chamber V, 24 August 2012, paras. 3-8.

Although the accused has the right to remain silent since the onus of proof rests with the prosecution, the accused also has the right to submit evidence relevant to the case (article 69(3) of the Statute), including the right to "*obtain the attendance and examination of witnesses on his or her behalf*" (article 67(1)(e) of the Statute and rule 140(2)(a) of the Rules). That notwithstanding, no organ of the Court can be held responsible for securing the appearance of the witnesses called to testify by a party, be it the prosecution or the defence. The party wishing to submit evidence by way of a witness's oral testimony is the sole entity responsible for contacting the

witness concerned, obtaining his or her voluntary consent to testify and proposing to the Chamber a feasible schedule for the appearance of witnesses, taking into account all necessary arrangements that may need to be implemented – with the support of the Registry and the Victims and Witnesses Unit ("VWU") – in order to enable the witnesses to appear to testify before the Court.

In accordance with the Court's legal framework, the VWU's role is to support the parties, and to arrange, in consultation with them, the logistics for the appearance of witnesses called to testify at trial. The functions and responsibilities of the VWU in relation to witnesses are, *inter alia*, detailed under article 43(6) of the statute, rules 16(2) 17(2) 18(b) and (c) of the rules and further specified in regulations 79 to 96 of the Regulations of the Registry. In addition, in the present case, the Unified Protocol on Witness Familiarisation and several decisions of the Chamber specify the VWU's obligations in relation to the facilitation of witnesses' testimony. Nowhere in these provisions are the VWU or the Registry made responsible for ensuring the appearance of witnesses. It should be stressed that the Court has no power to compel witnesses to testify. Only witnesses who have appeared before the Court may be compelled to provide testimony in accordance with rule 65 of the rules. In addition, pursuant to article 93(1)(e) of the statute, the Court may request cooperation from States only to facilitate the "*voluntary*" appearance of witnesses.

Accordingly, in the view of the Chamber, the calling party – be it the prosecution or the defence – bears principal responsibility for the presentation of its evidence and should take all reasonable measures to minimise gaps in the proceedings.

See No. ICC-01/05-01/08-2500, Trial Chamber III, 6 February 2013, paras. 23-25.

As a result of the failure of the consultations to produce an alternative solution, the Court remains in the following position. On the one hand, since the witnesses have finished their testimony and their security in case of return to the DRC is guaranteed, the Court has no reason any more to maintain custody over the witnesses and should return them. On the other hand, the Court's obligation to return the witnesses has been suspended pending the final outcome of their asylum claim. Given this situation, and the unwillingness of both the Host State and the DRC to find a constructive solution to this unprecedented situation, the Court has so far had no choice but to keep the three detained witnesses in its custody, in accordance with article 93(7) of the Statute.

[…]

The Chamber once again stresses that the Court has maintained custody over the Detained Witnesses until now because the existence of the asylum claims, combined with the intransigent position of the Host State, has engendered an extraordinary situation in which the Court has had very little room for manoeuvre. However, the Chamber reiterates its previous finding that the processing of the witnesses' asylum applications must not cause the unreasonable extension of their detention under article 93(7) of the Statute and that, in light of, *inter alia*, article 21(3) of the Statute, the Court cannot contemplate keeping them in its custody indefinitely.

See No. ICC-01/04-01/07-3352, Trial Chamber II, 8 February 2013, paras. 15 and 22.

The Chamber is of the view that a protocol for the handling of confidential information is necessary at this stage of the proceedings. It will assist the prosecution to discharge its disclosure obligations under article 67(2) of the Statute and rule 77 of the Rules, without unduly exposing the witnesses to security risks. Pursuant to articles 64(6)(e) and 68(1) of the Statute the Chamber has the obligation to provide for the protection of witnesses and it shall take appropriate measures to protect their safety, physical and psychological well-being, dignity and privacy. The Protocol, as approved by the Chamber, offers a degree of protection whilst allowing for meaningful investigations.

With regard to contacts by the defence of witnesses to be relied upon by the prosecution, the Chamber notes the defence's argument that such contacts have already taken place without any difficulty and in the absence of a protocol. However, considering the difficulty to obtain the consent of any witnesses to be interviewed by the opposing party, the Chamber deems it necessary to regulate any further contacts between a party and witnesses of the opposing party. In addition, regulations of contacts as foreseen in the Protocol in the Annex will apply not only to the prosecution witnesses but also to witnesses the defence intends to rely on. Therefore, as set out in the Prosecution Protocol and in line with the jurisprudence of the Court, provisions on regulations of such contacts have been included.

In the view of the Chamber, the Protocol does not deviate from the standing practice of the parties regarding the disclosure of confidential information and the interviewing of witnesses of a party by the opposing party. It will apply throughout the proceedings and for witnesses of either party from the date of notification of the present Decision.

In addition, the Chamber has considered whether a protocol on the handling of confidential information and the regulation of contacts of a party with witnesses for investigation purposes should apply, at this stage, to victims who have been authorised to participate in the case.

The Chamber finds that the Protocol as adopted in the present Decision concerns only one aspect of the broader victims' right to participate, namely the access by the victims and their common legal representatives to confidential information during interviews of dual status individuals.

[…]

The Chamber first underlines that the procedure to contact a witness for investigation purposes concern only witnesses to be called at trial. Second, the Chamber notes that both parties agree on the general principle that an interview with a witness of the opposing party requires the witness's consent. In addition to the parties' proposals, the Chamber specifies that once consent has been given, the calling party, the interviewing party and the VWU, where necessary, should liaise and take all reasonable steps to facilitate contact between the interviewing party and the witness. The Chamber considers that contact of a party's witness should therefore be made through the said party and where appropriate with the VWU facilitation.

[…]

The Chamber agrees with the Victims and Witnesses Unit ("VWU") and the prosecution that witnesses or individuals who may be interviewed by a party for the preparation of its case, may perceive themselves to be at very high risk by realising that investigative activities relating to them are conducted in the field. While this perception does not always correspond with the objective level of risk, it may still cause difficulties in the management of expectations and may ultimately have an effect on the willingness of those affected to cooperate with the Court.

[…]

The Chamber considers providing this information to witnesses and any individuals to be interviewed by a party as being part of good practices.

However, the Chamber specifies that, as examples of good practices, witnesses and the individuals to be interviewed by a party may be informed from the outset that their involvement with the Court may also entail being the subject of investigations for the purpose of preparation and presentation of the opposing party's case. As the case may be, the parties carry the responsibility of ensuring that the persons concerned provide their informed written consent to their involvement with the Court. This consent may be provided before the provision of any witness statement. The parties bear a higher responsibility in this regard when their activities may involve vulnerable individuals. In the event the witness or the individual to be interviewed by a party is a minor (*i.e.* under the age of 18), the informed consent should also be provided by their legal guardian, if at all possible.

When informing witnesses and the individuals to be interviewed by a party, parties may, as a good practice, explain (i) the nature of the information to be revealed; (ii) to whom it may be revealed; (iii) the purpose for which the information will be disclosed; and (iv) the possible consequences for them. In order to be able to provide informed consent, the individual should be given enough time to be able to comprehend, retain and balance the information provided before arriving at a decision. If a party collects visual and/or non-textual material from a witness or an individual interviewed by a party, it may clarify explicitly how these materials may be disclosed. If any of the information provided above changes, the parties may endeavour to inform the witness or the individual concerned of such a change.

See No. ICC-02/05-03/09-451, Trial Chamber IV, 19 February 2013, paras. 13, 16-19, 30, 33, and 35-37.

As an initial matter, the Chamber observes that there is no longer any justification for the redactions at issue to be maintained vis-à-vis the Defence. The Chamber considers that although the Redaction Protocol provides for ongoing redactions to the contact information of "*other persons at risk as a result of the activities of the Court*", it is silent as to redactions to the contact information of witnesses. Nevertheless, given that the Protocol on the handling of confidential information and contacts with witnesses whom the opposing party intends to call makes clear that contacts with witnesses of another party should be facilitated by the calling party, and as there is no suggestion that the contact information of these five witnesses is relevant to any aspect of the present case, the Chamber authorises the Prosecution's request to disclose lesser redacted versions of the applications.

See No. ICC-01/09-02/11-710, Trial Chamber V, 2 April 2013, para. 4. See also, No. ICC-01/09-02/11-806, Trial Chamber V(b), 18 September 2013, para. 4.

Credibility is effectively challenged only where the witness proves either wholly unable to explain the inconsistency or unable to explain it convincingly. Hence, it would have been highly questionable that the credibility of the witness might have been properly challenged by counsel during the confirmation hearing in his absence.

Indeed, it is notable that the Pre-Trial Chamber had itself observed as follows: "[T]*he Chamber underlines that an oral testimony can have a high or low probative value in light of the Chamber's assessment,* inter alia *as a result of the questioning, of the witness' credibility, reliability, accuracy, trustworthiness and genuineness. The final determination on the probative value of the live testimony will thus depend on the Chamber's assessment on a case-by-case basis and in light of the evidence as a whole*".

For its part, the Appeals Chamber has noted that while the Pre-Trial Chamber may evaluate credibility of witnesses in the course of the charges confirmation process, "*the Pre-Trial Chamber's determinations will necessarily be presumptive, and it should take great care in finding that a witness is or is not credible*".

All this is not, of course, to say that the Pre-Trial Chamber would have properly found it wholly insignificant, in its appraisal of the evidence before it, that there might have existed a contradiction that was obvious on the face of two or more statements from the same witness. But, then, that might have been a concern that the Pre-Trial Chamber would have been free to resolve at the level of the particular factual point that the contradiction concerned, as a divisible matter that might or might not have affected the general credibility of the witness as regards other facts to which that particular witness would also have testified.

Indeed, the foregoing analysis is wholly consistent with the views correctly expressed by the Pre-Trial Chamber itself concerning the effect of inconsistencies:

The Chamber is aware of possible inconsistencies within one or amongst several pieces of evidence and considers that inconsistencies may have an impact on the probative value to be accorded to the evidence in question. However, inconsistencies do not lead to an automatic rejection of the particular piece of evidence and thus do not bar the Chamber from using it. The Chamber will assess whether potential inconsistencies cast doubt on the overall credibility and reliability of the evidence and, therefore, affect the probative value to be accorded to such evidence. The said assessment must be conducted with respect to the nature and degree of the individual inconsistency as well as to the specific issue to which the inconsistency pertains. In fact, inconsistencies in a piece of evidence might be so significant as to bar the Chamber from using it to prove a specific issue, but might prove immaterial with regard to another issue, which, accordingly, does not prevent the Chamber from using it regarding that issue.

[…]

The same considerations would also perturb the question whether the apparency of the particular contradiction at issue establishes an objective truth of lack of credibility of this particular witness, such as entirely nullifies all value out of his evidence as it was employed to support the decision to confirm the charges, in a manner that legitimises the claim of "*miscarriage of justice*". In this connection, one prosecutor is certainly entitled to take the position that it does; and, may, in the result, withdraw the witness – and provoke the manner of litigation here now engaged. But, that may not settle the objective question. For, a different prosecutor may have taken the opposite view and insisted on retaining the witness on the list and calling him to testify, even possibly treating him as a hostile witness, in light of the possible motives for asserting and retracting his presence at the meetings, as part of the entire narrative of the case; hence possibly avoiding the present interlocutory litigation. Hence, the objective truth of lack of credibility resulting from the contradiction may be an open question, after all. As such, it necessarily lacks the capacity of invalidating the decision to confirm the charges: as opposed to merely raising questions – even serious questions – about its validity. But those questions, however serious, will not amount to "*miscarriage of justice*" or "*grave injustice*", as long as the opportunity remains at the trial to expose the weakness of a prosecution case made vulnerable by those questions.

See Corrigendum of Concurring Separate Opinion of Judge Eboe-Osuji, No. ICC-01/09-02/11-728-Anx3-Corr2-Red, Trial Chamber V, 2 May 2013, paras. 69-73, and 75.

The Chamber considers that the addition of re-interview statements does not particularly burden the Defence. Rather, the re-interview statements put the Defence on notice of issues that may arise during the testimony of the witnesses concerned. The Chamber considers that disclosure of the statements to the Defence sufficiently in advance of the start of trial for it to have adequate time to prepare, is in the interests of justice. Therefore, the Chamber permits the addition of the re-interview statements to the List of Evidence.

See No. ICC-01/09-01/11-762, Trial Chamber V(a), 3 June 2013, para. 57.

The Chamber notes that under the terms of the Witness Preparation Protocol, the Legal Representative is not a "*calling party*" with respect to Witness 536-the calling party is the Prosecution. Therefore, the protocol does not on its terms comprehend the preparation for which the Legal Representative seeks authorisation.

Further, the Witness Preparation Protocol prohibits using witness preparation "*for the purpose of seeking new evidence or continuing the calling party's investigations*". However, in view of the Legal Representative's limited prior contact with the witness, it appears that the preparation for which he seeks authorisation may involve seeking evidence or conducting investigations. It thus seems that the requested meeting with Witness 536 would serve purposes other than witness preparation within the meaning of the Witness Preparation Protocol. The Chamber, however, notes that the Request was made in unusual circumstances, whereby Witness 536 is coming to the seat of the Court sooner than initially expected. Therefore, as meeting with this victim represented by the Legal Representative prior to her testimony as a witness would enable the Legal Representative to prepare a more meaningful and efficient examination, the Application should be granted.

The Witness Preparation Protocol provides for a number of safeguards, the purpose of which is to prevent prejudice to the accused. The Chamber is of the view that in the particular circumstances of the present case the Legal Representative should be allowed to meet the witness prior to her testimony, despite the limited time that remains to the commencement of that testimony. However, in order to ensure that such a meeting does not cause prejudice to the accused, the Legal Representative shall observe the provisions of the Witness Preparation Protocol as set out below. In view of the unusual circumstances and having regard to the questions the Legal Representative intends to ask to the witness, the Chamber exceptionally allows the Legal Representative to seek new evidence and conduct his investigations during his meeting with Witness 536. All other general

principles set out in the Witness Preparation Protocol are applicable. The provisions regarding "*Responsibility for conducting witness preparation*", "*Location*" and "*Timing*" are also applicable in so far as relevant. The Legal Representative will have to observe the requirements of record keeping. The provisions of the protocol which concern the "*Required and Permissible Conduct*" are applicable unless the conduct referred to in that section of the Witness Preparation Protocol is meant for the calling party only and the witness activities listed therein will have been completed by the Prosecution. All provisions related to the "*Prohibited Conduct*" shall apply.

Finally, as regards the obligation to disclose the information obtained during a preparation session which is subject to disclosure, the Chamber notes that the disclosure obligations at the Court are not generally applicable to the Legal Representative in the same way as they apply to the parties. For instance, in certain circumstances the Chamber may request the victims to submit incriminating evidence in the course of the trial, even though such evidence will not have been disclosed to the accused prior to the commencement of the trial. However, given the unusual circumstances in which the Legal Representative will be authorised to meet Witness 536 and, in particular, the short time that remains until that witness's testimony, the Chamber finds it appropriate to require the Legal Representative to disclose to the Prosecution and the Defence, before the commencement of the evidence of Witness 536, any new information that he obtains during the meeting with the witness.

See No. ICC-01/09-01/11-938, Trial Chamber V(a), 13 September 2013, paras. 8-14.

A. THE COMPETENCE OF THE ICC TRIAL CHAMBER TO SUBPOENA WITNESSES

(4) The Rome Statute

A starting point in the consideration of the intention of the States Parties in favour of an ICC Trial Chamber's possession of the power to subpoena witnesses begins with the import of article 4(1) of the Rome Statute, which, it may be recalled, provides as follows: "*The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes*". On the basis of the principle of implied powers as a settled general principle of international law, as discussed earlier, article 4(1) would be an ample basis to imply any reasonable power necessary for the effective discharge of the mandate of the ICC. The power to subpoena witnesses is clearly first among the powers necessary for the performance of ICC functions.

[…]

There is no doubt at all in the Chamber's view that when article 64(6)(b) says that the Chamber may "*require the attendance of witnesses*", the provision means that the Chamber may – as a compulsory measure – order or subpoena the appearance of witnesses.

[…]

B. THE GENERAL OBLIGATION OF STATES TO COMPEL WITNESS APPEARANCE AT THE REQUEST OF A TRIAL CHAMBER

[…]

It is noted from the outset that article 86 imposes upon States Parties a general obligation to "*cooperate fully*" with the Court in its "*prosecution*" of crimes within the jurisdiction of the Court. According to the provision: "*States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court*". The wording saying that full cooperation shall be rendered in accordance with the provisions of this Statute affords no refuge to non-cooperation, such as may result purportedly from any claim that the subject-matter of the request was not spelt out explicitly in the Statute. Cooperation in accordance with "*the provisions of this Statute*" fully comprises cooperation resulting from a reasonable construction of other "*provisions of this Statute*" - including (but not limited to) article 21 of the Rome Statute (that recognises the applicability of '*treaties and the principles and rules of international law*' as well as general principles derived from national law beyond the Rome Statute) and article 4 (that gives the Court "*such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purpose*").

[…]

This Chamber agrees with Trial Chambers IV and V(B) that any cooperation request to a State Party must satisfy the tripartite principles of (i) relevance, (ii) specificity and (iii) necessity. In evaluating necessity in the context of whether to issue summonses to witnesses, the Chamber will consider both whether: (i) the witness' anticipated testimony is potentially necessary for the determination of the truth (noting that the value of any witness's testimony in a case may not be prejudged by the judge ahead of that witness's testimony and its appropriate evaluation in due course) and (ii) a summons, as a compulsory measure, is necessary to obtain the testimony of the witness.

[…]

For the reasons above, the Chamber finds that: (i) it has the power to compel the testimony of witnesses; (ii) pursuant to article 93(1)(d) and (1) of the Statute, it can, by way of requests for cooperation, obligate Kenya both to serve summonses and to assist in compelling the attendance (before the Chamber) of the witnesses thus summonsed; (iii) there are no provisions in Kenyan domestic law that prohibit this kind of a cooperation

request; and, (iv) the Prosecution has justified the issuance of the summonses to compel the appearance of the Eight Witnesses.

See No. ICC-01/09-01/11-1274-Corr2, Trial Chamber V(a), 30 April 2014, paras. 94, 103, 181, and 193.

The Appeals Chamber notes that both counsel for [the Accused] and the Prosecutor have indicated that they intend to communicate with the witnesses prior to the commencement of their testimony.

With respect to communication between the parties and the witnesses, the Appeals Chamber notes that these proposed communications have been announced in filings that have been notified to both parties and no objections have been raised. Further, the Appeals Chamber notes that Trial Chamber I issued decisions in the course of the trial, authorising the Prosecutor to contact defence witnesses prior to their testimony. Thus, the Appeals Chamber considers that the request of the Prosecutor is in conformity with prior practice in this case. Therefore, the Appeals Chamber permits the parties to proceed in this respect as they have proposed.

See No. ICC-01/04-01/06-3083 A4 A5 A6, Appeals Chamber, 30 April 2014, paras. 18-19.

The Appeals Chamber finds that article 64(6)(b) of the Rome Statute gives Trial Chambers the power to compel a witness to appear before it, thereby creating a legal obligation for the individual concerned.

See No. ICC-01/09-01/11-1598 OA7 OA8, Appeals Chamber, 9 September 2014, para. 113.

3.2. Familiarisation of witnesses

In the view of the Chamber, there are several provisions of the Statute and Rules which, without being referred to as "*witness preparation*", "*witness familiarisation*" or "*witness proofing*", encompass the measures contained in paragraphs 16(i) to (vi) of the Prosecution Information in order to assistthe witness in the experience of giving oral evidence before the Court so asto prevent the witness from finding himself or herself in a disadvantageous position, or from being taken by surprise as a result of hisor her ignorance of the process of giving oral testimony before the Court.

Hence, the Chamber considers that those measures included in paragraph 16(i) to (vi) of the Prosecution Information are not only admissible in lightof the above-mentioned provisions of the Statute and the Rules, but aremandatory according to such provisions. Moreover, it is the view of theChamber that labelling this practice as "*witness proofing*" is not suitablefor the content of this practice, and that the expression "*witness familiarisation*" is more appropriate in this context.

See No. ICC-01/04-01/06-679, Pre-Trial Chamber I, 8 November 2006, paras. 20 and 23.

Pursuant to article 43(6) of the Rome Statute and rules 16 and 17 of the Rules of Procedure and Evidence, the Victims and Witnesses Unit is the competent section of the Court to carry out any witness familiarisation.

See No. ICC-01/04-01/06-679, Pre-Trial Chamber I, 8 November 2006, para. 24. See also No. ICC-01/04-01/06-1049, Trial Chamber I, 30 November 2007, para. 33, and No. ICC-01/04-01/07-1134, Trial Chamber II, 14 May 2009, para. 18.

The purpose of allowing a witness to reread his or her statements is to help to "*refresh*" potentially fallible memories. This is not an "*evidence-checking*" procedure, namely establishing whether or not the witness maintains the original account or whether he or she considers that changes to the written account need to be made. Any discrepancies of that kind should be ventilated in court rather than being discussed and recorded shortly before the witness gives evidence. The Chamber is more likely to identify the truth if the witness explains any reservations about the written account during their oral testimony, rather than by having his or her concerns interpreted and recorded by a representative of the VWU. Therefore, the submissions of the VWU are apposite to the extent that it suggests it should not be under any duty to monitor or record anything that is said by the witnesses during this familiarisation process, unless something exceptional occurs. Although representatives of the parties or participants may be present during the familiarisation process, including when the written records are read, they will be unable to speak with the witness about the evidence, and as a result they will only be permitted to watch the procedure. Similarly, if the witness is also a participating victim who is represented, with the witness's consent, the representative can be present during this process.

See No. ICC-01/04-01/06-1351, Trial Chamber I, 23 May 2008, paras. 38-39. See also No. ICC-01/04-01/07-1134, Trial Chamber II, 14 May 2009, para. 18, and No. ICC-01/05-01/08- 1016, Trial Chamber III, 18 Novemebr 2010, paras. 21-25.

Although it declines to adopt the Draft Witness Preparation Protocol, the Majority of the Chamber considers it useful that witnesses are taken through a process which familiarises them with the functioning of the Court prior to their testimony. It endorses the arrangements proposed by the VWU, a neutral unit within the Registry, to allow witnesses to become accustomed with the layout of the courtroom, the sequence of events during testimony, and the different responsibilities of the various participants at a hearing, a process which includes a courtesy meeting between the witnesses and counsel. However, as a ten-minute courtesy meeting between counsel and the witness may not provide the time needed to cope with the stress and uncertainty prior to their testimony, no firm time limit should be imposed on the witnesses. The Majority of the Chamber endorses the most flexible approach to witness familiarisation in order to accommodate the changing necessities of trial.

Concerning submissions regarding joint travel and accommodation of witnesses, the Chamber is persuaded by the jurisprudence of other trial chambers in the Court that have decided that, in determining the appropriate travel and accommodation arrangements for witnesses, '*fact-sensitive decisions should be made, bearing in mind particularly the personal circumstances of each witness and the areas of evidence they will be addressing*'. In view of its mandate and expertise, the Chamber considers that the VWU is best placed to take such decisions, and if possible, through prior consultation with the calling entity and having regard, in particular, to whether the witness is participating in the Court's protection programme, whether joint travel might compromise confidentiality in respect of the witness's interaction with the Court and the risk of '*contamination*' of the witness's evidence. The Chamber should only be seised in the event the WVU and the calling party or participant are genuinely unable to agree.

[…] The Chamber regards the submissions of the WVU, in particular those underlining that: (i) the familiarisation process falls within the mandate of the WVU, which is a neutral and impartial unit of the Registry; (ii) the assistance provided by the VWU to witnesses during the familiarisation process – as well as its specific expertise concerning vulnerable witnesses and the protection of at risk individuals – has proven to be beneficial to the witnesses and victims whose appearance has been facilitated by the VWU; and (iii) the adoption of the existing version of the protocol as submitted would ensure uniform practice and equal treatment of witnesses appearing before the Court. In light of this, and with regard to the protocol recently adopted in the *Ntaganda* case, the Chamber has implemented some additional amendments as necessary. Accordingly, the Chamber determines that the WVU shall facilitate the practice of witness familiarisation pursuant to the 'Protocol on Witness Familiarisation' attached in Annex to this decision.

See No. ICC-02/11-01/15-355, Trial Chamber I, 2 December 2015, paras. 25-27.

Once an accused voluntarily testifies under oath, he waives his right to remain silent and must answer all questions put to him or her. The Chamber thus confirms that the answers provided by the Accused may be used against him in the present case, and if he declines to respond to a permissible question, the Chamber may draw adverse inferences, as appropriate.

[…]

The Chamber recalls that, in its Conduct of Proceedings Decision, it held that '[w]*itness testimony should, as far as possible, be given in public*' and that the use of private session is, in principle, largely resorted to as a measure to ensure the effectiveness of protective measures, and that the need to use private session shall be decided upon on a case-by-case basis. The Chamber considers that there is no compelling reason to depart from this approach in relation to the testimony of the Accused, and will thus: (i) adjudicate any request to move into private session during the course of his testimony; and (ii) take any further measures it considers necessary on the publicity of the proceedings.

See No. ICC-01/04-02/06-1945, Trial Chamber VI, 8 June 2017, paras. 24 and 30.

3.3. Witness Proofing

No general principle of law could provide legal basis for the practice of witness proofing (*i.e.* the preparation of witnesses by parties for testimony). On the contrary, if any general principle of law were to be derived from the national laws of the legal systems of the world on this particular matter, it would be the duty of the Prosecution to refrain from undertaking the practice of witness proofing.

See No. ICC-01/04-01/06-679, Pre-Trial Chamber I, 8 November 2006, para. 42. See also No. ICC-01/04-01/06-1049, Trial Chamber I, 30 November 2007, para. 36.

A visit to the courtroom and a "*walk through*" of the particular features the witness will encounter during their testimony is necessary, partly to provide as comfortable an environment as possible for the witness and partly to allow for the efficient presentation of their evidence. Particular attention should be paid to any children who are called as witnesses to ensure that their psychological well-being is considered as a matter of paramount importance, pursuant to article 68 of the Statute and rule 88 of the Rules.

[…]

Since the party which intends to call a particular witness is likely to have greater insight into the background and particular facets of the witness, which may assist the Victims and Witnesses Unit in discharging their role during the witness familiarisation process. The Victims and Witnesses Unit shall work in consultation with such a party in order to undertake the practice of witness familiarisation in the most appropriate way.

[…]

The Trial Chamber considers then that even though the practice of "*witness proofing*" is accepted to an extent in two legal systems [England and Wales], both of which are founded upon common law traditions, this does not provide a sufficient basis for any conclusion that a general principle based on established practice of national legal systems exists. The Chamber observes in particular that whilst the accepted practice allows the witness to read again his past statement prior to giving evidence, it permits neither substantive conversations between

the prosecution or the defence and a witness nor any type of question and answer session to take place prior to the witness giving evidence.

[…]

In this respect, the Trial Chamber observes that the Statute moves away from the procedural regime of the *ad hoc* tribunals, introducing additional and novel elements to aid the process of establishing the truth and that, therefore, the procedure of preparation of witnesses before trial is not easily transferable into the system of law created by the ICC Statute and Rules. While acknowledging the importance of considering the practice and jurisprudence at the *ad hoc* Tribunals, the Chamber is not persuaded that the application of *ad hoc* procedures, in the context of preparation of witnesses for trial, is appropriate.

[…]

The Trial Chamber considers that allowing a witness to read his past statements will aid the efficient presentation of the evidence and help the Trial Chamber to establish the truth. Witnesses may well have given their original statements a year or more in advance of their in-court testimony. The Trial Chamber is aware that it can be difficult to remember events in their exact detail and the order in which they occurred, particularly when those events were traumatic. Thus, greater efficiency may be achieved by providing past statements to a witness in advance to assist that witness with his recollection. Overall, this process will clarify for the witness events that occurred some time previously.

However, with regard to any discussion on the topics to be dealt with in court or any exhibits which may be shown to a witness in court, the Trial Chamber is not convinced that either greater efficiency or the establishment of the truth will be achieved by these measures. Rather, it is the opinion of the Chamber that this could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony. While the Trial Chamber notes the prosecution's undertaking that it will take all steps to limit any pre-trial rehearsal during a "*proofing session*", it is not persuaded that this is practically achievable. A rehearsed witness may not provide the entirety or the true extent of his memory or knowledge of a subject, and the Trial Chamber would wish to hear the totality of an individual's recollection.

Finally, the Trial Chamber is of the opinion that the preparation of witness testimony by parties prior to trial may diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness. The spontaneous nature of testimony can be of paramount importance to the Court's ability to find the truth, and the Trial Chamber is not willing to lose such an important element in the proceedings. The pro-active role of judges under the Statute and Rules will help to ensure that witnesses are not "*revictimized*" by their testimony, whilst also preventing any improper influence being applied to the witness.

See No. ICC-01/04-01/06-1049, Trial Chamber I, 30 November 2007, paras. 31-32, 34, 41-42, 45, and 50-52.

I consider that any ruling on witness proofing should be made after a careful review of the circumstances prevailing in each case before the Court. I agree with both Pre-Trial Chamber I and Trial Chamber I that the Rome Statute is silent on the issue of witness proofing. I would however, base my argument on article 64(2) and (3)(a), to be read in accordance with article 21(1)(a), rather than with article 21(1)(c), on which the abovementioned decisions base their conclusions. While noting that the *ad hoc* Tribunals' jurisprudence is not in any way binding upon this Court, I am of the opinion that the drafters of the ICC Statute intended the judges of the Court to benefit from the same procedural flexibility as enjoyed by the ICTY and ICTR, demonstrated by the language of article 64 of the Statute. Therefore, I believe that this provision is the proper legal basis to provide the Court with the necessary adaptability to create a system of its own.

For the purposes of the present Opinion, witness proofing refers to a meeting between a witness and the party calling the witness for the purpose of substantive preparation of the witness's testimony. It effectively consists of confirming with the witness as to whether his/her statement is accurate and complete, presuming that the witness already has been given the opportunity to review his/her statement during the familiarisation process, and going through the evidence and relevant exhibits. It may also include a question and answer session, but should not be a rehearsal of the questioning that is to take place during the in-court session. "*Rehearsing*", "*practicing*", "*coaching*" or any intentional or unintentional contamination of the evidence is therefore not included in the definition.

It is only after carefully balancing the merits and drawbacks of proofing and implementing various safeguards that many jurisdictions allow or even encouragewitness proofing. I believe that, in order to facilitate a fair and expeditious trial, with full respect for the rights of the accused and due regard for the protection of victims and witnesses, this Chamber would have considerably benefited from witness proofing, considering the scale, complexity, geographical and temporal scope of the case and cultural and linguistic remoteness from the Court as well as the particular vulnerability of the witnesses. Potential risks associated to witness proofing could have been avoided had the Chamber imposed appropriate safeguards to counter them.

See No. ICC-01/05-01/08-1039, Partly Dissenting Opinion of Judge Osaki, 24 November 2010, paras. 7, 9, 12, 17, and 25.

Article 64 of the Statute grants the Chamber flexibility in managing the trial. Its formulation makes clear that the Statute is neither an exhaustive nor a rigid instrument, especially on purely procedural matters such as witness preparation, and that silence on a particular procedural issue does not necessarily imply that it is forbidden. Article 64 is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witnesses and victims.

While bearing in mind the different statutory provisions that apply to those tribunals and the non-binding nature of their jurisprudence upon this Court, the fact that the *ad hoc* tribunals interpreted silence in their statutory provisions to confer flexibility regarding witness preparation is meaningful when evaluating the silence in this Court's analogous statutory provisions. Notwithstanding the provisions of the ICTR Rules, the Chamber finds that articles 64(2) and (3)(a) provide ample authority for the Chamber to adopt a case-specific approach to the issue of witness preparation.

The Chamber agrees that permitting witnesses to re-engage with the facts underlying their testimony aids the process of human recollection, better enables witnesses to tell their stories accurately on the stand and can assist in ensuring that the testimony of a witness is structured and clear.

Given the complexity of this case and the large number of potential exhibits, the Chamber finds that showing witnesses potential exhibits ahead of time will assist in the efficient conduct of proceedings and will help to ensure that witnesses are in a position to give the Chamber the most complete version of their evidence.

In order to elicit focused and structured testimony and to ensure that all probative evidence is presented, it is also important that counsel, particularly counsel of the calling party, are well prepared and fully acquainted with each witness's evidence. A pre-testimony meeting is a last opportunity for the calling party to determine the most effective way to question its witnesses and which topics will elicit the most relevant and probative evidence during in-court examination.

It is for these reasons that witness preparation is either allowed or encouraged at the *ad hoc* tribunals and in various national jurisdictions where the principle of the primacy of orality is followed and where trials heavily rely on the examination of live witnesses through questioning by the parties. The chamber is of the view that, properly conducted, witness preparation is also likely to enhance the efficiency, fairness and expeditiousness of the present trial.

The Chamber is of the view that proper witness preparation also enhances the protection and well-being of witnesses, including by helping to reduce their stress and anxiety about testifying. Limiting pre-testimony contact between counsel and witnesses to the ten minute "*courtesy meeting*" provided for in the Familiarisation Protocol does not best serve the Chamber's article 68(1) duty to take appropriate measures to protect the well-being and dignity of witnesses. In most of the cases before this Court, witnesses' concerns extend beyond the individual protective measures accorded to them or the logistics of trial proceedings such as the layout of the courtroom and the role of the parties and participants. Their concerns may also result from anxiety about giving evidence in what may feel like a foreign and even hostile environment, a lack of confidence in their ability to communicate and articulate their experiences, and/or apprehension over the unfamiliar experience of being challenged during cross-examination. Witness preparation can help to ensure that witnesses fully understand what to expect during their time in court and that they are able to communicate any concerns to the calling party, including case specific questions which the Victims and Witnesses Unit ("VWU") would be unable to address. Particularly with regard to vulnerable witnesses, such prior preparation may help to reduce the psychological burdens of testimony, since those witnesses may face unique difficulties when being questioned repeatedly about traumatic events. Enabling interaction with counsel on the substantive aspects of their evidence may help to increase witnesses' confidence and may reduce their reluctance to reveal sensitive information on the stand. The role of the VWU, while of vital importance to the work of the Court, is not a substitute for the relationship between questioning counsel and the witness in this respect. The majority of the Chamber finds that in the present case, witness preparation is even more crucial as a means to protect the well-being of the witnesses.

The Chamber emphasises that witness preparation is to be used to review and clarify the witness's evidence. It is not meant to function as a substitute for thorough investigations, nor as a way to justify late disclosure. As has been raised by both parties, witness preparation may result in new information being revealed which was not included in a witness's statement. However, an advantage of witness preparation in this regard is that the new information may then be disclosed to the defence, pursuant to the Statute and the Rules, in advance of the witness's testimony. The Chamber is of the view that such pre-testimony disclosure is preferable to requiring the opposing party to react to new evidence only when the witness is on the stand. It will also help to ensure that the Chamber is not foreclosed from the possibility of hearing the entirety of a witness's evidence. At the same time, the use at trial of such additional evidence will be controlled by the Chamber in order to ensure that the defence is not prejudiced.

The Chamber is mindful of the concern that witness preparation could become an improper rehearsal of in-court testimony which may negatively affect the reliability of the evidence adduced at trial. However, the Chamber is not convinced that this possibility necessitates a ban on pre-testimony meetings between parties and the witnesses they are calling, nor is it persuaded that an individual application should be required each

time a party wishes to conduct a pre-testimony meeting with a witness. The Chamber considers that the risk can be adequately addressed by appropriate safeguards.

The Chamber is of the view that cross-examination, and questioning by the Chamber, concerning the extent of a witness's preparation can provide an important check against improper conduct.

The risk that witness preparation could be used to coach witnesses can also be mitigated by clear guidelines establishing permissible and prohibited conduct. The Chamber has included such guidelines in the witness preparation protocol appended as an Annex to this Decision. In addition, the Chamber notes that professional standards require counsel to act in good faith at all times and prohibit intentional interference with a witness's evidence.

As an additional safeguard, the Chamber also considers it worthwhile to require that preparation sessions be video recorded [and the] presence of a representative from the no-calling party or the VWU at the meeting is unwarranted at this stage.

See No. ICC-01/09-01/11-524, Trial Chamber V, 2 January 2013, paras. 27, 29, 32-35, 37, 42, and 44-48. See also No. ICC-01/09-02/11-588, Trial Chamber V, 3 January 2013, paras. 31, 33, 35-41, and 46-52.

The Protocol specifies that the calling party should endeavour to complete its witness preparation session at least 24 hours before the start of the witness' testimony. The Chamber is of the view that non-substantive contact between the calling party and the witness in the 24 hours preceding the witness' testimony, while not prohibited, should be appropriate in the circumstances and guided by due regard to professional responsibility. Further, from the time the witness begins to testify until the end of the witness' testimony, the calling party's contact with the witness is restricted to its examination in Court, unless otherwise authorised by the Chamber.

See No. ICC-01/09-01/11-676, Trial Chamber V, 11 April 2013, para. 3. See also No. ICC-01/09-02/11-716, Trial Chamber V, 11 April 2013, para. 4.

In the Witness Preparation Protocol, in addition to setting out a number of specific guidelines to be followed when conducting witness preparation, the Chamber held that "[w]*itness preparation is to be carried out in good faith and in keeping with the applicable standards of professional conduct and ethics*". Although the Code does not apply to Prosecution counsel, members of the Office of the Prosecutor are bound by the provisions in the Rome Statute, the Rules of Procedure and Evidence, the Regulations of the Court, the Prosecution Regulations, and the Staff Rules and Regulations relating to the relevant standards of professional conduct and ethics, including articles 42(2), 44, 54(1), 70 and 71, rule 6 of the rules, regulation 29 of the Regulations, regulation 17 of the Prosecution Regulations, rules 101.9(a) and 110.1 of the Staff Rules, articles I and X and regulations 1.1, 1.2, 1.3 and 1.4 of the Staff Regulations.

See No. ICC-01/09-02/11-747, Trial Chamber V(b), 31 May 2013, para. 10.

While being common practice in common law jurisdictions, the possibility of parties preparing witnesses for their testimony is not provided for explicitly in the Court's statutory framework and cannot be considered a general principle of law within the meaning of Article 21(1)(c) of the Statute. However, pursuant to Article 64 of the Statute, the Chamber shall ensure that the trial is fair and expeditious. The Chamber therefore has a significant degree of discretion concerning the procedures it adopts in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witnesses.

At the outset, the Majority of the Chamber emphasises that the principles of orality and immediacy that govern trial proceedings require that evidence is brought before the Chamber in a genuine and undistorted manner, leaving it for the Judges to assess any inconsistencies or additional evidence which are, in any case, better tested in the courtroom before the Chamber.

The Majority of the Chamber stresses the inherent risk of witness interference and the truth being distorted. It is also mindful of the potential emergence of new evidence during preparation sessions and ensuing delayed disclosure which could further delay proceedings. The mere exercise of taking a witness systematically through inconsistencies in their statements may lead to conduct which the Majority of the Chamber considers to be impermissible, such as rehearsal, practice and coaching. In addition, this practice could inhibit the entirety of the true extent of an account, and could '*diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness*'. These concerns are shared by the Majority of the Chamber.

The Majority of the Chamber recalls that Trial Chamber I, as previously constituted, and Trial Chamber III barred the calling party from preparing witnesses for testimony before the Chamber. The Majority of the Chamber also notes that Trial Chamber V-A and Trial Chamber VI both agreed to authorise witness preparation invoking the singularity and complexity of the given case, including the lapse of time since the occurrence of the alleged facts and the large number of potential exhibits. The Majority of the Chamber further considers the recent decision by Trial Chamber VII finding that, with regard to the case at hand, '*it is unnecessary and inappropriate to authorise witness preparation as defined* [by Trial Chamber V]'.

It being at the discretion of each Chamber to adopt the most appropriate procedures for the conduct of the trial, the Majority of the Chamber, mindful of the risks of witness preparation as outlined above, does not consider that the risks of witness preparation in this case are outweighed by any other factors (including the number

of proposed witnesses and exhibits and the time lapse between the allegations and the trial). Accordingly, the Majority of the Chamber decides that witness preparation, as a general rule, is not appropriate in this case.

See No. ICC-02/11-01/15-355, Trial Chamber I, dated 2 December 2015, paras. 15-19.

3.4. Questioning of witnesses

A party may question a witness it has not called about matters which go beyond the scope of the witness's initial evidence. Other relevant matters in terms of rule 140(2) (b) of the Rules of Procedure and Evidence may include trial issues, sentencing issues and reparation issues. The parties are under an obligation to put such part of their case as is relevant to the testimony of a witness, *inter alia*, to avoid recalling witnesses unnecessarily. Since witness questioning is a dynamic process, in principle, the parties are not under a legal obligation to disclose their lines of questions in advance. Nevertheless, the Chamber appreciates that exceptions may be necessary, particularly in order to protect traumatised or vulnerable witnesses.

See No. ICC-01/04-01/06-1140, Trial Chamber I, 29 January 2008, paras. 32-33. See also oral decision of Trial Chamber I, No. ICC-01/04-01/06-T-107-ENG, 26 January 2009, pp. 72-73.

The questioning of witnesses by the victims' Legal Representatives pursuant to rule 91(3) of the Rules is one example of the ways in which victims may participate in the proceedings. However, this rule only describes the procedure that the Legal Representatives are to follow in order to apply for leave to ask questions. In the absence of any relevant provisions in the Rome Statute framework, the manner of questioning falls to be determined by the Chamber.

The terms "*examination-in-chief*", "*cross-examination*" and "*re-examination*", which are used in common law and Romano Germanic legal systems, do not appear in the Statute. However, as set out in the procedural history above, these expressions have been used as terms of convenience by the parties and the participants when addressing the issue of how witnesses are to be questioned during their evidence before the Trial Chamber.

The purpose of the "*examination-in-chief*" is "*to adduce by the putting of proper questions relevant and admissible evidence which supports the contentions of the party who calls the witness*". It follows from this purpose that the manner of such questioning is neutral and that leading questions (*i.e.* questions framed in a manner suggestive of the answers required) are not appropriate. However, it needs to be stressed that there are undoubted exceptions to this approach, for instance when leading questions are not opposed. In contrast, the purpose of "*cross-examination*" is to raise relevant or pertinent questions on the matter at issue or to attack the credibility of the witness. In this context, it is legitimate that the manner of questioning differs, and that counsel are permitted to ask closed, leading or challenging questions, where appropriate

The victims' Legal Representatives, however, fall into a category that is distinct and separate from the parties, and in this regard a description of the manner of questioning by the victims' Legal Representatives that uses the concepts of "*examination in chief*", "*cross-examination*" and "*re-examination*" is not necessarily helpful. This particular aspect of the proceedings at trial – the manner of questioning by the victims' Legal Representatives – is an example of the novel nature of the Statute, which is not the product of either the Romano Germanic or the common law legal systems. As participants in the proceedings, rather than parties, the victims' Legal Representatives have a unique and separate role which calls for a bespoke approach to the manner in which they ask questions.

By article 66(2) of the Statute, one of the prosecution's primary functions is to prove the guilt of the accused: "*the onus is on the prosecutor to prove the guilt of the accused*". However, the Appeals Chamber has held that this responsibility on the part of the prosecution does not "*preclude the possibility for victims to lead evidence pertaining to the guilt of the accused*". It follows that, depending on the circumstances, the alleged guilt of the accused may be a subject that substantively affects the personal interests of the victims, and the Appeals Chamber has determined that the Trial Chamber may authorise the victims' Legal Representatives to question witnesses on subjects that relate to this issue:

In addition the Trial Chamber finds support for this approach in the provision under rule 91(3) of the Rules. Under this rule the Trial Chamber may authorise, upon request, the Legal Representatives of victims to question witnesses or to produce documents in the restricted manner ordered. The Appeals Chamber considers that it cannot be ruled out that such questions or documents may pertain to the guilt or innocence of the accused and may go towards challenging the admissibility or relevance of evidence in so far as it may affect their interests earlier identified and subject to the confines of their right to participate.

It follows that the victims' Legal Representatives may, for instance, question witnesses on areas relevant to the interests of the victims in order to clarify the details of their evidence and to elicit additional facts, notwithstanding its relevance to the guilt or innocence of the accused.

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*". 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.

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.

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.

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.

See No. ICC-01/04-01/06-2127, Trial Chamber I, 16 September 2009, paras. 21-30.

As a general instruction to all the parties appearing before it, the Chamber wishes to highlight the importance of asking succinct and precise questions, which are easily understandable by the person being questioned. Long and compounded questions are to be avoided.

A. Examination-in-chief / Interrogatoire en chef

1. Scope of questioning

As stated in rule 140(2)(a), a party submitting evidence by way of a witness, has the right to question that witness.

As a matter of principle, the Chamber will only allow questions that are clearly and directly

relevant to contested issues. To the extent that a party has provided an indication of the themes it proposes to raise with a certain witness, and subject to any instructions by the Chamber regarding this matter, that party will be expected to confine its examination-in- chief to those themes.

Questions concerning the historical background and/or contextual elements of the case should as much as possible be focused on such matters as to which there is disagreement between the parties.

To the extent possible, both Defence teams should attempt to coordinate the calling of witnesses. As a matter of principle, the Chamber will not allow the same witness to be called more than once, unless there are overriding reasons for doing so.

When both accused wish to call the same witness, they shall coordinate with each other so as to avoid having to call the witness more than once. The Chamber therefore expects that in such a case the witness will be called by both Defence teams jointly. They shall agree among themselves how to organise the examination-in-chief and re-examination. In principle, all questions on behalf of both accused are to be put during examination-in-chief. The Defence teams may agree to partition the examination-in-chief of a witness or assign one Defence team to conduct the entire questioning. When one Defence team conducts the examination-in-chief on behalf of both accused, the other Defence team shall not have the right to cross-examine the witness.

2. Mode of questioning

As a general rule, during examination-in-chief only neutral questions are allowed. The party calling the witness is therefore not allowed to ask leading or closed questions, unless they pertain to an issue that is not in controversy.

However, if a party declares that the witness it has called has become adverse and the Chamber allows that party to continue questioning the witness, it may be appropriate for that party to cross-examine the witness. In such case, cross-examination must be limited to issues raised during the initial part of the interrogation or contained in the witness' previous statements.

B. Cross-examination/Contre-interrogatoire

1. Scope of questioning

It is a general rule and principle of fairness that the party opposing the party calling a witness, has the right to question that witness by way of cross-examination, in accordance with rule 140(2)(b).

Cross-examination shall be limited to matters raised during examination-in-chief and matters affecting the credibility of the witness. In addition, where the witness is able to give evidence relevant to the case for the cross-examining party, it may ask questions about such matters, even if they were not raised during examination-in-chief.

To the extent that the case of the cross-examining party is in contradiction with the evidence given by the witness during examinationin-chief, that party shall state this clearly to the witness before putting questions on that topic.

The Chamber stresses that cross-examination must also contribute to the ascertainment of the truth and is not to be used to obfuscate or delay the fact-finding process. As a general measure of good practice and subject to further specific instructions by the Chamber, parties are encouraged to adhere to the following guidelines when cross-examining:

a) Questions must pertain to matters of fact that could reasonably be expected to be known to the witness. Unless the witness is called as an expert, parties may not ask witnesses to speculate or explain their opinion about facts not known to them.

b) Before putting questions about contextual elements and/or the historical context of the case, counsel must state the purpose behind the question and explain how the evidence sought is relevant to the confirmed charges.

c) Questions probing the credibility of the witness and the accuracy of his or her testimony are allowed, but must be limited to factors that could objectively influence reliability. When the witness has fully answered the question, the party cross-examining the witness will not be allowed to put further questions aimed at impeaching that answer without permission of the Chamber.

d) If a witness did not provide all his or her testimony orally during examination- in-chief because the testimony was introduced by way of prior recorded testimony under rule 68(b), the cross-examining party must limit questioning to:

   i. issues contained in the passages of the prior recorded testimony that were relied upon by the party calling the witness, or

   ii. matters that are relevant to its own case.

The Chamber will not allow cross-examination on matters raised in the previously recorded testimony that have not been tendered into evidence by the party calling the witness.

The two Defence teams may agree among themselves if they wish to change the order in which they will cross-examine the witness. To the extent possible, the Chamber encourages them to coordinate so that only one of the Defence teams conducts the cross-examination. However, if the both Defence teams insist on conducting their own cross-examination, the Chamber will be strict in prohibiting repetitive questions and limit the second cross- examination to questions that pertain to matters directly relevant exclusively to its client. Challenges to credibility or accuracy of the witness should, in principle, only be asked by the first Defence team cross-examining the witness.

2. Obligation to put all questions relevant to the case of the cross-examining party

Cross-examination allows the party not calling the witness to elicit all further relevant evidence as may be useful for the case of that party or necessary for the determination of the truth. It is therefore incumbent upon the cross-examining party to put all questions it may have for the witness during this occasion. In principle, the Chamber will not allow a party to re-call a witness if it already had the opportunity to cross-examine him or her.

3. Mode of questioning

a) Leading and closed questions allowed

The party cross-examining may ask leading and closed questions of a witness. The Chamber insists that cross-examination is conducted in a focused and professional manner. It will not allow unwarranted insinuations or questions that are concealed speeches.

b) Challenging questions allowed

It is permissible to challenge the credibility of a witness by way of challenging questions, but cross-examination must at all times remain civil and respectful to the witness. The Chamber will not allow parties to assault the dignity or exploit the vulnerability of witnesses during cross-examination.

c) Specific limitations for cross-examination by co-accused

As explained above, the Chamber expects that, as a general rule, parties who have not called a witness will put all questions pertaining to their case during cross-examination. This implies that when a witness called by one accused is subsequently cross-examined by the co-accused (who did not jointly call the witness), the latter Defence has the obligation to put all questions that are relevant to its case at that time. In principle, the cross-

examining co-accused will not be allowed to put leading or closed questions in relation to matters that are being raised for the first time, unless the witness is clearly adverse to the co-accused.

C. Re-examination / Interrogatoire supplémentaire

1. Scope of questioning

After cross-examination, the party who originally called the witness has the right to ask additional questions of the witness, but only in relation to matters that were raised for the first time during crossexamination, unless the Chamber exceptionally allows other questions.

2. Mode of questioning

The same rules that apply to examination-in-chief shall equally apply to re-examination.

D. Final questions by the Defence

According to rule 140(2)(d), the Defence has the right to be the last to examine a witness. This means that if a witness was not called by an accused, the latter shall have the right to ask additional questions of the witness after he or she was re-examined by the party calling him or her.

1. Scope of questioning

Final questions are limited to matters raised since the Defence last had the opportunity to question the witness. If the Defence does not exercise its right to cross-examine a particular witness, it also waives its right to ask final questions of that witness, unless new matters are raised by additional questions of the Chamber or the participants after the examination-in chief.

2. Mode of questioning

The same rules that apply to examination-in-chief shall equally apply to final questioning.

E. Questions by Victims' Legal Representatives

As a matter of general principle, questioning by the Legal Representatives on behalf of victims who participate in the proceedings must have as its main aim the ascertainment of the truth. The victims are not parties to the trial and certainly have no role to support the case of the Prosecution. Nevertheless, their participation may be an important factor in helping the Chamber to better understand the contentious issues of the case in light of their local knowledge and socio-cultural background.

The following rules apply to questioning by Victims' Legal Representatives of witnesses called by other parties, participants or the Chamber.

See No. ICC-01/04-01/07-1665-Corr, Trial Chamber II, 20 November 2009, paras. 60-83.

In addition, the report of the VWU recommends measures as regards the mode of questioning by counsel based on the needs and the capacity of the witness. The Chamber again supports the suggestions that counsel should try to use short, simple, open ended questions and should avoid asking embarrassing and/or unnecessarily intrusive or repetitive questions.

The order of questioning during the presentation of evidence by the Legal Representatives of victims will proceed as follows: firstly, the Legal Representative calling the witness will pose questions. Secondly, and since a written application has been filed and leave to ask questions will be granted by our oral decision to be issued immediately after this proposal, the other common Legal Representative will pose questions, as have been authorised by the Chamber. Thirdly, the Prosecution will question the witness, and lastly the Defence will be given the opportunity to question the witness.

See Oral Decision, No. ICC-01/05-01/08-T-220-ENG, Trial Chamber III, 1 May 2012, pp. 2-3.

If questioning is allowed by the Chamber it will be conducted by the OPCV acting on behalf of the common Legal Representative, except where the Chamber has authorised the common Legal Representative to appear in person. Questions put by the OPCV, on behalf of the common Legal Representative, shall be limited to issues relevant to the victims' interests. They shall not be repetitive of questions already asked by the calling party. It must be stressed in this context that the Common Legal Representative may not formulate any new allegations against the accused.

See No. ICC-01/09-01/11-460, Trial Chamber V, 3 October 2012, para. 75; and No. ICC-01/09-02/11-498, Trial Chamber V, 3 October 2012, para. 74.

Pursuant to articles 64(2), 64(3)(a) and 64(8)(b) of the Statute, the Chamber and its Presiding Judge have the duty to ensure and facilitate the fair and expeditious conduct of the proceedings and shall adopt such procedures and give directions as are necessary in this regard. By the same token, and in accordance with regulation 43 of the Regulations, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode of questioning witnesses so as to (i) make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth; and (ii) avoid delays and ensure the effective use of time. In addition, in accordance with article 67(1) of the Statute, the accused is entitled to a fair hearing conducted impartially, in full equality, with a number of minimum guarantees including, *inter*

alia: (i) "*to be tried without undue delay*", as enshrined in sub-paragraph (c); and (ii) "*to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her*", as guaranteed by sub-paragraph (e).

In terms of fairness and equality of arms, the Chamber notes that the practice of this Chamber and that of the Court as a whole has been consistent in relation to the mode of appearance of witnesses when authorised to provide testimony by means of video technology. For the accused's right to question the witnesses he has called "*under the same conditions*" as the witnesses brought against him to be upheld, it is not necessary for members of the defence team to be authorised to question the witness from the location of the video-link.

The Chamber notes that, on the basis of the submissions made by the Registry on the technical aspects of the video-link arrangements, the presence of counsel at the location of the video-link may delay the proceedings. In particular, as noted in the Registry's Report, the use of two language channels – for testimony and questioning – would require the Chamber to consider adopting flexible and probably shorter sitting hours, in order to disrupt to the least extent possible the functioning of the location of the video-link. In addition, one of the language channels would need to use a telephone line, with which the sound quality would be lower, which would not only be more difficult for the interpreters but which might also lead to the need for repetition and a slower pace of questioning. Given the Chamber's scheduling constraints shortened sitting hours and a slower presentation of testimony entailing a longer period of time for completing this witness's testimony, would not be desirable.

See No. ICC-01/05-01/08-2509, Trial Chamber III, 15 February 2013, paras. 16-18.

Restriction of the legal representatives of victims' questioning

The Chamber recalls its previous decisions on the victims' rights to participate in the proceedings in accordance with article 68(3) of the Statute and rule 91(3) of the Rules. These rights, as acknowledged by the Chamber and in accordance with the jurisprudence of the Court, include, *inter alia*, the possibility for the legal representatives to question witnesses, subject to the Chamber's leave. In relation to Witness D04-07, the Chamber granted the legal representatives' applications to question the witness.

The Chamber notes that the role of the legal representatives is not equivalent to that of the parties. However, where (i) the interests of the victims they represent are affected, (ii) they have made an application to exercise their right to participate by questioning a witness, and (iii) the application has been granted by the Chamber, the legal representatives may lead evidence pertaining to the guilt or innocence of the accused and challenge the testimony of witnesses.

Moreover, when the legal representatives present or challenge evidence they may do so for the purpose of providing the Chamber with "*all evidence that it considers necessary for the determination of the truth*". Indeed, in the present instance, the Chamber granted the legal representatives' applications to question Witness D04-07 "*to better understand through the witness*['s] *testimony whether the charged crimes were allegedly committed by Bozizé's troops*". Taking this into account, along with the jurisprudence referred to in the preceding paragraphs, it is clear that the legal representatives' questioning would have formed part of the Chamber's overall assessment of Witness D04-07's testimony, including its credibility and reliability, as part of the Chamber's determination of the truth at the end of the case.

As to the defence's submission that the remaining authorised questions which the legal representatives did not get the opportunity to ask had already been asked and answered, the Chamber considers this submission to be misconceived. In this regard, the Chamber concurs with the legal representatives and prosecution's submissions to the effect that it is either impossible or speculative to attempt to predict whether Witness D04-07 would have given the same answers to the legal representatives' questions as he had given to previous questions during his testimony.

Restriction of the Chamber's questioning

The Chamber stresses that its own questioning of witnesses may, *inter alia*, seek to clarify witnesses' testimony or as appropriate, challenge their credibility and reliability for the purpose of contributing to the determination of the truth. In this regard, the Chamber notes that it has been the common practice of this Chamber to put most of its questions to witnesses after the conclusion of the legal representatives' questioning. Due to the interruption of Witness D04-07's testimony, the Chamber was not afforded a full opportunity to question the witness. For the above reasons, the Chamber does not consider Witness D04-07's testimony to be "*complete*".

See No. ICC-01/05-01/08-2839, Trial Chamber III, 21 October 2013, paras. 11-15.

(h) Questioning by the CLR

The Court has already developed an effective approach to dealing with victims' requests to question witnesses, as outlined by Trial Chamber III:

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 writing. 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. 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.

The Chamber notes the provisions of rule 91(3) of the Rules, as well as the joint submissions of the parties on this issue, and adopts the following procedure in the present case. The CLR shall submit a written application sufficiently in advance and no later than seven days before the expected date of testimony. In addition to the criteria specified in footnote 29 above, the application shall include the areas of questioning and the questions to the extent possible, and a justification of how the questions impact the personal interests of the victims, and should enclose any list of relevant documents to be used during questioning. The parties will make their observations orally before the questioning by the CLR, unless a different time limit is set.

With regard to the mode of questioning of witnesses by the CLR, the Chamber notes the joint submissions of the parties, and concurs with the approach common to other Trial Chambers. To the extent that questioning is permitted, the CLR shall ask her questions only after the completion of the prosecution's questioning, save for the situation where the evidence has been brought to the Chamber by the participating victims and its submission has been requested by the Chamber pursuant to article 69(3) of the Statute. In this case, the CLR may ask her questions prior to those of the prosecution. In general, questioning by the CLR shall be conducted in a neutral manner, without the use of leading or closed questions, unless otherwise authorised by the Chamber.

See No. ICC-02/05-03/09-545, Trial Chamber IV, 20 March 2014, paras. 31-33.

[TRANSLATION] In accordance with its Decision on the conduct of the proceedings and after having knowledge of the questions that the Legal Representative wishes to ask, the Chamber sees no obstacles to the questioning of the witness by the Legal Representatives after the Prosecution has concluded its examination in chief and before the Defence starts its cross-examination. Indeed, it considers that the Legal representative has demonstrated the relevance of the questions he wishes to pose for the interests of the victims he represents. Furthermore, the Chamber notes that probably the Prosecution will explore the majority of the questions the Legal Representative intends to pose. The Chamber does not consider it necessary to preliminary communicate to the Defence a list of questions which might change.

However, it wishes already to underline – and this will be recalled at the beginning of the hearing – that it will be appropriate : 1) as indicated by the Legal Representative himself, not to pose again the same questions already posed by the Prosecution ; 2) not to pose questions which could lead to explore again matters linked to the merit of the case ; 3) to not anticipate matters which might pertain to a subsequent procedure to determine whether there might be "*reparations*" and ; 4) as a general matter, that the questions posed aim only to allow the Chamber to have information of such nature of allowing it to better appreciate the sentence to be applied.

The Chamber underlines that these instructions apply to the "*anticipated*" questions, as well as to the ones which will be eventually posed spontaneously and that they also apply to the Prosecution and the Defence for what concerns points 2) and 4).

See No. ICC-01/04-01/07-3476, Trial Chamber II, 30 April 2014, paras. 3-5.

2. Procedure for notification of materials to be used during questioning

The Appeals Chamber decides, as requested by the parties, to apply the deadlines relevant to the notification of materials that were in place during the trial proceedings, as specified in paragraph (2)(d) above.

The Appeals Chamber notes that regulation 52(2) of the Regulations of the Registry, requires the parties to provide, three working days in advance of the scheduled hearing, the evidence they intend to use at the hearing to the courtroom officer, in electronic version whenever possible. The Appeals Chamber is mindful of the logistical issues specific to the hearing of witnesses via video-link technology and the preference, for technological reasons, that any such material be provided to the courtroom officer prior to the departure of the relevant Registrar staff member to the field. In this respect, the Registrar is instructed to inform the Appeals Chamber and the parties, without delay, if the above-mentioned deadline needs to be adjusted to accommodate the travel schedule of the relevant Registry staff to the field for the purposes of arranging the hearing of the witnesses via video-link technology.

The Appeals Chamber also instructs the parties to submit in written form any objections related to the use of evidence during the witnesses' testimony at least one working day before the hearing by 12:00 noon at the latest.

Finally, the Appeals Chamber also notes the Prosecutor's submission that she should also be allowed to add documents as a result of the examination by counsel for Mr Lubanga because "*cross-examination is to some extent reactionary*". The Appeals Chamber notes that this submission is in line with the practice used at trial. The Appeals Chamber does not consider it appropriate to approve such a request in the abstract and therefore will only decide on a request to add a document that was not notified if such a situation arises and on the basis of the document in question and the specific reasons as to why it was not submitted earlier. In addition, the Appeals Chamber reminds the Prosecutor of the logistical difficulties that can arise with respect to video-link technology when documents are not provided to the courtroom officer prior to the departure of the relevant Registry staff to the field and encourages the Prosecutor to have due regard to these logistical considerations when preparing for the examination of the witnesses.

The Legal Representatives of Victims V02 have requested leave to question the witnesses and provided the proposed questions to the Appeals Chamber. The Appeals Chamber does not consider that the request identifies any personal interest of the victims and, upon review, considers that the proposed questions do not relate to their personal interests. The request by the Legal Representatives of Victims V02 for leave to question the witnesses is therefore rejected.

Notwithstanding this, in conformity with article 68(3) of the Statute, should an issue related to the personal interests of the victims be addressed during the examination of the witnesses, the Legal Representatives of Victims V01 and V02 may orally request authorisation to ask questions about the relevant statements, the scope of which are to be limited to issues that were raised in examination.

See No. ICC-01/04-01/06-3083 A4 A5 A6, Appeals Chamber, 30 April 2014, paras. 20-23, 25, and 26.

The authority of the Chamber to intervene while counsel is questioning a witness is not only consistent with a proper exercise of juridical functions during the trial, but is also provided for in, *inter alia*, Article 64(8)(b) of the Statute, Rule 88(5) of the Rules, and Regulation 43 of the Regulations. In addition, the literal interpretation of Rule 140(2)(c) does not exclude the Chamber's intervention in the manner provided for in the Directions.

See No. ICC-02/11-01/15-229, Trial Chamber I, 18 September 2015, para. 9.

The Chamber is of the view that the objections by both Defence teams have not raised any argument that would justify the wholesale exclusion of P-369's testimony. Without prejudice to the Chamber's ultimate assessment of the weight of P-369's evidence, it does not appear in dispute that P-369 was present in Ivory Coast on several occasions and that he personally observed acts that may be relevant to the Prosecutor's case. Under these circumstances, it seems premature to exclude P-369's testimony in its entirety.

Nevertheless, the Defence have raised legitimate concerns about the scope of the evidence P-369 is eligible to give. In this regard, the Chamber reiterates its instructions from the new directions on the conduct of the proceedings issued on 4 May 2016. In particular, in paragraph 23 of said directions, the Chamber directed the parties to refrain from asking witnesses to speculate or to provide opinion evidence. The Defence is therefore right in noting that Witness P-369 should not be asked to pronounce on the conclusions he drew from his research in Ivory Coast. Only the Chamber has the authority to draw inferences in the context of these proceedings and only on the basis of evidence that has been submitted and discussed before it. Statements of witnesses made to a Human Rights Watch investigator are not before the Chamber in this sense.

Furthermore, Witness P-369 should not be asked to give his personal views as to the trustworthiness of any individuals he spoke to as part of his inquiry. Indeed, it is the Chamber's responsibility to form its own opinion about the trustworthiness of any relevant evidence and it cannot simply rely on the impressions of NGO representatives or other third persons in this regard. This restriction applies with even greater force when the identity of the sources of the Witness is not disclosed to the parties and the Chamber.

Finally, since the Chamber has decided that Witness P-369 is not permitted to keep his sources anonymous; it will not allow the Prosecutor to question Witness P-369 on facts which he learned from anonymous sources, regardless of whether the Witness had a single or multiple sources for a particular fact. The reason for this is clear: when the sources remain anonymous, the Chamber has no independent means to ascertain the trustworthiness of those sources or to determine whether different sources genuinely corroborate each other.

See No. ICC-02/11-01/15-539, Trial Chamber I, 13 May 2016, paras. 5-8.

3.5. Protection and well-being of witnesses

Applying article 64 of the Rome Statute and with respect to rules 87 and 88 of the Rules of Procedure and Evidence, the Chamber will ensure that appropriate steps are taken to guarantee the protection of all victims and witnesses, and particularly those who have suffered trauma or who are in a vulnerable situation. The Chamber will rule on the merits of individual application under rules 87 and 88 taking into account, *inter alia*, whether i) the testimony of a vulnerable witness is to be treated as confidential and access to it is to be limited to the parties and the participants in the proceedings; ii) evidence in appropriate circumstances can be given out of the direct sight of the accused or the public; iii) a witness should be able to control his or her testimony, and, if so, to what extent; iv) breaks in the evidence should be allowed as and when requested; a witness can require that a particular language is used.

See No. ICC-01/04-01/06-1140, Trial Chamber I, 29 January 2008, para. 35.

The obligation to identify, protect and respect the well-being and dignity of witnesses rests significantly with the party or participant calling the witness, but the other party and the participants, as well as the Court, have responsibilities in this regard. Thus, the Chamber calls on all the parties and participants, and in particular on the VWU, to inform the Chamber on the earliest opportunity on any specific concerns they may have regarding the integrity and well-being of a witness, and especially with those who may be traumatised or vulnerable.

See No. ICC-01/04-01/06-1140, Trial Chamber I, 29 January 2008, para. 36.

The Appeals Chamber emphasises that relocation is a serious measure that can, as argued by the Registrar, have a "*dramatic impact*" and "*serious effect*" upon the life of an individual, particularly in terms of removing a witness from their normal surroundings and family ties and re-settling that person into a new environment. It may well have long-term consequences for the individual who is relocated – including potentially placing an individual at increased risk by highlighting his or her involvement with the Court and making it more difficult for that individual to move back to the place from which he or she was relocated, even in circumstances where it was intended that the relocation should be only provisional. Where relocation occurs, it is likely to involve careful and possibly long- term planning for the safety and well-being of the witness concerned.

See No. ICC-01/04-01/07-776 OA7, Appeals Chamber, 26 November 2008, para. 66.

It is of note that article 43(6) is the sole provision of the Statute that deals with the setting up of a unit specifically to provide protective measures to victims and witnesses. The VWU is the responsibility of the Registrar and is situated within the Registry. There is no similar provision that establishes a unit for the provision of protective measures within the Office of the Prosecutor; nor is there therefore any provision which places the responsibility for such a unit under the authority of the Prosecutor.

The functions of, and responsibilities relating to, the VWU are expressly regulated by rules 16 to 19 of the Rules of Procedure and Evidence.

Those rules contain the only specific provision on relocation to appear in the statutory scheme of the Court. Rule 16(4) provides that agreements on relocation may be negotiated with States by the Registrar on behalf of the Court.

In addition, the specific provisions regulating the functions of the VWU are of note in this context. Rule 19(a) provides that the VWU may include, as appropriate, persons with expertise, *inter alia*, in witness protection and security. It was therefore foreseen that experts in witness protection and security would be located within the VWU. Given the serious consequences of relocation, as referred to above, it is appropriate that questions of relocation be considered by those with appropriate expertise.

Among the provisions regulating the functions of the VWU is rule 17(2)(a)(i), which refers to the VWU, in consultation with the Chamber, the Prosecutor and the defence, as appropriate, providing all witnesses, victims and others at risk on account of testimony given by such witnesses with adequate protective and security measures and formulating long- and short-term plans for their protection. The responsibility for the formulation of plans for the adequate protection of witnesses falls within the mandate of the VWU. The formulation of such plans is likely to be of particular relevance in cases where questions of relocation arise, in light of the seriousness of the measure and its potentially long-term duration, as referred to above.

Also of note in the context of the rules outlining the responsibilities of the VWU is rule 18(b), which specifically mandates the VWU to "respect the interests of the witness" and to "act impartially when cooperating with all parties", while recognising the specific interests of the Office of the Prosecutor, the defence and the witnesses.

See No. ICC-01/04-01/07-776 OA7, Appeals Chamber, 26 November 2008, paras. 74-79. See also No. ICC-01/04-01/07-428-Corr, Pre-Trial Chamber I (Single Judge), 25 April 2008, paras. 22-28.

In relation to emergency situations, the Impugned Decision recognised that there might be exceptional circumstances in which a witness is facing a serious threat of imminent harm that requires an immediate response. In such circumstances, the protection of the individual concerned is necessarily paramount. The Appeals Chamber approves generally the scheme set out by the Pre-Trial Chamber at paragraph 36 of the Impugned Decision in this regard, while recognising that, by the very nature of emergency situations, there may need to be some degree of flexibility in this regard. The Appeals Chamber envisages that, in an urgent situation in relation to a person for whom relocation is sought, the Prosecutor

may request the VWU to take a temporary emergency measure to protect the safety of a witness while the overall application for relocation is under consideration. The Appeals Chamber notes, in this context, the reference to a witness being placed temporarily in a "*safe house*" while the VWU completes its assessment of whether a witness should be relocated.

The Appeals Chamber also cannot rule out that there may be situations in which temporary emergency measures may have to be taken by the Prosecutor in relation to a person for whom relocation is sought, in a situation of urgency. However, in the abstract and without a specific set of factual circumstances before it. The Appeals Chamber would not envisage such temporary measures to include the preventive relocation of a witness.

See No. ICC-01/04-01/07-776 OA7, Appeals Chamber, 26 November 2008, paras. 102-103. See also No. ICC-01/04-01/07-428-Corr, Pre-Trial Chamber I (Single Judge), 25 April 2008, paras. 35-36.

The Chamber's Decision on witness' familiarisation held that the practice known as the "*proofing*" of witnesses by a party calling a witness will not be allowed, and the Victims and Witnesses Unit is responsible for dealing with witnesses in advance of their testimony before the Court. In addition, rule 87(1) of the Rules provides that the Victims and Witnesses Unit, as appropriate, may be consulted by the Chamber before protective measures are ordered. The Chamber remains of the view that the Victims and Witnesses Unit is the only organ of the Court which should deal with witnesses upon their arrival in The Hague, including reviewing their security.

However, there should be close cooperation between the Unit and the prosecution, particularly in light of article 68(4) of the Statute which provides that the "*Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6*".

Nonetheless, the Trial Chamber considers that, pursuant to rule 87 of the Rules, the responsibility for filing applications for protective measures lies primarily with the party calling a witness. The prosecution is therefore directed to file applications for protective measures for witnesses it is to call, based on the information already in its possession and supplemented, as appropriate, by any relevant information provided by the Victims and Witnesses Unit at the time of the filing of the applications. Thereafter, the prosecution may raise orally, or by way of a filing, any new information, provided by the Victims and Witnesses Unit concerning the witnesses prior to, or following, their evidence at trial, which is relevant to their security.

See No. ICC-01/04-01/06-1547, Trial Chamber I, 9 December 2008, paras. 5-6.

The Chamber has also borne in mind that it has wide-ranging obligations as regards protective measures that require it to take all necessary steps to protect victims and witnesses, so long as these do not undermine the fairness of the proceedings or materially prejudice the defence. In light of the Appeals Chamber's decision referred to above, this obligation extends to persons who may be at risk on account of activities of the Court.

See No. ICC-01/04-01/06-1980-Anx2, Trial Chamber I, 24 June 2009, para. 48.

The Chamber considers that closed sessions should remain a protective measure granted only on an exceptional basis, as it deprives the public from understanding parts of, or the entirety of, a witness's testimony and therefore, may affect the overall fairness of the proceedings. The Chamber notes that some Chambers at the Court have, in consultation with the parties and participants, established practices for the limited use of *in camera* hearings. Trial Chamber II recently issued an oral decision which this Chamber intends to adopt in the main as regards the following best practices.

[…]

For the above reasons and in keeping with these best practices, the Chamber does not favour evidence being given entirely in closed session. The Chamber notes that there are other possible measures available to protect sensitive information such as witnesses' identities and identifying information.

See No. ICC-01/05-01/08-1023, Trial Chamber III, 19 November 2010, paras. 23 and 25.

In regard to the question of whether the non-disclosure of the identity of the source of the three documents can be authorised, the Chamber is of the view that providers of documentary evidence can be considered as "*persons at risk on account of the activities of the Court*" in the sense of the Appeals Chamber's judgment of 13 May 2008. The fact that the person in question provided documentary evidence to the Defence instead of to the Prosecution does not mean that the potential risk is not related to the activities of the Court, even though the Defence is not, strictly speaking, an organ of the Court. Accordingly, the Chamber will apply the standard three-stage test as outlined by the Appeals Chamber. The Chamber is of the view that there is little doubt that if the identity of the source were to become publicly known, this would potentially put this person at risk. As stated by the Defence, the source provided the documents in violation of strict confidentiality obligations. There may thus be important legal and professional repercussions for the source if this breach of confidentiality becomes known. Moreover, the mere fact of having provided documentary evidence to a defendant before the Court may put the source in a precarious position. As has been argued repeatedly by the Prosecution in the past, in some circumstances the fact of being associated with the activities of the Court may put a person at risk. The Chamber considers, therefore, that there would be an objectively justified risk if the identity of the source were to be disclosed to the public. However, this does not answer the question whether disclosure to the parties only, potentially under strict conditions, would have a similar effect. The Chamber agrees with the Prosecution that the simple fact of disclosing the identity of the source to a limited number of officials of the Office of the Prosecutor would not automatically put the person at risk. The Prosecution must be presumed capable of keeping confidential information, without unintentionally disclosing or indeed leaking it.

However, the Chamber is of the view that if the information were to leave the premises of the Court, in order to be used, directly or indirectly, in contacts with third parties as part of investigations, the Office of the Prosecution would no longer be in a position to offer absolute guarantees that the source's identity would not be revealed. Even if the Prosecution conducts its investigation as cautiously and professionally as can be expected from it, the possibility cannot be excluded that third persons will become aware of the identity of the source. The Chamber notes, in this regard, that the Prosecution left little doubt about its intention to use the name of the source to conduct investigations.

Under those circumstances, the Prosecution's suggestion to restrict disclosure to a very limited number of individuals familiar with the case is of limited value, as it suffices that one person uses the source's identity in contacts with third parties to generate a potential risk. This is especially true in this case, given that the source allegedly occupies a very specific position, with access to secret documents. It should also be stressed, that the source is not benefiting from any form of operational protective measures and that it is unlikely that any such

measures could usefully be put in place. The Chamber therefore considers that complete non-disclosure is the only reasonably available measure that can provide the source with sufficiently strong protection.

The Chamber is not persuaded that the Prosecution will be prevented from conducting meaningful investigations if it does not have the identity of the source of the three documents. First and foremost, for an investigation into the documents' content, it is irrelevant who provided them to the Defence, as it is not alleged that the source is the author.

The Chamber is also of the view that the Prosecution can still meaningfully investigate the authenticity of the three documents even without knowing the source of the Defence. The documents contain several possible indicators of authenticity, such as names of alleged authors, signatures, alleged official stamps, *etc.*, which can be investigated regardless of the source. The Chamber further observes that if the authenticity of one or more of the three documents were to depend entirely on the source's identity, the Defence will have to accept the consequences of non-disclosure of the identity to the parties and participants. This is without prejudice to what the Chamber may decide about taking cognisance of the identity of the source *ex parte*.

As far as the Legal Representatives are concerned, the Chamber considers that non-disclosure of the identity of the source will not cause any identifiable prejudice to them. The role of the Legal Representatives is relatively limited compared to that of the Prosecution, which has a right to cross-examine the witnesses of the Defence. Insofar as the Legal Representatives may be authorised to ask certain questions to witness DRC-D02-P-0258, the identity of the source is not required in order to do so. In respect of the authenticity of the three documents, the same observations made in relation to the Prosecution apply.

See No. ICC-01/04-01/07-3057, Trial Chamber II, 4 July 2011, paras. 9-18. See also, No. ICC-01/04-01/07-3122, Trial Chamber II, 22 August 2011, paras. 9-18.

The Appeals Chamber has established criteria which are to be applied when a Chamber is considering whether to authorise, in exceptional circumstances, non-disclosure of the identities of witnesses to the Defence. It held that three of the most important considerations are: (1) the danger to the witness or his or her family members that disclosure may entail; (2) the necessity for the protective measures; and (3) an assessment of whether the measures will be prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial. The Appeals Chamber additionally required an investigation into the sufficiency and feasibility of less restrictive protective measures. Although these criteria were established in the course of pre-trial proceedings, in the assessment of the Chamber, they are equally applicable to the trial stage of the case.

[…]

In the Chamber's assessment, this approach of the Appeals Chamber extending protection for the groups expressly provided for in rule 81(4) of the Rules – *i.e.* witnesses, victims and members of their families – to the "*other persons at risk on account of the activities of the Court*" is to be applied during trial proceedings. Therefore, the Trial Chamber's responsibility under article 64(6)(e) of the Statute to provide for the protection of the accused, witnesses and victims includes providing for the protection of other persons at risk on account of the activities of the Court.

See No. ICC-01/04-01/06-2763-Red, Trial Chamber I, 25 July 2011, paras. 11 and 13.

The Chamber has examined the risks to the security of Defence Witness 19 in the context of its obligations under article 68 of the Statute to take measures to protect the safety and well-being of witnesses. The Chamber must decide the matter on the basis of the present facts, and its duty under article 68 of the Statute does not include an open-ended responsibility for illnesses that may unfortunately befall the witness in the future, whether as a result of a potentially recurring condition or otherwise.

[…]

Pursuant to article 68(4) of the Statute, "*the Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph*", and by rule 17(2)(a)(ii) of the Rules, the Unit shall "[recommend] *to the organs of the Court the adoption of protection measures and also advise relevant States of such measures*".

Therefore, the VWU is the body within the Court that is equipped, with the necessary qualified staff and professional expertise to conduct risk assessments and to make recommendations on the security of victims and witnesses, and the Chamber is entitled to rely on its advice when reaching decisions on protective measures.

[…]

However, article 21(3) of the Statute stipulates that the application and interpretation of the applicable law must be consistent with internationally recognized human rights. The obligation to return defence Witness 19 to the DRC without delay under article 93(7)(b) of the Statute and rule 192(4) of the Rules cannot, therefore, be discharged without an assessment of whether internationally recognized human rights may be violated. This leads the Chamber to consider the implications of his asylum claim. The right to make an asylum application is enshrined, in the Geneva Convention of 1951 and the Protocol of 1967, as well as article 14 of the Universal Declaration and this important legal process exists wholly independently of the functions of this Court, Given the Chamber's obligation to interpret the Statute consistently with internationally recognized human rights

under article 21(3) of the Statute, the Court is bound to assess the steps (if any) that need to be taken in order to enable the Dutch government to discharge its obligations under national and international law as regards this asylum request.

[…]

Given the Chamber's lack of jurisdiction over the asylum application, and bearing in mind that the security of Defence Witness 19 under article 68 of the Statute will be sufficiently addressed by implementing the protective measures the Registry has discussed with the DRC authorities, the obligation of the Court is to return Defence Witness 19 without delays under article 93(7) of the Statute, to the extent that this step conforms with article 21(3) of the Statute.

See No. ICC-01/04-01/06-2766-Red, Trial Chamber I, 5 August 2011, paras. 66-68, 72, and 83-86.

Addressing first the submissions on the extraordinary character of the asylum proceedings as advanced by counsel for Defence Witness 19, the Chamber does not have authority to review decisions of the domestic authorities as regards their implementation of national laws.

See No. ICC-01/04-01/06-2835, Trial Chamber I, 15 December 2011, para. 14.

The use of the names of witnesses whose identity and interaction with the Court is concealed to the public or who are subject to other protective measures known by the other party, could in certain circumstances be necessary for the purposes of a party's investigations. A balance should be reached between the need to ensure the protection of witnesses and the rights of the parties to investigate.

[…]

The Single Judge recalls that inclusion in the ICCPP represents the most intrusive protection measure that can be applied to witnesses. Considering that the Registrar is mandated by regulation 96 of the Regulations of the Court to "*take all necessary measures to maintain a protection programme for witnesses*", the Single Judge is of the view that the VWU is the only appropriate channel through which the investigating party may initiate the procedure to contact the other party's witness benefiting from the ICCPP. Accordingly, should a party wish to interview an ICCPP witness of the other party, it shall contact the VWU which will make the necessary arrangements for the interview to take place.

As for contacts with witnesses of the other party who are not included in the ICCPP, the Single Judge points out that these interviews may only take place if the witness consents. The consent must be given voluntarily and must be sought through the representative of the other party and after having informed the VWU of the intention to contact the witness. It is recalled that the party calling the witness or relying on his or her statement "*is prohibited from trying to influence the witness' decision as to whether or not to agree to be interviewed*" by counsel of another party.

After obtaining the witness' consent to be interviewed, the VWU shall be responsible for the necessary arrangements. Concerning the presence during the interview of a representative of the party calling the witness or relying on his or her statement, the Single Judge considers it appropriate to endorse the established practice of other Chambers. Accordingly, the party calling the witness or relying on his or her statement is entitled to have a representative attending the interview, unless the interviewing party objects to such presence and applies to the Chamber for a ruling on the matter. However, if the witness wishes for the interview take place without a representative of the party calling him or her or relying on his or her statement, then there is no need for an application to the Chamber, as the witness's consent in this sense is sufficient.

See No. ICC-02/11-01/11-49, Pre-Trial Chamber III (Single Judge), 6 March 2012, paras. 19, and 30-32.

The Chamber instructs the Legal Representative in consultation with the VWU to inform the Chamber about any recommended protective measures the victims called to testify as witnesses may need to be granted. Any related requests for protective measures should be legally and factually justified and filed publicly in accordance with rule 87(2)(a) of the Rules. If the Legal Representative considers that the requests contain information that should remain confidential, she may file confidential or *ex parte* versions of these requests, along with appropriate redacted versions .

See No. ICC-01/05-01/08-2158, Trial Chamber III, 6 March 2012, para. 8(e).

It's not up to the Chamber to provide Defence with guidance on what kind of line of defence the Chamber would like to receive. On the other hand, as stated in the Rules of Procedure and Evidence, it's up to the Presiding Judge to ensure the proper conduct of the proceedings and to give guidance as why or how a witness should be questioned. At the end of the day, the witness was visibly tired, upset, distressed, not understanding a word of what you were saying, and you were pushing hard on the witness on problems related – and I called your attention for that – maybe even of translation, of interpretation, and of course you disregarded the warnings of the Chamber for some problems that the witness could be facing because of translation problems. I tried, not to interrupt the Defence very often, only when I saw it was really necessary. So if there was any intervention of the Presiding Judge that could have any adverse effect on the spirit of the Defence, maybe it's because, you did not understand that the criticism was not in relation to the content of your questions but to the

way you put your questions to an uneducated and illiterate witness that does not understand sometimes what you were asking for, and the Chamber will continue doing that because this is my duty.

See Oral Decision, No. ICC-01/05-01/08-T-222-ENG, Trial Chamber III, 3 May 2012, pp. 6-7.

The Chamber is seized of a request pursuant to regulation 42(1) of the Regulations of the Court for lifting redactions previously authorised under rule 81(4) of the Rules.

Regulation 42(1) of the Regulations states that protective measures in respect of a victim or witness shall continue in full force in other proceedings and after proceedings have been concluded, subject to revision by a Chamber. Pursuant to regulation 42(3) of the Regulations, any application to vary a protective measure shall first be made to the Chamber which issued the order, unless it is no longer seized of the proceedings in which the protective measure was ordered. As Pre-Trial Chamber I is no longer seized of case, the Chamber can vary the protective measures ordered by Pre-Trial Chamber I in that case.

The Chamber has affirmed that "*leave* […] *is required for the lifting of redactions previously authorised under rule 81(4) of the Rules*". This is due to the Trial Chamber's obligation under article 68 to protect the safety, physical and psychological well-being, dignity and privacy of victims and witness and, by extension, persons at risk on account of the activities of the Court. This Chamber has also noted that in order to grant leave to lift redactions to the identifying information of an individual subject to previous redactions under rule 81(4), the Chamber needs to be satisfied that "*the person in question will not be exposed to an enhanced risk by virtue of the disclosure of this information*". In the present case, the prosecution submits that, due to changed circumstances, the redactions to the identifying information of these specified third parties are no longer justified. The Chamber accepts that the underlying reason for the redactions no longer exists and the security risk to these individuals is low, as explained in greater detail in the prosecution's confidential *ex parte* Application. Further, the Chamber affirms the principle set out by the Appeals Chamber that the non-disclosure of information is the exception, and in general full disclosure should be made, with specific regard to the rights of the accused. Therefore, the lifting of these redactions as requested by the prosecution is justified.

See No. ICC-02/05-03/09-368, Trial Chamber IV, 13 July 2012, paras. 6-9.

As previously stated, the term "*given in person*" used by article 69(2) of the Statute does not imply that witness testimony shall necessarily, under any circumstances, be given by way of live testimony in court. Instead, the Statute and the Rules give the Court broad discretion, subject to the provisions of rule 67 of the Rules, to permit evidence to be given *viva voce* by means of video or audio technology whenever necessary, provided that the Statute and the Rules are respected and such measures are not prejudicial to, or inconsistent with, the rights of the accused.

The Chamber recalls that, according to article 67(1)(e) of the Statute, the accused has the right "*to obtain the attendance and examination of witnesses on his or her behalf*". Further, pursuant to rule 67(1) of the Rules, the Chamber may allow a witness to give *viva voce* (oral) testimony by means of audio or video technology, provided that such technology permits the witness to be examined by the defence at the time the witness so testifies.

The Chamber has previously held that one of the relevant criteria to be considered in determining whether or not a witness should be allowed to give testimony by means of video technology is the witness's personal circumstances. However, as previously stressed by the Chamber, although personal circumstances have been interpreted as linked to the well-being of a witness, the Chamber is not confined by the Statute in considering other types of personal circumstances which might justify a witness testifying by means of audio or video technology. Similarly, the Chamber considers that other relevant circumstances, such as logistical difficulties in arranging a witness's travel to testify at the seat of the Court in The Hague, which would seriously impact upon the expeditious conduct of the proceedings, can also justify a witness to be heard by means of video or audio technology.

See No. ICC-01/05-01/08-2525-Red, Trial Chamber III, 7 March 2013, paras. 4-6. See also No. ICC-01/05-01/08-2572-Red, Trial Chamber III, 3 April 2013, paras. 8-10; No. ICC-01/05-01/08-2580, Trial Chamber III, 12 April 2013, paras. 6-8; No. ICC-01/05-01/08-2608-Red, Trial Chamber III, 1 May 2013, paras. 6-8; and No. ICC-01/05-01/08-2646, Trial Chamber III, 31 May 2013, paras. 8-9.

In order to determine whether the variation [of protective measures] is appropriate, the Chamber must comply with its duty under article 68(1) of the Statute to "*protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses*". In addition, pursuant to regulation 42(4) of the Regulations, before making a determination on a request for a variation of protective measures, the Chamber "*shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made*".

See No. ICC-01/05-01/08-3014, Trial Chamber III, 12 March 2014, para. 17.

[The Chamber] further recalls that the protective measures granted to the victims authorised to participate in the proceedings also apply to the persons authorised to participate on behalf of the deceased victims. In this regard, and having regard to the Defence submission concerning the current composition of its team, it draws the parties' attention to their obligations of confidentiality and protection.

See No. ICC-01/04-01/07-3547-tENG, Trial Chamber VIII, 11 May 2015, para. 11.

Indeed, in a prior oral ruling, the Chamber stated very clearly that, by their very nature, the information contained in VWU assessments supporting requests for protective measures are mainly confidential *ex parte*; accordingly, it is only in very limited and exceptional scenarios, if any, that the parties might be able to make submissions in order to satisfy the Chamber that it is necessary and appropriate to diverge from the case-specific recommendation made by the VWU and overrule it (ICC-02/11-01/15-T-12-Red-ENG).

This approach was further confirmed in the Directions on the Conduct of Proceedings (ICC-02/11-01/15-498-AnxA, para. 57), where the Chamber unmistakably provided that information submitted by the requesting party to the VWU for the purposes of their assessment may remain *ex parte*, and thus not available to the other parties for their submissions. By the same token, the Directions provide for the making of meaningful, case-specific objections to the granting of the requests (as opposed to submissions of a general nature calling into question the expertise and professional assessment of the VWU), whether on the basis of factual information in their possession or of their interpretation of the law (paras. 57-58). A typical scenario which would fall within the scope of paragraphs 57 and 58 of the Directions is the one where information defeating the very purpose of the requested protective measure would be available to the non-requesting party.

See No. ICC-02/11-01/15-598, Trial Chamber I, 23 June 2015, paras. 6-7.

The Single Judge considers that the provision, as reworded by the parties and the LRV, supports the principle that non-disclosure of the details of contact of protected witnesses is the norm, and acknowledges the discretion of the Chamber to decide otherwise, when circumstances so justify. Given the Chamber's own obligations pursuant to Article 68(3) of the Statute, the Single Judge is not persuaded that this amendment could indeed jeopardise witnesses' security and finds it appropriate to include it.

[…]

The Single Judge agrees with the Prosecution and the *Gbagbo* Defence that the Defence should notify not only the LRV but also the Prosecution of the dual status of any of the witnesses it will call. However, the Single Judge considers that the provision as drafted is too broad as it seems to include any individual the Defence has interviewed and may consider calling, even if the decision to call the individual as a witness has not yet been made. The Single Judge has reworded the provision, so as to mirror that pertaining to the Prosecution's obligation.

With regard to the *Gbagbo* Defence's proposal that the Prosecution should inform the Defence of the dual status of a witness it will call '*as soon as*' it becomes aware of it, the Single Judge agrees that it would be beneficial for the parties and participants for the Protocol to specify a timeframe within which the calling party should inform the other parties and participants of the dual status of one of its witnesses. Paragraph 4 (a) of the Protocol has been amended accordingly.

Further, in relation to the *Gbagbo* Defence's second suggestion that the Prosecution should transmit the victim application form to the Defence and that the LRV should transmit the lesser redacted version of it, the Single Judge refers to its 'Decision on victim participation'. Therein, it indicated that it was for the Prosecution to disclose lesser redacted versions of applications for participation of dual status witnesses, thus in accordance with its disclosure obligations and in a manner consistent with the 'Protocol establishing a redaction regime' .

See No. ICC-02/11-01/15-199, Trial Chamber I (Single Judge), 1 September 2015, paras. 15, and 19-21.

The Single Judge has given considerable weight to the parties' agreements. Where there has been no disagreement, the Chamber has generally accepted the proposed procedure, at times with minor modifications to ensure clarity and with a view to harmonising protocols amongst Trial Chambers. With respect to issues on which agreements were not reached, the Single Judge carefully considered the parties' competing submissions. In doing so, it has balanced the rights of the accused pursuant to Articles 64(2) and 67 of the Statute and the protection of the safety, physical and psychological well-being, dignity and privacy of witnesses under Article 68(1) of the Statute.

[…]

The Single Judge further notes that the fact that the calling party intends to call a witness or to rely upon his/her statement may become known to the non-calling party as a result of the filing of a list of witnesses or when the witness himself/herself informs the investigating party. Thus, in line with the Court's previous jurisprudence on this issue, the Single Judge considers that the definition of the term witness, for the purpose of the Protocol, should read as follows:

The term '*witness*' shall refer to a person whom a party or the LRV intends to call to testify or whose statement the party or the LRV intends to rely upon, provided that such intention has been conveyed to the non-calling party or the LRV by means that establish a clear intention on behalf of the calling party or the LRV to rely upon the individual as a witness.

B. Disclosure of the identity of witnesses not being called by that party in the course of investigations

1) The need to inform the VWU prior to the mission when, in the course of an investigation, it is necessary to disclose the identity of a witness in the ICCPP or who has otherwise been relocated with the assistance of the Court

[…]

The Single Judge considers that the VWU, as the entity of the Court in charge of the protection of witnesses, shall be informed when the identity of any protected witnesses has been disclosed, as disclosure may change the risk profile of the individual. Hence, if a party intends to disclose or has disclosed the identity of a witness who is not in the ICCPP or who has not been relocated with the assistance of the Court, but who is protected in any other manner by the VWU, it shall inform the VWU that such disclosure will occur or has occurred, as soon as possible.

The Single Judge therefore finds it appropriate to stress that, in accordance with paragraph 10 of the Protocol, the investigating party shall, under no circumstances, reveal a protected witness's involvement with the Court.

2) Investigating the place of residence of protected witnesses

[…]

The Single Judge notes that, in accordance with the Chamber's adopted redaction regime, recent contact information of witnesses may be redacted on an ongoing basis, so as to protect witnesses' safety, dignity, privacy and well-being. In light of this, the Single Judge considers that should a specific reason arise in which a party or the LRV considers it necessary to investigate the whereabouts of a witness, it may seek authorisation from the Chamber.

[…]

D. Inadvertent Disclosure: the restriction on sharing inadvertently disclosed material with the accused

[…]

The Single Judge is of the view that inadvertently disclosed material requires specific measures regulating its use, as it is understood that it should never have been disclosed in the first place. As inadvertently disclosed material may have a serious impact on the security of witnesses, the Single Judge considers, in accordance with Article 68(1) of the Statute, and in line with the Court's jurisprudence, that the team member of the receiving party noticing or having been informed of the inadvertent nature of the information disclosed shall prevent its further dissemination, including with the accused and, to the extent possible, with other members of the team.

E. Contacts between a party and witnesses not being called by that party

[…]

1) Contact between the LRV and witnesses from the parties

[…]

As indicated above, the Chamber finds it appropriate to aim, to the extent possible, at harmonising protocols amongst Trial Chambers. However, noting that under the statutory scheme, the LRV, as participant to the proceedings, does not have a responsibility comparable to that of the parties and noting additionally that all parties agree on this issue, the Chamber finds that the LRV should not be permitted to contact a party's witness. However, in accordance with paragraph 4 of the Protocol, nothing prevents the LRV from seising the Chamber with a request, should the need to contact a specific witness arise.

Further, the Chamber considers that, should the LRV be authorised to call witnesses, the Protocol shall foresee the possibility for the parties to contact said witnesses. Consequently, the scope of this section of the Protocol has been expanded to include the possibility for a party to contact a witness of the LRV through the addition of the words '*or* [of] *the LRV*' as necessary.

2) The involvement of the VWU in case of contact with witnesses from the opposing party

The Single Judge concurs with the VWU that it should not be made responsible for organising logistical arrangements for the parties' investigations. The Single Judge considers that the language suggested in the Prosecution Proposed Protocol is sufficient, and that the VWU shall be involved only in organisational matters relating to contacting witnesses participating in the ICCPP. Accordingly, the Single Judge rejects the *Gbagbo* Defence's proposals.

Further, and for the same reason, the Chamber considers it is not practicable that a representative of the VWU attends witness interviews and produce a report, should a witness refuse to be audio-recorded. It thus rejects the amendment to paragraph V(p) of the Prosecution Proposed Protocol, as suggested by the *Gbagbo* Defence.

Finally, and in accordance with the Court's jurisprudence, the Chamber finds that a party intending to interview a witness who has been relocated with the assistance of the Court shall inform the VWU.

[…]

4) Presence during the interview

However, the Chamber fails to see any valid reason for which the investigating party could object to the presence of a representative of the calling party being present, if the latter is present at the request of the witness. Further, the Chamber considers that it should be the witness's choice to have a representative of the calling party present during the interview. […].

5) The appropriate measures when investigating witnesses of the opposing party allege that they suffered sexual violence, where it is apparent that the witness has not revealed the sexual violence to his or her family

[…]

The Chamber is mindful of the Defence's argument that, in general, it should be authorised to question a witnesses' family to test the witnesses' credibility. However, the Chamber considers that the utmost caution should be exercised when investigating victims of sexual violence, who are particularly vulnerable witnesses. Further, the Chamber agrees with the Prosecution that the added value of questioning the family of the witness on an event it about which it is not aware will likely not advance the investigating party, who will generally have other means to investigate the credibility of a witness.

See No. ICC-02/11-01/15-200, Trial Chamber I (Single Judge), 1 September 2015, paras. 10, 15, 24-25, 38, 42-43, 46-48, 53, and 57.

I. Protective measures

Any applications for in-court protective measures, including those made pursuant to Rules 87 and 88 of the Rules, shall be made as soon as possible to allow the Chamber to receive submissions on the request and to allow the Victims and Witnesses Section to fulfil its mandate.

Rule 87 applications shall be filed confidentially, but not *ex parte*. The information which the applying party seeks to withhold from the other party shall be provided in an *ex parte* annex to the application, which shall include the justification for its *ex parte* designation.

J. Private and closed session

Insofar as possible, witness testimony shall be given in public. Requests for private and/or closed sessions shall be made in a neutral and objective way, if possible, referring to the topics that will be covered. To the extent possible, the parties are directed to group identifying questions together to avoid unnecessary recourse to closed and/or private session.

See No. ICC-02/11-01/15-205, Trial Chamber I, 3 September 2015, paras. 62-64.

The Chamber further recalls that the VWU is part of the Registry, which is a neutral organ of the Court tasked, amongst other things, with the function of '[a]*ssisting* [witnesses] *when they are called to testify before the Court*'. The Chamber further recalls that Rule 88 of the Rules and Regulation 94 *bis* of the Regulations of the Registry provides that the Chamber, upon request, may order special measures to protect '*vulnerable persons*' and to facilitate their appearance before the Court.

The Chamber considers that, pursuant to Regulation 94 *bis* (3) of the Regulations of the Registry, it is for the VWU, as the entity with a mandate to protect witnesses' well-being – and not for any other expert chosen by the parties – to conduct any assessment with the witness and to recommend any protective and/or special measures it deems necessary. Additionally, in accordance with Regulation 94 *bis* (3), the Chamber finds that the assessment shall serve to evaluate the mental health status of the witness and his/her capacity to appear before the Court and finds therefore appropriate to maintain the text of the Proposed Protocol.

The Chamber further emphasises that, as provided for in the Proposed Protocol and as clarified further in the VWU Observations any intervention by the VWU shall be conducted with the witnesses' consent and in consultation with the calling party, who shall be kept informed throughout the whole process. As submitted by the VWU, the Chamber finds it appropriate that the calling party is notified of any recommendations made to the Chamber pursuant to the Proposed Protocol.

With regard to the Defence's objections to certain special measures proposed by the VWU, the Chamber notes that the special measures listed in the Proposed Protocol are mere suggestions of measures that could be recommended. The Chamber will ultimately decide on the appropriateness of any suggested measures and will thereby ensure that the rights of the accused persons are guaranteed, in accordance with, *inter alia*, Article 67(1) of the Statute. Consequently, the Chamber considers that the Proposed Protocol is not prejudicial to the rights of the accused persons and that the amendments suggested by the Defence ought to be rejected.

The Chamber considers that the same applies to the possibility for the psychologist to request the Chamber's authorisation to sit in the Courtroom and to intervene, if need be. In due course, and if such a request is made by the VWU, the Chamber will decide upon it, giving due consideration to the rights of the accused.

See No. ICC-02/11-01/15-357, Trial Chamber I, 4 December 2015, paras. 16-20.

The Chamber will rule on the adequacy of video-link testimony for these witnesses. As developed in the paragraphs below, although the submission of the witness's statement pursuant to Rule 68(3) of the Rules is a consideration, it is not a fundamental consideration.

Pursuant to Article 69(2) of the Statute, the testimony of a witness at trial shall be given in person, except to the extent provided for in the Rules. Thus, although the preference for testimony in person before the Chamber is clear, the Chamber may authorise measures such as testimony by video-link, whenever this becomes necessary and appropriate, and is not prejudicial to or inconsistent with the rights of the accused.

Article 68(1), (2) and Rule 87 of the Rules give the Chamber the discretionary power to order protective measures in favour of witnesses, in order to protect their safety, physical and psychological well-being, dignity and privacy, taking into consideration factors such as age, gender, health, the nature of the crime and other circumstances, including the view of the witness concerned. These measures include, among others, testimony via video-link. In accordance with the aforesaid provisions, a decision of the Chamber in this regard may be triggered either by the parties, the victim or the witness concerned, their legal representative or the Chamber, on its own motion. However, before taking such a decision, consultation with the VWU, whenever possible and appropriate, is required.

Moreover, the Chamber has repeatedly stated that, as a general rule, in light of the assessments given by the VWU, and the powers vested in the Chamber, protective and special measures supported and recommended by the VWU will be granted by the Chamber. It also suggested that any recommendation for such protective measures, including video-link, should be brought to the attention of the Chamber as soon as possible.

In light of the above, it would be illogical to deter the VWU from directly communicating with the Chamber when it considers that protective measures should be accorded to upcoming witnesses. Consequently, it welcomes such direct communication between the VWU and the Chamber. However, for future instances, and whenever possible, the VWU is directed to consult with the calling party and seek the views of the witness concerned. Moreover, as applicable, the conditions under Rule 87(2) of the Rules should be taken into consideration when making such a recommendation before the Chamber in order to safeguard the fairness of proceedings.

However, video-link should not be viewed as a protective measure. Although it is a possible protective measure, it is also a method that facilitates live testimony when other issues arise. For example, video-link testimony may be accorded in instances in which witnesses are not able to travel to the seat of the Court (*i.e.* impossibility to obtain a visa or illegal migratory status). In fact, as noted by Rule 67 of the Rules, video-link is not an exception to live testimony, but a means to give *viva voce* live testimony by means of audio or video technology. Moreover, it is to be noted that this technology has improved extraordinarily since the adoption of the said provision.

Notwithstanding, Rule 67(3) of the Rules dictates that the venue chosen for video-link testimony must be '*conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness*'. Accordingly, when deciding on video-link testimony, the Chamber shall take this into consideration.

Turning to the proposed video-link for the Rule 68(3) witnesses, the Chamber notes that their live testimony will be in all likelihood shorter than for other witnesses. This is not only the result of the conditional submission of their written statements pursuant to Rule 68(3) of the Rules, but also because they are all crime base witnesses whose testimony, in any case, would not have seemingly lasted for more than some hours.

Although budget and logistical concerns are not determinative, they cannot be overlooked, particularly if such considerations could affect the expeditious conduct of proceedings. Unquestionably, video-link testimony from Cote d'Ivoire, where all witnesses appear to reside, will enable the VWU to arrange their order of appearance in an uninterrupted manner. Moreover, as there will be a break in the hearings from 7-11 November 2016, no witness will have to stay grounded in The Hague during that week.

See No. ICC-02/11-01/15-721, Trial Chamber I, 11 October 2016, paras. 11-19.

There is little dispute that the Statute and the Rules give the Chamber a wide discretion to permit the *viva voce* testimony of witnesses to be given by means of video link technology, whenever this becomes necessary and appropriate, and is not prejudicial to or inconsistent with the rights of the Accused. It is also indisputable that the Chamber is required to protect the psychological wellbeing and dignity of the witnesses that are called to appear before it through appropriate measures. In such cases, the decision of whether or not to permit testimony via video link requires a careful assessment of a range of factors that are fact-specific to the application under consideration. In terms of assessing the necessity of hearing a witness via video link, the Chamber may consider factors including but not limited to the witnesses' age, vulnerability, state of health and psychological well-being, the concerns and objections (if any) of the Accused, the expeditiousness of the proceedings, as well as logistical concerns and the financial resources of the Court. Factors that may be relevant for assessing the appropriateness of allowing a witness to appear via video link include, among others, the characteristics of the

witness and the nature of the evidence. In particular, the Chamber ought to consider whether the witness is expected to testify about matters that are strongly contested by the parties or which pertain to core issues in the case. It is also relevant to consider the precise modalities of the video link, which must allow the non-calling party to properly confront the witness. This may require the ability to establish direct visual contact between Counsel and the witness.

The assessment of the appropriateness of video link evidence should be conducted in respect of each witness individually. I am in agreement with the submissions of the Prosecution that applications for video link testimony should be individualised and not be made in respect of a class of witnesses. In the exercise of the Chamber's discretion, such applications must be justified in the case of each witness, having regard to the peculiar circumstances of the witness and the range of factors previously identified. Where such is the case, it ensures the consistent and uniform application of the relevant principles to the particular facts under consideration. Apart from encouraging legal certainty, this is an important safeguard against what may well be inconsistent decisions of a Chamber.

Regarding the automatic grant of protective measures, I am not in agreement with my colleagues that as a general rule, measures supported and recommended by the VWU will be granted by the Chamber. Appropriate protective measures are an important mechanism available to a Trial Chamber that enables the Chamber to strike the correct balance when dealing with at risk witnesses, while at the same time fully respecting the rights of the Accused. Both the Statute and the Rules require the Chamber to balance these rights, and the Rules in particular set out a detailed procedure that the Chamber is required to follow to safeguard these respective rights. The decision to make such orders is made by the Chamber and the Chamber alone. While the Victims and Witnesses Unit has an advisory role on the appropriate protective measures that may be necessary for the well-being of a witness, the decision on whether such measures may nonetheless be or are prejudicial to or inconsistent with the rights of the accused and the dictates of a fair and impartial trial remain the exclusive responsibility of the Trial Chamber. Such a decision is not capable of being delegated.

Turning to the applications at hand and leaving aside the issue of whether the applications are now brought by the Prosecution who appear to have adopted the applications, the basis of the applications is, in my view, generic and factually threadbare. This Chamber has consistently expressed its disapproval of applications for measures that are supported by vague and generic statements with little or no factual support. The instant requests are open to this criticism. The basis of these applications was set out in an email of the VWU to the Trial Chamber I Communications inbox. Nothing factually was added for the Chamber's consideration during the hearing held for that purpose on 27 September 2016. Unlike the situation, for example, in *Lubanga* (vulnerable and unsophisticated witness from a remote area who had never travelled) or *Ntaganda* (a medical report), no specific reason has been advanced for the Chamber's consideration. And if the generic basis argued provides the ground for granting the application, then there is nothing that would stand in the way of the Chamber running the entire trial by way of video link by allowing any witness to be examined via video link. Moreover, by relying on such a vague and generic basis, there is nothing to prevent the Chamber from giving inconsistent or totally arbitrary decisions. Indeed, it is difficult to understand the reasoned basis on which P-0106 and P-0230 will testify in person in court while the other witnesses are permitted to testify via video link, when the applications were all made on the same basis. Surely, it cannot be the case that the mere fact that the Prosecution expressed the simple wish to hear these witnesses in court suffices to distinguish between the witnesses.

In short, while I do not reject the possibility of hearing some of the witnesses via video link, I am of the view that the case for doing so has not been sufficiently made. Moreover, I believe it is not appropriate to hear witnesses who testify about core contested issues in the case via video link, unless there are compelling reasons for doing so.

See No. ICC-02/11-01/15-721-Anx, Trial Chamber I, Dissenting Opinion of Judge Henderson, 11 October 2016, paras. 2-6.

Article 68(2) of the Statute provides that the Chamber may, as an exception to the principle of publicity and in order to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. According to the same provision of the Statute, such measures "*shall be implemented in case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness*". Rules 87 and 88 of the Rules then regulate in further detail, respectively, "*measures to protect a victim, a witness or another person at risk on account of testimony given by a witness*" and "*measures to facilitate the testimony of a traumatised victim or witness, a child, an elderly person or a victim of sexual violence*".

Witnesses P-0407, P-0185 and P-0404 are expected to testify about sexual violence perpetrated upon them. The Chamber has previously held, with respect to witnesses in an identical situation, that "*due to the traumatic events they suffered, they are vulnerable and may indeed be exposed to retraumatisations if they were to testify publicly*", and deems that these considerations are equally applicable to Witnesses P-0407, P-0185 and P-0404.

[…]

The Chamber has also previously, in a similar situation, found it preferable that the entire testimonies be heard in closed session and decisions as to possible reclassification of parts of the testimony as public be deferred to a later stage, in order to prevent that the purpose of the measures be defeated. These considerations are equally valid in the present instance.

[…]

The Chamber considers that the requested special measures may benefit the concerned witnesses during their testimony, while having no adverse impact on the rights of the parties and participants, in particular of the accused.

As concerns the Defence's objection to the proposed special measure described by the Prosecutor as "*adapted questioning*", the Chamber considers that the granting of such measure does not interfere with the rights of the accused. Its effect is simply a reiteration of the Chamber's expectation from counsel to be mindful during questioning of the needs of individual witnesses.

[…]

The Chamber makes reference to its previous decision authorising testimony via video-link under Rule 67 of the Rules, where the general considerations are laid out in detail. With respect to Witness P-0047, the Chamber considers that the state of his health and his anxiety about travelling are good reasons to hear his testimony by video-link. The Chamber considers that the information made available to it through the VWU is sufficient for the purposes of the present decision, and deems unnecessary the proposal of the Defence of Laurent Gbagbo for an adversary procedure with experts appointed separately by the parties. As concerns Witnesses P-0293 and P-0362, considering that they are crime base witnesses whose testimony will be shorter than that of certain other witnesses, and considering that there is no significant difference between live testimony in The Hague and live testimony by means of video-link, the request that they testify by video-link can equally be granted.

Indeed, the Chamber is of the view that the rights of the Defence are not affected by video-link testimony in the manner in which it has so far been organised in this case. As a consequence, the Chamber does not see a need to consider the proposal of the Defence to have parties' representatives at the video-link location. In this regard, the Chamber also does not accept the Defence's blanket assertion that presentation of documents is "*much more difficult*" when a witness testifies by video-link. As the Chamber has stated previously, practice shows that with basic preparation (in particular by communicating to the Registry in advance the documents that may be shown to the witness), testimony by video-link can go as smoothly as testimony in the courtroom in The Hague.

See No. ICC-02/11-01/15-1060, Trial Chamber I, 3 November 2017, paras. 10-11, 13, 27-28, and 35-36.

The Prosecutor seeks, for Witness P-0554, "*subject to the views of the VWU*", special measures under Rule 88(1) of the Rules in the form of reading assistance, adapted questioning, and the presence of a psychologist during the testimony.

[…]

The Chamber notes that, with a view to enabling the preparation of the parties, the witnesses concerned and the Registry for the upcoming testimony, this decision is taken without the Witnesses and Victims Unit (VWU) having yet provided to the Chamber its advice as to the need for special measures for Witness P-0554. In the assessment of the Chamber, this advice is not indispensable in this particular instance and the requested special measures can be decided on the basis of the information currently available. Decisions as concerning protective and special measures are always subject to review if relevant new or additional information becomes available.

The Chamber recalls that Witness P-0554 has already been granted the measure of having her testimony heard in camera and considers that, in light of her personal circumstances and the subject matter of her testimony, the requested special measures may benefit Witness P-0554, while having no adverse impact on the rights of the parties and participants, in particular of the accused.

As regards the special measure of the presence of the psychologist, recent experience with other witnesses benefiting from such assistance shows that the psychologist's role is strictly limited to supporting the witness's well-being if and when required and that the psychologist's intervention, if any, always occurs under the strict control of the Chamber. Accordingly, no issue of interaction with the witness on the merits or the testimony or of any other kind of interference vis-à-vis the defence's line of questioning arises. As to the request by the Defence, that a preliminary psychological assessment be carried out, the Chamber notes that a professional assessment will be carried out by the expert psychologists of the VWU shortly before the testimony is due to start, in accordance with the usual practice.

As regards the special measure of "*adapted questioning*", and as already stated, the Chamber considers that the granting of this measure does not interfere with the rights of the accused and does not anyhow restrict or otherwise affect the Defence's ability to question the witnesses or the scope of the allowed questioning. Its effect is simply a reiteration of the Chamber's expectation from counsel to be mindful of the needs of individual witnesses during questioning.

Accordingly, the special measures under Rule 88(1) of the Rules are granted. Variations of these special measures will be ordered if necessary after the relevant reports are received by the Chamber from the VWU.

[…]

The Chamber makes reference to its previous decision authorising testimony via video-link under Rule 67 of the Rules, where general considerations are laid out in detail, as well as its recent decision authorising video-link testimony for Witnesses P-0293 and Witness P-0362. The Chamber notes that Witness P-0554 is a crime base witness whose testimony will be shorter than that of certain other witnesses, and that there is no significant difference between live testimony in The Hague and live testimony by means of video-link. The Chamber sees therefore no reason to pursue the alternative solution of postponing the testimony of Witness P-0554 until after the completion of the list of remaining witnesses. Accordingly, the Prosecutor's Second Request can equally be granted.

Indeed, the Chamber is of the view that the rights of the Defence are not affected by video-link testimony in the manner in which it has so far been organised in this case, as also confirmed by the experience with witnesses recently heard in this form. The Chamber also reiterates that with basic preparation (in particular by communicating to the Registry in advance the documents that may be shown to the witness), testimony by video-link can go as smoothly as testimony in the courtroom in The Hague. As a consequence, the Chamber does not need to consider the proposal of the Defence to have parties' representatives at the video-link location.

See No. ICC-02/11-01/15-1079, Trial Chamber I, 27 November 2017, paras. 3, 6-10, and 15-16.

Pursuant to Regulation 43 of the Regulations, the variation of an existing protective measure requires from the Chamber to obtain all relevant information as well as, to the extent that it is possible, the consent of the person in respect of whom the application to rescind or vary the protective measure has been made. The Chamber notes that the determination to grant protective measures in these proceedings, including the determination to have some of the testimonies entirely heard in camera, has always been made in light of the professional security assessment submitted by the VWU and that this professional assessment has also always taken into account the views of the person for whom the protective measures had been requested.

The Chamber agrees that it is appropriate to review the existing protective measures in light of updated information on the current situation of each witness and of any relevant developments which might have occurred since the time of the granting of the measure. For this reason, the VWU is directed to submit to the Chamber updated security assessments of all witnesses for whom protective measures have been granted. However, at this stage of the proceedings, the Chamber considers that this information is not urgent for the preparation of the Defence.

The Chamber takes the view that the Protocol provides the Defence with a tool allowing them to use confidential information in the context of their investigations, subject only to the adoption of a number of precautionary measures. These measures had been prescribed as a result of a careful consideration of the need to appropriately balance all relevant interests, including the principle of the publicity of the proceedings and the ability of the defence to conduct meaningful investigations, and assessed as reasonable and justified. The Chamber considers that is still the case and sees no reason to depart from that assessment; accordingly, the Defence is directed to comply with the relevant provisions of the Protocol.

See No. ICC-02/11-01/15-1194, Trial Chamber I, 2 February 2018, paras. 8-10.

The Single Judge repeats that the publicity of proceedings is a fundamental right of the accused and a necessary component of a fair and transparent trial. However, this is subject to certain exceptions and the protection of victims and witnesses amounts to one such exception.

The Single Judge further recalls the interpretation of Articles 68(1) and (2) of the Statute, as well as Rules 87 and 88 of the Rules as set out in detail in the Decision on Protective and Special Measures. Requests for protective measures require a case-by-case assessment of the existence of an objectively justifiable risk to the witness's '*safety, physical and psychological well-being, dignity and privacy*'. Special measures can also be ordered to facilitate the testimony of a traumatized witness.

Notwithstanding the above, the Single Judge reiterates his previous guidance that in order to ensure the most meaningful participation of victims testifying as a witness and for the most effective exercise of their rights the testimony must be as public as possible. If the granting of protective measures has the consequence of substantial parts of the testimony being elicited in private session, the presentation of the evidence might not be appropriate.

A. In-court protective measures

In this particular instance, the Single Judge is persuaded that there is an objectively justifiable risk to the witness's well-being to warrant granting the in-court protective measures. The witness was victimised by the LRA at a young age and has faced ongoing stigmatisation within his community as a result – exacerbated in the past by the recounting of his experiences. The witness has subsequently refrained from sharing the details of his experiences in the bush with his family members. The risk of further stigmatisation, including by family members who are obviously familiar with the witness's face and voice, unduly increases the danger of further harm being suffered.

For the protective measures to be meaningfully implemented this includes conducting any part of the testimony which could identify the witness in private session and the redaction of any identifying information from public records. This might entail not revealing the identities of certain other persons, or particular events which would risk the witness being identified as highlighted in the Request. The Request refers to specific isolated events which need to be adduced in private session but substantial parts of the witness's testimony relating to the stigmatisation faced in general can still be elicited in public and the LRV are encouraged to do so.

Given the above, and noting that no opposition to the requested protective measures were raised, in-court protective measures *i.e.* use of a pseudonym, face and voice distortion are granted.

B. Special measures

As previously stated, the Victims and Witnesses Unit ('VWU') is best placed when conducting its vulnerability assessment to determine whether special measures, such as the presence of a support person, are required. The Single Judge reiterates the general proposition set out in the Decision on Protective and Special Measures '*to grant special measures intended to provide psychological support for witnesses in the manner to be determined by the VWU*'.

Furthermore, the VWU evaluates the witness's mental health and capacity to testify, which alerts the Court to any particular concerns of re-traumatisation. However, the question of whether additional measures such as eliciting sensitive (but non-identifying) information in private session are warranted will be determined on a case-by-case basis following receipt of the VWU's assessment.

See No. ICC-02/04-01/15-1227, Trial Chamber IX (Single Judge), 16 April 2018, paras. 6-13.

Articles 64(7) and 67(1) of the Statute set forth the paramount principle of the publicity of the proceedings as a fundamental tenet of a fair trial. Accordingly, it is only under limited and specific circumstances that a Chamber may exceptionally restrict the scope of application of the principle: in particular, in light of the need to ensure the protection of victims, witnesses and innocent third parties pursuant to article 68(1)of the Statute. This may result in the Court adopting protecting measures in the form of redactions, to the extent that these measures are not prejudicial to or inconsistent with the rights of the accused, pursuant to rule 87 of the Rules.

[…]

The Chamber reiterates and confirms the principles which have guided it throughout these proceedings in decisions relating to protective measures resulting in a restriction of the publicity of the trial. More specifically, the Chamber recalls that the following factors are all unsuitable to trigger the application of rule 87: (i) generic references to the social context in Ivory Coast, including its alleged "*polarisation*", or to the level of attention reserved to this trial by media, social media and ordinary citizens; (ii) speculative and hypothetic scenarios; (iii) a witness's personal subjective fears and concerns, or preferences, not substantiated by objective, verifiable circumstances, and (iv) isolated past episodes, even when serious. Protective measures resulting in limiting the right of the accused to a public trial can only be granted in the presence of a concrete, objective, identifiable risk suitable to be neutralised or mitigated by the specific requested measure. All witnesses before the Court are neutral and only expected to tell the truth and appearing in public is part of the responsibilities attached to the role.

See No. ICC-02/11-01/15-1155-Red, Trial Chamber I, 20 April 2018, paras. 6 and 8.

3.6. Dual status of victim and witness

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.

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.

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 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.

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. Although the cooperation of the defence is expected in this regard, the Chamber is not persuaded that this should be described as an obligation. The Trial Chamber notes that consultations have taken place between the Victims and Witnesses Unit, the Victims Participation and Reparations Section, the parties and the participants on possible practical arrangements for the exchange of information on persons with the dual status of victim and witness and that discussions are continuing.

On the issue of whether or not the Victims and Witnesses Unit has responsibility for victims who have applied to participate prior to the determination by the Court of their application, the starting point is article 43(6) of the Statute which provides:

> *The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.*

In the view of the Chamber, the process of "*appearing before the Court*" is not dependent on either an application to participate having been accepted or the victim physically attending as a recognised participant at a hearing. The critical moment is the point at which the application form is received by the Court, since this is a stage in a formal process all of which is part of "*appearing before the Court*", regardless of the outcome of the request. Therefore, once a completed application to participate is received by the Court, in the view of the Chamber, "*an appearance*" for the purposes of this provision has occurred. Whilst the Chamber readily understands that considerable demands are made on the Victims and Witnesses Unit and there are undoubted limitations on the extent of the protective measures that can be provided, nonetheless to the extent that protection can realistically be provided by the Court during the application process, the responsibility for this rests with the Victims and Witnesses Unit, pursuant to article 43(6). It follows the Chamber rejects the submissions of the Prosecution and accepts the concession made at one stage by the Registrar that this responsibility lies with the Unit.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 132-137.

Introductory remarks

Prior to addressing the issues raised by the parties, the participants and the relevant sections of the Court on the subject of individuals with dual status, the Chamber identifies the following principles:

a. Participation by an individual as a victim in the proceedings shall not compromise his or her security;

b. The fact that an individual has dual status does not grant him or her rights in addition to those of someone who is only a victim or a witness; and

c. Communication between the different sections of the Registry, as the Court's neutral body with principal responsibility for the protection of witnesses and victims, must be direct and continuous.

The role of the VWU and communicating information to the Registry

The Chamber endorses the following matters, as agreed by the parties and participants:

a. As a general rule, the fact that an individual participates in the ICC protection programme shall remain confidential;

b. The VWU shall facilitate all contact between a protected individual and the other organs of the Court, the parties and the participants;

c. The VWU does not have an obligation to disclose to a party or the participants the details of contact with a protected individual; and

d. The VWU should be aware of the dual status of a protected individual in order to reduce possible risks and to facilitate a proper risk-assessment.

As regards the practical solutions proposed by the VWU, the Trial Chamber:

a. Recommends that the VWU assessment-procedure includes questions as to whether the applicant may have dual status;

b. Orders that the VWU is:

    - afforded access (as necessary) to the VPRS records,
    - notified of all applications communicated to the Chamber, and
    - is provided with the accompanying reports, as well as any decision of the Chamber granting participating status to an applicant.

c. Orders the party who refers a witness to the ICC protection programme to inform the VWU as soon as possible if they are aware of an individual's potential dual status.

d. Orders the VWU to inform the VPRS of the dual status of an individual in order for the section to take this into account when notifying applicants and when submitting any confidential *ex parte* report to the Chamber.

e. Orders the VWU to advise witnesses with potential dual status to seek legal advice when it is aware that the witness may also be a potential victim.

Communication between the Legal Representative of a victim and the Prosecution

The Chamber endorses the following procedure which was agreed upon by the parties, participants and the relevant sections of the Registry:

a. When the Legal Representatives of victims become aware that their client has dual status, they should provide the prosecution with the name of the individual, his or her date of birth and other identifying information, to the extent possible;

b. Thereafter, the prosecution should check whether or not the witness has dual status, and if so, communicate this in writing to the Legal Representative (including when the witness is under the ICC protection programme);

c. The prosecution should also verify whether it intends to make an application for protective or special measures under rules 87 and 88 of the Rules and communicate this to the Legal Representative;

d. The procedure under a., b. and c. above is subject to the following conditions:

- there must be a solicitor-client relationship between the individual and the Legal Representative;
- all communications must be confidential; and
- Legal Representatives must have the victims' consent to disclose his or her identity to the prosecution.

In the event that the above inter partes mechanism fails, the Chamber orders that the following alternative procedure shall apply:

a. The Legal Representative shall make an application to the Chamber in order to verify whether his or her client is in the ICC protection programme.

b. Thereafter, the Chamber shall hold an *ex parte*, Registry-only hearing with the VWU and the VPRS in attendance (as the two sections of the Registry dealing with witnesses and victims).

c. At that hearing, the Registry shall inform the Chamber as to whether the individual has dual status.

d. If the person has dual status, it will be open to the Chamber to order the Registry to communicate with the individual, to seek his or her consent as regards the possible communication of this fact to the Legal Representative.

Communication between the Legal Representative of a victim and the Defence

The Chamber endorses the following as agreed by the parties and participants:

a. The Legal Representatives shall communicate the name of his or her client to the defence, where the identity of that victim is already known by the defence; and

b. The defence shall thereafter inform the Legal Representatives if the name provided is a potential witness for the defence.

When the defence is unaware of the identity of the individual, the Legal Representative should make an application in accordance with paragraph 56 above.

Modalities of contact with individuals enjoying dual status

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.

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.

Contact between a witness with dual status and his or her Legal Representative

The Chamber endorses the agreement of the parties that, as a general rule, the legal representative may contact his or her client if they are a victim with dual status.

Providing the Legal Representatives with a copy of the signed statements and other materials, such as notes and documents, relating to a witness with dual status

The Chamber notes that as regards this particular issue there is no clear agreement between the parties and participants. Whilst the Chamber is sympathetic to the need for the parties to be able to control their own materials, it is persuaded that materials in the possession of the parties which not only relate to specific

participating victims with dual status but were also produced with their direct involvement and assistance should, whenever possible, be provided to the Legal Representative of the relevant participating victim in order to enhance the role of both of them and to assist the Chamber.

Accordingly, the Chamber establishes the following procedure:

a. If access is sought to materials in these circumstances, the Legal Representatives shall submit a detailed request outlining, *inter alia*, the reasons why access should be provided;

b. Unless reasons exist for refusing access, the parties shall provide the Legal Representative of dual status victims, upon request, with a copy of these materials, under conditions of strict confidentiality;

c. If a party considers that it should not provide particular materials or will only submit them in redacted or summary form, it shall inform the Chamber and the Legal Representative of the reasons; and

d. The Chamber will then consider the matter, if an application is made by the Legal Representative.

Attendance by the Legal Representatives at the medical examination of witnesses with dual status and disclosure of any report to the Legal Representatives

The Chamber approves the agreement between the parties that as a general rule the Legal Representative may be present during a medical examination of a victim or victim-applicant with dual status, provided that there is consent from the individual concerned.

The presence of the Legal Representative must not in any way obstruct a proper medical examination

The same procedure as stated in paragraph 56 above applies where the Legal Representative is unable to obtain the consent of the individual.

The attendance of the Legal Representative at interviews of a witness with dual status

The Chamber endorses the agreement between the parties that as a general rule the Legal Representative may be present during an interview of an individual with dual status, provided there is consent from the individual concerned.

The Legal Representative has the right to receive a copy of the statement, transcript or recording made during the interview.

The presence of the Legal Representative must not obstruct a proper interview.

If the party considers that the presence of the Legal Representative is inappropriate, it shall, as soon as practicable, inform the Legal Representative of the interview and, unless a delay cannot be justified because of urgency, establish whether the party wishes to raise the matter with the Chamber and (when relevant) ensure that sufficient time is afforded to enable this to happen prior to the interview.

Where applicable, it shall provide the Legal Representative with any relevant material.

Providing information to the Legal Representative about the family or legal guardian of a child witness with dual status

The Chamber notes the defence position that the information it holds in this respect is subject to legal professional privilege. However, no restriction on its disclosure would arise if the individual concerned gives his or her consent to disclosure. Accordingly, weighing the submissions of the parties and participants, the Chamber hereby:

a. Orders the parties to share this information with the Legal Representatives of victims with dual status, provided there is consent from the individual concerned; and

b. Establishes that when the witness is in the ICC protection programme, the VWU is the competent entity to provide this information to the Legal Representative, provided there is consent from the individual concerned and the security of the individual or the operation of the protection programme is not put at risk.

Communication between the VPRS and the VWU

The proposal of the parties and participants is that whenever a victim or applicant is without legal representation, and the VPRS needs to contact the person, the VWU will inform the VPRS as to whether the person is in the ICC protection programme, having first consulted with the party or participant who referred the witness.

The Chamber considers that the issue of communication between the VWU and the VPRS is essentially an internal Registry issue, to be resolved by that organ of the Court. However, the Chamber is of the view that the prior consent of the party referring the victim to the protection programme is not a necessary precondition for this communication – indeed it is undesirable, particularly in those instances where the victim has indicated that he or she does not wish their identity to be revealed to one or both parties.

The Chamber therefore endorses the recommendations of the Registry in this regard and stipulates that the VWU shall indicate to the VPRS whether a victim applicant is in the protection programme in order to facilitate contact between the VPRS and the applicant.

The VWU shall take account of a victim's request that his or identity is not revealed to the parties, and instruct the VPRS not to reveal to any participant or party that the person is in the ICC protection programme and has dual status.

Whether the party should inform the legal representatives of its intention to refer a witness with dual status to the ICC protection programme

The Chamber endorses the agreement between the parties and participants that a party should inform the Legal Representative of victims and applicants of its intention to refer an individual to the ICC protection programme, where the party has knowledge of the individual's dual status.

However, the content of the referral shall remain at all times strictly confidential between the referring party and the VWU.

See No. ICC-01/04-01/06-1379, Trial Chamber I, 5 June 2008, paras. 52-78. See also No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 12 July 2010, paras. 50-54.

At the outset, the Single Judge notes that neither the Statute nor the Rules expressly prohibit the recognition of the procedural status of victim to an individual who is also a witness in the case. Indeed, the Single Judge observes that among the criteria provided for in rule 85 of the Rules for the granting of the procedural status of victim in any given case, there is no clause excluding those who are also witnesses in the same case.

Moreover, the Single Judge also notes that neither the Statute nor the Rules contain any specific prohibition against the admissibility of the evidence of individuals who have been granted the procedural status of victim in the same case. In this regard, the controlling provision is article 69(4) of the Statute, which provides that:

The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, m accordance with the Rules of Procedure and Evidence.

[…]

In relation to the set of procedural rights to be granted to Witness 166 as a result of the Single Judge's recognition of his procedural status of victim at the pretrial stage of the present case, the Single Judge observes that neither the Statute nor the rules establish any specific limitation on the set of procedural rights to be granted to an applicant who is also a witness in the same case. Nevertheless, the Single Judge notes that article 68(3) of the Statute makes clear that any such set of procedural rights must be defined "*in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair andimpartial trial*".

Moreover, the Single Judge also notes that neither the Statute nor the rules contain any specific limitation on the probative value to be given to the evidence of a witness who also has the procedural status of victim in the same case.

In this regard, the Single Judge observes that, in its 18 January 2008 Decision, the Trial Chamber did not specify (i) the set of procedural rights granted to individuals who have the dual procedural status of victim and witness; and (ii) the consequences, if any, for the probative value of the evidence given by an individual with such a dual status.

See No. ICC-01/04-01/07-632, Pre-Trial Chamber I (Single Judge), 23 June 2008, paras. 18-19, and 23-25.

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 andthe VPRS. Whilst the Chamber will ensure that the accused'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.

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.

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 reclassify the applications of the victims. For the reasons set out hitherto this issue is properly resolved by applying the approach to disclosure which has been outlined in this Decision.

See No. ICC-01/04-01/06-1637, Trial Chamber I, 21 January 2009, paras. 11-13. See also No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 12 July 2010, paras. 58-60.

The Chamber considers that neither the Statute nor the Rules prohibit victim status from being granted to a person who already has the status of a prosecution or defence witness. Similarly, rule 85 of the Rules does not prohibit a person who has been granted the status of victim from subsequently giving evidence on behalf of one of the parties.

See No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, para. 110.

The Prosecution submits that the inconsistencies within and between the accounts of the alleged former child soldiers do not necessarily mean their testimony is unreliable, and in this regard the Chamber is invited to focus on the evidence of the expert witness. The OPCV submits any contradictions and difficulties in the testimony of P-0007, P-0008, P-0010 and P-0011 should be viewed in the context of the trauma they may have experienced, including the stress of giving evidence. The Defence also relies on part of the expert evidence, namely that Post Traumatic Stress Disorder can only be identified by way of a medical examination, and accordingly it is suggested it has not been demonstrated that any of these witnesses suffered from this disorder. The defence suggests the expert further testified that trauma does not affect an individual's memory, including his or her ability to tell the truth, but instead it may make it difficult for them to speak about relevant events (as opposed to other, non-traumatic matters), and therefore the potential impact of trauma should not be considered when assessing the credibility of the witnesses.

The Chamber has taken into account the psychological impact of the events that have been described in evidence, and the trauma the children called by the prosecution are likely to have suffered. The Chamber accepts that some or all of them may have been exposed to violence in the context of war, and this may have had an effect on their testimony. Additionally, they were often interviewed on multiple occasions following these events. Nonetheless, for the reasons identified in the relevant analysis for each witness, the inconsistencies or other problems with their evidence has led to a finding that they are unreliable as regards the matters that are relevant to the charges in this case.

On the basis of the entirety of the analysis set out above, the Chamber has not accepted the Prosecution's submission that it has established beyond reasonable doubt that P-0007, P-0008, P-0010, P-0011, P-0157, P-0213, P-0294, P-0297 and P-0298 were conscripted or enlisted into the UPC/FPLC when under the age of 15 years, or that they were used to participate actively in hostilities, between 1 September 2002 and 13 August 2003. It is relevant to note that these nine individuals were identified by the prosecution at an early stage in these proceedings as demonstrating the way in which children were enlisted, conscripted and used by the FPLC.

The Chamber has concluded that P-0038 who was over 15 when he joined the UPC gave accurate and reliable testimony. Similarly, the Chamber has acted on the evidence relating to the videos addressed by P-0010 in her evidence. The effect of this evidence is considered in the Chamber's overall conclusions.

The Chamber is of the view that the prosecution should not have delegated its investigative responsibilities to the intermediaries in the way set out above, notwithstanding the extensive security difficulties it faced. A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on. The Chamber spent a considerable period of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest. The Prosecution's negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the Court. An additional consequence of the lack of proper oversight of the intermediaries is that they were potentially able to take advantage of the witnesses they contacted. Irrespective of the Chamber's conclusions regarding the credibility and reliability of these alleged former child soldiers, given their youth and likely exposure to conflict, they were vulnerable to manipulation.

As set out above, there is a risk that P-0143 persuaded, encouraged, or assisted witnesses to give false evidence; there are strong reasons to believe that P-0316 persuaded witnesses to lie as to their involvement as child soldiers within the UPC; and a real possibility exists that P-0321 encouraged and assisted witnesses to give false evidence. These individuals may have committed crimes under article 70 of the Statute. Pursuant to rule 165 of the Rules, the responsibility to initiate and conduct investigations in these circumstances lies with the prosecution. Investigations can be initiated on the basis of information communicated by a Chamber or any reliable source. The Chamber hereby communicates the information set out above to the OTP, and the Prosecutor should ensure that the risk of conflict is avoided for the purposes of any investigation.

Witnesses P-0007, P-0008, P-0010, P-0011, and P-0298 were granted permission to participate in the proceedings as victims, as the information submitted was sufficient to establish, on a *prima facie* basis, that they were victims under rule 85 of the Rules. In the view of the Majority, given the Chamber's present conclusions as to the reliability and accuracy of these witnesses, it is necessary to withdraw their right to participate. Similarly, the father of P-0298, P-0299, was granted permission to participate on account of his son's role as a child soldier. The Chamber's conclusions as to the evidence of P-0298 render it equally necessary to withdraw his right to participate in his case. In general terms, if the Chamber, on investigation, concludes that its original *prima facie* evaluation was incorrect, it should amend any earlier order as to participation, to the extent necessary. It would

be unsustainable to allow victims to continue participating if a more detailed understanding of the evidence has demonstrated they no longer meet the relevant criteria.

See No. ICC-01/04-01/06-2842, Trial Chamber I, 14 March 2012, paras. 478-484.

(d) Dual status individuals

[…]

The Chamber concurs with the current jurisprudence of the Court that, whilst the views and concerns of a victim may be presented either in person or through a representative, the manner in which a victim may contribute to the determination of the truth at trial is by giving evidence under oath, thereby becoming a "*dual status*" individual. This may occur in one of two ways: (i) the victim is called as a witness by a party; or (ii) by the Chamber, upon request of the CLR or on its own initiative, pursuant to article 69(3) of the Statute as further developed below.

The Chamber will establish whether the participation of dual status individuals in the relevant stage of proceedings would be appropriate and in particular whether their participation may be effected in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and expeditious trial.

See No. ICC-02/05-03/09-545, Trial Chamber IV, 20 March 2014, paras. 22-23.

4) Modalities of contact with individuals with dual status

As to the [Defence]'s objection to informing the LRV of its intention to contact an individual with dual status on the basis that it would oblige the Defence to disclose its case strategy prematurely, the Single Judge is not persuaded that the Defence strategy would be revealed by the mere fact of informing the LRV of their intention to contact the dual status individual.

[…]

However, this provision does not exclude from its scope, instances in which an ICCPP dual status witness wishes to contact a party other than the party calling him/her. In these circumstances, the Single Judge agrees with the *Blé Goudé* Defence that the calling party shall be made aware of the mere fact that the witness it intends to call and who has been admitted to participate in the ICCPP, has contacted the opposing party. Paragraph 5(c) has been amended accordingly.

Moreover, the Single Judge rejects the Defence arguments against paragraphs 6(c) and 6(d) of the Proposed Protocol which imposes an obligation on any party that has contacts with a dual status individual, to inform the LRV. Indeed, the Single Judge finds that, as the representative of the said victim in the proceedings before the Court, the LRV shall be informed.

See No. ICC-02/11-01/15-199, Trial Chamber I (Single Judge), 1 September 2015, paras. 22, and 26-27.

3.7. Expert witnesses

The work of the Court – and the interests of justice as reflected in regulation 54(m) of the Regulations of the Court – would be significantly assisted if a single, impartial and suitably qualified expert is afforded the best possible opportunity to investigate areas of dispute, having been provided with the detail of the rival contentions.

[…]

The joint instruction of experts will potentially be of great assistance to the Court because through the exercise of identifying with precision the real areas of disagreement between the parties, the expert will be placed in the best possible position to achieve a balanced and comprehensive analysis. There are two particular dimensions to this procedure that deserve mention: first, given the single expert will not be in any sense influenced, however unconsciously, by the viewpoint of only one party, he or she will be particularly able to present a balanced view of the issues, informed by the particular concerns of both sides; second, this procedure avoids any later disagreement as to the qualifications and impartiality of an expert instructed by a single party, with all the potential for delay and disruption to the trial proceedings.

Accordingly, the Chamber favours, where possible, the joint instruction of expert witnesses. If the parties are unable to agree upon the joint instructions to be provided to the expert, they are to provide separate instructions on all the relevant issues. This approach will maintain the benefits of having agreement as to qualifications and expertise whilst also potentially keeping some of the advantages of limiting the areas of disagreement, following the discussions between the parties. The expert will then complete one report covering all the issues that have been raised in the competing instructions. The Chamber adds that, except for exceptional circumstances, it is impractical for the joint expert to provide separate, private reports because he or she would usually be faced with insuperable difficulties as regards confidentiality, both when discussing the issues with the parties individually

and when giving evidence. Unless exceptional circumstances exist, the parties may not provide confidential instructions to a joint expert and their letters of instruction to a joint expert may become a public document.

See No. ICC-01/04-01/06-1069, Trial Chamber I, 10 December 2007, paras. 14-16. See also No. ICC-01/05-01/08-695, Trial Chamber III, 12 February 2010, paras. 11-12; and the Oral decision of Trial Chamber III, No. ICC-01/05-01/08-T-21-ENG, 29 March 2010, pp. 13-24.

If a participant has been given leave to participate in the trial as regards a particular issue or area of evidence which is to be the subject of expert evidence, the parties, whenever appropriate, should notify the participant and thereby provide him with the opportunity of contributing to the joint instructions or filing separate instructions.

If the parties or participants intend to appoint an expert jointly (whether instructed jointly or separately), the name of that expert is to be communicated in a public filing (unless there are good reasons for restricting the filing) in order to enable any question as to the expert's qualifications or professional standing to be raised at an early stage and before the expert has undertaken his or her work.

Participants must make an application to the Chamber for leave if they seek to introduce expert evidence.

Whenever an expert is to be appointed jointly, the instructions (whether joint or separate) are to be filed with the Chamber at an early stage to enable the Bench to provide additional instructions. Pursuant to regulation 44 of the Regulations of the Court, the Chamber may separately instruct an expert witness if it believes there are relevant issues that are not under consideration by the parties.

The list of experts maintained by the Registry should provide a wide selection of experts, all of whom will have had their qualifications verified; moreover, they will have undertaken to uphold the interests of justice when admitted to the list. In the establishment of the list of experts the Registrar should have regard to equitable geographical representation and a fair representation of female and male experts, as well as experts with expertise in trauma, including trauma related to crimes of sexual and gender violence, children, elderly, and persons with disabilities, among others.

See No. ICC-01/04-01/06-1069, Trial Chamber I, 10 December 2007, paras. 18-20, and 22-24.

The Chamber therefore endorses the Registry's proposal that there should be a team of experts, rather than a sole expert. The team ought to include representatives from the DRC, international representatives and specialists in child and gender issues. The Chamber accepts the TFV's suggestion that there should be a preliminary consultative phase involving the victims and the affected communities, to be carried out by the team of experts, with the support of the Registry, the OPCV and any local partners. This work must be undertaken with the cooperation and assistance of any relevant ICC officials.

[…]

The Chamber endorses the five-step implementation plan suggested by the TFV, which is to be executed in conjunction with the Registry, the OPCV and the experts. First, the TFV, the Registry, the OPCV and the experts, should establish which localities ought to be involved in the reparations process in the present case (focusing particularly on the places referred to in the Judgment and especially where the crimes committed). Although the Chamber referred in the article 74 Decision to several particular localities, the reparations programme is not limited to those that were mentioned. Second, there should be a process of consultation in the localities that are identified. Third, an assessment of harm should be carried out during this consultation phase by the team of experts. Fourth, public debates should be held in each locality in order to explain the reparations principles and procedures, and to address the victims' expectations. The final step is the collection of proposals for collective reparations that are to be developed in each locality, which are then to be presented to the Chamber for its approval.The Chamber agrees that the assessment of harm is to be carried out by the TFV during a consultative phase in different localities. Moreover, the Chamber is satisfied that, in the circumstances of this case, the identification of the victims and beneficiaries (regulations 60 to 65 of the Regulations of the TFV) should be carried out by the TFV.

[…]

As noted above, the TFV proposes that a team of interdisciplinary experts assesses the harm suffered by the victims in different localities, with the support of the Registry, the OPCV and local partners. The TFV indicates that it has already used this approach in its projects under its assistance mandate.

[…]

There are very limited financial resources available in this case and it should be ensured that these are applied to the greatest extent possible to the benefit of the victims and any other beneficiaries. The Chamber considers that coordination and cooperation between the Registry, the OPCV and the TFV in establishing the reparations that are to be applied and implementing the plan are essential.

See No. ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012, paras. 264, 281-283, 285, and 288.

The Chamber considers an expert witness to be a person who, by virtue of some specialised knowledge, skill or training can assist the Chamber in understanding or determining an issue of a technical nature that is in dispute.

When considering the admissibility of an expert report or testimony, the Chamber considers that it must: i) be satisfied that the proposed witness is an expert; ii) make a determination as to whether testimony in the relevant subject area of expertise would be of assistance; and iii) determine that the content of the report and/or anticipated testimony falls within the expertise of the witness. Moreover, the content of the proposed expert report or testimony must not usurp the functions of the Chamber as the ultimate arbiter of fact and law. The Chamber may entertain certain objections to the admissibility of expert evidence prior to formal submission when doing so would ensure a fair and expeditious trial.

Expert witnesses are ordinarily afforded wide latitude to offer opinions within their expertise and their views need not be based upon first-hand knowledge or experience. It is, however, for the Chamber to assess whether the witness has sufficient expertise in a relevant subject area such that the Chamber may benefit from hearing his or her opinion. At all times, the expert is obliged to testify with the utmost neutrality and objectivity.

Finally, the Chamber recalls that it will determine the admissibility of evidence, in accordance with Articles 64(9)(a) and 69(4) of the Statute, by assessing its relevance, probative value, and prejudice that its admission may cause to a fair trial or to the evaluation of the testimony of a witness, at the time of submission to the Chamber. The Chamber therefore will not consider the probative value of the expert reports, or lack thereof, at this stage, and notes that the parties will have an opportunity to make any relevant submissions in that regard in due course.

See No. ICC-01/04-02/06-1159, Trial Chamber VI, 9 February 2016, paras. 7-10.

The Chamber considers that the Expert's anticipated evidence is relevant and that his testimony on the topics identified in the Prosecution Request and Report may be of assistance to the Chamber in determining the appropriate sentence. Further, in light of his extensive experience and qualifications, the Chamber is satisfied that his evidence could provide a unique perspective in relation to the impact of the crimes on the victims. The Expert's evidence will cover the "*longitudinal and intergenerational impact of crimes*", including aspects which have not previously featured in the evidentiary record thus far, for example, the effects of trauma on parenting, intergenerational transmission of trauma, and healing prospects.

See No. ICC-01/05-01/08-3384, Trial Chamber III, 4 May 2016, para. 12.

[…] [T]he Chamber recalls that the Initial Directions [on the Conduct of the Proceedings] state that expert reports must fulfil the procedural requirements of Rule 68 of the Rules, unless no objection to the submission is raised. The Defence opposes the submission of the [expert] report on this basis. In line with its previous ruling the Chamber sees no reason why the Rule 68 requirements should not apply to expert reports submitted by victim representatives during trial.

Under these circumstances, the Report cannot be recognised as formally submitted. Rule 68 of the Rules is an exception to the principle of orality of witness testimony. In other words, in cases where the witness is not present before the Chamber (and Rule 68(2) of the Rules applies), the person giving the prior recorded testimony is still considered a witness in the case. In the Decision on Evidence presented by the Victims Representatives the Chamber specifically allowed the testimony of only one of the two experts proposed by the CLRV on issues related to children and youth. A submission of the expert's report would amount to a de facto circumvention of this decision. Accordingly, the Chamber denies this part of the Request.

See No. ICC-02/04-01/15-1224, Trial Chamber IX, 10 April 2018, paras. 8-9.

Relevant decisions regarding evidence

Decision on the Prosecution practice to provide to the defence redacted versions of evidence and materials without authorisation by the Chamber (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-355, 25 August 2006

Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information on Electronic Version for their Presentation during the Confirmation Hearing (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-360, 28 August 2006

First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-437, 15 September 2006

Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-455, 20 September 2006

Decision concerning the Prosecutor Proposed Summary Evidence (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-517, 4 October 2006

Decision on the Defence "Request to exclude video evidence which has not been disclosed in one of the working languages"(Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-676, 7 November 2006

Decision on the schedule and conduct of the confirmation hearing (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-678, 7 November 2006

Decision on the Practices of Witness Familiarisation and Witness Proofing (Pre-Trial Chamber I), No. ICC-01/04-01/06-679, 8 November 2006

Decison on the confirmation of charges (Pre-Trial Chamber I), No. ICC-01/04-01/06-803-tEN, 29 January 2007

Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (Trial Chamber I), No. ICC-01/04-01/06-1049, 30 November 2007

Decision on the procedures to be adopted for instructing expert witnesses (Trial Chamber I), No. ICC-01/04-01/06-1069, 10 December 2007

Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted (Trial Chamber I), No. ICC-01/04-01/06-1084, 13 December 2007

Decision on the E-Court Protocol (Trial Chamber I), No. ICC-01/04-01/06-1127, 24 January 2008

Decision on various issues related to witness' testimony during trial (Trial Chamber I), No. ICC-01/04-01/06-1140, 29 January 2008

Decision on disclosure by the defence (Trial Chamber I), No. ICC-01/04-01/06-1235-Corr-Anx1, 20 March 2008

Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-412, 18 April 2008

Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-428-Corr, 25 April 2008

Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008

Decision regarding the Protocol on the practices to be used to prepare witnesses for trial (Trial Chamber I), No. ICC-01/04-01/06-1351, 23 May 2008

Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses (Trial Chamber I), No. ICC-01/04-01/06-1372, 3 June 2008

Decision on the admissibility of four documents (Trial Chamber I), No. ICC-01/04-01/06-1399, 13 June 2008

Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (Trial Chamber I), No. ICC-01/04-01/06-1401, 13 June 2008

Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (Appeals Chamber), No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008

Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties (Pre-Trial Chamber III), No. ICC-01/05-01/08-55, 31 July 2008

Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I (Appeals Chamber), No. ICC-01/04-01/07-776 OA7, 26 November 2008

Decision on the prosecution's oral request regarding applications for protective measures (Trial Chamber I), No. ICC-01/04-01/06-1547, 9 December 2008

Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol (Trial Chamber II), No. ICC-01/04-01/07-956, 13 March 2009

Decision on a number of procedural issues raised by the Registry (Trial Chamber II), No. ICC-01/04-01/07-1134, 14 May 2009

Decision issuing confidential and public redacted versions of "Decision on the 'Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information' of 5 December 2008 and 'Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information'of 12 March 2009" (Trial Chamber I), No. ICC-01/04-01/06-1980 and Annex 2, No. ICC-01/04-01/06-1980-Anx2, 24 June 2009

Decision on the admission of material from the "bar table" (Trial Chamber I), No. ICC-01/04-01/06-1981, 24 June 2009

Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims (Trial Chamber I), No. ICC-01/04-01/06-2127, 16 September 2009

Directions for the conduct of the proceedings and testimony in accordance with rule 140 (Trial Chamber II), No. ICC-01/04-01/07-1665-Corr, 1 December 2009

Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses (Trial Chamber I), No. ICC-01/04-01/06-2192-Red, 20 January 2010

Decision on the Modalities of Victim Participation at Trial (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010

Decision on the procedures to be adopted for instructing expert witnesses (Trial Chamber III), No. ICC-01/05-01/08-695, 12 February 2010

Oral decision of Trial Chamber III, No. ICC-01/05-01/08-T-21-ENG, 29 March 2010

Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 12 July 2010

Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial" (Appeals Chamber), No. ICC-01/04-01/07-2288 OA11, 16 July 2010

Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents (Trial Chamber III), No. ICC-01/05-01/08-813-Red, 22 July 2010

Redacted Decision on the "Request for the conduct of the testimony of witness CAR-OTPWWWW-0108 by video-link" (Trial Chamber III), No. ICC-01/05-01/08-947-Red, 12 October 2010

Corrigendum of Decision on the "Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)" (Trial Chamber I), No. ICC-01/04-01/06-2589-Corr, 25 October 2010

Decision on the defence request for the admission of 422 documents (Trial Chamber I), No. ICC-01/04-01/06-2595-Red-Corr, 17 November 2010

Redacted Decision on the "Seconde requête de la Défense aux fins de dépôt de documents" (Trial Chamber I), No. ICC-01/04-01/06-2596-Red, 17 November 2010

Redacted Decision on the Prosecution third and fourth applications for admission of documents from the "bar table" (Trial Chamber I), No. ICC-01/04-01/06-2600-Red, 17 November 2010

Decision on the Unified Protocol on the practices used to prepare familiarise witnesses for giving testimony at trial (Trial Chamber III), No. ICC-01/05-01/08-1016, 18 November 2010

Decision on the admission into evidence of materials contained in the prosecution's list of evidence (Trial Chamber III), No. ICC-01/05-01/08-1022, 19 November 2010

Decision on Directions for the Conduct of the Proceedings (Trial Chamber III), No. ICC-01/05-01/08-1023, 19 November 2010

Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence, No. ICC-01/05-01/08-1028, 23 November 2010

Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, No. ICC-01/05-01/08-1039, 24 November 2010

Redacted Decision on the Prosecution's Requests for Non-Disclosure of Information in Witness-Related Documents (Trial Chamber I), No. ICC-01/04-01/06-2597-Red, 3 December 2010

Decision on the Prosecutor's Bar Table Motions (Trial Chamber II), No. ICC-01/04-01/07-2635, 17 December 2010

Decision on Agreements as to Evidence (Trial Chamber II), No. ICC-01/04-01/07-2681, 3 February 2011

Decision on the "Prosecution´s request for a review of potentially privileged material" (Pre-Trial Chamber I), No. ICC-01/04-01/10-67, 4 March 2011

Redacted Decision on the "Quatrième requête de la Défense aux fins de dépôt de documents" (Trial Chamber I), No. ICC-01/04-01/06-2693-Red, 7 March 2011

Corrigendum to Decision on the Legal Representative´s application for leave to tender into evidence material from the "bar table" and on the Prosecution´s Application for Admission of three documents from the Bar Table Pursuant to Article 64(9) (Trial Chamber I), No. ICC-01/04-01/06-2694-Corr, 9 March 2011

Redacted Decision on the "Troisième requête de la Défense aux fins de dépôt de documents" (Trial Chamber I), No. ICC-01/04-01/06-2664-Red, 16 March 2011

Redacted Decision on the "Cinquième requête de la Défense aux fins de dépôt de documents" (Trial Chamber I), No. ICC-01/04-01/06-2702-Red, 6 April 2011

Decision amending the e-Court Protocol (Pre-Trial Chamber I), No. ICC-01/04-01/10-124, 28 April 2011

Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution´s list of evidence" (Appeals Chamber), No. ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011

Order on the procedure relating to the submission of evidence (Trial Chamber III), No. ICC-01/05-01/08-1470, 31 May 2011

Partly Dissenting Opinion of Judge Kuniko Ozaki on the Order on the procedure relating to the submission of evidence (Trial Chamber III), No. ICC-01/05-01/08-1471, 31 May 2011

Decision on the Defence Request to Redact the Identity of the Source of Three Items of Documentary Evidence (Trial Chamber II), No. ICC-01/04-01/07-3057, 4 July 2011

Redacted Decision on the Prosecution´s Request for Non-Disclosure of Information in Six Documents (Trial Chamber I), No. ICC-01/04-01/06-2763-Red, 25 July 2011

Redacted Registry transmission of information in relation to the "Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application" (ICC-01/04-01/06-2766-Conf) (Trial Chamber I), No. ICC-01/04-01/06-2766-Red, 5 August 2011

Decision on the Defence Request to Redact the Identity of the Source of DRC-D03-0001-0707 (Trial Chamber II), No. ICC-01/04-01/07-3122, 22 August 2011

Decision (i) ruling on Legal Representatives´ applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses (Trial Chamber III), No. ICC-01/05-01/08-1729, 9 September 2011

Decision on the Joint Submission regarding the contested issues and agreed facts (Trial Chamber IV), No. ICC-02/05-03/09-227, 28 September 2011

Decision on the Bar Table Motion of the Defence of Germain Katanga (Trial Chamber II), No. ICC-01/04-01/07-3184, 21 October 2011

Second order regarding the applications of the Legal Representatives of victims to present evidence and the views and concerns of victims (Trial Chamber III), No. ICC-01/05-01/08-2027, 21 December 2011

Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011 (Trial Chamber III), No. ICC-01/05-01/08-2012-Red, 9 February 2012

Public Redacted Version of the Partly Dissenting Opinion of Judge Kuniko Ozaki on the First decision on the prosecution and defence requests for the admission of evidence of 15 December 2011 (Trial Chamber II), No. ICC-01/05-01/08-2015-Red, 14 February 2012

Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation" (Appeals Chamber), No. ICC-02/05-03/09-295 OA2, 17 February 2012

Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-49, 6 March 2012

Decision on the "Requête aux fins d'être autorisés à soumettre un Addendum" (Pre-Trial Chamber IV), No. ICC-02/05-03/09-304, 6 March 2012

Order on the implementation of Decision on the supplemented applications by the Legal Representatives of victims to present evidence and the views and concerns of victims (Trial Chamber II), No. ICC-01/05-01/08-2158, 6 March 2012

Judgment pursuant to Article 74 of the Statute (Trial Chamber I), No. ICC-01/04-01/06-2842, 14 March 2012

Oral Decision (Trial Chamber III), No. ICC-01/05-01/08-T-220-ENG, 1 May 2012

Oral Decision (Trial Chamber III), No. ICC-01/05-01/08-T-222-ENG, 3 May 2012

Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (Appeals Chamber), No. ICC-01/09-01/11-414 OA3 OA4, 24 May 2012

Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (Appeals Chamber), No. ICC-01/09-02/11-425 OA4, 24 May 2012

Decision on the "Prosecution's Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court by Lifting Certain Redactions Authorised Pursuant to Rule 81(4) of the Rules of Procedure and Evidence" (Trial Chamber IV), No. ICC-02/05-03/09-368, 13 July 2012

Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call (Trial Chamber V), No. ICC-01/09-01/11-449, 24 August 2012

Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call (Trial Chamber V), No. ICC-01/09-02/11-469, 24 August 2012

Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure" (Trial Chamber III), No. ICC-01/05-01/08-2293, 4 September 2012

Partly Dissenting Opinion of Judge Ozaki on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 69(4) of the Rome Statute (Trial Chamber III), No. ICC-01/05-01/08-2300, 6 September 2012

Decision on victims' representation and participation (Trial Chamber V), No. ICC-01/09-01/11-460, 3 October 2012

Decision on victims' representation and participation (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012

Decision on the "Notification by the Board of Directors in accordance with Regulation 50 a) of the Regulations of the Trust Fund for Victims to undertake activities in the Central African Republic" (Pre-Trial Chamber I), No. ICC-01/05-41, 23 October 2012

Decision on request related to page limits and reclassification of documents (Pre-Trial Chamber II), No. ICC-02/11-01/11-266 OA2, 26 October 2012

Public Redacted version of the "Judgement of the appeal of Mr Laurent Koudou Gbagbo aginst the decision of the Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'" (Appeals Chamber), No. ICC-02/11-01/11-278-Red OA, 26 October 2012

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Decision on VWU submission regarding witness preparation (Trial Chamber V), No. ICC-01/09-02/11-716, 11 April 2013

Decision on "Defence Motion for authorisation to hear the testimony of Witness D04-39 via video-link" (Trial Chamber III), No. ICC-01/05-01/08-2580, 12 April 2013

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Decision on disclosure of lesser redacted version of victim's application relating to Witness 232 (Trial Chamber V(B)), No. ICC-01/09-02/11-806, 18 September 2013

Decision on "Defence Submissions on the Testimony of CAR-D-04-PPPP-0007"(Trial Chamber III), No. ICC-01/05-01/08-2839, 21 October 2013

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Decision on the motion for clarification and reconsideration of the timetable for the parties' final submissions of evidence (Trial Chamber III), No. ICC-01/05-01/08-2855, 30 October 2013

Decision on Maître Douzima's "Requête de la Représentante légale de victimes en vue de soumettre des documents en tant qu'éléments de preuve selon l'article 64(9) du Statut de Rome" (Trial Chamber III), No. ICC-01/05-01/08-2950, 29 January 2014 (reclassified as public on 5 February 2014)

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Decision on "Prosecution request for a variance of protective measures of trial witnesses to allow access to transcripts of evidence in a related article 70 proceeding" (Trial Chamber III), No. ICC-01/05-01/08-3014, 12 March 2014

Decision on the participation of victims in the trial proceedings (Trial Chamber IV), No. ICC-02/05-03/09-545, 20 March 2014

Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation (Trial Chamber V(a)), No. ICC-01/09-01/11-1274-Corr2, 30 April 2014

Dissenting Opinion of Judge Herrera Carbuccia on the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" (Trial Chamber V(a)), No. ICC-01/09-01/11-1274-Anx, 30 April 2014

Décision sur la demande du représentant légal aux fins d'être autorisé à interroger le témoin du Procureur (Trial Chamber II), No. ICC-01/04-01/07-3476, 30 April 2014

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Public Redacted Version of "Decision on the admission into evidence of items deferred in the Chamber's previous decisions, items related to the testimony of Witness CHM-01 and written statements of witnesses who provided testimony before the Chamber" of 17 March 2014 (Trial Chamber III), No. ICC-01/05-01/08-3019-Red, 26 August 2014

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Public Redacted Version of Decision on the modalities of the presentation of additional evidence pursuant to Articles 64(6)(b) and (d) and 69(3) of the Rome Statute (Trial Chamber III), No. ICC-01/05-01/08-3157-Red, 8 October 2014

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Decision adopting mechanisms for exchange of information on individuals enjoying dual status (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-199, 1 September 2015

Decision adopting the "Protocol on disclosure of the identity of witnesses of other parties and of the LRV in the course of investigations, use of confidential information by the parties and the LRV in the course of investigations, inadvertent disclosure and contacts between a party and witnesses not being called by that party" (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-200, 1 September 2015

Directions on the conduct of the proceedings (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015

Decision on the Defence request for leave to appeal the "Directions on the conduct of the proceedings" (Trial Chamber I), No. ICC-02/11-01/15-229, 18 September 2015

Decision on witness preparation and familiarisation (Trial Chamber I), No. ICC-02/11-01/15-355, 2 December 2015

Decision on Protocol on vulnerable witnesses (Trial Chamber I), No. ICC-02/11-01/15-357, 4 December 2015

Decision on the submission and admission of evidence (Trial Chamber I), No. ICC-02/11-01/15-405, and Dissenting Opinion of Judge Henderson, No. ICC-02/11-01/15-405-Anx, 29 January 2016

Decision on Defence preliminary challenges to Prosecution's expert witnesses (Trial Chamber VI), No. ICC-01/04-02/06-1159, 9 February 2016

Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103 (Trial Chamber VI), No. ICC-01/04-02/06-1205, 11 March 2016

Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing (Trial Chamber III), No. ICC-01/05-01/08-3384, 4 May 2016

Decision on request for leave to appeal the "Fourth decision on matters related to disclosure and amendments to the List of Evidence" and other issues related to the presentation of evidence by the Office of the Prosecutor (Trial Chamber I), No. ICC-02/11-01/15-524, 13 May 2016

Decision on the applications for resumption of action submitted by the family members of deceased victims a/0170/08 and a/0294/09 (Trial Chamber II), No. ICC-01/04-01/07-3547-tENG, 11 May 2015

Decision on "Defence's Motion to Preclude and Exclude the prospected Evidence of Witnesses P-369, or, in the alternative, to restrict the Scope of Witness P-0369's intended Evidence" (Trial Chamber I), No. ICC-02/11-01/15-539, 13 May 2016

Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3) (Trial Chamber I), No. ICC-02/11-01/15-573-Red, and Partially Dissenting Opinion of Judge Henderson, No. ICC-02/11-01/15-573-Anx-Red, 9 June 2016

Decision on the Gbagbo Defence Request for leave to appeal the Chamber's Decision granting protective measures to P-0321 (ICC-02/11-01/15-561) (Trial Chamber I), No. ICC-02/11-01/15-598, 23 June 2016

Decision on the mode of testimony of Rule 68(3) witnesses (Trial Chamber I), No. ICC-02/11-01/15-721, and Dissenting Opinion of Judge Henderson, No. ICC-02/11-01/15-721-Anx, 11 October 2016

Decision on the "Prosecution's application to conditionally admit the prior recorded statements and related documents in relation to Witnesses P-0106, P-0107, P-0117 and P-0578 under rule 68(3)" (Trial Chamber I), No. ICC-02/11-01/15-722-Red, and Dissenting Opinion of Judge Henderson, No. ICC-02/11-01/15-722-Anx, 13 October 2016

Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)" (Appeals Chamber), No. ICC-02/11-01/15-744 OA8, 1 November 2016

Decision on the request for leave to appeal the "Decision on the mode of testimony of Rule 68(3) witnesses" (Trial Chamber I), No. ICC-02/11-01/15-756, 15 November 2016

Decision concerning the Prosecutor's submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016 (Trial Chamber I), No. ICC-02/11-01/15-773, 9 December 2016 and Dissenting Opinion of Judge Henderson, No. ICC-02/11-01/15-773-AnxI, 13 December 2016

Public redacted version of Decision on Prosecution application for admission of prior recorded testimony of Witnesses P-0020, P-0057 and P-0932 under Rule 68(2)(b) (Trial Chamber VI), No. ICC-01/04-02/06-1730-Red, 18 January 2017

Decision on the "Prosecution's application to conditionally admit the prior recorded statement and related documents in relation to Witness P-0045 under rule 68(3)" (Trial Chamber I), No. ICC-02/11-01/15-789, 2 February 2017

Decision on further matters related to the testimony of Mr Ntaganda (Trial Chamber VI), No. ICC-01/04-02/06-1945, 8 June 2017

Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against Trial Chamber I's decision on the submission of documentary evidence (Appeals Chamber), No. ICC-02/11-01/15-995 OA11 OA12, 24 July 2017

Decision on protective and special measures, mode of testimony and the order of appearance of certain upcoming witnesses (Trial Chamber I), No. ICC-02/11-01/15-1060, and Partially Concurring Opinion of Judge Henderson, No. ICC-02/11-01/15-1060-Anx, 3 November 2017

Decision on the Prosecutor's urgent application for testimony by means of video-link technology and for additional special measures with respect to Witness P-0554 (Trial Chamber I), No. ICC-02/11-01/15-1079, 27 November 2017

Decision on Victims' Application for Protective and Special Measures (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1227, 13 April 2018

Decision on the Prosecutor's application for protective measures for Witness P0428 (Trial Chamber I), No. ICC-02/11-01/15-1155-Red, 20 April 2018

Decision on the common legal representative of victims' application to submit one item of documentary evidence (Trial Chamber I), No. ICC-02/11-01/15-1188, and Dissenting Opinion of Judge Geoffrey Henderson, No. ICC-02/11-01/15-1188-Anx, 19 June 2018

Decision on Mr Gbagbo's Request for lifting of redactions and reclassification of documents in the record (confidential filing no. 1173) and related orders (Trial Chamber I), No. ICC-02/11-01/15-1194, 5 July 2018

6. Issues related to Reparations

Articles 75 of the Rome Statute
Rules 94 – 99 of the Rules of Procedure and Evidence
Regulation 88 of the Regulations of the Court
Regulations 110 – 111 of the Regulations of the Registry

1. Reparations in general

Pursuant to article 75(1) of the Statute, "*the Court shall establish principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation*".

The Statute and the Rules introduce a system of reparations that reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognizes the need to provide effective remedies for victims.

The Chamber agrees with the observation of Pre-Trial Chamber I when it stated:

The reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. In the Chamber's opinion, the success of the Court is, to some extent, linked to the success of its reparation system.

Reparations fulfill two main purposes that are enshrined in the Statute: they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts. Furthermore, reparations can be directed at particular individuals, as well as contributing more broadly to the communities that were affected. Reparations in the present case must – to the extent achievable – relieve the suffering caused by these offences; afford justice to the victims by alleviating the consequences of the wrongful acts; deter future violations; and contribute to the effective reintegration of former child soldiers. Reparations can assist in promoting reconciliation between the convicted person, the victims of the crimes and the affected communities (without making the convicted person's participation in this process mandatory).

In the Chamber's view, reparations, as provided in the Statute and Rules, are to be applied in a broad and flexible manner, allowing the Chamber to approve the widest possible remedies for the violations of the rights of the victims and the means of implementation. The Court should have a real measure of flexibility in addressing the consequences of the crimes that the convicted person committed in this case (*i.e.* enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities). Although in this decision the Trial Chamber has established certain principles relating to reparations and the approach to be taken to their implementation, these are limited to the circumstances of the present case. This decision is not intended to affect the rights of victims to reparations in other cases, whether before the ICC or national, regional or other international bodies.

[…]

Reparations proceedings are an integral part of the overall trial process. Article 75 of the Statute provides that the Court may order reparations, although it does not specify the body that is to monitor and supervise this part of the proceedings. Pursuant to article 64(2) and (3)(a) of the Statute, the Chamber is of the view that these tasks fall within the responsibilities and functions of the Judiciary.

The Chamber considers that it is unnecessary for the present judges of Trial Chamber I to remain seized throughout the reparations proceedings. Therefore, reparations in this case will be dealt with principally by the Trust Fund for Victims (TFV), monitored and overseen by a differently composed Chamber.

During the implementation process, as indicated below, the Chamber will be in a position to resolve any contested issues arising out of the work and the decisions of the TFV.

See No. ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012, paras. 176-181, and 260-262.

The Appeals Chamber considers that, under the statutory framework for reparations, which is addressed further below, reparations proceedings can be divided into two distinct parts: 1) the proceedings leading to the issuance of an order for reparations; and 2) the implementation of the order for reparations, which the Trust Fund may be tasked with carrying out.

The proceedings before the Trial Chamber leading to the issuance of an order for reparations are regulated in particular by articles 75 and 76(3) of the Statute and by rules 94, 95, 97, and 143 of the Rules of Procedure and Evidence. During this first part of the proceedings, the Trial Chamber may, *inter alia*, establish principles relating to reparations to, or in respect of, victims. This first part of the reparations proceedings concludes with the issuance of an order for reparations under article 75(2) of the Statute or a decision not to award reparations.

The second part of the reparations proceedings consists of the implementation phase, which is regulated primarily by article 75(2) of the Statute and rule 98 of the Rules of Procedure and Evidence. If the Trial Chamber has ordered that reparations be made through the Trust Fund pursuant to rules 98(3) and 98(4) of the Rules of Procedure and Evidence, or that the award for reparations be deposited with the Trust Fund pursuant to rule 98(2) of the Rules of Procedure and Evidence, the Trust Fund plays an important role in this phase and the Regulations of the Trust Fund apply. In this respect, the Appeals Chamber notes that, under the Regulations of the Trust Fund, an order for reparations has to be issued in order to seize the Trust Fund and allow it to undertake implementation activities in relation to reparations. This is stipulated in regulation 50(b) of the Regulations of the Trust Fund.

The Appeals Chamber also notes that the Regulations of the Trust Fund contemplate oversight and a certain degree of intervention by the Trial Chamber during the implementation phase of reparations. In this regard, the Appeals Chamber recalls regulations 54, 55, 57 and 58 of the Regulations of the Trust Fund, which are part of Chapter II, Section III entitled "*If the activities and projects of the Trust Fund are triggered by a decision of the Court*", and regulation 69 of the Regulations of the Trust Fund which is part of Chapter IV entitled "*Collective awards to victims pursuant to rule 98(3)*".

In the view of the Appeals Chamber, the judicial "*approval*" of the draft implementation plan, pursuant to regulations 57 and 69, if applicable, of the Regulations of the Trust Fund is not an initial order for reparations. Rather, as stated above, pursuant to regulation 50(b) of the Regulations of the Trust Fund, an "*order for reparations*" in terms of article 82(4) of the Statute must be issued under article 75 of the Statute prior to any implementation activities by the Trust Fund.

See No. ICC-01/04-01/06-2953 A A2 A3 OA21, Appeals Chamber, 14 December 2012, paras. 53-57.

The Chamber recalls that, under article 75 of the Statute, it is for the Chamber to specify in its order against the convicted person the appropriate reparations to or in respect of victims and to determine the scope of the convicted person's liability. The Chamber notes that any indication as to the resources that the Fund might possibly be called on to advance for the purpose of reparations in this case is dependent on prior determination of the anticipated monetary amount. At the current stage of the proceedings, it is not therefore possible to anticipate the monetary amount needed to compensate for the harm caused by the crimes of which the Accused has been convicted.

See No. ICC-01/04-01/07-3566-tENG, Trial Chamber II, 22 June 2015, para. 5.

At this stage of the proceedings, all means and resources must be focused on reparations for the victims and affected communities – not on a prolongation of the proceedings, which would only result in further victimisation.

Owing to the widespread nature of the crimes committed, a rigid interpretation of what is needed to begin implementing the collective reparations plan would only lead to impunity for the convicted person (in civil liability terms) and injustice for the victims, who have been waiting 10 years since the start of the proceedings. The Trust Fund for Victims must do better, but it is above all incumbent on the Chamber – despite the challenges at hand – to find a solution that urgently addresses the needs of the victims.

[…]

It should be stressed that all the parties participating in the reparations proceedings are entitled to a fair hearing. In the specific context of this civil matter, equality of arms implies a fair balance between the rights of the convicted person and the interests of the victims. Moreover, we must also bear in mind the interests of the communities affected by [the convicted person]'s crimes, as well as the interest of the Court.

[…]

We cannot wait until 3,000 victims have been identified just because the TFV has estimated this to be the total number of victims potentially eligible to receive reparations. Given the nature of the crimes committed, such an individual identification process would be unfeasible or, at best, more costly (not only budget-wise but also in terms of victim well-being) than the available reparations.

See No. ICC-01/04-01/06-3252-Anx-tENG, Trial Chamber II (Opinion of Judge Herrera Carbuccia), 25 October 2016, paras. 2-3, 6, and 9.

The Chamber must underscore the importance of the reparations phase, which marks a critical juncture in the administration of justice, and it is of one mind with Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo* ("*Lubanga*"): the success of the Court is, to some extent, linked to the success of its reparation system.

The Chamber recalls that the purpose of the reparation proceedings is to oblige those responsible for grave crimes to repair the harm they caused to the victims and to enable the Court to ensure that offenders account for their acts. It is by virtue of the reparation proceedings that the Court gives public acknowledgement to the suffering which the grave crimes committed by the convicted person caused to the victims, and delivers to them justice by alleviating, as far as possible, the consequences of the wrongful acts. To such end, the Court must strive to the utmost to ensure that reparations are meaningful to the victims and that, to the extent possible,

they receive reparations which are appropriate, adequate and prompt. The Chamber further underlines that at the reparations stage victims and convicted person are cast in the position of parties to the proceedings.

The Chamber sees reparation proceedings as connected to and yet distinct from the penal proceedings. They are so connected in that liability for reparations is intrinsically linked to the crimes of which the person was convicted. They are distinct in that they constitute a discrete set of proceedings, where the victims tender evidence which is proper to that phase and which, where possible and duly redacted, the convicted person may impugn. It is then that the parties engage in exchanges of observations and argument, oral and written, on the various legal and factual aspects of the proceedings. The order for reparations is the culmination of all such exchanges.

An order for reparations, it is to be noted, must reflect the context from which it arises – that is, at this Court, a legal system, whereby individual criminal responsibility for offences under the Statute is established – and it must be treated in the same manner as a decision to convict or sentence.

The reparations phase, like all proceedings before the Court, is a judicial process. Accordingly, the Chamber must strike a fair balance between the divergent rights and interests of the victims on the one hand and those of the convicted person on the other.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 14-18.

The legal texts of the Court contemplate that reparations proceedings may commence in parallel to a pending appeal. The suspension of decisions is only envisaged in two settings: (1) the execution of decisions under Article 74 or 76 of the Statute which shall be suspended for the duration of appeals proceedings pursuant to Article 81 (4) of the Statute; (2) appeals under Article 82 of the Statute which may be suspended upon request pursuant to Article 82 (3) of the Statute. These provisions are not applicable to the present matter.

It is an established practice at this Court that preparatory steps to facilitate and expedite the reparations proceedings are launched following a conviction. The issuance of a reparations order is not prejudicial to the rights of the convicted person irrespective of whether there is an appeal against the conviction decision. The execution of a reparations order on the other hand depends upon a conviction. Therefore, a reparations order can only be implemented once the conviction decision itself becomes executable, *i.e.* when it has been confirmed on appeal.

The reparations proceedings in the present case are, in contrast, at a preliminary stage. All currently envisaged steps in these proceedings, such as the appointment of experts, are of a preparatory nature. Thus, they are not only permissible within the legal framework of the Court but, moreover, logical and necessary steps for the Chamber to take following the Conviction and Sentencing Decisions against Mr Bemba.

The Chamber further notes that, in the Court's statutory instruments, the power to order suspensive effect is only given to the Appeals Chamber. However, the Chamber considers that Article 64(3)(a) of the Statute gives a Trial Chamber the power to suspend the proceedings if this is "*necessary to facilitate the fair and expeditious conduct of the proceedings*".

The Chamber is not persuaded that, in the present circumstances, suspending the proceedings is appropriate. A suspension of the reparations proceedings, including the appointment of experts in preparation for the issue of a reparations order, would in fact negatively impact on the expeditiousness of the reparations proceedings as it would create a substantial delay.

The suspension of all reparations proceedings until after the Appeals Chamber has rendered its decision would substantially impact on the victims' interests to access reparations in a timely manner.

[…]

The Chamber is mindful that unnecessary costs should be avoided to the greatest possible extent. Nonetheless, the Chamber needs to balance its duty to make use of the Court's resources appropriately, with its obligation to promote efficient and expeditious proceedings, taking into account the ultimate goal of reparations proceedings and victims' rights.

See No. ICC-01/05-01/08-3522, Trial Chamber III, 5 May 2017, paras. 14-19, and 22.

Reparations must be implemented in a gender and culturally sensitive manner which does not exacerbate – and in fact addresses – any pre-existing situation of discrimination preventing equal opportunities to victims.

See No. ICC-01/12-01/15-236, Trial Chamber VIII, 17 August 2017, para. 105.

A trial chamber, in making an award for reparations, has discretion, explicitly circumscribed only by the '*scope and extent of any damage, loss and injury*' (article 75 (1) of the Statute and rule 97 (1) of the Rules). In reaching its decision, a trial chamber shall take account of parties' submissions, as per article 75 (3) of the Statute, and it '*may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect if victims and to suggest various options concerning the appropriate types and modalities of reparations*' pursuant to rule 97(2) of the Rules.

See No. ICC-01/12-01/15-259-Red2 A, Appeals Chamber, 8 March 2018, para. 34.

The legal framework leaves it for chambers to decide the best approach to take in reparations proceedings before the Court. Chambers have thus ample margin to determine how best to deal with the matter before them, depending on the concrete circumstances at hand. However, in the exercise of their discretion, it is clear that proceedings intended to compensate victims for the harm they suffered, often years ago, must be as expeditious and cost effective as possible and thus avoid unnecessarily protracted, complex and expensive litigation.

The Appeals Chamber is not persuaded that the approach chosen by the Trial Chamber for the reparations proceedings before it, which was based on an individual assessment of each application by the Trial Chamber, was the most appropriate in this regard as it has led to unnecessary delays in the award of reparations. However, the Appeals Chamber considers that the Trial Chamber's approach did not amount to an error of law or an abuse of discretion that would justify the reversal of the Impugned Decision.

[…]

The Appeals Chamber observes that the *ultra petita* principle has been interpreted as preventing a court from exceeding parties' claims in two different ways: (i) by ruling on matters not raised by the parties; and (ii) by granting more than was requested by the parties.

The Appeals Chamber recalls that reparations proceedings are governed by article 75 of the Statute, which vests a trial chamber with the power to "*determine the scope and extent of any damage*", stipulating that, before making an order for reparations, it "*may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States*". Article 75 (1) of the Statute also grants the possibility, albeit in exceptional circumstances, for a trial chamber to determine the scope and extent of any damage for the purposes of reparations *proprio motu*. Rule 97(1) of the Rules provides that, "[t]*aking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both*".

The Appeals Chamber considers that, together, these provisions illustrate that a trial chamber, in making an award for reparations, has the discretion to depart from an applicant's claim for reparations, if it considers it to be appropriate. In this respect, the Appeals Chamber notes that a trial chamber is permitted to issue a decision on reparations without being seized by any party and this, by definition, entails making an award to victims which has not been sought. This precludes the strict applicability of the *ultra petita* principle to reparations proceedings before the Court. Similarly, article 75(3) of the Statute, stating that a trial chamber "*may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States*" (emphasis added), suggests that a trial chamber is not strictly bound by these representations. The Appeals Chamber notes that the same provision requires a trial chamber to take account of representations of the convicted person and victims, as well as of "*other interested persons or interested States*". The inclusion of stakeholders other than the convicted person and the victims represents a departure from the *ultra petita* principle, as it assumes that trial chambers are not strictly bound by the parties' submissions. In this respect, in reparations proceedings, trial chambers may consult different stakeholders, but enjoy discretion in ruling on reparations, based on the different input they receive, and in line with "*the scope and extent of any damage, loss and injury to, or in respect of, victims*" pursuant to article 75(1) of the Statute. The Appeals Chamber also notes that […] the individual assessment of individual claims should only be done when there are very few applications, and the intention is to personalise the award. In all other circumstances, albeit very important in order to understand the nature of the harm alleged, the applications for reparations are not the only basis for an award. Indeed, faced with hundreds or thousands of applications, it would be impracticable to tailor reparations to each claim. In such circumstances, the issue of *ultra petita* does not arise.

The Appeals Chamber recalls that, pursuant to article 21(1)(c) of the Statute, the Court may apply "*general principles of law derived by the Court from national laws of legal systems of the world*". Nevertheless, even if the *ultra petita* principle could be considered such a general principle of law, the same provision requires the Court to apply, in the first place, its own Statute, Rules and Elements of Crimes. Given the Court's framework as set out above, the principle does not apply in reparations proceedings before the Court.

The Appeals Chamber would note that if, in the future, trial chambers were to presume psychological harm associated with the experience of an attack for all applicants who have proved material harm, but have not personally experienced the attack, they should carefully approach this issue, providing clear reasons as to the basis on which such a presumption is made. Furthermore, while the Trial Chamber awarded USD 250 to each victim in this case, this should not be viewed as a precedent or indication of quantum when it comes to the determination of awards in future cases.

See No. ICC-01/04-01/07-3778-Red A3 A4 A5, Appeals Chamber, 8 March 2018, paras. 64-65, and 145-149.

The Chamber is nonetheless of the view that, the mandate of this Chamber at this stage of the proceedings is limited to monitoring and supervising the implementation of reparations. The Chamber is also of the view that the circumstances enumerated by the OPCV – the absence of evidence, the withdrawal by the previously designated legal representative from his mandate and the lack of representation of the Concerned Victims for a lengthy period – are the same as those submitted to and adjudicated by the Appeals Chamber.

Nor does the Chamber agree with the argument that an order for reparations issued pursuant to article 75 of the Statute "[TRANSLATION] *is not frozen in time and must be adaptable to the special circumstances of a case so that as many victims as possible can qualify for reparations*". The Chamber is of the opinion that both the victims and the defence are entitled to a fair trial within a reasonable time. It is also of the opinion that, in the context of reparations proceedings, the victims therefore have the right to be informed of their status, as well as of any reparations that they are awarded. Likewise, the defence has the right to be informed of the scope of liability for reparations, once and for all.

The Chamber thus considers it advisable to recall that the finality of a legal process constitutes a basic and consistent principle in all legal systems. This principle reflects the idea that it is in the public interest for any litigation to have an end, and also the need for certainty and stability in legal solutions. For the Chamber, it stands to reason that the same principle applies to orders for reparations issued pursuant to article 75 of the Statute, which must, as stated above, "*be treated in the same manner as a decision to convict or sentence*".

Hence, in the interest of judicial stability, the Chamber considers that it is not within its purview to amend the Order for Reparations to recognize additional harm, as requested by the OPCV, given that the Appeals Chamber has upheld this Order, save for the issue on transgenerational harm – which it remanded.

See No. ICC-01/04-01/07-3801-Red, Trial Chamber II, 12 July 2018, paras. 30-33.

The Chamber agrees that no reparations order can be made against [the person acquitted in appeal] under Article 75 of the Statute. The Chamber must respect the limitations of this Court and recalls that it can only address compensation for harm suffered as a result of crimes when the person standing trial for his or her participation in those crimes has been found guilty. However, the Court was created with both a punitive and restorative function, and the Chamber is of the view that a Final Decision on the reparations proceedings is within the ambits of its powers as the Chamber which has conducted the entire trial and reparations proceedings in this case. The Chamber considers it appropriate to acknowledge the victims' views and concerns, in accordance with Article 68(3) of the Statute, and does not consider this Final Decision in any way prejudicial or inconsistent with the rights of the acquitted person.

The Chamber acknowledges that further individuals, who have not been admitted as participating victims in this case, may have suffered harm as a result of crimes under the jurisdiction of the Court in the CAR between 2002-2003, and should thus also be considered victims for the purposes of the TFV's assistance mandate.

The Chamber does not consider it appropriate to make concrete findings on the extent and scope of victimisation. However, the Chamber recognises the suffering which occurred in the CAR communities, in particular the effects of the use of sexual violence during the conflict.

Lastly, the Chamber takes note of the Legal Representatives' request that the Chamber issue an order pursuant to Article 75(1) and (6) of the Statute, in which it, *inter alia*, establishes principles on reparations which could be applicable to future proceedings. The Chamber is of the view that in the specific circumstances of the case, in particular at this stage, it would be inappropriate to issue principles on reparations.

See No. ICC-01/05-01/08-3653, Trial Chamber III, 3 August 2018, paras. 3, 6-7, and 16.

Although both article 28 of the Code of Conduct and the Arrangements for Contact apply to counsel mandated to represent the rights and interests of victims before the Court – which is not the role of the Trust Fund – the Chamber considers that the Legal Representative's request is reasonable given that the Trust Fund's regular contact with the victims in this case relates to their right to reparations. The Chamber reiterates that the Trust Fund has no objection to being subject to those rules.

Accordingly, the Chamber grants this aspect of the Application and decides that the ethical rules of the Code of Conduct, in particular article 28, and the Arrangements for Contact shall apply *mutatis mutandis* to the Trust Fund.

See No. ICC-01/04-01/07-3807-Red-tENG, Trial Chamber II, 7 September 2018, paras. 23-24.

2 Principles and Elements required for an order for reparations

B. PRINCIPLES ON REPARATIONS

1. Applicable Law

In accordance with article 21(1)(a) of the Statute, when deciding on reparations the Court shall apply the Statute, the Elements of Crimes and the Rules. The Court will also consider the Regulations of the Court, the Regulations of the Registry and the Regulations of the TFV.

Pursuant to article 21(1)(b) and (c) of the Statute, the Court will consider, where appropriate, the applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict, and the general principles of law derived by the Court from national laws of legal systems of the world.

In accordance with article 21(3) of the Statute, the implementation of reparations "*must be consistent with internationally recognized human rights and be without any adverse distinction founded on grounds such as gender age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status*".

The Chamber accepts that the right to reparations is a well-established and basic human right, that is enshrined in universal and regional human rights treaties, and in other international instruments, including the UN Basic Principles; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime; the Nairobi Declaration; the Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa; and the Paris Principles. These international instruments, as well as certain significant human rights reports, have provided guidance to the Chamber in establishing the present principles.

In addition to the instruments rehearsed above, given the substantial contribution by regional human rights bodies in furthering the right of individuals to an effective remedy and to reparations, the Chamber has taken into account the jurisprudence of the regional human rights courts and the national and international mechanisms and practices that have been developed in this field.

2. Dignity, non-discrimination and non-stigmatisation

All victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings. Notwithstanding the submissions of the defence and the legal representatives of victims, it would be inappropriate to limit reparations to the relatively small group of victims that participated in the trial and those who applied for reparations.

The victims of the present crimes, as defined in rule 85 of the Rules, are to enjoy equal access to any information relating to their right to reparations and to assistance from the Court, as part of their entitlement to fair and equal treatment throughout the proceedings.

In all matters relating to reparations, the Court shall take into account the needs of all the victims, and particularly children, the elderly, those with disabilities and the victims of sexual or gender violence, pursuant to article 68 of the Statute and rule 86 of the Rules.

When deciding on reparations, the Court shall treat the victims with humanity and it shall respect their dignity and human rights, and it will implement appropriate measures to ensure their safety, physical and psychological well being and privacy, pursuant to rules 87 and 88 of the Rules.

Under article 21(3) of the Statute, reparations shall be granted to victims without adverse distinction on the grounds of gender, age, race, color, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status.

Reparations need to address any underlying injustices and in their implementation the Court should avoid replicating discriminatory practices or structures that predated the commission of the crimes. Equally, the Court should avoid further stigmatization of the victims and discrimination by their families and communities.

Reparations should secure, whenever possible, reconciliation between the convicted person, the victims of the crimes and the affected communities.

3. Beneficiaries of reparations

Pursuant to rule 85 of the Rules, reparations may be granted to direct and indirect victims, including the family members of direct victims; anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings.

In order to determine whether a suggested "*indirect victim*" is to be included in the reparations scheme, the Court should determine whether there was a close personal relationship between the indirect and direct victim, for instance as exists between a child soldier and his or her parents. It is to be recognized that the concept of "*family*" may have many cultural variations, and the Court ought to have regard to the applicable social and familial structures. In this context, the Court should take into account the widely accepted presumption that an individual is succeeded by his/her spouse and children.

Indirect victims may also include individuals who suffered harm when helping or intervening on behalf of direct victims.

Reparations can be granted to legal entities, pursuant to rule 85(b) of the Rules. These may include, *inter alia*, non-governmental, charitable and non-profit organizations, statutory bodies including government departments, public schools, hospitals, private educational institutes (primary and secondary schools or training colleges), companies, telecommunication firms, institutions that benefit members of the community (such as cooperative and building societies, or bodies that deal with micro finance), and other partnerships.

In the reparations proceedings, victims may use official or unofficial identification documents, or any other means of demonstrating their identities that are recognized by the Chamber. In the absence of acceptable documentation, the Court may accept a statement signed by two credible witnesses establishing the identity of the applicant and describing the relationship between the victim and any individual acting on his or her behalf.

When the applicant is an organization or institution, the Chamber will recognize any credible document that constituted the body in order to establish its identity.

The Chamber recognizes that priority may need to be given to certain victims who are in a particularly vulnerable situation or who require urgent assistance. These may include, *inter alia*, the victims of sexual or gender-based violence, individuals who require immediate medical care (especially when plastic surgery or treatment for HIV is necessary), as well as severely traumatized children, for instance following the loss of family members. The Court may adopt, therefore, measures that constitute affirmative action in order to guarantee equal, effective and safe access to reparations for particularly vulnerable victims.

Pursuant to article 75(6) of the Statute, a decision of the Court on reparations should not operate to prejudice the rights of victims under national and international law. Equally, decisions by other bodies, whether national or international, do not affect the rights of victims to receive reparations pursuant to article 75 of the Statute. However, notwithstanding those general propositions, the Court is able to take into account any awards or benefits received by victims from other bodies in order to guarantee that reparations are not applied unfairly or in discriminatory manner.

4. Accessibility and consultation with victims

A gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations, ensuring that they are accessible to all victims in their implementation. Accordingly, gender parity in all aspects of reparations is an important goal of the Court.

The victims of the crimes, together with their families and communities should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective.

Reparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, including participation in any reparations programme.

Outreach activities, which include, firstly, gender- and ethnic-inclusive programmes and, secondly, communication between the Court and the affected individuals and their communities are essential to ensure that reparations have broad and real significance.

The Court should consult with victims on issues relating, *inter alia*, to the identity of the beneficiaries, their priorities and the obstacles they have encountered in their attempts to secure reparations.

5. Victims of sexual violence

The Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence. The Court must reflect the fact that the consequences of these crimes are complicated and they operate on a number of levels; their impact can extend over a long period of time; they affect women and girls, men and boys, together with their families and communities; and they require a specialist, integrated and multidisciplinary approach.

The Court shall implement gender-sensitive measures to meet the obstacles faced by women and girls when seeking to access justice in this context, and accordingly it is necessary that the Court takes steps to ensure they are able to participate, in a full sense, in the reparations programmes.

Therefore, the approach taken by the Court should enable women and girls in the affected communities to participate in a significant and equal way in the design and implementation of any reparations orders.

6. Child victims

Pursuant to article 68(1) of the Statute, one of the relevant factors – which is of high importance in the present case – is the age of the victims. Pursuant to rule 86 of the Rules, the Court shall take account of the age-related harm experienced by, along with the needs of, the victims of the present crimes. Furthermore, any differential impact of these crimes on boys and girls is to be taken into account.

In reparations decisions concerning children, the Court should be guided, *inter alia*, by the Convention on the Rights of the Child and the fundamental principle of the "*best interests of the child*" that is enshrined therein. Further, the decisions in this context should reflect a gender-inclusive perspective.

The Chamber notes that the Convention on the Rights of the Child encourages States Parties to the Convention to:

> *Take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.*

Reparations proceedings, and reparations orders and programmes in favor of child soldiers, should guarantee the development of the victims' personalities, talents and abilities to the fullest possible extent and, more broadly, they should ensure the development of respect for human rights and fundamental freedoms. For each child, the measures should aim at developing respect for their parents, cultural identity and language. Former child soldiers should be helped to live responsibly in a free society, recognizing the need for a spirit of understanding, peace and tolerance, showing respect for equality between the sexes and valuing friendship between all peoples and groups.

The Court shall provide information to child victims, their parents, guardians and legal representatives about the procedures and programmes that are to be applied to reparations, in a form that is comprehensible for the victims and those acting on their behalf.

The views of the child victims are to be considered when decisions are made about individual or collective reparations that concern them, bearing in mind their circumstances, age and level of maturity.

In this context, the Court shall reflect the importance of rehabilitating former child soldiers and reintegrating them into society in order to end the successive cycles of violence that have formed an important part of past conflicts. These measures must be approached on a gender-inclusive basis.

7. Scope of reparations

There is a growing recognition in international human rights law that victims and groups of victims may apply for and receive reparations. Pursuant to rule 97(1) of the Rules, "*the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both*". In consequence, and in accordance with article 21(3) of the Statute and rule 85 of the Rules, reparations may be awarded to: a) individual victims; or b) groups of victims, if in either case they suffered personal harm.

The Court shall ensure that reparations are awarded on non-discriminatory and gender-inclusive basis.

Given the uncertainty as to the number of victims of the crimes in this case -save that a considerable number of people were affected – and the limited number of individuals who have applied for reparations, the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified.

Individual and collective reparations are not mutually exclusive, and they may be awarded concurrently. Furthermore, individual reparations should be awarded in a way that avoids creating tensions and divisions within the relevant communities.

When collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis. The Court should consider providing medical services (including psychiatric and psychological care) along with assistance as regards general rehabilitation, housing, education and training.

8. Modalities of reparations

Although article 75 of the Statute lists restitution, compensation and rehabilitation as forms of reparations, this list is not exclusive. Other types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate. As set out above, a gender-sensitive approach should be applied when determining the manner in which reparations are to be applied.

a. Restitution

Restitution should, as far as possible, restore the victim to his or her circumstances before the crime was committed, but this will often be unachievable for victims of the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities.

Restitution is directed at the restoration of an individual's life, including a return to his or her family, home and previous employment; providing continuing education; and returning lost or stolen property.

Restitution may be apposite for legal bodies such as schools or other institutions.

b. Compensation

Compensation should be considered when i) the economic harm is sufficiently quantifiable; ii) an award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case); and iii) the available funds mean this result is feasible.

Compensation is to be approached on a gender-inclusive basis and awards should avoid reinforcing previous structural inequalities and perpetuating prior discriminatory practices.

The concept of "*harm*", while not defined in the Statute or the Rules, denotes "*hurt, injury and damage*". The harm does not necessarily need to have been direct, but it must have been personal to the victim.

Consistent with internationally recognized human rights law, compensation requires a broad application, to encompass all forms of damage, loss and injury, including material, physical and psychological harm.

Although some forms of damage are essentially unquantifiable in financial terms, compensation is a form of economic relief that is aimed at addressing, in a proportionate and appropriate manner, the harm that has been inflicted.

Examples include:

a. Physical harm, including causing an individual to lose the capacity to bear children;

b. Moral and non-material damage resulting in physical, mental and emotional suffering.

c. Material damage, including lost earnings and the opportunity to work; loss of, or damage to, property; unpaid wages or salaries; other forms of interference with an individual's ability to work; and the loss of savings.

d. Lost opportunities, including those relating to employment, education and social benefits; loss of status; and interference with an individual's legal rights (although the Court must ensure it does not perpetuate traditional or existing discriminatory practices, for instance on the basis of gender, in attempting to address these issues).

e. Costs of legal or other relevant experts, medical services, psychological and social assistance, including, where relevant, help for boys and girls with HIV and Aids.

The measures put in place for awarding compensation should take into account the gender and age-specific impact that the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities can have on direct victims, their families and communities. The Court should assess whether it is appropriate to provide compensation for any of the detrimental consequences of child recruitment for the individuals directly affected, along with their families and communities.

c. Rehabilitation

The right of victims to rehabilitation is to be implemented by the Court on the basis of the principles relating to non-discrimination, and this shall include a gender-inclusive approach that encompasses males and females of all ages.

Rehabilitation shall include the provision of medical services and healthcare (particularly in order to treat HIV and Aids); psychological, psychiatric and social assistance to support those suffering from grief and trauma; and any relevant legal and social services.

Rehabilitation of the victims of child recruitment should include measures that are directed at facilitating their reintegration into society, taking into account the differences in the impact of these crimes on girls and boys. These steps should include the provision of education and vocational training, along with sustainable work opportunities that promote a meaningful role in society.

The rehabilitation measures ought to include the means of addressing the shame that child victims may feel, and they should be directed at avoiding further victimization of the boys and girls who suffered harm as a consequence of their recruitment.

The steps taken to rehabilitate and reintegrate former child soldiers may also include their local communities, to the extent that the reparations programmes are implemented where their communities are located. Programmes that have transformative objectives, however limited, can help prevent future victimization, and symbolic reparations, such as commemorations and tributes, may also contribute to the process of rehabilitation.

d. Other Modalities of Reparations

The conviction and the sentence of the Court are examples of reparations, given they are likely to have significance for the victims, their families and communities.

The wide publication of the article 74 Decision may also serve to raise awareness about the conscription and enlistment of children under the age of 15 and their use to participate actively in the hostilities, and this step may help deter crimes of this kind.

The Court, through the present trial and in accordance with its broad competence and jurisdiction, assisted by the State Parties and the international community pursuant to Part 9 of the Statute on "*International cooperation and judicial assistance*", is entitled to institute other forms of reparation, such as establishing or assisting campaigns that are designed to improve the position of victims; by issuing certificates that acknowledge the harm particular individuals experienced; setting up outreach and promotional programmes that inform victims as to the outcome of the trial; and educational campaigns that aim at reducing the stigmatization and marginalization of the victims of the present crimes. These steps can contribute to society's awareness of the crimes committed by the convicted person and the need to foster improved attitudes towards events of this kind, and ensure that children play an active role within their communities.

Reparations may include measures to address the shame felt by some former child soldiers, and to prevent any future victimization, particularly when they endured sexual violence, torture and inhumane and degrading treatment following their recruitment. As canvassed above, the Court's reparations strategy should, in part, be directed at preventing future conflicts and raising awareness that the effective reintegration of the children requires eradicating the victimization, discrimination and stigmatization of young people in these circumstances.

The convicted person is able to contribute to this process by way of a voluntary apology to individual victims or to groups of victims, on a public or confidential basis.

9. Proportional and adequate reparations

Victims should receive appropriate, adequate and prompt reparations.

The reparations should, in all circumstances, be awarded on a non-discriminatory basis, and they need to be formulated and applied in a gender-inclusive manner. The awards ought to be proportionate to the harm, injury, loss and damage as established by the Court. The measures will depend on the particular context of this case and circumstances of the victims, and they should accord with the overarching objectives of reparations, as set out in this decision.

Reparations should aim at reconciling the victims of the present crimes with their families and all the communities affected by the charges.

Whenever possible, reparations should reflect local cultural and customary practices unless these are discriminatory, exclusive or deny victims equal access to their rights.

Reparations need to support programmes that are self-sustaining, in order to enable victims, their families and communities to benefit from these measures over an extended period of time. If pensions or other forms of economic benefits are to be paid, these should be allocated, if possible, by periodic instalments rather than by way of a lump payment.

10. Causation

The "*damage, loss and injury*", which form the basis of a reparations claim, must have resulted from the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities.

It is to be observed in this general context that neither the Statute nor the Rules define the precise requirements of the causal link between the crime and the relevant harm for the purposes of reparations. Moreover, there is no settled view in international law on the approach to be taken to causation.

Reparations should not be limited to "*direct*" harm or the "*immediate effects*" of the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities, but instead the Court should apply the standard of "*proximate cause*".

In reaching this conclusion as to the relevant standard of causation to be applied to reparations, and particularly to the extent that they are ordered against the convicted person, the Chamber needs to reflect the divergent interests and rights of the victims and the convicted person. Balancing those competing factors, at a minimum the Court must be satisfied that there exists a "*but/for*" relationship between the crime and the harm and, moreover, the crimes for which the person was convicted were the "*proximate cause*" of the harm for which reparations are sought.

11. Standard and burden of proof

At trial, the prosecution must establish the relevant facts to the criminal standard, namely beyond a reasonable doubt. Given the fundamentally different nature of these reparations proceedings, a less exacting standard should apply.

Several factors are of significance in determining the appropriate standard of proof at this stage, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence. This particular problem has been recognized by a number of sources, including rule 94(1) of the Rules, which provides that victims' requests for reparations shall contain, to the extent possible, any relevant supporting documentation, including names and addresses of witnesses.

Given the article 74 stage of the trial has concluded, the standard of "*a balance of probabilities*" is sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person.

When reparations are awarded from the resources of the Trust Fund for Victims or from any other source, a wholly flexible approach to determining factual matters is appropriate, taking into account the extensive and systematic nature of the crimes and the number of victims involved.

12. Rights of the defence

Nothing in these principles will prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial.

13. States and Other Stakeholders

State Parties have the obligation under Parts 9 and 10 of the Statute, of cooperating fully in the enforcement of orders, decisions and judgments of the Court, and they are enjoined not to prevent the enforcement of reparations orders or the implementation of awards.

Pursuant to articles 25(4) and 75(6) of the Statute, reparations under the Statute do not interfere with the responsibility of States to award reparations to victims under other treaties or national law.

14. Publicity of these Principles

In accordance with rule 96 of the Rules, entitled "*Publication of reparation proceedings*", the Registrar is responsible for taking all the necessary measures in this context, including outreach activities with the national authorities, local communities and the affected populations, in order to publicize these principles and any reparation proceedings before the Court.

Reparations proceedings shall be transparent and measures should be adopted to ensure that all victims within the jurisdiction of the Court have detailed and timely notice of these proceedings and access to any awards.

See No. ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012, paras. 182-259.

The Appeals Chamber notes that the Court's legal texts do not provide a comprehensive definition as such of an "*order for reparations*", nor do they specify the minimum required content and details of such an order. Notwithstanding this, the Appeals Chamber considers that, when read together, the Court's legal texts provide a clear framework as to the minimum elements required for an order for reparations pursuant to article 75 of the Statute. […].

The Appeals Chamber holds that an order for reparations under article 75 of the Statute must contain, at a minimum, five essential elements: 1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97(1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.

[…]

The Appeals Chamber considers that the inclusion of these five elements in an order for reparations is vital to its proper implementation. It also ensures that the critical elements of the order are subject to judicial control, consistent with rule 97(3) of the Rules of Procedure and Evidence, which requires that "[i]*n all cases* [when reparations are awarded], *the Court shall respect the rights of victims and the convicted person*". The inclusion of these elements is also of significance with respect to the right to appeal, provided for in article 82(4) of the Statute. In the Appeals Chamber's view, if one of the above elements is not subject to judicial determination in the order for reparations, "[a] l*egal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75*" will be unable to effectively exercise their right to appeal.

[…]

In conclusion, the Appeals Chamber now holds that the Impugned Decision contains sufficient elements to be an order for reparations within the meaning of article 75 of the Statute, subject to the amendments detailed in this judgment.

[…]

Article 21 of the Statute does not include official actions taken by the Assembly of States Parties as a source of applicable law. However, article 79(3) of the Statute stipulates that the Trust Fund is to be managed according to determinations made by the Assembly of States Parties. Thus, this statutory provision is unambiguous that the management of the Trust Fund does not lie with the Court.

[…]

Taking the above into account and noting particularly the reference in article 75(2) of the Statute and rule 98 of the Rules of Procedure and Evidence to article 79 of the Statute, the Appeals Chamber considers that, for purposes of awards for reparations made through the Trust Fund, resolutions of the Assembly of States Parties in this respect should be given due regard by Trial Chambers. To the extent that a Trial Chamber issues an order for reparations that impinges on the management of the Trust Fund's finances, resolutions of the Assembly of States Parties in this regard must be taken into account and are to be considered an authoritative source for purposes of interpreting the Regulations of the Trust Fund.

[…]

The Appeals Chamber considers that the requirement to establish principles relating to reparations is mandatory ("*shall*"). The second sentence of article 75(1) of the Statute makes it clear that a decision to award individual reparations pursuant to a request or a *proprio motu* decision under rules 94 or 95 of the Rules of Procedure and Evidence must be based on the article 75(1) principles and requires the Trial Chamber to "*state the principles on which it is acting*" in making the individual award. The Appeals Chamber considers that this also applies to individual reparation awards deposited with the Trust Fund pursuant to rule 98(2) of the Rules of Procedure and Evidence. This is because, in the Appeals Chamber's view, "*deposited with*" does not affect the fact that the order is still made directly against the convicted person, but rather it is a mechanism to address situations where it is "*impossible or impracticable to make individual awards directly to each victim*" (emphasis added).

Therefore, the Appeals Chamber considers that a collective reparation order made against the convicted person, but through the Trust Fund, must also be based on the relevant article 75(1) principles.

Given the inter-related nature of the article 75(1) principles and the order for reparations, the Appeals Chamber considers that, pursuant to rule 153(1) of the Rules of Procedure and Evidence, it may amend, as necessary, both the principles and the order for reparations that is based upon those principles. In this respect, the Appeals Chamber considers that amending the principles implies not only addressing those principles already contained in the Impugned Decision, but may also entail articulating principles not yet included therein.

The Appeals Chamber agrees that Trial Chambers should articulate principles within the context of the circumstances of the specific case at hand. However, principles relevant to the circumstances of a case must be distinguished from the order for reparations, *i.e.* the Trial Chamber's holdings, determinations and findings based on those principles. Accordingly, principles should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers.

[…]

A. First element: The order for reparations must be made against the convicted person

The Appeals Chamber recalls the principle established in the Impugned Decision that reparations "*ensure that offenders account for their acts*". The Appeals Chamber considers that this principle properly reflects the system of reparations at the Court. In other words, reparations, and more specifically orders for reparations, must reflect the context from which they arise, which, at the Court, is a legal system of establishing individual criminal liability for crimes under the Statute. In the view of the Appeals Chamber, this context strongly suggests that reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence.

[…]

The Appeals Chamber therefore considers that the principle of accountability for '*the offender*' and the relevant provisions of the Court's legal texts make it clear that an order for reparations should be made against the convicted person. However, the question arises as to whether this principle must always be reflected in an order for reparations under article 75 of the Statute or whether, based on the circumstances of a specific case, this principle may be deviated from.

First, in the view of the Appeals Chamber, issuing an order for reparations "*against*" the convicted person and acting "*through*" the Trust Fund are not mutually exclusive concepts. To the contrary, the Appeals Chamber finds that, even if reparations are ordered "*through*" the Trust Fund in accordance with the second sentence of article 75(2) of the Statute, the Trial Chamber must still direct the order "*against*" the convicted person. The Appeals Chamber arrives at this conclusion based on the Court's legal texts, which do not provide for any deviation from the principle of accountability that is expressed by the order for reparations being directed against the convicted person.

The Appeals Chamber considers that the second sentence of article 75(2) of the Statute, which deals with awarding reparations "*through the Trust Fund*", does not provide for an alternative to making an order "*against a convicted person*" pursuant to the first sentence of this provision. Rather, it is an alternative to making such an order "*directly*" against the convicted person. Therefore, while these two sentences differ on the directness of the order, what they have in common is that the order is nonetheless made against the convicted person.

Rule 98 of the Rules of Procedure and Evidence provides that a Trial Chamber may make a reparation award through the Trust Fund or order that the award be deposited with the Trust Fund in three circumstances: 1) when, at the time of making the order, it is impossible or impracticable to make individual awards directly to each victim, 2) where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate, and 3) when the award is made to an intergovernmental, international or national organisation.

[…]

The Appeals Chamber finds that the legal framework clearly establishes that an order for reparations has to be issued in all circumstances against the convicted person. When appropriate, such an order for reparations can – in addition – be made through the Trust Fund.

[…]

The Appeals Chamber considers that the relevant principle embodied in this rule is that: Reparation is to be awarded based on the harm suffered as a result of the commission of any crime within the jurisdiction of the Court.

The Appeals Chamber considers that the principle which finds expression in this holding is that: The causal link between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of a case.

Accordingly, the Appeals Chamber articulates the principle that: In the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. In this sense, what is the "*appropriate*" standard of proof and what is "*sufficient*" for purposes of an applicant meeting the burden of proof will depend upon the circumstances of the specific case. For purposes of determining what is sufficient, Trial Chambers should take into account any difficulties that are present from the circumstances of the case at hand.

[…]

B. Second element: The order for reparations must establish and inform the convicted person of his or her liability

The Appeals Chamber therefore considers that the obligation to repair harm arises from the individual criminal responsibility for the crimes which caused the harm and, accordingly, the person found to be criminally responsible for those crimes is the person to be held liable for reparations.

[…]

(a) Indigence of the convicted person as a reason not to impose liability for any reparations awarded

The Appeals Chamber finds that the Trial Chamber erred by considering the convicted person's indigence to be relevant to whether he should be liable for any reparations awarded. […].

Article 75 (4) of the Statute provides that "*the Court may* […] *determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1*". The latter article lists various forms of cooperation that the Court may request from States Parties, including "*(k)* [t]*he identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties*". The Appeals Chamber considers that the specific reference in article 75 (4) of the Statute to the possibility of seeking assistance of States Parties in, *inter alia*, the identification and freezing of property and assets indicates that indigence is not an obstacle to the imposition of liability for reparations on the convicted person. In this respect, the Appeals Chamber notes that the provision provides that the Trial Chamber may seek assistance from States Parties *"in order to give effect to*" the reparation order.

The Appeals Chamber further notes that pursuant to regulation 117 of the Regulations of the Court, "[t]*he Presidency shall, if necessary, and with the assistance of the Registrar as appropriate, monitor the financial situation of the sentenced person on an ongoing basis, even following completion of a sentence of imprisonment, in order to enforce fines, forfeiture orders or reparation orders* […]". This regulation therefore confirms that indigence at the time when the Trial Chamber issues an order for reparations is not an obstacle to imposing liability because the order may be implemented when the monitoring of the financial situation of the person sentenced reveals that he or she has the means to comply with the order.

[…]

(b) The Trial Chamber's control of the "other resources" of the Trust Fund

The Appeals Chamber considers that the word "*may*" in rule 98 (5) of the Rules of Procedure and Evidence means that a decision to use "*other resources*" is a discretionary decision and not mandatory. Regarding who is to make the decision to use these "*other resources*", the Appeals Chamber considers that the wording of regulations 50 and 56 of the Regulations of the Trust Fund makes it clear that this decision is to be made by the Board of Directors, not by the Court. […].

[…]

The Appeals Chamber is therefore of the view that, in addition to the clear text of the provision at issue, the decision by the Assembly of States Parties to place the authority to determine whether to complement the resources collected for an award for reparations with the Board of Directors, as opposed to an individual Trial Chamber, is clearly preferable from a policy and practical perspective, given the competing financial considerations that must be balanced in deciding whether to complement an award for reparations that is ordered in a specific case.

The determination, pursuant to regulation 56 of the Regulations of the Trust Fund, of whether to allocate the Trust Fund's "*other resources*" for purposes of complementing the resources collected through awards for reparations falls solely within the discretion of the Trust Fund's Board of Directors.

In cases where the convicted person is unable to immediately comply with an order for reparations for reasons of indigence, the Appeals Chamber agrees […] that the Trust Fund may advance its "*other resources*" pursuant to regulation 56 of the Regulations of the Trust Fund, but such intervention does not exonerate the convicted person from liability. The convicted person remains liable and must reimburse the Trust Fund.

Upon being seized of the amended order for reparations, the Trust Fund's Board of Directors may decide whether to advance its resources in order to enable the implementation of the order for reparations. If the Board of Directors decides to do so, the Trust Fund will be able to claim the advanced resources from the convicted person. Should the latter be found indigent, despite efforts to identify his property and assets, including through,

inter alia, requests for assistance from States Parties, his financial situation shall be monitored pursuant to regulation 117 of the Regulations of the Court.

(c) The scope of a convicted person's liability for reparations

The Appeals Chamber notes that the scope of a convicted person's liability for reparations may differ depending on, for example, the mode of individual criminal responsibility established with respect to that person and on the specific elements of that responsibility. Accordingly, the Appeals Chamber finds it necessary to be guided by a principle not previously articulated by the Trial Chamber, namely that: A convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.

C. Third element: The order for reparations must specify the type of reparations, either individual, collective or both

(b) Alleged error in not ordering both collective and individual reparations on the basis of the individual reparation requests filed

[…]

The Appeals Chamber considers that the Court's legal texts provide for two distinct procedures for awards for reparations. The first, which relates to individual reparation awards, is primarily application ("*request*") based and is mainly regulated by rules 94 and 95 of the Rules of Procedure and Evidence. The second relates to collective reparation awards and is regulated in relevant part by rules 97 (1) and 98 (3) of the Rules of Procedure and Evidence.

The Appeals Chamber considers that the drafting history of the Court's legal texts provides additional support for this distinction. The Appeals Chamber notes that, during the Rome Conference, there were conflicting opinions on the concept of "*reparations*". In particular, the main issue of contention surrounded to what extent the Court should engage in determining individual cases of damage, loss or injury in relation to a crime. In this respect, the Appeals Chamber finds particularly instructive the explanatory note in relation to the interpretation of article 75(1) of the Statute, adopted by the Committee of the Whole, which provides that some delegates held the view that

> [t]*his provision intends that where there are only a few victims the Trial Chamber may make findings about their damage, loss and injury. Where there are more than a few victims, however, the Trial Chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparations. Instead, the Trial Chamber may make findings as to whether reparations are due because of the crimes and will not undertake to consider and decide claims of individual victims.*

The Appeals Chamber also considers that this second procedure, relevant to collective reparations, corresponds with the principles discussed above, namely that reparations "*oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts*". In this respect, the Appeals Chamber recalls that it has already held above that "*reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence*", decisions which are based on the evidence and factual findings relevant to the entire trial proceedings. The Appeals Chamber considers that it would contravene this principle to require that collective reparations can only be awarded on the basis of the individual requests for reparations received.

The Appeals Chamber therefore holds that, when only collective reparations are awarded pursuant to rule 98(3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations. Rather, the determination that it is more appropriate to award collective reparations operates as a decision denying, as a category, individual reparation awards. Such a determination may be challenged on appeal based on the Trial Chamber's consideration of the factors laid out in rule 98(3) of the Rules of Procedure and Evidence.

[…]

The Appeals Chamber therefore finds that the Legal Representatives of Victims V01, as well as the Legal Representatives V02 with the OPCV, have not demonstrated that an award for collective reparations, without deciding upon the merits of each individual request for reparations, is not consistent with internationally recognized human rights.

The Appeals Chamber therefore finds that the Trial Chamber's decision to award reparations on a collective basis and not to rule on the merits of the individual reparation requests did not undermine the objectives of the reparations proceedings.

(c) The transmission of the individual applications to the Trust Fund

The Appeals Chamber notes that, at the time of making applications for reparations, the victims either applied for individual awards or applied for a collective award, without knowledge of the kind of a collective programme that would be ultimately adopted. The Appeals Chamber therefore finds that it is necessary to seek the victims' consent when a collective award is made, consistent with the principle, identified by the Trial Chamber, that "[r]*eparations are entirely voluntary*".

Furthermore, in its direction to the Registrar to transmit all applications to the Trust Fund, the Trial Chamber did not include any clause regarding confidentiality, which is contrary to regulation 118(2) of the Regulations of the Registry.

The Appeals Chamber therefore considers it appropriate to include in the order for reparations an instruction to the Registrar to consult, through their Legal Representatives, with the victims who submitted requests for reparations in this case, in order to seek their consent to disclosure of confidential information to the Trust Fund for purposes of participation in the eventual collective programme(s) that are to be designed by the Trust Fund. The Trust Fund is instructed to refrain from further reviewing these requests until such consent is received and to permanently remove any confidential information it may have stored electronically or elsewhere in the event that consent is not granted. When the collective reparation awards contained in the draft implementation plan have been approved, the Trust Fund is directed to seek consent to participate therein from the victims whose applications are forwarded to it.

[…]

D. Fourth element: The order for reparations must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the appropriate modalities of reparations based on the circumstances of the case

The Appeals Chamber notes that the statutory framework relevant to reparations envisages the possibility of expert assistance at two distinct phases: 1) before an order for reparations is issued as regulated by rule 97(2) of the Rules of Procedure and Evidence and 2) after the order for reparations has been issued, which is regulated by the Regulations of the Trust Fund.

[…]

(a) Assessing the harm suffered by the victims and identifying the effect that the crimes for which the Accused was convicted had on the victims' families and communities

At the outset, the Appeals Chamber highlights the critical distinction between identifying the harms to direct and indirect victims caused by the crimes for which the person was convicted and assessing the extent of that harm for purposes of determining the nature and/or size of reparation awards. In the Appeals Chamber's view, the former must be done by the Trial Chamber and must be contained in the order for reparations. The Appeals Chamber considers that the victims, through their legal representatives, and the convicted person must be informed of this critical aspect of an order for reparations and further considers that the absence of this determination infringes on the rights of the victims and the convicted person to meaningfully appeal an order for reparations under article 82(4) of the Statute.

[…]

With respect to assessing the extent of the harms, the […] Appeals Chamber notes that rule 97 (2) of the Rules of Procedure and Evidence provides that a Trial Chamber "*may appoint experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims*" and that the Regulations of the Trust Fund provide that this assessment may instead be carried out at the implementation stage. In the Appeals Chamber's view, when read together, it becomes clear from these provisions that there are two options available to a Trial Chamber with respect to the assessment of the extent of the harm. First, the Trial Chamber may, with or without the assistance of experts pursuant to rule 97(2) of the Rules of Procedure and Evidence, determine the scope, extent of any damage, loss and injury to, or in respect of, victims in the order for reparations. Secondly, the Trial Chamber may define the harms caused to direct and indirect victims and set the criteria that are to be applied by the Trust Fund for purposes of assessing the extent of the harms, either on a collective or individual basis, depending on the order for reparations. On that basis, the Trust Fund would subsequently determine the appropriate size and nature of the reparation awards to be proposed in its draft implementation plan.

The Appeals Chamber therefore holds that, in order to protect the rights of the convicted person and ensure that reparations are not awarded to remedy harms that are not the result of the crimes for which he or she was convicted and to also protect the right of the victims to appeal the exclusion of any harms that they consider have been shown to be caused by these crimes, the Trial Chamber must clearly define the harms that result from the crimes for which the person was convicted, the extent of which may then be assessed by the Trust Fund for purposes of determining the size and nature of reparation awards. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in delegating to the Trust Fund the task of defining the harms caused to direct and indirect victims as a result of the crimes for which the Accused was convicted.

In this regard, the limitations set in the present judgment with respect to the harm caused to direct and indirect victims as a result of the crimes for which the Accused was convicted for purposes of reparations is without prejudice to other potential scenarios, such as where a Trial Chamber makes a finding in the order for reparations of a harm for which reparations may be awarded: 1) that is based on evidence presented under regulation 56 of the Regulations of the Court during the trial only for the purposes of reparations and which was not relied upon for factual findings relevant to the conviction and sentence of the person; 2) is based on evidence received at a reparation hearing, in written submissions from the parties and participants, or from experts who were engaged for the purpose of providing such evidence; or 3) is based on evidence contained in a request for reparations pursuant to rule 94 of the Rules of Procedure and Evidence that identifies a harm that is not mentioned in the

decisions on conviction and sentence. The Appeals Chamber notes that the above scenarios are relevant to the time frame prior to the issuance of an order for reparations and that the Court's statutory framework provides for the convicted person to be able to challenge any such evidence that could potentially be relied upon in the eventual order for reparations.

[…]

The Appeals Chamber therefore considers that the Sentencing Decision is also of relevance in terms of defining the harm caused by the crimes for which the Accused was convicted.

[…]

In the particular circumstances of the present case, the Appeals Chamber considers that the Trial Chamber's finding that the acts of sexual violence could not be attributed to the convicted person amounts to concluding that the Trial Chamber did not establish that harm from sexual and gender-based violence resulted from the crimes for which the Accused was convicted, within the meaning of rule 85 (a) of the Rules of Procedure and Evidence. The Appeals Chamber therefore considers that the convicted person cannot be held liable for reparations in respect of such harm and accordingly amends the Impugned Decision in this respect.

The above finding in relation to the convicted person's liability for reparations in respect of harm resulting from sexual and gender-based violence should not be viewed as precluding such victims from being able to benefit from assistance activities that the Trust Fund may undertake. The Appeals Chamber is therefore of the view that it is appropriate for the Board of Directors of the Trust Fund to consider, in its discretion, the possibility of including such victims in the assistance activities undertaken according to its mandate under regulation 50(a) of the Regulations of the Trust Fund. The Appeals Chamber also considers that it is appropriate for the draft implementation plan to include a referral process to other competent NGOs in the affected areas that offer services to victims of sexual and gender-based violence.

(b) Identifying the most appropriate modalities of reparations in this case

The Appeals Chamber also considers that a Trial Chamber must identify the most appropriate modalities of reparations, based on the specific circumstances of the case at hand, in the order for reparations. Indeed, the Appeals Chamber considers that identifying the harm caused to direct and indirect victims as a result of the crimes for which a person was convicted is inter-linked with identifying the appropriate modalities of reparations in that specific case. In this sense, the appropriateness of a modality of reparations can only be determined by reference to the harms that were caused and which the reparations seek to remedy. However, the Appeals Chamber notes that a modality of reparations is not an award for reparations, as meant by the Regulations of the Trust Fund. Rather, awards for reparations are designed based on the modalities of reparations identified by the Trial Chamber. Thus, in the view of the Appeals Chamber, if a Trial Chamber does not specify the nature and size of an award for reparations in the order itself, it must identify the modalities of reparations that are appropriate for the circumstances of that case, based upon which the Trust Fund then designs the award for reparations. Accordingly, the Appeals Chamber holds that, in the order for reparations, at a minimum, the Trial Chamber must identify those modalities of reparations which it considers appropriate based on the circumstances of the specific case before it. The Trust Fund shall design awards for reparations on the basis of all or some of those modalities and should link the relevant modalities to the award for reparations in its draft implementation plan, in order for the Chamber to review the determinations made in this respect.

The Appeals Chamber considers that, in designing the awards for reparations, the Trust Fund should endeavour to design awards on the basis of all the identified modalities of reparations. However, the Appeals Chamber notes that the design of the awards will also be informed by the views received during the consultation stage with victims, members of the affected communities, as well as potentially experts, which the Trust Fund will undertake prior to submitting its draft implementation plan. Thus, the Appeals Chamber considers that it is possible that not all the modalities will ultimately be reflected in the awards for reparations. In this respect, should any particular modality not be the basis of any of the awards for reparations proposed by the Trust Fund in its draft implementation plan, the Trust Fund is instructed to include an explanation regarding the reasons why that modality is not reflected in the proposed awards for reparations.

[…]

E. Fifth element: The order for reparations must identify the victims eligible to benefit from reparations or set out the criteria of eligibility

Where an award for reparations is made to the benefit of a community, only members of the community meeting the relevant criteria are eligible.

The Appeals Chamber notes that certain crimes may have an effect on a community as a whole. The Appeals Chamber considers that, if there is a sufficient causal link between the harm suffered by members of that community and the crimes of which [the Accused] was found guilty, it is appropriate to award collective reparations to that community, understood as a group of victims. However, the Appeals Chamber considers that the scope of the convicted person's liability for reparations in respect of a community must be specified.

[…]

The meaningfulness of reparation programmes with respect to a community may depend on inclusion of all its members, irrespective of their link with the crimes for which [the Accused] was found guilty. It is therefore appropriate for the Board of Directors of the Trust Fund to consider, in the exercise of its mandate under regulation 50(a) of the Regulations of the Trust Fund, the possibility of including members of the affected communities in the assistance programmes operating in the situation area in the DRC, where such persons do not meet the above-mentioned criteria.

See No. ICC-01/04-01/06-3129-AnxA A2 A3, Appeals Chamber, 3 March 2015, paras. 31-32, 34, 38, 46, 48, 52-55, 65, 69-72, 76, 79-81, 99, 102-104, 111, 113-116, 118, 149-152, 155-156, 160-162, 178, 181, 183-185, 187, 198-199, 200-201, 211-212, and 215.

ORDER FOR REPARATIONS (amended)

A. PRINCIPLES ON REPARATIONS

a. Introductory Remarks

The Statute and the Rules of Procedure and Evidence introduce a system of reparations that reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognises the need to provide effective remedies for victims.

Reparations fulfil two main purposes that are enshrined in the Statute: they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Court to ensure that offenders account for their acts.

The reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. The success of the Court is, to some extent, linked to the success of its system of reparations.

These principles and the order for reparations are not intended to affect the rights of victims to reparations in other cases, whether before the Court or national, regional or other international bodies.

Principles should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers.

b. Principles on Reparations

1. Beneficiaries of reparations

It is to be recognised that the concept of "*family*" may have many cultural variations, and the Court ought to have regard to the applicable social and familial structures. In this context, the Court should take into account the widely accepted presumption that an individual is succeeded by his or her spouse and children.

Reparations can also be granted to legal entities, as laid down in rule 85(b) of the Rules of Procedure and Evidence. These may include, *inter alia*, nongovernmental, charitable and non-profit organisations, statutory bodies including government departments, public schools, hospitals, private educational institutes (primary and secondary schools or training colleges), companies, telecommunication firms, institutions that benefit members of the community (such as cooperative and building societies, or bodies that deal with micro finance), and other partnerships.

[…]

2. Harm

The concept of "*harm*", while not defined in the Statute or the Rules of Procedure and Evidence, denotes "*hurt, injury and damage*". The harm does not necessarily need to have been direct, but it must have been personal to the victim. Harm may be material, physical and psychological.

3. Causation

Reparation is to be awarded based on the harm suffered as a result of the commission of any crime within the jurisdiction of the Court. The causal link between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of a case.

4. Dignity, non-discrimination and non-stigmatisation

All victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings leading to the decision under article 74 of the Statute.

The victims of the present crimes are to enjoy equal access to any information relating to their right to reparations and to assistance from the Court, as part of their entitlement to fair and equal treatment throughout the proceedings.

In all matters relating to reparations, the Court, as enshrined in article 68 of the Statute and rule 86 of the Rules of Procedure and Evidence, shall take into account the needs of all victims.

When deciding on reparations, the Court shall treat the victims with humanity and shall respect their dignity and human rights, and it will implement appropriate measures to ensure their safety, physical and psychological well-being and privacy.

Reparations shall be granted to victims without adverse distinction on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status, as set forth by article 21(3) of the Statute.

Reparations need to address any underlying injustices and in their implementation the Court should avoid replicating discriminatory practices or structures that predated the commission of the crimes. Equally, the Court should avoid further stigmatisation of the victims and discrimination by their families and communities.

A gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations, ensuring that they are accessible to all victims in their implementation. Accordingly, gender parity in all aspects of reparations is an important goal of the Court.

Priority may need to be given to certain victims, who are in a particularly vulnerable situation or who require urgent assistance. The Court may adopt, therefore, measures that constitute affirmative action in order to guarantee equal, effective and safe access to reparations for particularly vulnerable victims.

5. The liability of the convicted person

Reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for the criminal acts is determined in a sentence.

The convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.

6. Standard and burden of proof

In the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. Given the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the prosecution must establish the relevant facts to the standard of "*beyond a reasonable doubt*", should apply. In determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.

7. Child victims

One of the relevant factors to be considered in reparation proceedings is the age of the victims, in accordance with article 68 (1) of the Statute. The Court shall take account of the age-related harm experienced by the victims and of their needs, pursuant to rule 86 of the Rules of Procedure and Evidence. Furthermore, any differential impact of these crimes on boys and girls is to be taken into account.

[…]

When dealing with reparations concerning children, the Court must be mindful of the need to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Reparation orders and programmes in favour of child soldiers, should guarantee the development of the victims' personalities, talents and abilities to the fullest possible extent and, more broadly, they should ensure the development of respect for human rights and fundamental freedoms. For each child, the measures should aim at developing respect for their parents, cultural identity and language. Former child soldiers should be helped to live responsibly in a free society, recognising the need for a spirit of understanding, peace and tolerance, showing respect for equality between the sexes and valuing friendship between all peoples and groups.

[…]

The Court shall also reflect the importance of rehabilitating former child soldiers and reintegrating them into society in order to end the successive cycles of violence that have formed an important part of past conflicts.

8. Accessibility and consultation with victims

The victims of the crimes, together with those members of their families and communities who meet the criteria of eligibility for reparations, should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective.

Reparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, including participation in any reparations programme.

Outreach activities, which include, firstly, gender- and ethnic-inclusive programmes and, secondly, communication between the Court and the affected individuals and their communities are essential to ensure that reparations have broad and real significance.

The Court should consult with victims on issues relating, *inter alia*, to the identity of the beneficiaries and their priorities.

9. Modalities of reparations

Individual and collective reparations are not mutually exclusive, and they may be awarded concurrently. Furthermore, individual reparations should be awarded in a way that avoids creating tensions and divisions within the relevant communities. When collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis.

Reparations are not limited to restitution, compensation and rehabilitation, as listed in article 75 of the Statute. Other types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate.

a. Restitution

Restitution is directed at the restoration of an individual's life, including a return to his or her family, home and previous employment; providing continuing education; and returning lost or stolen property.

Restitution may also be apposite for legal bodies such as schools or other institutions.

b. Compensation

Compensation should be considered when i) the economic harm is sufficiently quantifiable; ii) an award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case); and iii) in view of the availability of funds, this result is feasible.

Compensation is to be approached on a gender-inclusive basis and awards should avoid reinforcing previous structural inequalities and perpetuating prior discriminatory practices.

Compensation requires a broad application, to encompass all forms of damage, loss and injury.

Although some forms of damage are essentially unquantifiable in financial terms, compensation is a form of economic relief that is aimed at addressing, in a proportionate and appropriate manner, the harm that has been inflicted.

Examples include:

a. Physical harm, including causing an individual to lose the capacity to bear children;

b. Moral and non-material damage resulting in physical, mental and emotional suffering;

c. Material damage, including lost earnings and the opportunity to work; loss of, or damage to, property; unpaid wages or salaries; other forms of interference with an individual's ability to work; and the loss of savings;

d. Lost opportunities, including those relating to employment, education and social benefits; loss of status; and interference with an individual's legal rights (although the Court must ensure it does not perpetuate traditional or existing discriminatory practices, for instance on the basis of gender, in attempting to address these issues);

e. Costs of legal or other relevant experts, medical services, psychological and social assistance.

c. Rehabilitation

The right of victims to rehabilitation is to be implemented by the Court on the basis of the principles relating to non-discrimination, and this shall include a gender-inclusive approach that encompasses males and females of all ages.

Rehabilitation shall include the provision of medical services and healthcare, psychological, psychiatric and social assistance to support those suffering from grief and trauma; and any relevant legal and social services.

d. Other Modalities of Reparations

As the conviction and the sentence are likely to have significance for the victims, their families and communities, the wide publication of the Conviction Decision may also serve to raise awareness about the conscription and enlistment of children under the age of fifteen and their use to participate actively in the hostilities, as well as may help deter crimes of this kind.

10. Proportional and adequate reparations

Victims should receive appropriate, adequate and prompt reparations.

The awards ought to be proportionate to the harm, injury, loss and damage as established by the Court.

Reparations should aim at reconciling the victims with their families and the affected communities.

Whenever possible, reparations should reflect local cultural and customary practices unless these are discriminatory, exclusive or deny victims equal access to their rights.

Reparations need to support programmes that are self-sustaining, in order to enable victims, their families and communities to benefit from these measures over an extended period of time. If pensions or other forms of economic benefits are to be paid, these should be allocated, if possible, by periodic instalments rather than by way of a lump payment.

See No. ICC-01/04-01/06-3129-AnxA A A2 A3, Appeals Chamber, 3 March 2015, paras. 1-5, 7-8, 10-23, 25-26, and 28-48. See also, No. ICC-01/04-01/07-3532-tENG, Trial Chamber II, 10 October 2015, paras. 10-14.

In the case at bar, 341 applications for reparations are put before the Chamber; they consist of forms for reparation or forms for participation in the trial against the Accused, together with supporting documentation and other additional documents ("Applicants").

That being so, the Chamber hereby decides that satisfaction of the five essential elements laid down by the Appeals Chamber requires that the 341 applications for reparations be analysed individually. That individual analysis of the 341 applications for reparations will inform the Chamber's assessment of the total extent of the harm caused to the Applicants. The assessment, will, amongst other factors, form the basis of the Chamber's determination of the size of the award for which the convicted person is personally liable. It is the Chamber's view that by so proceeding the convicted person's liability for reparations, and hence, the size of the award for reparations against him, may be determined in a just and fair manner. What is more, the parties may thereby exercise in full the right of appeal vested in them by article 82(4)of the Statute.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 32-33.

3. Beneficiaries of an order for reparations

The Chamber will not be able to rule on the monetary amount of [the convicted person's] liability until the potential victims have been identified and it has examined both their status as victims eligible to benefit from the reparations and the extent of the harm they have suffered. In this context, the Chamber recalls that it is responsible for deciding on the status of eligible victims once the Defence has had the opportunity to submit its observations on the eligibility of each victim.

The Chamber instructs the Trust Fund for Victims (TFV) to begin the process of locating and identifying victims potentially eligible to benefit from the reparations and transmit the results of this process to the Chamber […].

[…]

The Chamber instructs the TFV to prepare a file for each potential victim, with a copy of the identification documents or other means of identification presented, the interviews and the TFV's conclusions with regard to the victim's status and the extent of the harm he or she has suffered, as well as any other relevant information the TFV has taken into account in reaching its conclusions. To that end, the TFV must seek to obtain the potential victims' written consent to transmit this information to the Defence, *i.e.* their identity, their status as direct or indirect victims and the description of the factual allegations, including the harm suffered.

See No. ICC-01/04-01/06-3198-tENG, Trial Chamber II, 9 February 2016, paras. 14-15, and 17.

The Chamber authorises the OPCV to continue the Identification Process, with support from the relevant Sections of the Registry, according to the specifications set out below.

The Chamber considers that it is for the OPCV to decide, on the basis of its own expertise, what approach it deems suitable for the conduct of interviews with Potentially Eligible Victims. Nonetheless, for the sake of consistency, the Chamber considers that it is appropriate to use the form previously employed by the TFV.

The Chamber does not object to the presence of OPCV counsel during outreach missions, but considers that it is up to the competent, mandated units of the Registry to decide on the arrangements for those missions.

The Chamber considers it appropriate that it should receive, through VPRS, the files of Potentially Eligible Victims who have consented to the disclosure of their identities to the Defence, as well as the files of those who have refused such disclosure.

See No. ICC-01/04-01/06-3252-tENG, Trial Chamber II, 21 October 2016, paras. 18-21.

The Chamber reiterates that all Potentially Eligible Victim files, including those of victims who refuse the disclosure of their identities to the Defence, must be transmitted to the Chamber (through VPRS).

The Chamber considers that it falls to the legal representatives of victims to determine the best approach to conducting interviews with Potentially Eligible Victims, on the basis of their shared expertise and experience. Nonetheless, the Chamber wishes to stress that Potentially Eligible Victims must be treated equally and that the approach adopted must be both effective and economical. To this end, the Chamber directs the Legal Representatives of V02 Victims and the TFV to confer on how best to proceed with the Identification Process and with the preparation and transmission of files, and in particular on whether it is necessary to conduct the interviews with a doctor, a psychologist, a counsel and one additional person present.

See No. ICC-01/04-01/06-3267-tENG, Trial Chamber II, 21 December 2016, paras. 10-11.

On 24 February 2017, the LRV filed a request seeking the authorisation to file additional applications for reparations obtained during its mission, as well as supplementary information related to the 135 Applications.

[…]

The Single Judge notes that the Defence will not suffer any undue prejudice as a result of the filing of a limited number of applications. The Defence will have the opportunity to address the additional applications if it wishes so in its final reparations submissions due by 26 May 2017.

[…]

Beyond general submissions on the insecurity in Timbuktu, the LRV fails to provide any specific reasons justifying why an extension of time is warranted at this stage. The speculative possibility of obtaining further materials [additional applications for reparations] is not sufficient to constitute '*good cause*' under Regulation 35(2) of the Regulations.

See No. ICC-01/12-01/15-209, Trial Chamber VIII, Single Judge, 20 March 2017, paras. 5, 8, and 10.

The Chamber notes that to accord the status of victim participating at the trial stage to a person who has applied to that end, the Chambers have relied on the four conditions defined by the Appeals Chamber in *Lubanga*, *viz.*, the applicant must be a natural or legal person; the applicant must have suffered harm; the crime which caused the harm must fall within the jurisdiction of the Court; and there must be a causal nexus between the harm suffered and the crime.

The Chamber holds that said conditions find application at the reparations phase, but one qualification attaches to the condition that "*the crime which caused the harm falls within the jurisdiction of the Court*": it must be a crime of which the person in question was convicted.

From the outset the Chamber must underscore that the matter as to whether a person suffered harm as a consequence of the commission of one or more of the crimes by the convicted person and so, in the view of the Court, qualifies as a victim, must be determined in the light of the particular circumstances of the case at bar.

The Chamber recalls that the Court has consistently held that, in determining whether a natural person suffered harm, the Chamber must inquire as to whether the harm was personally suffered. In that respect, the concept of victim necessarily implies the existence of personal harm but not necessarily direct harm. The Chamber recognizes that the harm suffered by a victim, by reason of the commission of a crime within the jurisdiction of the Court and, in the instant case, by reason of the commission of one or more of the crimes of which the person was convicted, maybe the cause of harm to persons other than the direct victims. Accordingly, a natural person may be a direct victim or an indirect victim.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 36-39.

The Chamber wishes to stress that the Decision of 6 April 2017 does not imply that other Potentially Eligible Victims cannot be considered for reparations in the instant case. The eligibility for reparations of persons who were unable to submit their applications by 31 March 2017 will be examined by the Trust Fund when reparations are implemented.

See No. ICC-01/04-01/06-3338-tENG, Trial Chamber II, 13 July 2017, para. 11.

The Chamber is unable to arrive at a precise number of victims of the crimes of which the accused was convicted.

In the Chamber's view, although the individual identification of a greater number of victims to set the size of the reparations award would have been desirable, the necessary consultations would have unduly prolonged the proceedings, prejudicing not only the convicted person's right to notice within a reasonable time of his obligations arising from the reparations, but also the right of the victims to receive prompt reparations.

[…]

The Chamber regards the 425 persons who have established that they are victims for the purposes of reparations as forming only a sample of the potentially eligible victims, and that other victims were affected by the crimes of which the accused was convicted.

[…]

The Chamber finds it established to the requisite standard of proof that, along with the 425 victims in the sample, hundreds and possibly thousands more victims were affected by the crimes of which the accused was convicted.

See No. ICC-01/04-01/06-3379-Red-Corr-Anx-tENG, Trial Chamber II, 21 December 2017, paras. 233-234, 240, and 244.

The Appeals Chamber understands that the Trial Chamber considered that all applications should be screened at the same time and by the same entity, which would ensure that the screening would be done in a consistent and equal manner. The Appeals Chamber also notes that the Trial Chamber set out, in the Impugned Decision, an eligibility [*sic*] criteria, the '*exclusive link*' requirement, of which the 139 applicants would not have been aware at the time of submitting their applications to the Trial Chamber. Therefore, in remitting the matter to

the TVF, the Trial Chamber left open the possibility for new victims to submit applications, but also for those who had already submitted their applications, to submit additional supporting documents of such nature as to prove the '*exclusive link*'.

[…]

The Appeals Chamber observes that, in the instant case, the Trial Chamber considered, in a general manner, the applications filed before it, and made a principled decision as to the category of persons who should receive individual reparations.

[…]

The Appeals Chamber notes that the Trial Chamber delegated a relatively limited task to the TFV, namely the determination of whether the 139 current applicants as well as any future applicants fall within the group of individuals that are, according to the Trial Chamber's determination, entitled to individual reparation. In doing so, the Trial Chamber maintained a high level of control over the activities of the TFV, while the TFV could seek further guidance from the Trial Chamber, if required.

The applicable legal texts at the Court confer discretion on the trial chamber in its determination of reparations. Beyond article 75(1) of the Statute and rule 97(1) of the Rules, there are no provisions that regulate the content of a chamber's final decision on reparations. The Court's legal texts, however, envisage scenarios whereby the TFV may assist a trial chamber in the implementation of an order, with rule 98(2) of the Rules providing that:

> *The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim.*

The Regulations of the TFV expand on the role of the TFV when such an award is deposited with it, detailing what should occur in situations where the Court identifies a beneficiary and those in which it does not (see regulations 59 to 68 of the Regulations of the TFV).

The Appeals Chamber considers that the Trial Chamber's decision is in conformity with rule 98(2) of the Rules and the underlying rationale of this provision, namely that there may be situations in which it may be '*impossible or impracticable to make individual awards directly*' and that the Trial Chamber may need to rely on the TFV to enhance the efficiency and effectiveness of the reparations process.

In respect of the group of unidentified victims referred to by the Trial Chamber, the Appeals Chamber notes that the Regulations of the TFV clearly envisage a situation where, in implementing an award under rule 98 (2) of the Rules, the TFV is given responsibility for identifying a group of beneficiaries, when not already identified by the Trial Chamber (regulations 60 to 65 of the Regulations of the TFV).

The Appeals Chamber also recalls more generally that, in previously setting out general principles on reparations, it found that one of the five essential elements for an order for reparations under article 75 of the Statute was that the order '*must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted*'. This jurisprudence illustrates that the actual assessment of individual applications must not necessarily be carried out by the Trial Chamber, as long as it sets out the eligibility criteria.

It is also noted that, in the case of *Lubanga*, the Appeals Chamber held that:

> *When only collective reparations are awarded pursuant to rule 98(3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations.*

While the Appeals Chamber expressly left open whether this also applied when a trial chamber decided to award reparations on an individual bases, the Appeals Chamber's holding in *Lubanga* nevertheless indicates, together with rule 97(1) of the Rules, that it is within a trial chamber's discretion to grant, or not to grant, individual reparations but that, therefore, victims do not have a right to an individual award as such. This lends further support to the conclusion that the Trial Chamber may delegate aspects of the assessment of applications for individual reparations to the TFV. In this regard, the Appeals Chamber stresses that, in any event, and as developed in more detail below, the Trial Chamber will exercise judicial control over the overall process.

[…]

In conclusion, the Appeals Chamber considers that the Trial Chamber did not err when it delegated the particular aspects it did, relating to the administrative screening of the applications for individual reparations, to the TFV. It is within the discretion of a trial chamber to request, on a case-by-case basis, the assistance of, for example, the TFV to undertake the administrative screening of the beneficiaries of individual reparations meeting the eligibility criteria set out by the trial chamber. At the same time, however, the Appeals Chamber finds that it is for the Trial Chamber, in the exercise of its judicial functions, to make final determinations on individual victim applications where administrative decisions of the TFV are contested or *proprio motu*.

[…]

Therefore, the Appeals Chamber finds that applicants for reparations, both those who already applied for reparations and those who will be identified in the future by the TFV, should be eligible to participate in the screening process that the TFV will undertake, even if they wish not to have their identity disclosed to the convicted person.

The Appeals Chamber considers that for the TFV to exercise such functions, it needs to be able to verify the identity of the applicants, and assess the authenticity of documents submitted in support of the applications. Therefore, victims who wish to obtain individual reparations must make their identity known to the TFV or consent for such information to be transmitted to the TFV.

[…]

The TFV is authorised to also consider applications for individual reparations made by applicants who do not wish to have their identifying information disclosed to the convicted person.

See No. ICC-01/12-01/15-259-Red2 A, Appeals Chamber, 8 March 2018, paras. 56-57, 59-66, 72, 95-96, and 99.

To the extent that the Defence argues in favour of a limited interpretation of the term '*indirect victim*', the Appeals Chamber finds that the definition of '*victims*' entitled to reparations under article 75 of the Statute, whether direct or indirect, is not restricted to any specific class of persons. '*Victims*' are, pursuant to rule 85(a) of the Rules, "*natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court*". The Appeals Chamber observes that this definition emphasises the requirement of the existence of harm rather than whether the indirect victim was a close or distant family member of the direct victim.

Therefore, individuals may claim reparations for psychological harm from the loss of a family member as a result of the crimes for which a conviction has been entered. In such cases, they must demonstrate both the existence of the psychological harm and that the harm resulted from the loss of the family member – and therefore, indirectly, from the commission of the relevant crimes. One way in which an indirect victim may satisfy these requirements is by demonstrating a '*close personal relationship*' with the direct victim, supported by evidence and established on a balance of probabilities. Establishing a close personal relationship may prove both the harm and that the harm resulted from the crimes committed.

The Appeals Chamber's determination that victim status depends, as a matter of fact, on whether a person can show that he or she suffered harm as a result of the commission of a crime under the jurisdiction of the Court.

The Appeals Chamber observes that a determination of psychological harm to certain family members of a direct victim must still correspond to the specific circumstances of the case. Furthermore, indirect victims not benefitting from a presumption of harm have been assessed on a case-by-case basis, having regard to whether there is a particularly close relationship between them and the direct victims. Therefore, the Appeals Chamber observes that the term '*indirect victim*' is not strictly defined in the jurisprudence of the IACtHR to include or to exclude particular categories of family members who will be able to recover reparations in all cases. Furthermore, although there is a general trend in the jurisprudence of the IACtHR that a person is presumed to suffer psychological harm after the loss of an immediate family member, the Appeals Chamber finds this presumption to be discretionary.

The Appeals Chamber notes that the ECtHR follows a similar approach in preferring eligibility based upon the demonstration of harm rather than the demonstration that the indirect victim falls within a specified class of persons.

Thus, the approach of human rights courts does not create a principle that would constrain a trial chamber's discretion in its assessment of harm under article 75 (1) of the Statute. Rather, the approach is case-specific and focuses on the existence of harm.

See No. ICC-01/04-01/07-3778-Red A3 A4 A5, Appeals Chamber, 8 March 2018, paras. 115-120.

4. Redaction of information in reparation forms

The Chamber notes that, in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I ordered the lifting of redactions relating to the identities of intermediaries because irregularities had been found in the identities and testimonies of certain victims. Trial Chamber I was of the view that this information was required by the defence team in order to shed light on these irregularities. Moreover, Trial Chamber I was of the view that the disclosure of this information did not constitute a material risk to the security of intermediaries.

The Chamber notes that, in this case, no irregularity affecting the applications for reparations has been brought to its attention. Furthermore, the Chamber notes the observations made by VPRS that identifying victims could, on the one hand, put at risk the security not only of intermediaries but also of the victims with whom they are in contact and, on the other hand, hamper the work of VPRS on the ground.

In this regard, the Chamber considers that redactions relating to the identities of intermediaries must be maintained.

[…]

The Chamber notes that the above-mentioned information may indeed be necessary for the Defence to verify the indirect victim status of the victim applicant. Consequently, the Chamber authorises the lifting of redactions relating to the identity of the person(s) killed and their link with the victim.

[…]

The Chamber notes that certain details included by the victims in their description of the Bogoro attack and of the harm suffered may prove useful in allowing the Defence to test the credibility of victims and assess the extent of the alleged harm. Consequently, the Chamber authorises the lifting of redactions that are strictly related to the description of the Bogoro attack, the harm suffered, and the link between this harm and the crimes for which the Accused has been convicted.

See No. ICC-01/04-01/07-3583-tENG, Trial Chamber II, 1 September 2015, paras. 13-15, 19, and 24.

The Chamber confirms that it will not rule on the participation of applicants in the reparation proceedings and that applicants participate in the proceedings simply by virtue of filing their request for reparations. Once the Chamber has received all of the requests for reparations, it will rule on their merits.

[…]

Consequently, it is the Chamber's view that the redactions relating to the names and the information relating to the identity of the new applicants, with the exception of the information relating to the applicants' current place of residence, must be lifted. In keeping with the Decision of 1 September 2015, it follows that the redactions relating to "[TRANSLATION] *the names of deceased family members for whom psychological harm is claimed*" must also be lifted.

See No. ICC-01/04-01/07-3653-Corr-tENG, Trial Chamber II, 16 February 2016, paras. 12 and 16.

The Chamber notes that, in connection with the case at hand, the Applications to Resume Action filed during the trial, and during the reparations stage, along with the relevant supporting documentation, were transmitted to the Defence in redacted form. The Chamber considers that the redactions applied to the Applications to Resume Action and the related supporting documentation are justified and do not unduly affect the Defence's ability to submit observations in an informed manner.

See No. ICC-01/04-01/07-3682-tENG, Trial Chamber II, 14 April 2016, para. 26.

The Chamber considers that it would be appropriate to order the redaction of information pertaining to the current residence or other contact information that may be used to locate victims who may be eligible.

Nonetheless, the Chamber considers that the names of the victims who may be eligible and other identifying information about them could be useful to the Defence when it examines the eligibility of said victims and the reliability of their claims. Consequently, the identities of victims who may be eligible should not be redacted if they have consented to the disclosure of such information to the Defence.

Regarding victims who may be eligible but who have refused to disclose their identities to the Defence for security reasons, the Chamber considers that, at this stage of the proceedings, it would also be appropriate to provide their application files to the Defence. However, mindful of the victims' concerns, the Chamber instructs the Victims Participation and Reparations Section ("VPRS") to redact their names as well as any other identifying information.

[…]

The Chamber considers that information describing the harm suffered and the incidents that caused it may also be useful in enabling the Defence to gauge the extent of the harm alleged. Consequently, the Chamber considers that any information relating strictly to the description of the harm suffered, the events that caused the harm, and the link between such harm and the crimes of which the accused has been convicted, should not be redacted, except for information that might reveal the identities of victims who may be eligible who have refused to disclose that information to the Defence.

[…]

Where intermediaries are used to assist in the process of identifying victims who may be eligible, and prepare their files, the Chamber considers that, for now, their identities should be redacted.

See No. ICC-01/04-01/06-3275-tENG, Trial Chamber II, 22 February 2017, paras. 14-16, and 18-19.

The Chamber recalls that, in order to decide on the appropriate protective measures during investigation, prosecution and trial, judges must strike a balance between the free exercise of the defence's rights, the need to protect victims and witnesses under article 68 of the Statute, and the circumstances of the case, in keeping with the principle of proportionality. Moreover, such decisions must not impair the meaningful exercise of the defence's right of response.

The Chamber notes that the same principles apply to the reparations phase.

[…]

Firstly, the Defence contends that the only part of the files that should have nbeen affected by redaction of the current places of residence of Potentially Eligible Victims was subsection G, "*Victim contact information*". The Chamber finds that this interpretation is mistaken. The Chamber considers that, for the purpose of effectively protecting Potentially Eligible Victims in accordance with article 68(1) of the Statute and the relevant principles highlighted above, the redactions ordered are applicable to the files of Potentially Eligible Victims in their entirety. It may thus prove necessary to redact a place name, which could be used to locate a Potentially Eligible Victim, appearing anywhere in section 2, "*Claim to victim status*".

[…]

The Chamber's Order of 22 February 2017 did not explicitly address the issue of information pertaining to third parties, such as witnesses or the relatives of Potentially Eligible Victims. Nonetheless, the Chamber considers that any information which might be used to identify and locate a person named or mentioned in an application for reparations, but who has not expressly consented to the disclosure of his or her identity to the Defence, must also be redacted. Accordingly, the Chamber finds that it is justified to redact a place name that might be used to locate a witness or a relative of a Potentially Eligible Victim, the role of a former child soldier within the UPC/FPLC or a commander's name that might be used to identify the direct Potentially Eligible Victim.

See No. ICC-01/04-01/06-3328-tENG, Trial Chamber II, 5 June 2017, paras. 4-5, 9, and 12.

The Chamber sees that most of the potentially eligible victims agreed to disclose their identity and, what is more, upon an initial perusal of the dossiers, the Chamber noticed that those potentially eligible victims who had agreed to disclose their identity and those who had refused furnished similar statements recounting the events and similar supporting documentation to bolster allegations. That being so, the Chamber considers that the Defence was in a position to make submissions on the dossiers of victims which are similar to the dossiers of those potentially eligible victims who had refused to disclose their identity to the Defence.

In the light of the foregoing, the Chamber is satisfied that the Defence had sufficient information to impugn the evidence brought against it in a process which duly afforded it notice and the opportunity to be heard, and, hence, a fair hearing. Accordingly, the Chamber […] has decided to take account of all of the information furnished by the potentially eligible victims, including redacted information. Likewise, in setting the size of the reparations award for which [the accused] is liable, the Chamber has decided also to consider the dossiers of those potentially eligible victims who refused to disclose their identity to the Defence, where the dossiers satisfy the requisite conditions.

[…]

The Appeals Chamber finds that the Trial Chamber erred in ordering victims to reveal their identity to the convicted person as a pre-condition to having their claims for individual reparations assessed by the TFV, thereby essentially creating an unnecessary obstacle to certain victims to receive reparations.

The Regulations of the TFV do not grant the defence the right to have access to the identity of victims applying for reparations.

[…]

When ruling on requests for redactions, a trial chamber must take into account and balance the rights and interests of the parties as per article 68 of the Statute, […] the Appeals Chamber has stated that, in so doing, a chamber should apply the principle of proportionality, in the sense of balancing those two requirements, and make its determination on a case-by-case basis, taking into account the '*various interests involved*'.

In the proceedings which took place prior to issuance of the Impugned Decision, the Accused did not have access to the applicants' names and identifying information. The Appeals Chamber also observes that, in the reparations proceedings before the Court to date, in *Lubanga*, in *Katanga* until 11 July 2017 and in the on-going proceedings in *Bemba*, the defence was not granted access to the identity of victims applying for reparations who had requested anonymity. In the case of *Lubanga*, Trial Chamber II ruled that the convicted person had sufficient access to information enabling him to contest the evidence produced against him, guaranteeing him a fair procedure; this was despite the fact that he had only access to redacted versions of individual applications for reparations.

[…]

The Appeals Chamber also notes that the convicted person's interests at this stage of the proceedings are limited. In this sense, the Trial Chamber has already set the convicted person's monetary liability and, as agreed by the LRV, the results of the screening process will have no impact on this. A wholesale ruling, granting access to all victims' identifying information, at a stage of the proceedings where the interest of the defence is limited in this way, is disproportionate.

See ICC-01/04-01/06-3379-Red-Corr-tENG, Trial Chamber II, 21 December 2017, paras. 58-59, 87-88, 90-91, and 93.

5. Experts

The Chamber strongly recommends that a multidisciplinary team of experts is retained to provide assistance to the Court in the following areas: a) an assessment of the harm suffered by the victims in this case; b) the effect that the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities had on their families and communities; c) identifying the most appropriate form of reparations in this case, in close consultation with the victims and their communities; d) establishing those individuals, bodies, groups or communities who should be awarded reparations; and e) accessing funds for these purposes. The team of experts needs to be in a position to assist the Court in the preparation and implementation of a reparations plan.

The Chamber therefore endorses the Registry's proposal that there should be a team of experts, rather than a sole expert. The team ought to include representatives from the DRC, international representatives and specialists in child and gender issues. The Chamber accepts the TFV's suggestion that there should be a preliminary consultative phase involving the victims and the affected communities, to be carried out by the team of experts, with the support of the Registry, the OPCV and any local partners. This work must be undertaken with the cooperation and assistance of any relevant ICC officials.

The Chamber, in discharging its powers under rule 97(2) of the Rules, delegates to the TFV the task of selecting and appointing appropriate multidisciplinary experts, and the TFV is to oversee their work. Experts in the fields of child soldiers, violence against girls and boys and gender issues should be amongst those appointed by the TFV.

The Chamber is of the view that the TFV is well placed to determine the appropriate forms of reparations and to implement them. It is able to collect any relevant information from the victims, and the Chamber notes the TFV is already conducting extensive activity in the DRC for the benefit of victims in the context of the general situation of which this case is a part.

See No. ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012, paras. 263-266.

The Registry shall provide the Appointed Experts with all the reasonable logistical and security assistance required to facilitate the expeditiousness of the drafting of the reports. This includes facilitating communication among the experts as well as the organisation of a field mission, if necessary and feasible. Additionally, should the Appointed Experts request access to certain filings, transcripts or evidence relied upon in the Judgement, the Registry shall facilitate such access, in the version available to the Defence. The Appointed Experts may submit a joint or separate reports and may work together as they see fit.

Further, the Chamber has noted the LRV's suggestions that information be provided on the two following areas: (i) the economic functioning and administration of the destroyed buildings; and (ii) the traditional mechanisms of conflict resolutions and reparations in Timbuktu. The Defence also suggested that a report be provided on the perception of the reparations provided so far by UNESCO, in particular with regard to the possible use of different materials to rebuild the destroyed buildings. The Chamber directs, to the extent feasible, that the experts also include information on these two areas in their reports.

See No. ICC-01/12-01/15-203-Red, Trial Chamber VIII, 19 January 2017, paras. 6-7.

Pursuant to Rule 97(2) of the Rules the Chamber may appoint experts to assist in determining the scope, extent of any damage, loss and injury to, or in respect of victims and the appropriate types and modalities of reparations. The Chamber notes that it may appoint experts without seeking the parties' observations.

[…]

The Appointed experts shall provide their report(s) on the five issues set out in the Order [(a) Victims and groups of victims eligible to benefit from reparations, including issues relevant to the "*identification of victims*"; (b) Types of relevant harm suffered by direct and indirect victims as a result of the crimes for which Mr Bemba was convicted, regardless of whether or not they have participated at trial; (c) Scope of Mr Bemba's liability for reparations, including the financial or monetary assessment of the harm suffered by the victims under (b); (d) Types and modalities of reparations that would be appropriate to address the harm under (b); (e) Criteria for victims' prioritization, including sexual violence, child victims, or other appropriate criteria]. The Chamber further notes that the LRV, the OPCV and the Defence identified specific detailed questions which fall within the five issues listed by the Chamber. It invites the Appointed experts, to the extent feasible and necessary, to include information on these questions in their report(s).

See No. ICC-01/05-01/08-3532-Red, Trial Chamber III, 2 June 2017, paras. 1, 8, and 12.

6. Evidentiary criteria

The Chamber recalls that it rests with the applicant seeking reparations to provide sufficient proof of identity, of the harm suffered and of the causal nexus between said harm and the crime of which the person was convicted.

[…]

In determination of the standard of proof applicable to the reparation proceedings, the Chamber has regard to the features of the case, specifically the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or the unavailability of evidence in the relevant circumstances. In the case at bar, it is worth recalling that fourteen years have elapsed since the attack on Bogoro.

[…]

Having regard to the foregoing, the Chamber will avail itself of the "*balance of probabilities*" standard. Thus the Chamber must be satisfied that the facts alleged by an Applicant in claiming reparations are established on a balance of probabilities. That standard means that the Applicant must show that it is more probable than not that he or she suffered harm as a consequence of one of the crimes of which the Accused was convicted.

[…]

That being so, and having regard to the practice of the Inter-American Court and certain transitional justice mechanisms, the Chamber sees fit to proceed on presumptions and to act on circumstantial evidence to satisfy itself of certain facts in the case.

VII. INDIVIDUAL ANALYSIS OF THE APPLICATIONS FOR REPARATIONS

A. Credibility of the various evidence and treatment of minor discrepancies

[…]

The Chamber pays particular attention to the internal consistency, the level of detail, and the plausibility of the applications vis-à-vis the evidence as a whole provided by each Applicant. Furthermore, where it sees fit, the Chamber considers the situation of an Applicant in the light of the information furnished in other applications.

[…]

Having regard to the aforegoing considerations and the Legal Representative's efforts at verification, the corrections must be regarded in the same vein as the applications, that is, as having being made wholly bona fide. The Chamber considers, as have other Chambers of this Court in relation to applications for participation, that the mere fact that an application for reparations contains slight discrepancies does not, on the face of it, cast doubt on its credibility.

B. Evaluation of the evidence presented to substantiate the Applicants' identity

The Chamber recalls that the Court has consistently held that applicants may use official or unofficial identification, or any other means of proof of identity. Where an applicant is unable to present acceptable documentation, the Chamber may accept a statement signed by two credible witnesses establishing the identity of the applicant.

[…]

C. Definition of the harm and evaluation of the evidence presented to substantiate the harm alleged by the Applicants

[…]

The Chamber sees that the applications for reparations submitted by the Applicants allege material, physical, psychological and *sui generis* harm.

[…]

D. Causal nexus between the harm alleged and the crimes of which [the accused] was convicted

[…]

The Chamber recalls that the causal nexus between the crime and the harm must be determined in view of the characteristics of the case under consideration. Hence, the causal nexus between the harm alleged and the crimes of which the Accused was convicted must be considered in the light of the aforementioned circumstances. It must in particular be underlined that the Accused had a part in conceiving the design to attack Bogoro, that he provided weapons to the Ngiti combatants, but also that combatants other than the Ngiti took part in the attack on Bogoro. Having regard to the foregoing, the Chamber determines that where the Applicants have established that the harm was a consequence of the attack on Bogoro, they have established the requisite causal nexus for the purposes of the present reparation proceedings.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 45, 47, 50, 61, 67, 70-71, 75, and 166.

It is noted that in most cases the potentially eligible victims were not in a position to submit supporting documentation to prove their allegations. Nevertheless, rule 94(1)(g) of the Rules of Procedure and Evidence requires applicants to present documentation to support their applications for reparations "[t]*o the extent possible*". It is the Chamber's view that this rule makes allowance for the fact that potentially eligible victims are not always in a position to furnish documentary evidence in support of all the harm alleged, given the circumstances in the DRC and the many years that have elapsed since the material events.

[…]

Accordingly, to assess victim status, the Chamber looks for corroborating evidence that would specifically establish child-soldier status. The Chamber looks mainly at whether the statements made by a potentially eligible victim in the dossier are consistent with one another. Where it sees necessary (in particular where the Defence raises discrepancies between the statements in the dossier and those in a previous application for reparations, or where deficient statements in the dossier need to be made complete), the Chamber also considers the statements provided by the victim in his or her application for participation and/or a previous application for reparations.

E. Assessment against the conditions of eligibility as a victim for the purposes of reparations

[…]

In the case at bar, for the crimes of which the Accused was convicted the "*child-soldier status*" is the sine qua non that the victim, direct or indirect, must prove.

So, in the case of a potentially eligible direct victim, the Chamber verifies (1) identity and looks at (2) the direct victim's child-soldier status. In the case of a potentially eligible indirect victim whose identity it has verified, the Chamber looks at (3) the child-soldier status of the direct victim and whether there was a close personal relationship between the direct and the indirect victim. Where the direct victim's child-soldier status is established and, in the case of an application from an indirect victim, where the close personal relationship with the direct victim is established, the Chamber then considers (4) whether the potentially eligible direct or indirect victim has established on a balance of probabilities the existence of the harm alleged and (5) the causal nexus between the harm alleged and the crimes of which [the Accused] was convicted.

1. Identity

[…]

The Chamber considers that a victim is not duty-bound to present a civil status record as proof of identity or to justify why it was impossible to do so.

[…]

2. Child-soldier status of potentially eligible direct victims

[…]

It must be underscored that the Chamber's analysis is qualitative rather than quantitative, inasmuch as it does not require a set number of criteria to be met. The victim's eligibility is determined with regard to the quality of all of the evidence he or she provides and in consideration of the requisite standard of proof – a balance of probabilities. Further it is to b underlined that the veracity of the information provided is not verified because the Chamber is not in a position to check whether a given commander was in fact part of the UPC/FPLC's hierarchy. In that respect, the Chamber considers that, besides the commanders mentioned by name in the Judgment Handing Down Conviction, some might have gone by nicknames.

[…]

A child's recruitment before that time frame [of the charges] is therefore not decisive to the conferral of victim status. It suffices that the child was enlisted or conscripted or that the child participated actively in hostilities during the time frame of the charges.

3. Potentially eligible indirect victims

[…]

[…] It is the Chamber's view that indirect victims cannot be required to recount the circumstances of a direct victim's membership of the militia to the same degree of detail. Accordingly, an indirect victim is not required to provide an indication of the date when the direct victim might have left the UPC/FPLC or how long he or she spent in it. The Chamber is also of the opinion that an indirect victim cannot be required to submit a certificate of demobilization or separation in the name of a direct victim who has survived in order for his or her application for reparations to be entertained.

[…]

4. Harm alleged

[…]

With regard to the harm suffered, it is, in the Chamber's view, beyond doubt that any child who was conscripted or enlisted into an armed group or who participated in combat suffers psychologically, as well as in a physical and material sense, on account of his or her age and the ensuing vulnerability, and from the conditions in the militias. Also beyond doubt is that indirect victims, owing to their close personal relationship with the direct victim, have suffered personally in an emotional, a material and, in some cases, a physical sense as a result of the direct victim's enlistment.

[…]

The Chamber sees no need to scrutinize the specific harm alleged by each potentially eligible victim. Instead, the Chamber sees fit to apply a presumption of harm to each direct and indirect victim once child-soldier status (in the case of a direct victim) and a close personal relationship with a child soldier (in the case of an indirect victim) have been established on a balance of probabilities. The Chamber determines that, for both direct and indirect victims, said presumed harm consists of a material component, a physical component and a psychological component.

5. Causal nexus between the harm suffered and the crimes of which [the accused] was convicted

[…]

Since the victims in the sample were considered because they met the above-mentioned criteria (child-soldier status and close personal relationship, or child-soldier status), and since, on that basis, the Chamber presumed the existence of harm, the Chamber finds that the causal nexus between the harm and the crimes of which [the accused] was convicted is also established.

See No. ICC-01/04-01/06-3379-Red-Corr-Anx-tENG, Trial Chamber II, 21 December 2017, paras. 61, 63, 66-67, 75, 90, 93, 161, 180, 185, and 189.

[…] The Appeals Chamber considers that, in the absence of direct evidence in certain circumstances, for example, owing to difficulties in obtaining evidence, a trial chamber may resort to factual presumptions in its identification of the heads of harm. The Appeals Chamber considers that resort to factual presumptions in reparations proceedings is within a trial chamber's discretion in determining "*what is* 'sufficient' *for purposes of an applicant meeting the burden of proof*". However, the Appeals Chamber emphasises that, while a trial chamber has discretion to freely evaluate the evidence of harm in a particular case, this discretion is not unlimited. A trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions.

[…]

The Appeals Chamber finds that, while the applicants had not requested that the impugned presumption be formulated to address the specific difficulties faced by the applicants in support of their claims concerning material harm resulting from loss of cattle, fields and crops, the parties and participants to the proceedings were aware of the difficulties faced by the applicants in obtaining evidence in the support of their claims. […] In this regard, the Appeals Chamber notes that it may have been advisable for the Trial Chamber to have indicated to the parties and the participants that it was intending to draw the impugned presumption, including but not limited to inviting submissions on its formulation.

See No. ICC-01/04-01/07-3778-Red A3 A4 A5, Appeals Chamber, 8 March 2018, paras. 75 and 91.

7. Types of harm

7. 1. Material harm

a) Material harm

i. Destruction of houses, outbuildings of houses, and business premises

The Chamber will treat material harm resulting from the destruction of houses, outbuildings of houses, and business premises by: first, determining whether the harm alleged by the Applicants ensued from one or more of the crimes of which the Accused was convicted (b.); second, assessing the evidence presented by the Applicants in support of the harm alleged (c.) and, lastly, deciding with regard to the evidence and findings of Trial Chamber II, sitting in its previous composition, whether the harm at issue is established, subject to the particular circumstances which emerge from an individual analysis of each application for reparations and the relevant Defence observations (d.).

[…]

Having regard to these findings of fact, the Chamber determines that the material harm alleged by the Applicants as a result of the destruction of houses, outbuildings of houses, and business premises ensued from the crimes of which the Accused was convicted, *viz*., destruction of enemy property as a war crime under article 8(2)(e)(xii) of the Statute, insofar as the existence of said harm and the causal nexus with the crimes are established on a balance of probabilities.

[…]

In view of the information contained in the residence certificates and, in particular, their signature by a person who was acting in an official capacity and a credible witness, the Chamber finds them to be of sufficient probative value to be entertained in its individual analysis of the applications for reparations.

[…]

The Chamber considers that, […] material harm resulting from the destruction of a house, an outbuilding or a business premises is established to the requisite standard of proof by the following: a statement by an Applicant alleging the destruction of a house, an outbuilding of a house, or a business premises; a residence certificate or any similar such evidence, where issued in the name of the Applicant, dated and signed by a person acting in an

official capacity and where it is stated that the immovable property belonging to the Applicant was destroyed in the attack; and the findings of Trial Chamber II, sitting in its previous composition, concerning the destruction of enemy property as a war crime under article 8(2)(e)(xii) of the Statute.

Lastly, it is noted, the Defence having made the point, that the residence certificates do not provide particulars of the immovable property, save that it consisted of houses and, in some cases, outbuildings or business premises. Accordingly, the Chamber is not in a position to determine whether such immovable property was, for example, made of straw, rammed earth, or fired or unfired brick.

ii. Destruction or pillaging of furniture, personal effects and wares

[…]

In the view of the Chamber, it is reasonable to presume that the great majority of the population of Bogoro owned property essential to daily life and that by reason of the destruction of houses, outbuildings of houses, and business premises in the attack on Bogoro, the property within was destroyed or pillaged.

Therefore, the Chamber is of the view that, where an Applicant establishes that he or she suffered material harm as a result of the destruction of a house, an outbuilding of a house, or a business premises, the material harm resulting from the destruction or pillaging of furniture, personal effects or wares is presumed to be established, absent any specific piece of evidence.

The Chamber also considers that the material harm sustained by an Applicant as a result of the destruction or pillaging of property essential to daily life is presumed to be established where the Applicant provides proof of the destruction of the house in which he or she lived, but did not own.

As to an Applicant who alleges solely destruction or pillaging of personal effects essential to daily life, the Chamber regards such harm as established where through corroboration the Applicant shows to the requisite standard of proof that he or she was present or living in Bogoro during the attack.

However, from the evidence presented, the Chamber is not in a position to determine the type and quantity of furniture, owned by the Applicants.

iii. Pillaging of livestock; destruction of fields and harvests; pillaging of harvests

[…]

Having regard to the foregoing, the Chamber determines that where an Applicant establishes harm resulting from the destruction of a house, the material harm resulting from the pillaging of livestock or other animals and the destruction of fields and harvests or the pillaging of harvests is presumed to be established, absent any specific evidence.

The Chamber also determines that the material harm resulting from the pillaging of livestock and the destruction of fields and harvests or the pillaging of harvests is presumed to be established where an Applicant provides proof of the destruction of the house in which he or she was living, but which he or she did not own.

As to the extent of the harm alleged, absent specific evidence, the Chamber is not in a position to ascertain, in most cases, the type and quantity of livestock pillaged, the area of the fields destroyed or the type and quantity of harvests destroyed or pillaged. For that reason, the Chamber considers the harm sustained, in general, to be equivalent to consumption per capita. The Chamber determines that consumption of livestock per capita amounts to the value of the total livestock kept – one cow, two goats and three hens – and consumption of fields or harvests per capita amounts to the price fetched by ten piquets of the commonest crops in Bogoro.

[…]

The Chamber regards a statement signed by two credible witnesses mentioning the type and quantity of livestock the Applicants owned in 2003 to be of sufficient probative value to establish the extent of the harm as described therein. Where, for example, an Applicant alleges the loss often or so cows in the attack on Bogoro and tenders a declaration of livestock ownership signed by two credible witnesses, stating that he or she owned ten or so cows in 2003, the Chamber will determine that the extent of the harm suffered by the Applicant amounts to the loss of ten cows.

The Chamber sees that some declarations of livestock ownership tendered state a lower quantity of livestock than that defined as consumption per capita. In the particular circumstances of the case, the Chamber sees no justification in arriving at a figure below the consumption per capita laid down in this Section. To so proceed would give rise to a situation of unfairness, where detailed proof stating the type and quantity of livestock could result in a figure below that derived from proof which provides little detail and makes no mention of the type or quantity of livestock. Thus, the Chamber takes the view that if a presumption of pillaging of livestock in an amount corresponding to consumption per capita is applicable to an Applicant who did not tender a declaration of livestock ownership, it must apply all the more to an Applicant who tenders a declaration stating a quantity of livestock owned which falls below that of consumption per capita, or an Applicant who presents a declaration which does not specify the type or quantity of livestock owned. Accordingly, fairness dictates that the Chamber assess the harm suffered by such persons as being equivalent to consumption per capita.

iv. Destruction or pillaging of the family property

The Chamber notes that, in their applications for reparations, some Applicants allege that they suffered material harm ensuing from the destruction or pillaging of the family property in the attack on Bogoro. The Applicants mainly present residence certificates in the names of their ascendants but no other evidence to substantiate succession of the family property specifically.

The Chamber does not consider itself competent to adjudge such matters, which are the province of Congolese national law. Accordingly, the Chamber is not in a position to make a finding of succession of family property, and hence, of personal harm suffered by the Applicants who allege loss of the family property.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 77, 79, 83, 85-86, 90-94, 99-101, and 104-107.

7.2. Psychological harm

i. Psychological harm connected to the death of a relative

The Chamber first recalls that it has been consistently held that indirect victims are eligible for reparations. The harm caused to an indirect victim may include psychological suffering experienced as a result of the sudden loss of a family member. To qualify as an indirect victim, the Chamber recalls, an applicant must also establish that the harm was personally suffered. To that end, the applicant must show that he or she had a close personal relationship with the direct victim. In *Lubanga*, the Appeals Chamber made particular reference to the close personal relationship binding offspring and parents.

The Chamber will treat psychological harm as a result of the death of a relative by first satisfying itself that the harm alleged by the Applicant ensued from one or more of the crimes of which the accused was convicted (b.). Then, to determine whether the Applicant is an indirect victim, the Chamber will satisfy itself that the death of a direct victim in the attack on Bogoro has been established (c.) and the Applicant had a close personal relationship with the direct victim (d.).

[…]

c. Death of a direct victim

Turning to the Defence remark that the death certificates do not entail an irrefutable finding of a direct victim's death, the Chamber finds that one Applicant's statements as a whole and the death certificate, which was signed by a civil status registrar in the DRC, are sufficient evidence to establish to the requisite standard of proof that the direct victim in question did in fact die in the attack on Bogoro. […].

d. Close personal relationship with the direct victim

The Chamber notices that as proof of a close personal relationship with a direct victim, the Applicants generally provide a certificate of family relationship, dated and signed by a civil status registrar, stating the family relationship between the direct victim and the Applicant. […] [T]he Chamber takes the view that it rests with it, in its individual analysis of the applications for reparations, to assess how the direct victim and the Applicant are related, with due consideration for the documentation and evidence as a whole provided in support of the applications for reparations. Hence, the Chamber is of the opinion that the family relationship may be proven without tendering any such certificate. This will be so where family relationship maybe established by the fact that the parents' names on a voter's card accord with those on a death certificate. The Chamber also looks at family relationships between Applicants for corroboration of the allegations.

The Chamber recalls that the concept of "*family*" must be understood in relation to the relevant family and social structures. In *Lubanga*, the Appeals Chamber adverted to the widely accepted presumption "*that an individual is succeeded by his or her spouse and children*". In the case at bar, the Chamber has treated the concept of "*family*" with due regard for family and social structures in the DRC and in Ituri in particular. The issue to which the Chamber must turn its attention is whether "*as a result of their* [the indirect victims'] *relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them*". In the specific circumstances of the attack on Bogoro, the Chamber regards the loss of a family member as a traumatic experience entailing psychological suffering – it is of little consequence whether the relative was near or distant.

[…]

Accordingly, where the death of a direct victim in the attack on Bogoro and the family relationship between the direct victim and the Applicant are established in the light of the documents and evidence as a whole furnished in support of an application for reparations, the Chamber considers psychological harm resulting from the death of a relative to be established.

ii. Psychological harm connected to the experience of the attack on Bogoro

[…]

The Chamber regards the fact alone of having been in Bogoro on 24 February 2003 during the attack and of having seen or fled the massacres and atrocities perpetrated had major ramifications for the mental health of the persons present that day.

[…]

Having regard to those findings and considerations, the Chamber has decided to make a finding that an Applicant sustained psychological harm connected to the experience of the attack on Bogoro, where it is proven that that person suffered other harm during the attack, even if he or she makes no explicit allegation of psychological harm. To so proceed is, in the Chamber's estimation, warranted by the fact that every Applicant who establishes that he or she was affected in a material or physical way by the attack on Bogoro may be presumed to have suffered repercussions on his or her mental health.

[…]

Lastly, the Chamber reiterates that it will make a finding of psychological harm connected to the experience of the attack, irrespective of any other psychological harm. So, where an Applicant alleges psychological harm resulting from the death of a relative and psychological harm connected to the experience of the attack on Bogoro, the Chamber will consider the Applicant to have suffered two distinct types of psychological harm.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 113-114, 119-122, 125, 129, and 131.

7.3. Physical harm

The Chamber considers that many victims allege bodily harm with only the most summary of assertions that this happened during the attack, making it difficult to ascertain the circumstances of these deaths and how they occurred in the course of the attack against the Protected Buildings. This makes it impossible to tell if the bodily harm was caused by those attacking the Protected Buildings […] or others in a manner which the convicted person neither knew of nor could reasonably anticipate. The Chamber emphasises again that no factual findings in the Judgment suggest that bodily harm played any part in the criminal plan for which the accused was convicted.

On the basis of the information before it, the Chamber does not consider that any bodily harm suffered was sufficiently foreseeable as to conclude that the convicted person's crime is its actual and proximate cause.

As such, the Chamber orders no reparations for this kind of harm.

See No. ICC-01/12-01/15-236, Trial Chamber VIII, 17 August 2017, paras. 97-99.

7.4. Transgenerational harms

Even where those Applicants are, in all likelihood, suffering from transgenerational psychological harm, the point must be made […] that no evidence is laid before the Chamber to establish on a balance of probabilities the causal nexus between the trauma suffered and the attack on Bogoro.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, para. 134.

In the view of the Appeals Chamber, and in the absence of any further explanation by the Trial Chamber, the Trial Chamber's conclusion that the causal nexus had not been established was contradictory to the Trial Chamber's statement

That the Five Applicants were "*in all likelihood*" suffering from transgenerational harm. The finding in the Impugned Decision that the causal nexus had not been established was repeated, but not further elaborated upon in Annex II to the Impugned Decision, where the Trial Chamber assessed the individual applications. This finding cannot be reconciled with the Trial Chamber's conclusion that all Five Applicants had suffered psychological harm and that the harm was "*in all likelihood*" transgenerational.

Thus, the Trial Chamber erred in failing to properly reason its decision in relation to the causal nexus between the attack on Bogoro and the harm suffered by the Five Applicants. This makes it impossible for the Appeals Chamber to assess the reasonableness of the Trial Chamber's finding that the causal nexus had not been established to a balance of probabilities.

[…]

The Appeals Chamber considers it appropriate to reverse the Trial Chamber's findings in relation to the Five Applicants and to remand the matter to the Trial Chamber, which has detailed knowledge of the case, for it to reassess the question of the causal nexus between the crimes for which the Accused was convicted and their psychological harm and whether they should be awarded reparations.

See No. ICC-01/04-01/07-3778-Red A3 A4 A5, Appeals Chamber, 8 March 2018, paras. 238-239, and 260.

As mentioned above, the scope of this remand [by the Appeals Chamber] is limited to reassessing the causal nexus between the crimes of which [the Accused] was convicted and the psychological harm suffered by the Applicants Concerned. […].

]The Chamber deems it useful, in the context of the matter remanded by the Appeals Chamber, to elaborate on the proximate cause standard. The Chamber notes that, in general terms, the proximate cause standard is a limitation placed by some courts on a person's liability for the consequences of his or her actions. This means that the liability of the person who committed an act is limited to the causes that are closely connected to the result of that act and that are significant enough to justify a finding of liability.

The standard is of particular importance when harm appears to have more than one cause. The Chamber notes that, according to a wide range of case law, the chain of causation between an act and its result is broken when an event which the person who committed the initial act could not have reasonably foreseen occurs after the commission of the initial act and affects its result. In other words, if the person who committed the initial act could not have reasonably foreseen the event in question, the initial act cannot be considered to be the proximate cause of the harm suffered by the victim and, consequently, the person who committed the initial act cannot be held liable for the harm in question. In other words, the rationale for applying the proximate cause standard is the need to place just and fair limits on the consequences of the crimes that can be attributed to the convicted person.

[…]

Before proceeding with the assessment de novo of the applications for reparations submitted by the Applicants Concerned, the Chamber deems it appropriate to explain its approach. The Chamber will assess the applications for reparations on a case-by-case basis and will consider the circumstantial evidence as a whole to determine whether the psychological harm suffered by each Applicant Concerned was the result of the crimes of which the Accused was convicted. To that end, it will examine the statements and supporting material submitted by the Applicants Concerned, in particular the mental health certificates. In addition the Chamber will take note of the current state of the scientific debate on the phenomenon of transgenerational transmission of trauma, in particular the two schools – the epigenetic school and the social school.

In this regard, the Chamber considers in general that, with respect to the transgenerational harm, the closer the date of birth of the Applicant to the date of the Attack, the more likely it is that the Attack had an impact on the Applicant Concerned, especially if no other potentially traumatic events occurred between 24 February 2003 and the date of the Applicant's birth. In the light of this, the Chamber notes that the mental health certificates issued by the neuropsychiatrists who examined the Applicants Concerned provide details of their "*pre-, peri- and postnatal medical history*" or report that this history is unknown. In this connection, the Chamber will also examine the discrepancies between the dates of birth on the different documents provided by the Applicants Concerned.

Conversely, the Chamber considers that the farther the date of birth of the Applicant Concerned from the date of the attack on Bogoro, the more likely it is that other factors/events may have contributed to the suffering of the Applicants Concerned. In the light of this, the Chamber notes that, during the medical examination of one of the Applicants Concerned, the neuropsychiatrist found that a multifactorial etiology of the Applicant's emotional disorder could not be ruled out. In other words, all of the causes of the pathology in question involve several factors. The Chamber also notes that […] the parents' suffering "*is combined with other anxieties such as those triggered by insecurity in the region as well as other contextual factors*". In that regard, the Chamber recalls the principles applicable to causal nexus, in particular the proximate cause standard, which is that the crime must be sufficiently related to the harm to be considered the cause of that harm.

See No. ICC-01/04-01/07-3804-Red-tENG, Trial Chamber II, 19 July 2018, paras. 15-17, and 28-30.

7.5. Other types of harm

Sui generis harm: loss of standard of living, loss of opportunity and forced departure

[…]

The Chamber determines that a finding of psychological harm connected to the experience of the attack on Bogoro encompasses loss of opportunity, loss of standard of living and forced departure.

Harm not ensuing from one or more of the crimes of which [the accused] was convicted

[…]

The Chamber does not regard itself as in a position to determine that the physical and psychological harm occasioned by rape and/or sexual violence or gender-based violence during the attack on Bogoro ensued from one of the crimes of which the Accused was convicted.

[…]

Further, the Chamber invites the TFV to afford consideration as part of its assistance mandate, wherever possible, to these Applicants.

Harm not alleged by the Applicants – the case of former child soldiers

[…]

The Chamber holds that the former child soldiers are ineligible for reparations in the present proceedings brought in connection with the crimes of which [the accused] was convicted. Be that as it may, the Chamber invites the TFV to give consideration as part of its assistance mandate, wherever possible, to the harm suffered by the Applicants in the attack on Bogoro upon which the Chamber has not been in a position to act in the case.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 139, 152, 154, and 161.

8. Assessment of the harm

The Chamber takes the view that the extent of the harm suffered by the victims for the purposes of reparations in the case, with due regard for the 341 applications for reparations put before it, is the sum-total of the harm which the Chamber has found to be established. Accordingly, the Chamber will undertake an assessment of the monetary value of each head of harm it has defined above so as then to set the size of the reparations award for which the convicted person is liable.

[…]

B. Time frame of reference for the assessment of the monetary value of the harm

[…]

Having regard to the foregoing, and cognizant of the disparity between the value at the material time of the property lost and its value now, and of the difficulty of providing proof of the value of the property destroyed at time of the attack on Bogoro, the Chamber determines that the harm must be assessed at the time of the award.

C. General context of the harm suffered by the convicted person's victims

[…]

The Chamber is of the view that the monetary assessment of pecuniary harm is inseverable from the economic context of the Ituri region and that of the village of Bogoro in particular. To that end, the Chamber directed from the parties and the TFV observations on prices on the local market of the property whose destruction the victims allege.

However, the Chamber regards the economic situation of Ituri as immaterial to the determination of the size of the award for non-pecuniary harm. The monetary assessment of the psychological harm resulting from the ordeal which the victims endured at the time of the attack, and the psychological harm connected to the death of a relative, must, in no circumstances, be made contingent on the victims' financial situation.

D. Assessment of the monetary value per head of harm

[…]

Harm under each of the heads defined by the Chamber will now be examined against the information in the applications for reparations and the observations of the parties and the TFV. Where it cannot identify any specific particulars to consult, the Chamber will make an *ex aequo et bono* assessment of the harm which has been established. The Chamber has considered that it need not avail itself of experts to such end in the case at bar.

[…]

1. Material harm

a) Destruction of houses

[…]

The Chamber recalls that the residence certificates presente do not specify the type of house or its condition. Hence, the Chamber sees fit to accept the minimum figure suggested by the Legal Representative and the Defence, and hereby sets the harm connected to destruction of a house at USD 600. As to the Defence argument that Bogoro was subjected to several attacks before 24 February 2003, the Chamber recalls that it has examined the causal nexus between the harm suffered and the crimes committed by the convicted person in the individual analysis of each application for reparations.

b) Destruction of outbuildings

[…]

From the analysis of the applications for reparations the Chamber has not been in a position to determine the features of the outbuildings, and so puts *ex aequo et bono* the material harm connected to the destruction of an outbuilding at USD 100.

c) Destruction or pillaging of furniture

[…]

The Chamber sees fit to accept the Legal Representative's suggestion for a basic set of furniture for seven persons and so reckons the harm resulting from the destruction or pillaging of furniture at USD 500 per house. That figure includes kitchen utensils.

d) Destruction or pillaging of personal effects

[…]

As to personal effects, the Chamber sees that the Applicants allege mostly pillaging of clothing and school supplies. The Chamber recalls that, absent detailed evidence, it has not been in a position to determine what precisely the Applicants lost. Accordingly, harm connected to the destruction or pillaging of personal effects is put *ex aequo et bono* at USD 75 per person.

e) Destruction or pillaging of business premises

[…]

The Chamber recalls that, in most cases, it is not in a position to determine the business premises' features, such as building material. The Chamber therefore accepts the suggestions of the Legal Representative and the Defence regarding the average value of a business premises made of straw. The Chamber thus sets the harm connected to the destruction and pillaging of a business premises whose features it has not been in a position to determine at a figure of USD 300, which includes its contents.

The Chamber has been in a position to enter a finding of destruction and pillaging of two business premises made of durable material (restaurants). The Chamber sets the harm connected to that destruction and pillaging at a figure of USD 800, which includes the contents. The Chamber has also been in a position to make a finding of destruction and pillaging of a hotel made of durable material. It puts the harm connected to its destruction and pillaging at a figure of USD 3,000, which includes its contents.

f) Destruction or pillaging of wares

[…]

The Chamber recalls that some Applicants alleged that they were renting the business premises they were using and that the wares inside were pillaged. Having regard to the parties' observations, the Chamber sets the harm connected to the destruction or pillaging of wares of a business premises at USD 100.

g) Pillaging of livestock

[…]

Where the Chamber is in a position to make a finding as to the precise type and quantity of livestock which an Applicant owned and to determine that the type and number exceed the monetary value of what the Chamber considers to be the average total livestock kept, the Chamber will assess the corresponding harm on the basis of the following figures: USD 400 for a cow, USD 50 for a goat, and USD 8 for a hen. Where the Chamber is not in a position to make a finding as to the precise type and quantity of livestock which the Applicant owned, the harm resulting from the pillaging of livestock will be put at USD 524, which corresponds to the monetary value of what the Chamber considers to be the average total livestock kept.

h) Destruction of fields and harvests; pillaging of harvests

[…]

It is to be noted that, upon analysis of the applications for reparations, the Chamber considered some Applicants to have suffered harm as a result of the destruction of fields and harvests or the pillaging of harvests, but, absent sufficient evidence, it has not been in a position to determine the area of the fields or the type of crops grown. Given the considerable disparity in the tracts of land owned, the crops grown and, hence, the extent of the harm suffered by the Applicants, the Chamber accepts the […] suggestion of USD 150 per Applicant, which corresponds to the price fetched by ten piquets of sweet potato or corn.

2. Physical harm

[…]

The Chamber has found that head of harm to be established in respect of two Applicants. Both cases involve bullet wounds. The Chamber is not in a position to determine a precise figure for the harm on the basis of their applications for reparations. Accordingly, in each case the physical harm is reckoned *ex aequo et bono* at USD 250.

3. Psychological harm

a) Psychological harm as a result of the death of a relative

[…]

The Chamber thus lays down two categories of death affecting each victim: death of near relatives (spouses, parents, children, grandparents and grandchildren); and death of other, more distant relatives (other relatives). Psychological harm connected to the death of a near relative is reckoned *ex aequo et bono* at USD 8,000 and psychological harm connected to the death of a more distant relative is reckoned *ex aequo et bono* at USD 4,000.

b) Psychological harm connected to the experience of the attack on Bogoro

[…]

The psychological harm connected to the experience of the attack is reckoned *ex aequo et bono* at USD 2,000 per Applicant. The Chamber reiterates that it has made a finding of psychological harm connected to the experience of the attack on Bogoro, irrespective of psychological harm connected to the death of a relative.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 181, 185, 188, 189, 191, 195, 197, 202, 205, 209-210, 214, 218, 222, 226, 232, and 236.

When pronouncing the sentence, the Chamber concluded that the convicted person had caused moral harm.

Every victim applicant before the Chamber alleges some sort of moral harm as a result of the attack on the Protected Buildings. The Chamber considers that the victims established the following forms of moral harm to the requisite standard: (i) mental pain and anguish, including losses of childhood, opportunities and relationships among those who fled Timbuktu because the Protected Buildings were attacked and (ii) disruption of culture.

The Chamber has also received a variety of other information describing the emotional distress and harm suffered across the Timbuktu community.

The Chamber is satisfied that the convicted person's crime is both the actual and proximate cause of this moral harm. It was reasonably foreseeable that attacking cultural property integral to the community in Timbuktu would cause these kinds of distress.

[…]

Two of the experts appointed by the Chamber state that the moral harm suffered in the present case is at least as great as the economic loss suffered. There is no evident methodology leading to this conclusion beyond assertions of the widespread moral harm suffered in Timbuktu. This broader moral harm is caused by a variety of factors, and the Accused's acts and conduct can be said to have caused only part of it. Noting that it has determined these same experts' conclusions on economic loss to be highly excessive, the Chamber is not persuaded that what these experts state is a sufficiently substantiated starting point for establishing the Accused's liability. This is not to say that the Chamber does not believe that the moral harm is less important than the economic loss suffered (quite the contrary), but rather that the Chamber does not have enough information to quantify this harm at the same level as the economic loss.

In contrast, another of the Chamber's appointed experts estimated in monetary terms the mental pain and anguish suffered in the present case at approximately 437,000 USD. The expert derived this figure from an award identified in a similar case, whereby in 2009 the Eritrea Ethiopia Claims Commission reflected the unique cultural significance of the damaged Stela of Matara with a 23,000 USD award. The expert then revised this number upwards to reflect the fact that 10 Protected Buildings were destroyed and nine of them held world heritage status.

The Chamber considers that the latter expert's methodology allows for a reasonable starting point for determining the approximate amount of mental pain and anguish overwhelmingly established in the present case. The figure the expert arrived at needs to be revised to reflect inflation and converted into euros. The result would again need to be revised upwards to reflect the disruption of culture suffered, although there is no way of objectively estimating such a consideration.

Taking these considerations into account, the Chamber sets the convicted person's liability for moral harm at 483,000 euros.

See No. ICC-01/12-01/15-236, Trial Chamber VIII, 17 August 2017, paras. 84-87, and 130-133.

The Chamber does not see fit to engage in a separate monetary assessment of each type of harm suffered by each victim.

The Chamber does not see fit to distinguish between direct and indirect victims for the purposes of determining the monetary value of the harm suffered.

The Chamber now turns to the assessment of the average harm suffered by each victim.

[…]

The Chamber reckons *ex æquo et bono* the harm suffered by each victim, direct or indirect, at USD 8,000.

See No. ICC-01/04-01/06-3379-Red-Corr-Anx-tENG, Trial Chamber II, 21 December 2017, paras. 249-251 and 259.

The Appeals Chamber has concerns as to the Trial Chamber's approach in identifying the "*monetary value*" of the harm in the way it did. This approach required it to analyse all individual applications in detail, only to then put a monetary value to the harm which did not reflect the reparations eventually awarded to the victims. […] The Trial Chamber's approach also required the TFV to go through an equally detailed analysis for the purposes of the Draft Implementation Plan, only to arrive at different monetary values for the costs of repairing the harms identified. The Appeals Chamber considers that the result of this approach was incompatible with the overall goals of this part of the proceedings. The approach taken was time consuming, resource intensive and, in the end, disproportionate to what was achieved.

The Appeals Chamber notes that article 75(1) of the Statute requires a trial chamber to "*determine the scope and extent of any damage, loss and injury to, or in respect of victims*". The Appeals Chamber considers that, in doing so, a trial chamber should, generally speaking, establish the types or categories of harm caused by the crimes for which the convicted person was convicted, based on all relevant information before it, including the decision on conviction, sentencing decision, submissions by the parties or amici curiae, expert reports and the applications by the victims for reparations.

The Appeals Chamber notes that there may be circumstances where a trial chamber finds it necessary to individually set out findings in respect of all applications in order to identify the harms in question (for example, if there is a very small number of victims to whom the chamber intends to award individual and personalised reparations). However, when there are more than a very small number of victims, this is neither necessary nor desirable. This is not to say that trial chambers should not consider those applications – indeed the information therein may be crucial to assess the types of harm alleged and it can assist a chamber in making findings as to that harm. However, setting out an analysis for each individual, in particular in circumstances where a subsequent individual award bears no relation to that detailed analysis, appears to be contrary to the need for fair and expeditious proceedings.

In the view of the Appeals Chamber, rather than attempting to determine the "*sum-total*" of the monetary value of the harm caused, trial chambers should seek to define the harms and to determine the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy. The Appeals Chamber considers that focusing on the cost to repair is appropriate, in light of the overall purpose of reparations, which is indeed to repair. This approach is also appropriate in light of the need to ensure that reparations proceedings advance efficiently. In assessing the cost of repair, the Trial Chamber may seek the assistance of experts and other bodies, including the TFV, before making a final ruling thereon. This ruling on the cost of repairing the harm is to be taken by the trial chamber, in the exercise of its judicial functions under the Statute.

See No. ICC-01/04-01/07-3778-Red A3 A4 A5, Appeals Chamber, 8 March 2018, paras. 69-72.

9. Liability of the convicted person

The convicted person has been declared indigent and no assets or property have been identified that can be used for the purposes of reparations. The Chamber is, therefore, of the view that the convicted person is only able to contribute to non-monetary reparations. Any participation on his part in symbolic reparations, such as a public or private apology to the victims, is only appropriate with his agreement. Accordingly, these measures will not form part of any Court order.

As regards the concept of "*reparations through the Trust Fund*", and applying the Vienna Convention on the Law of Treaties, the Chamber gives the word "*through*" its ordinary meaning, namely "*by means of*". Thus, when article 75(2) of the Statute provides that an award for reparations may be made "*through*" the Trust Fund, the Court is able to draw on the logistical and financial resources of the Trust Fund in implementing the award.

Moreover, the Chamber is of the view that when the convicted person has no assets, if a reparations award is made "*through*" the Trust Fund, the award is not limited to the funds and assets seized and deposited with the Trust Fund, but the award can, at least potentially, be supported by the Trust Fund's own resources. This interpretation is consistent with rule 98(5) of the Rules and regulation 56 of the Regulations of the TFV. Rule 98(5) of the Rules provides that the Trust Fund may use "*other resources*" for the benefit of victims. Regulation 56 of the Regulations of the TFV imposes an obligation on the TFV's Board of Directors to complement the resources collected from a convicted person with "*the other resources of the Trust Fund*", providing the Board of Directors make all reasonable efforts to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98(3) and (4) of the Rules. In the Chamber's view, the wording of regulation 56 of the Regulations of the TFV suggests that the "*need to provide adequate resources*" includes the need to fund reparation awards. In circumstances when the Court orders reparations against an indigent convicted person, the Court may draw upon "*other resources*" that the TFV has made reasonable efforts to set aside.

Furthermore, this interpretation is consistent with Pre-Trial Chamber I's decision permitting the Trust Fund to engage in activities outside the context of Court-ordered reparations, pursuant to regulation 50 of the Regulations of the TFV, noting that "*the responsibility of the Trust Fund is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparation order pursuant to article 75 of the Statute*".

The Chamber considers that pursuant to regulation 56 of the Regulations of the TFV, the TFV shall complement the funding of a reparations award, albeit within the limitations of its available resources and without prejudice to its assistance mandate.

As noted above, the TFV has indicated that reparations to be funded by the TFV with its own resources will tend to be collective in nature or they will be made to an organization pursuant to regulation 56 of the Regulations of the TFV. The Chamber endorses this suggestion of the TFV that a community-based approach, using the TFV's voluntary contributions, would be more beneficial and have greater utility than individual awards, given

the limited funds available and the fact that this approach does not require costly and resource- intensive verification procedures.

The Chamber furthermore acknowledges the importance of the ongoing child soldier rehabilitation projects, sustained by the TFV, which provide support to former child soldiers in improving their economic position through access to village savings and loans schemes. Furthermore, partnerships between the TFV and various organizations within the DRC have established a local system of "*mutual solidarity*", which is another form of community savings plan. These initiatives, in the Chamber's view, deserve the support of the ICC, the States Parties and any other interested actors.

See No. ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012, paras. 269-275.

At the outset, the Appeals Chamber stresses that the imposition of liability on a convicted person, including the precise scope of that liability, should be done by the Trial Chamber in the order for reparations. Indeed, the Appeals Chamber considers it to be beyond question that a person subject to an order of a court of law must know the precise extent of his or her obligations arising from that court order, particularly in light of the corresponding right to effectively appeal such an order, and that the extent of those obligations must be determined by a court in a judicial process.

[…]

The Appeals Chamber holds that the Trial Chamber's determination of the amount of the convicted person's liability for the awards for reparations constitutes a part of the order for reparations within the meaning of article 75 (2) of the Statute and is therefore appealable, pursuant to article 82 (4) of the Statute.

See No. ICC-01/04-01/06-3129 A A2 A3, Appeals Chamber, 3 March 2015, paras. 237 and 242.

In order to establish responsibility [for reparations of the convicted person] and inform him of it, the Chamber recalls that it must determine the extent of the harm caused to victims, after having examined their status as victims eligible for reparations.

The Chamber also recalls that, pursuant to article 75(3) of the Statute, it may "*invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States*". The Chamber further recalls that, pursuant to rule 97(2) of the Rules of Evidence and Procedure, it may "[…] *appoint appropriate experts to assist it in determining the scope, extent of any* […] *injury to, or in respect of victims*".

The Chamber observes that the requesters allege having suffered material, physical and psychological harm. The Chamber notes that, in the Second Observations, the Defence presents information on the current prices of goods or property the requesters allegedly lost during the Bogoro attack of 24 February 2003.

Albeit mindful of the difficulty of such an exercise and in order to help determine the extent of the harm caused to victims in the instant case, the Chamber instructs the Legal Representative, the Defence and the Trust Fund for Victims – in view of its extensive knowledge of the context in Ituri – to file additional observations on what they consider a fair monetary value for each type of harm, be it material, physical or psychological, suffered by the requesters. For a list of the types of harm alleged, the Legal Representative, the Defence and the TFV may *inter alia* consult the Table describing links between crimes and harm suffered.

See No. ICC-01/04-01/07-3702-tENG, Trial Chamber II, 15 July 2016, paras. 6-9.

It is noteworthy that in cases coming before the Court, a plurality of persons potentially bear responsibility for having contributed to the commission of the crimes which caused harm to victims. That said, it must be emphasized that the competence over such crimes of a chamber tasked with overseeing the conduct of a case is circumscribed by the charges confirmed against an accused person and the evidence tendered by the parties at trial, and so the bench is not in a position to determine the responsibility of every person who had a part in the crimes at issue. As regards the case at bar, to the Chamber's knowledge, no convictions have been returned against other persons for the attack on Bogoro in other fora.

[…]

The scope of the convicted person's liability, it is recalled, must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes of which he or she was found guilty, in the specific circumstances of the case, and, having regard to all of the factors aforementioned, the Chamber sets the sum-total of [the convicted person]'s liability for reparation at USD 1,000,000.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 263-264.

The Chamber disagrees that the convicted person's indigence has an impact on its reparations award. The Appeals Chamber has determined that it is an error to conclude that a convicted person's indigence is relevant to whether he or she should be liable for any reparations awarded. Rule 97(1) of the Rules provides that the Chamber shall take into account the '*scope and extent of any damage, loss or injury*' – but the personal financial circumstances of the convicted person are not mentioned. Taking such circumstances into account would inevitably lead to understanding the harm suffered and depriving victims of their right to a remedy. A convicted person's financial circumstances may affect how a reparations award is enforced – such as by affording an option to make reasonable payments in instalments – and the Chamber does not intend to impose hardships

on the convicted person that make it impossible for him to reintegrate into society upon his release. But enforcement of reparations awards is under the auspices of the Presidency and is beyond the current question of the convicted person's personal liability.

See No. ICC-01/12-01/15-236, Trial Chamber VIII, 17 August 2017, para. 114.

Having found that 425 of the 473 victims in the sample qualify for reparations awarded in the case, and having assessed ex æquo et bono the value of the harm per capita, taking into account the above considerations and factors pertaining to the convicted person's individual responsibility, the Chamber reckons ex æquo et bono [the convicted person's] liability in respect of the 425 victims in the sample at USD 3,400,000.

Recalling that hundreds and possibly thousands more victims suffered harm as a consequence of the crimes of which [the accused] was convicted, and having regard to the above considerations and factors, the Chamber reckons *ex æquo et bono* [the convicted person's] liability in respect of those other victims who may be identified during the implementation of reparations at USD 6,600,000.

Accordingly, the Chamber sets the total reparations award for which [the convicted person] is liable at USD 10,000,000.

See No. ICC-01/04-01/06-3379-Red-Corr-Anx-tENG, Trial Chamber II, 21 December 2017, paras. 279-281.

(i) Scope of Liability for Reparations

[…]

Importantly, the purpose of reparations is to repair the harm that was inflicted on the victims. This corresponds to the general principle of public international law that reparations should, where possible, attempt to restore the status quo ante. For these reasons, the Appeals Chamber finds that, in principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person's liability to repair that harm. While a reparations order must not exceed the overall cost to repair the harm caused, it is not, per se, inappropriate to hold the person liable for the full amount necessary to repair the harm.

The modes of individual criminal responsibility which may underpin such a conviction are, in the view of the Appeals Chamber, relevant for capturing criminal responsibility. However, at the reparations stage, the focus is on repairing the harm that has resulted from the crimes in question.

The Appeals Chamber notes that, in some cases it may be appropriate for a trial chamber to take into account the role of the convicted person vis-à-vis others in the commission of the crimes when deciding on a reparations order against that person. For example, if more than one person is convicted by the Court for the same crimes at the same time, it may be appropriate to apportion liability for the costs to repair. Nevertheless, the focus in all cases should be the extent of the harm and cost to repair such harm, rather than the role of the convicted person.

[…]

When determining the amount a convicted person is liable to pay for reparations, the primary consideration is the extent of the harm and cost it takes to repair that harm. Criteria such as the gravity of the crimes or mitigating factors such as characteristics personal to the convicted person are not relevant to this question. The goal of reparations is not to punish the person but indeed to repair the harm caused to others.

The Appeals Chamber acknowledges that the objective of reparations proceedings is remedial and not punitive. This remedial character is inherent in the modalities of reparations available to victims under article 75(2) of the Statute – restitution, compensation, and rehabilitation – and the other forms of reparations that have been recognised by the Appeals Chamber which may be appropriate on an *ad hoc* basis. […] However, as long as a convicted person is held liable for the costs that it takes to repair the harm caused, there is no punitive element. That this amount may be high is simply a result of the extent of the harm caused by the crimes for which the person was convicted.

[…]

(ii) Indigence and role of the TFV

[…]

The Appeals Chamber does not find that the convicted person has any concrete right to have the benefit of reduced liability on account of his present indigence. […] [T]he Appeals Chamber does not find this to be "*unfair*" or "*unjust*". […] At the same time, the Appeals Chamber notes that person's personal circumstances may affect how a reparations order is enforced. Such a consideration is under the authority of the Presidency and has no impact on the reasonableness of the reparations order itself. […] The Appeals Chamber recalls that, in accordance with rule 217 of the Rules, it is also for the Presidency, and not a trial chamber, to seek the assistance of States Parties in respect of cooperation matters.

See No. ICC-01/04-01/07-3778-Red A3 A4 A5, Appeals Chamber, 8 March 2018, paras. 178-180, 184-185, and 190.

10. Types and modalities of reparations

The Chamber recalls that under rule 97(1) of the Rules of Procedure and Evidence, it may award reparations on an individualized basis (rule 98(2)), a collective basis (rule 98(3)) or both. Individual and collective reparations are not mutually exclusive and may be awarded concurrently.

In determination of the reparations most appropriate to the case, it is paramount, in the Chamber's view, to heed the expectations and needs voiced by the victims in the various consultation exercises. The Chamber also has regard to the factors set down in the Rules of Procedure and Evidence: the scope and extent of any damage, loss or injury; the number of victims; and the scope and the modalities of reparations foreseen. Lastly, it takes account of the quantum for which it has determined [the convicted person] to be liable.

[…]

What is more, the Chamber recalls, reparations should "*be proportionate to the harm, injury, loss and damage as established by the Court*" and aim at reconciling the convicted person with the victims of the crimes. Wherever possible, "*reparations should reflect local cultural and customary practices unless these are discriminatory, exclusive or deny victims equal access to their rights*". In that regard, the Chamber emphasizes that "*reparations* […] *should avoid replicating discriminatory practices or structures that predated the commission of the crimes*". It is also desirable that reparations support programmes that are self-sustaining to enable victims to benefit from these measures over an extended period of time. Ultimately, the Chamber keeps in consideration that the utmost must be done to ensure that the victims themselves perceive the reparations as meaningful.

[…]

The Chamber takes the view and the United Nations has underscored that whereas collective reparations avoid stigmatization, individual reparations ensure that the victim does not feel excluded, marginalized or further stigmatized. The Chamber is further of the opinion that individual reparations are important to the victims and may, in addition to compensation or relief, afford personal and symbolic acknowledgment of the harm suffered. The Chamber also considers that individual reparations allow the victims to regain their self-sufficiency and to make decisions for themselves on the basis of their needs.

The Chamber foresees, moreover, that access to collective reparations could prove difficult for those victims who no longer live in Bogoro. Individual reparations could, therefore, resolve that conundrum.

Ultimately, the Chamber recalls its finding that 297 victims are eligible for reparations. In its view, 297 is a figure which makes individual awards feasible.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 265, 266, 268, and 285-287.

The Chamber therefore orders that the moral harm caused by the convicted person necessitates: (i) individual reparations for the mental pain and anguish of those whose ancestors' burial sites were damaged in the attack and (ii) collective reparations for the mental pain/anguish and disruption of culture of the Timbuktu community as a whole. As for the modalities, the Chamber considers that individual reparations are to be implemented through compensation and collective reparations through rehabilitation to address the emotional distress suffered as a result of the attack on the Protected Buildings. These collective reparations can also include symbolic measures – such as a memorial, commemoration or forgiveness ceremony – to give public recognition of the moral harm suffered by the Timbuktu community and those within it.

See No. ICC-01/12-01/15-236, Trial Chamber VIII, 17 August 2017, para. 90.

10.1. Symbolic reparations

The Chamber agrees that the implementation of symbolic reparations "*paves the way for the social acceptance of reparations awards in the affected communities, and it creates a safe environment for victims to come forward and voluntarily participate in the service-based collective awards without undue fear for their safety or reputation*". The Chamber also concurs with the TFV that the proposed symbolic reparations project "*provide for an enabling environment to develop and implement service-based collective reparations awards*".

[…]

Accordingly, the Chamber approves the proposed plan in line with the steps elaborated by the TFV in the 19 September 2016 Filing and the annex appended thereto. To this end, the Chamber invites the TFV Board of Directors to use the amount referred to in the 19 September 2016 Filing for the implementation of the proposed plan on the symbolic reparations project.

In terms of time frame for conducting the procurement of services through the proposed process of international competitive bidding, the Chamber finds it more efficient to opt for the "*alternative procurement modality*", which lasts for 18 weeks instead of the standard process which could take up to 33 weeks.

The Chamber also wishes to turn the TFV's attention to study the possibility of expanding its project beyond the five proposed localities […], in order to cover, to the extent possible, the Ituri region within the confines of the proposed budget. Finally, […] the Chamber draws the TFV's attention to the need to ensure the permanence of the envisaged structures and therefore to provide for their sustainability in the future.

See No. ICC-01/04-01/06-3251, Trial Chamber II, 21 October 2016, paras. 12, and 14-16.

10.2. Individual reparations

a) Individual reparations

The Chamber regards reparations as individual in character where the ensuing benefit is afforded directly to an individual to repair the harm he or she suffered as a consequence of the crimes of which the person was convicted. Individual reparations confer on a victim a benefit to which the person is exclusively entitled; put differently, the benefit received is particular to the victim. Compensation paid directly into the bank account of the victim concerned would be an example of individual reparations. Hence, the involvement of an organization or an intermediary group in the administration or apportionment of the reparations does not, in the view of the Chamber, detract from the individual character of the award.

[…]

The Chamber recalls that the Legal Representative and the Defence suggest the award of a symbolic amount of one euro to each of [the] victims. The Chamber takes the view that the distribution of a symbolic amount by way of compensation gives acknowledgement, in a personal and symbolic sense, of the harm done and suffering occasioned. In the case at bar, the Chamber considers that such individual acknowledgement may be meaningful to [the] victims, given the atrocities to which they were subjected.

The Chamber does consider it appropriate to award a more substantial symbolic award as compensation so that it is meaningful to the victims, but not the source of tension within the community.

From that standpoint, it is appropriate, in the Chamber's view, that each victim to whom it has accorded such *locus standi* receive a symbolic award of USD 250 compensation. The Chamber underscores that the symbolic award is not intended as compensation for the harm in its entirety. Yet, the Chamber believes that that award may provide some measure of relief for the harm suffered by the victims. It could help the victims become financially independent, by enabling them, for instance, to purchase tools or livestock, or to set up a small business. That way, the victims would be able to take their own decisions on the basis of their needs.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 271, and 298-300.

The Chamber awards individual reparations for consequential economic loss only to those whose livelihoods exclusively depended upon the Protected Buildings. An individualised response is more appropriate for them, as their loss relative to the rest of the community is more acute and exceptional. Such persons include those whose livelihood was to maintain and protect the Protected Buildings. Certain business owners may also qualify – such as a business whose only purpose is to sell sand perceived as holy from the sites of the Protected Buildings – but not owners of businesses with broader purposes who have been harmed by the loss of the Protected Buildings.

[…]

The Chamber therefore considers that individual reparations through compensation are necessary to address the mental pain and anguish the victims suffered.

See No. ICC-01/12-01/15-236, Trial Chamber VIII, 17 August 2017, paras. 81 and 89.

10.3. Collective reparations

The Chamber thus determines that to receive collective reparations, a group or category of persons may be bound by a shared identity or experience, but also by victimization by dint of the same violation or the same crime within the jurisdiction of the Court. Collective reparations may, therefore, benefit a group, including an ethnic, racial, social, political or religious group which predated the crime, but also any other group bound by collective harm and suffering as a consequence of the crimes of the convicted person.

Accordingly, the Chamber holds that for reparations to be collective in character, they must benefit a group or category of persons who have suffered shared harm. It is noted that the crimes within the jurisdiction of the Court may victimize various categories of persons for different reasons. Each such person may have been the victim of different crimes. The crime per se cannot be the touchstone defining a group which may be awarded reparations. The crux of collective reparations lies in the perception of the members of the group who experienced shared harm. Accordingly, the Chamber determines that collective awards can be made only where the victims perceive themselves as having suffered shared harm.

It also considers that to gain a collective award, the group need not be vested with a prior legal personality or a collective right. The Chamber also takes the view that collective reparations may serve to benefit a group irrespective of how they are to be administered or distributed. Lastly, the Chamber notes that shared harm does not necessarily pre-suppose the violation of a collective right. Victim say be bound by harm resulting from the violation of a collective right which was vested in them prior to the crime, but also as a result of the violation

of the individual rights of a large number of members of the group or the violation of individual rights with a collective impact.

What is more, collective reparations differ from individual reparations: the former confer on a group a benefit to which its individual members are not exclusively entitled, whereas in the case of the latter, the benefit belongs to each member of the group. By way of example, collective reparations accorded in the form of rehabilitation projects are not put in place for the exclusive benefit of one victim, but aim to benefit all members of the group and the community.

The Chamber is of the opinion that two categories of collective reparations may be differentiated: those aimed at benefiting the community as a whole and those focused on the individual members of the group. As a matter of fact […], the concept of collective reparations is an open concept. Collective reparations addressing the community as a whole are, therefore, just one possible form within the much wider concept of collective reparations. The Chamber takes the view that this open concept of collective reparations, through various modalities, places the emphasis on the potential benefit of such reparations both to the community and to the individual.

The first category of collective reparations ("*community reparations*"), therefore, is intended to benefit the community as a whole and does not specifically address individual members of the group. For example, the building of a school or hospital may be of general help to the community. A facility of that ilk needs, however, to provide specialized services addressing the needs of the victims in the case *sub judice*. Of further note, as the TFV has pointed out, is that some modalities of collective reparations, such as symbolic reparations in the form of a memorial, provide an inherently collective benefit of sharing memory and may not be conceived in individual terms.

Reparations in the second category may also be focused on the individual members of the group. The Chamber considers […] that some forms of collective reparations might result in individual benefits. The Chamber underscores that such reparations, although collective in nature, respond to the needs and current situation of individual victims in the group. That could be said of healthcare which is provided to all members of the group but which is specialized and addresses each victim individually. Such collective reparations, framed as individualized, are provided to a group of victims, but allow for the benefit to be adjusted to the particular need of each victim. Put otherwise, this second category of collective reparations is focused on the individuals themselves.

[…]

Turning to collective reparations, the Chamber considers, per its definition laid down above, the victims in the case to be a group which suffered shared harm at the time of the attack on Bogoro. It must be noted that the great majority of victims in the case lived in Bogoro in 2003. Moreover, from the applications which said victims submitted, the Chamber gathers that even though each individual did not suffer the same harm, they perceive themselves as part of a single group which was subjected to the attack on Bogoro. Accordingly, the Chamber determines that said persons may receive reparations on a collective basis.

The Chamber further regards collective reparations as appropriate to the case in that they would address shared needs and the complexity of the suffering of the various victims. Further still, in its view, collective reparations could foster reconciliation.

[…]

That said, the Chamber considers that collective reparations must, to the utmost, address the victims as individuals. In that connection it is worth recalling that the concept of collective reparations is an open concept, which places the emphasis on the benefit both to the individual and to the community.

Accordingly, the Chamber determines that it is appropriate to award collective reparations which are designed to benefit each victim so as to provide a meaningful remedy for the harm suffered by the convicted person's victims.

[…]

The Chamber hereby rules that collective reparations designed to benefit each victim shall specifically take the form of support for housing, support for an income-generating activity, support for education and psychological support.

The Chamber shares the view of the Legal Representative that the modalities of reparations must retain some flexibility and ensure that the reparations are commensurate to the harm suffered by each of the victims. Categorization of beneficiaries, for example, according to the head or the extent of harm suffered, can achieve that end.

In sum, the Chamber awards individual reparations, that is, compensation in the form of a symbolic award of USD 250. In addition, the Chamber makes an award for collective reparations designed to benefit each victim, in the form of support for housing, support for an income-generating activity, support for education and psychological support. The Chamber wishes to make plain that the collective reparations designed to benefit

each victim must include clear and sufficient explanations to inform the victims of and foster their trust in the measures.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 274-280, 288-289, 294-295, and 304-306.

The Chamber considers that the number of victims and the scope of the consequential economic loss make a collective award more appropriate for those beyond this identified group. This is not to say that individual businesses and families could not receive financial support in the implementation of these collective reparations, but rather that the Chamber considers that a collective response is needed to adequately address the harm suffered, As indicated by the Appeals Chamber, '*the decision not to award reparations on an individual basis does not prejudice the individuals who filed individual reparations requests with respect to their eligibility to participate in any collective reparations programme*'.

The Chamber therefore considers that the economic harm caused by the convicted person necessitates: (i) individual reparations for those whose livelihoods exclusively depended upon the Protected Buildings and (ii) collective reparations for the community of Timbuktu as a whole. As for the modalities, the Chamber considers that individual reparations are to be implemented through compensation to address the financial losses suffered. The modalities for collective reparations should be aimed at rehabilitating the community of Timbuktu in order to address the economic harm caused. Collective measures in this regard may include community-based educational and awareness raising programmes to promote Timbuktu's important and unique cultural heritage, return/resettlement programmes, a '*microcredit system*' that would assist the population to generate income, or other cash assistance programmes to restore some of Timbuktu's lost economic activity.

See No. ICC-01/12-01/15-236, Trial Chamber VIII, 17 August 2017, paras. 82 and 83.

11. Implementation of reparations

The Chamber endorses the five-step implementation plan suggested by the TFV, which is to be executed in conjunction with the Registry, the OPCV and the experts.

First, the TFV, the Registry, the OPCV and the experts, should establish which localities ought to be involved in the reparations process in the present case (focusing particularly on the places referred to in the Judgment and especially where the crimes committed). Although the Chamber referred in the article 74 Decision to several particular localities, the reparations programme is not limited to those that were mentioned. Second, there should be a process of consultation in the localities that are identified. Third, an assessment of harm should be carried out during this consultation phase by the team of experts. Fourth, public debates should be held in each locality in order to explain the reparations principles and procedures, and to address the victims' expectations. The final step is the collection of proposals for collective reparations that are to be developed in each locality, which are then to be presented to the Chamber for its approval.

The Chamber agrees that the assessment of harm is to be carried out by the TFV during a consultative phase in different localities. Moreover, the Chamber is satisfied that, in the circumstances of this case, the identification of the victims and beneficiaries (regulations 60 to 65 of the Regulations of the TFV) should be carried out by the TFV.

In light of the above, the Chamber considers that the individual application forms for reparations received thus far by the Registry should be transmitted to the TFV. If the TFV considers it appropriate, victims who have applied for reparations could be included in any reparations programme that is to be implemented by the TFV.

As noted above, the TFV proposes that a team of interdisciplinary experts assesses the harm suffered by the victims in different localities, with the support of the Registry, the OPCV and local partners. The TFV indicates that it has already used this approach in its projects under its assistance mandate.

In order for the Judiciary to exercise its monitoring and oversight functions, the newly constituted Chamber should be updated on this five-step implementation plan on a regular basis. In accordance with article 64(2) and (3)(a) of the Statute, the Chamber may be seized of any contested issues arising out of the work and the decisions of the TFV.

The Chamber will not otherwise issue, in this case, any order or instruction to the TFV on the implementation of reparations that are to be made through the TFV and funded by any voluntary contributions (as governed by regulations 47 and 48 of the Regulations of the TFV and the decisions of its Board of Directors pursuant to regulation 50 of the Regulations of the TFV).

There are very limited financial resources available in this case and it should be ensured that these are applied to the greatest extent possible to the benefit of the victims and any other beneficiaries. The Chamber considers that coordination and cooperation between the Registry, the OPCV and the TFV in establishing the reparations that are to be applied and implementing the plan are essential.

See No. ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012, paras. 281-288.

The Chamber generally considers that the TFV's proposals are in line with the modalities of reparations ordered by the Appeals Chamber. The Chamber is of the view, however, that the TFV has presented only a summary description of the prospective programmes and how they will be developed and managed. This information is insufficient for the Chamber to approve the implementation of the Proposed Plan.

Accordingly, the Chamber instructs the TFV to propose, by 7 May 2016, a set of collective reparation programmes as ordered by the Appeals Chamber, based on the principles presented in the Proposed Plan, the broad outlines of which the Chamber accepts. These programmes must be geared towards the direct and indirect victims of the crimes of which [the Accused] has been convicted. They must place particular emphasis on the gender-specific consequences of the crimes, as the TFV has suggested. The Chamber is also of the opinion that these programmes must be designed so that as many victims as possible may participate.

The Chamber instructs the TFV to present to it the specific terms of reference of each programme for which it is considering issuing a request for proposals or directly negotiating a contract. Each programme must include a precise evaluation of its cost, as well as provisions that allow the Chamber to fulfil the duty of monitoring assigned to it by the Appeals Chamber. The time limits for the implementation of each programme must be mentioned. Lastly, the Chamber is willing to examine any programmes the TFV deems useful to present to it.

See No. ICC-01/04-01/06-3198-tENG, Trial Chamber II, 9 February 2016, paras. 20-22.

A. Draft implementation plan

In the first instance, the TFV is directed to devise the Draft Plan, which must be put before the Chamber within three months of the date of the present order for reparations. The Draft Plan shall set out a programme, describing the reparations projects which the TFV intends to develop to give effect to the present order. The TFV shall, in crafting the Draft Plan, rely on the modalities determined by the Chamber. The Chamber directs the TFV to impart to it concrete particulars of the projects, *inter alia*, a description of the projects, their costings, and the modus operandi for their adoption and implementation, and for their oversight by the Chamber. The Chamber points out in this connection that the TFV must heed the victims' views and proposals regarding the projects which they see as the most appropriate. The Chamber remains cognizant, however, that not all of the modalities might be adopted down to the last detail. So, where the TFV is of the view that it cannot incorporate some measures in the modalities, it shall account for that decision.

Furthermore, the TFV shall foresee, within the Draft Plan, appropriate measures to ensure the safety, the physical and psychological well-being, and the privacy of the victims, and shall proceed on a gender-inclusive basis, such that the reparations are accessible to all of the victims. Moreover, priority may need to be given to certain victims, who are in a particularly vulnerable situation or who require urgent assistance. The TFV may also take on board the views of experts, whom are to be consulted before submission of the Draft Plan.

[…]

4. States and other stakeholders

It must be pointed out that article 75(6) of the Statute lays down: "*Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law*". An order for reparations does not, therefore, relieve States Parties of the responsibility to award reparations to victims pursuant to other treaties or domestic legislation.

[…]

B. Funding of reparations

2. Funding of reparations where a convicted person is indigent

In the view of the Chamber, the discretion to award individual reparations, where the conditions are met, applies irrespective of the financial situation of the person held liable for reparations. Furthermore, to the Chamber's mind, the burden of a convict's indigence should not be borne by the victims alone. Otherwise put, the award of individual reparations should not hinge on the indigence of the convicted person.

It is to be acknowledged that as prescribed by regulation 56 of the Regulations of the TFV, the decision whether to set aside funds from the "*other resources*" of TFV to complement the resources collected through awards for reparations lies within the sole discretion of Board of Directors of the TFV. In this connection, the Chamber notes that regulation 56 of the Regulations of the TFV provides that the Board of Directors "*shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards*".

That said, the Chamber does not see any provision in the Regulations to bar the Board of Directors of the TFV from managing its resources to complement the individual reparations, even if the Regulations cast no such obligation.

The Chamber points out that the figure to be potentially earmarked for individual reparations comes to around 7% of the sum-total of the reparations awarded and so is a modest amount. As aforementioned, this modality of individual reparation is of symbolic value and the figure which the Chamber has determined reflects its desire to give the victims individual acknowledgement of the harm they suffered.

It is, moreover, this Chamber's firm view that the order for reparations would, for the most part, be missing its mark-delivery of justice to and reparation of the harm done to the victims as a result of the crimes committed by [the convicted person] – were it to disregard their almost unanimous preference, by awarding only collective reparations.

[…]

The Chamber directs the Board of Directors of the TFV to advise the Bench whether it is minded to use its "*other resources*" for the funding and implementation of reparations, and to apprise it in the Draft Plan of the monetary amount. Specifically, the Chamber invites the Board of Directors of the TFV to avail itself of the latitude accorded to it by the instruments of the Court and to afford consideration to the provisions applicable to reparations with a view to the award of reparations which are meaningful to the victims. It thus advises the Board of Directors of the TFV to be amenable to exploring the possibility of using compensation out with the collective awards, and to agree to providing resources to complement the individual reparations.

[…]

That being so, the Chamber invites the TFV to give consideration as part of its assistance mandate, wherever possible, to the harm suffered by the Applicants in the attack on Bogoro upon which the Chamber has not been in a position to act in the case.

See No. ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 309-310, 323, 335-339, 342, and 344.

On the basis of its assessment of the overall programmatic framework presented and the description of the envisaged method of implementation, the Chamber finds that the information provided therein sufficiently lays down the concrete parameters of the proposed future projects envisaged as well as the different steps to be undertaken by the TFV. As such, the Chamber considers that the information provided so far in relation to the first stage of the programmatic framework for collective service-based reparations is sufficient to justify the approval of the proposed programmatic framework.

Therefore, the Chamber directs the TFV to commence forthwith with the selection of implementing partners via the international competitive bidding outlined in the 13 February 2017 Submission. Nevertheless, the Chamber wishes to emphasize that the implementation stage is subject to the ongoing process of identification of victims and the assessment of the extent of the harm they suffered – a process which is essential for determining the convicted person's liability and which may permit to identify, in greater detail, the specific needs of the victims and thus further inform the implementation of the proposed reparations. In this context, the Chamber recalls that reparations to the victims should be meaningful. Accordingly, the TFV is instructed to report to the Chamber before finalising the contracts with the selected implementing partner, at which point, the Chamber may approve the second stage of the implementation process, after having determined the convicted perosn's liability for reparations.

See No. ICC-01/04-01/06-3289, Trial Chamber II, 6 April 2017, paras. 16-17.

The Chamber notes the TFV's mandate as an implementing agency upon being seized of a reparations award and considers that the present order is the first of three Chamber determinations to be made during the reparations proceedings. Following this order, the TFV will propose a draft implementation plan reflecting the parameters of the Chamber's draft order, including the objectives, outcomes and necessary activities that comprehensively respond to all of the reparations modalities that can realistically be implemented. […] Upon approval, the TFV will then identify discrete implementation partners in order to implement the Chamber's award, and the Chamber will approve the selected projects in a third decision.

Bearing all this in mind, it is not the Chamber's responsibility at this time to give detailed information about the implementation component of the reparations phase.

[…]

The Chamber emphasises its view that the limited number of individual reparations ordered should be prioritised when implementing the award.

[…]

As also recognised by the Appeals Chamber, the Regulations of the TFV explicitly contemplate individual reparations for unidentified beneficiaries. This is in juxtaposition to the TFV Regulations governing individual eparations in cases where the Court identifies each beneficiary. When the Court does not identify the beneficiaries, it falls to the TFV to establish a verification procedure to determine that any persons who identify themselves to the TFV are in fact members of the beneficiary group. The Chamber considers that proceeding in this manner is an alternative to an application based process, whereby the Chamber assesses the reparation requests of identifiable beneficiaries filed pursuant to Rule 94 of the Rules.

For the reasons above, the Chamber considers that the impracticability of identifying all those meeting its individual reparations parameters justifies an eligibility screening during the implementation phase. The Chamber therefore considers it best that individual reparations be awarded on the basis of an administrative screening by the TFV.

[…]

This screening process itself must respect the rights of both the victims and the convicted person. The Chamber considers that the full details of this screening are to be determined by the TFV, but it can already set out the following general parameters:

(i) Reasonable efforts must be made to identify individuals who may be eligible under the screening process, within a timeframe to be proposed by the TFV.

(ii) Individuals who wish to be considered for the screening process are to provide a reparations application and any supporting documents. It is noted in this regard that this step has already been taken by the reparations applicants in the present case, and these persons should be considered first by the TFV if they also apply to be screened.

(iii) Both the applicant, on his or her own or through a legal representative, and the Defence must be given an opportunity to make representations before the TFV assesses any applicant's eligibility. In assessing eligibility, the TFV may base itself only on information made available and to which the Defence has had an opportunity to access and respond.

(iv) Anyone who wishes to be considered for individual reparations must make their identity known to both the TFV and the Defence. The Defence steadfastly requests the proof of identity of those seeking individual reparations, but the Chamber notes that one of its appointed experts cautions against turning over victims' names to the Defence. It is true that the regulations governing the TFV verification procedure in this context do not expressly specify any role for the Defence, but these same regulations also make clear that the TFV verification procedure is subject to additional principles specified in the Court's order. The Chamber considers it appropriate that the convicted person be afforded an opportunity to present informed views and concerns regarding the individuals claiming to be owed individual reparations from him. The Chamber does not identify beneficiaries in a full Chamber procedure – complete with the procedural rights associated with such a procedure – for a reason outside the Defence's control, namely the impracticability of conducting such an assessment. It is fair to afford the Defence an opportunity to present an informed submission to the TFV in these circumstances. Involving the Defence in this way assists the TFV in having all relevant information before it during the screening. This in turn will increase the accuracy of the screening itself and ensure the integrity of the overall procedure. The Chamber emphasises that no identity of a reparations applicant may be transmitted to the TFV or Defence without the victim's consent.

(v) The result of the screening for each applicant is to be communicated to both the applicant and the Defence. No administrative review mechanism is available to the Defence for victims screened as eligible. The absence of a review mechanism for those screened as eligible is appropriate in view of the administrative nature of the screening exercise. The TFV is merely identifying eligible victims according to the parameters specified in the present order. A denial of the eligibility of any particular applicant during the screening process will not reduce the convicted person's total liability in any way, giving him only a limited interest during the screening process. To permit the Defence to effectively appeal any affirmative screening would be to invite a full-fledged, non-administrative judicial procedure. The Chamber has already considered such a procedure to be impracticable, which is why it ordered an administrative screening in the first place. On the other hand, the Defence always has the right to challenge the victim parameters, total liability conclusions and administrative screening process set forth in the present order before the Appeals Chamber.

See No. ICC-01/12-01/15-236, Trial Chamber VIII, 17 August 2017, paras. 136-137, 140, 143-144, and 146.

Considering the Trust Fund's late selection of implementing partners for the service-based collective reparations, and so as to build on the efforts of the OPCV and the Legal Representatives of V02 Victims, especially the contact they have made with potentially eligible victims, the Chamber invites the Trust Fund to study the possibility of continuing to seek and identify potentially eligible victims with their assistance, before the implementing partners are selected and the Chamber approves the second phase of the implementation of the service-based collective reparations.

See No. ICC-01/04-01/06-3379-Red-Corr-Anx-tENG, Trial Chamber II, 21 December 2017, para. 296.

III. Individual reparations

2. Organisation of the screening process

New application form

A new application form will be created. The TFV is therefore ordered to produce a draft form, in consultation with all relevant stakeholders, and to submit it to the Chamber as soon as possible and, in any case, no later than at the time of the submission of the Updated [Implementation Plan].

Those applicants whose applications are already in the case record are not required to fill in a new application. They shall merely provide any missing information, as requested by the VPRS and with the assistance of the LRV. Any application received before the approval of the new form by the Chamber will be processed as such, as it would otherwise cause unnecessary delays in the award of individual reparations.

Treatment of an application from submission to final decision

The TFV states that it will rely on VPRS for data input, processing and preliminary analysis of applications and relevant supporting documents. […] The Chamber is satisfied with this course of action. It directs that the screening process should unfold as follows:

The VPRS receives reparations applications. It analyses them, in accordance with its internal methods (preliminary legal analysis, cross-check and quality check) to reach a preliminary assessment on the eligibility of the applicant ('VPRS Preliminary Assessment').

Upon completion of this VRPS Preliminary Assessment, the VPRS prepares the applications for transmission to the Defence and the LRV. Transmissions will be made in batches submitted every 30 days and will also be notified to the TFV. To the extent possible, applications are grouped by Protected Building.

The transmission shall contain the VPRS Preliminary Assessment as well as summaries of the applications or full applications (in redacted form when the applicant has not consented to his or her identity being communicated to the Defence). […] The VPRS will disclose the full applications only when manifest inconsistencies exist. In such cases, all supporting documents must be disclosed (also with redactions, as necessary).

The subsequent procedure then varies in accordance with the result of the VPRS Preliminary Assessment. The parties will have an opportunity to make submissions within the framework set out below. The parties and VPRS shall have the opportunity to request the TFV to extend any deadlines on the grounds specified in Regulation 35 of the Regulations of the Court. The TFV's decision on any such extension request shall be notified to the parties and VPRS. Once the opportunity to file submissions has passed, the VPRS shall transmit its final recommendation on the eligibility of the applicant ('VPRS Final Recommendation') to the TFV.

When the VPRS Preliminary Assessment is positive, the Defence shall submit its observations on the eligibility, if any, within 15 days of receipt of the VPRS transmission. Within 15 days of the expiry of the deadline for the Defence's response, the VPRS shall transmit the VPRS Final Recommendation to the TFV, with the Defence's response when applicable.

When the VPRS Preliminary Assessment is negative, the LRV shall submit its observations on the eligibility, if any, within 15 days of receipt of the VPRS transmission. Within 15 days of the expiry of the deadline for the response, the VPRS shall transmit its VPRS Final Recommendation to the TFV, with the LRV's observations when applicable.

When the VPRS Preliminary Assessment is unclear, the Defence shall submit its observations on the eligibility, if any, within 15 days of receipt of the VPRS transmission. The LRV shall then be given 15 days to respond. Within 15 days of the expiry of the deadline for the LRV response, the VPRS shall transmit its VPRS Final Recommendation to the TFV, with the parties' responses when applicable.

The Chamber approves the proposed content of the VPRS Final Recommendation and notes that the VPRS is not in a position to provide an assessment of the authenticity of the supporting documents.

At the end of the overall implementation period, the VPRS will provide a final consolidated table grouping information for all applications screened by Protected Building.

Within 15 days of receipt of the VPRS Final Recommendation, the TFV shall issue its decision. Reasons for decisions must be sufficiently clear and detailed. The decision must be notified to the Defence, the LRV and the VPRS.

In the event of a negative finding, the decision must also inform the applicant of his rights and be notified to the Chamber. This notification must include all relevant materials leading to the negative finding. The negative decision and these materials are to be notified as annexes to the Monthly Report. The Chamber is kept informed of positive findings solely by the inclusion of a list of eligible beneficiaries in the Monthly Report.

In the event of a negative finding, an applicant has a right of review by the Trial Chamber. An applicant, through the LRV, must file a request for review of the TFV's decision by the Trial Chamber within 15 days of the negative finding's notification to the Chamber (by way of the Monthly Report). The request shall set out the reasons why the TFV erred in determining why the applicant is not eligible for individual reparations. In cases where several applicants are rejected for the same reason, the LRV is encouraged, when possible, to file a consolidated request. The TFV and the Defence must file their response, if any, within 15 days of notification of the request for review.

The Chamber concurs […] that an Independent Review Panel is unnecessary and will cause delays. First, the Appeals Chamber has decided that victims are entitled to a judicial review for adverse individual reparations findings, rendering an administrative review unnecessary.

[…]

B. Substantive considerations related to the implementation of individual reparations

1. Nature of the VPRS's and TFV's review, standard of proof and beneficiaries

[…]

Subject to the clarifications made below in respect of the scope of the categories of beneficiaries, the Chamber approves the criteria of assessment proposed by the TFV, including the standard of proof (balance of probability) and the non-discrimination criterion proposed.

With regard to the TFV's and LRV's concerns in relation to the supporting documents, the Chamber is mindful of the reality of the situation in Timbuktu and is satisfied with the system of attestations proposed [system of attestations by persons with authority in the community to support the applications].

[…]

Accordingly, the Chamber agrees […] that it is possible that other individuals not identified specifically in the Reparations Order had livelihoods exclusively dependent on the Protected Buildings. However, the Reparations Order makes it clear that, to be eligible for individual reparations, the applicant must demonstrate the exclusive link requirement as defined and interpreted in the Reparations Order (for instance, [REDACTED]).

[…]

This said, the Chamber clarifies that family members of these persons are not eligible for individual reparations solely because they belong to a family in which one individual is eligible for individual reparations.

[…]

IV. Collective reparations

1. Collective reparations for economic and moral harm

The Chamber finds that the objective and outcome identified by the TFV, namely '*improved economic resilience*' (specifically '*improved revenue of victims from economic activities, including agriculture, trade services, small and light industry, and handicrafts*') and '*improved moral resilience*', (specifically '*improved community dialogue, enabled through cultural and religious ceremonies that acknowledge the importance and restoration of Timbuktu's material and immaterial cultural heritage*') respond adequately to the Reparations Order.

The TFV is therefore directed to pursue its efforts to identifying specific projects responding to these implementation parameters and to submit them in the Updated IP, with all requisite details, such as identification of the implementing partner if necessary, timeline, budget and staffing, if applicable. Proposed projects must address the harm suffered as a result of the crime of which [the Accused] was convicted by the Court.

Concerning the measures needed to mitigate the security risks, while the Chamber fully approves the need for discretion it considers that one important aspect of a reparative measure is the fact that the victim knows that it is aimed at repairing the harm suffered. Hence, the Chamber will reject any project framed in a way that does not make it clear to the victims that the activity they are participating in is a reparative measure for the harm suffered as a result of the crime of which the Accused was convicted by the Court. The Chamber considers that the LRV's proposal that the victims be involved in the design of the collective reparations programmes should be explored by the TFV.

[…]

Accordingly, the TFV must take this reality into account when preparing the Updated [Implementation Plan]. The Chamber expects specific measures directed at the displaced population belonging to the community of Timbuktu. [REDACTED].

[…]

Lastly, the Chamber understands the TFV's submission that women and elderly should be prioritised for collective economic reparations as a consequence of the approach taken [REDACTED] and approves this measure.

[…]

V. Symbolic reparations

The TFV indicates that the symbolic award to the Government of Mali and [REDACTED] will be awarded after approval of the Plan on a mutually agreeable date to the respective parties in accordance with an agreed ceremonial programme.

The LRV does not oppose but suggests that said ceremony should not be held until the first victims receive reparations, to avoid frustrating them.

The Chamber approves the proposed way forward and directs the TFV to include in the Updated IP a specific project taking into account the LRV's submission for the implementation of this symbolic reparation award.

See No. ICC-01/12-01/15-273-Red, Trial Chamber VIII, 12 July 2018, paras. 30-31, 35-48, 60-61, 63, 65, 74-75, 98-101, 103, 105, and 108-110.

The TFV is now tasked to manage an administrative eligibility screening, and it is primarily for the TFV itself to decide on the most reasonable way to conduct its assessment in the context of concrete cases. It is inconsistent with the notion of ordering an administrative screening for the Chamber to micro-manage the screening process.

The Chamber considers it self-evident – without any clarification – that: (i) victims who do not meet the requisite threshold are still expected to have their harms fully addressed by the collective part of the award and (ii) it never intended for the Exclusive Link Requirement to be so limiting as to foreclose any meaningful individual reparations. But it is for the TFV to decide how to best apply the criteria specified in the Chamber's previous decisions. Should any unduly restrictive determinations be made in the course of the screening, then the Chamber can correct them in the course of its judicial review.

See No. ICC-01/12-01/15-280, Trial Chamber VIII, 31 August 2018, paras. 7-8.

12. Identification, freezing and seizure of property and assets for reparations purposes

In this regard, the Single Judge stresses that the identification, freezing and seizure of property and assets "[…] *is necessary in the best interests of the victims*" to guarantee that, in the event of a conviction, "*the said victims may, pursuant to article 75 of the Statute, obtain reparations for the harm which may have been caused to them*".

[…]

In light of the foregoing, and considering that existing technology may make it possible to place property and assets beyond the Court's reach in a short period of time, the Single Judge considers it necessary to identify, trace and freeze or seize as soon as possible the property and assets belonging to or under the control of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, in order to ensure that, in the event that they are found guilty of the crimes they have allegedly committed, the reparation orders for victims may be promptly executed.

See No. ICC-01/09-02/11-42, Pre-Trial Chamber I (Single Judge), 5 April 2011, paras. 6-7, and 9 (reclassified as public on 21 October 2014).

Pursuant to article 93(1)(k) of the Statute, States Parties to the Statute should provide assistance to the Court in "*the identification, tracing and freezing or seizure of proceeds, property, assets and instrumentalities of crimes for the purpose of eventual forfeiture*".

The identification and freezing of any assets of the convicted person are a fundamental element in securing effective reparations, and pursuant to article 93(1)(k) of the Statute, State Parties should provide the Court with timely and effective assistance at the earliest possible stage of the proceedings. In order for the reparations award to have effect, the ICC requires the cooperation of States Parties and non-states parties, as well as the close cooperation with the DRC local government.

On 8 June 2010, during its 9th plenary meeting, the Review Conference adopted a resolution that:

Calls upon States Parties, international organizations, individuals, corporations and other entities to contribute to the Trust Fund for Victims to ensure that timely and adequate assistance and reparations can be provided to victims in accordance with the Rome Statute, and expresses its gratitude to those that have done so.

The Chamber recommends that the Registry and the TFV establish standard operating procedures, confidentiality protocols and financial reporting obligations that are to be applied by the international, national, and local organizations with which they may collaborate.

See No. ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012, paras. 276-280.

The Single Judge recalls that, pursuant to article 57(3)(e) of the Statute, where a summons to appear has been issued, the Pre-Trial Chamber may, having due regard to the strength of the evidence and the rights of the parties concerned, seek the cooperation of States pursuant to article 93(1)(k) of the Statute, to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

The Majority considers that the statutory framework does not require any such nexus to be established when ordering protective measures under article 57(3)(e). In the Majority's view, the word '*forfeiture*', which may be defined as broadly as the '*divestiture of property without compensation*'; as contained in article 57(3)(e) of the Statute, also encompasses an award for reparations under the Statute. In particular, the Majority does not consider that the use of the word '*forfeiture*' limits the Pre-Trial Chamber's authority to solely ordering protective measures for the purpose of article 77(2)(b)of the Statute. It is apparent from, for example, rule 99 of the Rules, entitled 'Cooperation and protective measures for the purpose of forfeiture under articles 57(3)(e) and 75(4)', that, when used elsewhere in the statutory framework, the term '*forfeiture*' may carry a broader meaning which encompasses an award for reparations. In addition, rule 99(1) of the Rules provide, *inter alia*, that a legal representative of victims who has made a request for reparations may request a Pre-Trial Chamber or Trial Chamber to seek relevant measures pursuant to articles 57(3)(e) or 75(4) of the Statute, as applicable. As noted by Pre-Trial Chamber I, in light of rule 99 of the Rules, the contextual interpretation of article 57(3)(e) of the Statute makes clear that the Chamber may, pursuant to article 57(3)(e) of the Statute, seek the cooperation

of States Parties to take protective measures for the purpose of securing the enforcement of a future reparation award.

Moreover, as noted by the Prosecution both Pre-Trial Chamber I and Pre-Trial Chamber II have held that appropriate weight must be given to the phrase '*in particular for the ultimate benefit of victims*' contained in article 57(3)(e) of the Statute. This provision must be read in light of the important role accorded by the Statute to the victims and the power afforded to a Trial Chamber to order a convicted person to make appropriate reparations to address the victims' harm and suffering. The Majority shares the view of Pre-Trial Chamber I that: [t]he teleological interpretation of article 57(3)(e) of the Statute reinforces the conclusion arising from a contextual interpretation. Indeed, since forfeiture is a residual penalty pursuant to article 77(2)(b) of the Statute, it will be contrary to the "*ultimate benefit of victims*" to limit to guaranteeing the future enforcement of such a residual penalty the possibility of seeking the cooperation of the States Parties to take protective measures under article 57(3)(e) of the Statute.

Indeed, the Majority considers that such an interpretation – one in which the Court would have authority to order both reparations and the '*residual penalty of forfeiture*' yet would only be empowered to take early and effective protective measures in respect of the latter – would be contrary to the effective application of the Statute and to its object and purpose. As emphasised by Pre-Trial Chamber I, the reparation scheme provided for in the Statute is one of its key features, and '*early tracing, identification, freezing or seizure of the property and assets*' of a person against whom a warrant of arrest or summons to appear has been issued '*is a necessary tool to ensure that reparation awards ordered in favour of victims*' may be enforced. Thus, based on a teleological interpretation of article 57(3)(e) of the Statute, and to ensure that the relevant Trial Chamber will have recourse to such assets for the purpose of an eventual order for reparations, it is necessary that protective measures are implemented at the earliest opportunity.

It follows therefrom that the Majority does not interpret rule 99(1) of the Rules as reserving the right solely to the Trial Chamber to order protective measures for the purpose of reparations. This is because, as explained above, article 57(3)(e)of the Statute may also encompass a request for protective measures for the purpose of reparations.

In light of the authority of the Pre-Trial Chamber to make such orders, the submission of the Kenyan Government that a request for protective measures must be predicated upon a nexus already having been established cannot be sustained.

Nonetheless, the Majority notes that an order for protective measures for the purpose of reparations should be appropriately tailored to the circumstances, including consideration of the claims of victims and the personal circumstances of an accused, as appropriate. In the context of the Pre-Trial Chamber's Order, the Majority notes that this was an initial order at a preliminary stage of proceedings, which also sought the assistance of the Kenyan Government in identification and tracing of relevant assets, which may then have enabled subsequent modification of the order in light of information provided.

In sum, articles 57(3)(e) and 93(1)(k) of the Statute and rule 99(1) of the Rules confirm the authority of the Pre-Trial Chamber to take protective measures to identify, trace, freeze and seize property or assets of an accused person prior to the commencement of trial. Collectively, these provisions authorise the Pre-Trial Chamber, after the consideration of certain factors, to request cooperation from a State to implement such protective measures after the issuance of a warrant of arrest or a summons to appear and prior to the start of trial, both for the purposes of eventual forfeiture as an applicable penalty under article 77(2)(b) of the Statute and for reparations under Article 75 of the Statute.

Therefore, on 5 April 2011 the Pre-Trial Chamber acted pursuant to authority provided in the Statute and Rules when it requested cooperation from the Kenyan Government pursuant to articles 57(3)(e) and 93(1)(k) of the Statute in "*the identification, freezing and seizure of property and assets*" which it considered "[was] *necessary in the best interests of the victims*" and "*to guarantee that, in the event of a conviction*", "*the said victims may, pursuant to article 75 of the Statute, obtain reparations for the harm which may have been caused to them*". Thus, pursuant to article 61(11) of the Statute, the Majority is satisfied that it may also exercise such authority.

> See No. ICC-01/09-02/11-931, Trial Chamber V(b), 8 July 2014, paras. 12-17, and 19-20 (reclassified as public on 21 October 2014).

I do not read the phrase '*in particular for the ultimate benefit of victims*' contained in article 57(3)(e) of the Statute as expanding the authority of the Pre-Trial Chamber under that article beyond that which is expressly stated. Rather, I see this phrase as an acknowledgment that in taking the significant step of prospectively freezing or seizing the property or assets of a person who is presumed innocent, the Pre-Trial Chamber shall take into consideration – in addition to the strength of the evidence and the rights of the accused person whether such measures would in particular be for the ultimate benefit of the victims. In this regard, article 79(2) of the Statute provides that the Court may order that money and other property collected through fines or forfeiture be transferred to the Trust Fund. The Trust Fund itself is expressly established for the benefit of victims of crimes that fall within the jurisdiction of the Court, and article 75(2) provides that the Court may order reparations to victims out of this Fund.

In my view, this reading, as explained above, is also supported by commentators to the travaux preparatoires.

I acknowledge that victims, pursuant to the Court's jurisdiction ratione materiae, have a central role in these proceedings and in the fight against impunity. I also acknowledge that at the appropriate stage of proceedings and in appropriate circumstances, the Court may grant reparations to alleviate, as much as possible, the negative consequences of their victimization, and in so doing, that this will be in their benefit. On this basis, in *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I reasoned that it had authority to take protective measures for the purpose of securing the enforcement of a future reparation award, as to do otherwise would not be in the ultimate benefit of the victims. In my view, this objective can be effectively achieved by the Pre-Trial Chamber requesting protective measures for the purposes of eventual forfeiture, which in appropriate circumstances can be transferred to the Trust Fund and thereafter used for the benefit of the victims in an award for reparations, as provided in the plain text of article 57(3)(e) of the Statute.

While I agree with the Majority that unless the Pre-Trial Chamber has the statutory authority to request at the earliest opportunity protective measures for the purposes of an eventual order for reparations, the possibility to seize such assets may be lost, I differ in how that objective is to be achieved. I cannot agree with an interpretation that, in my view, effectively overreaches the plain text of the provisions of the Rome Statute and the Rules of Procedure and Evidence and is unnecessary to achieve the desired result. In my respectful view, if it is the desire that the Pre-Trial Chamber has authority to make such an order, then it is a matter to be addressed by the Assembly of States Parties under article 121 of the Statute.

See No. ICC-01/09-02/11-931-Anx, Dissenting Opinion of Judge Henderson, Trial Chamber V(b), 9 July 2014, paras. 5-8 (reclassified as public on 21 October 2014).

Relevant decisions regarding issues related to reparations

Decision Ordering the Registrar to Prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Pre-Trial Chamber I, Single Judge), No. ICC-01/09-02/11-42, 5 April 2011 (reclassified as public on 21 October 2014)

Decision establishing the principles and procedures to be applied to reparations (Trial Chamber I), No. ICC-01/04-01/06-2904, 7 August 2012

Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations (Trial Chamber I), No. ICC-01/04-01/06-2911, 29 August 2012

Directions on the conduct of the appeal proceedings (Appeals Chamber), No. ICC-01/04-01/06-2923 A A2 A3 OA21, 17 September 2012

Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of the proceedings (Appeals Chamber), No. ICC-01/04-01/06-2953 A A2 A3 OA21, 14 December 2012

Decision on the implementation of the request to freeze assets (Trial Chamber V(b)) and Dissenting Opinion of Judge Henderson, No. ICC-01/09-02/11-931, 9 July 2014 (reclassified as public on 21 October 2014)

Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2 (Appeals Chamber), No. ICC-01/04-01/06-3129 A A2 A3, 3 March 2015

Order instructing the parties and participants to file observations in respect of the reparations proceedings (Trial Chamber II), No. ICC-01/04-01/07-3532-tENG, 1 April 2015

Order granting leave to file representations pursuant to article 75(3)of the Statute (Trial Chamber II), No. ICC-01/04-01/07-3533-tENG, 1 April 2015

Decision on the "Defence Request Relating to the Trust Fund for Victims" (Trial Chamber II), No. ICC-01/04-01/07-3566-tENG, 22 June 2015

Decision on the "Defence Request for the Disclosure of Unredacted or Less Redacted Victim Applications" (Trial Chamber II), No. ICC-01/04-01/07-3583-tENG, 1 September 2015

Decision on the request of the common legal representative of victims for assistance from the Victims and Witnesses Unit (Trial Chamber II), No. ICC-01/04-01/07-3608-tENG, 9 October 2015

Order instructing the Trust Fund for Victims to supplement the draft implementation plan (Trial Chamber II), No. ICC-01/04-01/06-3198-tENG, 9 February 2016

Corrigendum to the "Order relating to the submission of the Legal Representative of Victims" (Trial Chamber II), No. ICC-01/04-01/07-3653-Corr-tENG, 16 February 2016

Decision on the submission of observations on the requests for reparations and the applications to resume action (Trial Chamber II), No. ICC-01/04-01/07-3682-tENG, 14 April 2016

Order instructing the parties and the Trust Fund for Victims to file observations on the monetary value of the alleged harm (Trial Chamber II), No. ICC-01/04-01/07-3702-tENG, 15 July 2016

Order on the Trust Fund's request for access to document ICC-01/04-01/07-3681-Conf and on observations on the monetary value of the alleged harm (Trial Chamber II), No. ICC-01/04-01/07-3705-tENG, 23 August 2016

Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations (Trial Chamber II), No. ICC-01/04-01/06-3251, 21 October 2016

Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016 (Trial Chamber II), No. ICC-01/04-01/06-3252-tENG, and Opinion of Judge Herrera Carbuccia, No. ICC-01/04-01/06-3252-Anx-tENG, 21 October 2016

Order to complete the process of identifying victims potentially eligible to benefit from reparations (Trial Chamber II), No. ICC-01/04-01/06-3267-tENG, 21 December 2016

Public redacted version of "Decision Appointing Reparations Experts and Partly Amending Reparations Calendar" (Trial Chamber VIII), No. ICC-01/12-01/15-203-Red, 19 January 2017

Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to The Defence Team of Thomas Lubanga Dyilo (Trial Chamber II), No. ICC-01/04-01/06-3275-tENG, 22 February 2017

Decision on LRV requests for submission of additional reparation applications and for an extension of time (Trial Chamber VIII, Single Judge), No. ICC-01/12-01/15-209, 20 March 2017

Order for Reparations pursuant to Article 75 of the Statute (Trial Chamber II), No. ICC-01/04-01/07-3728-tENG, 24 March 2017

Order approving the proposed programmatic framework for collective service-based reparations submitted by the Trust Fund for Victims (Trial Chamber II), No. ICC-01/04-01/06-3289, 6 April 2017

Decision on the Defence's request to suspend the reparations proceedings (Trial Chamber III), No. ICC-01/05-01/08-3522, 5 May 2017

Decision on LRV's request for clarification of procedure applicable to newly collected reparations applications (Trial Chamber VIII, Single Judge), No. ICC-01/12-01/15-222, 31 May 2017

Public redacted version of "Decision appointing experts on reparations" (Trial Chamber III), No. ICC-01/05-01/08-3532-Red, 2 June 2017

Decision on the Application of the Defence for Thomas Lubanga Dyilo of 24 April 2017 concerning Redactions in some of the Files of Potentially Eligible Victims (Trial Chamber II), No. ICC-01/04-01/06-3328-tENG, 5 June 2017

Decision on the Motion of the Office of Public Counsel for Victims for Reconsideration of the Decision of 6 April 2017 (Trial Chamber II), No. ICC-01/04-01/06-3338-tENG, 13 July 2017

Reparations Order (Trial Chamber VIII), No. ICC-01/12-01/15-236, 17 August 2017

Corrected Version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" (Trial Chamber II), No. ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017

Public redacted Judgment on the appeal of the victims against the "Reparations Order" (Appeals Chamber), No. ICC-01/12-01/15-259-Red2 A, 8 March 2018

Public redacted version of "Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations" (Trial Chamber VIII), No. ICC-01/12-01/15-273-Red, 12 July 2018

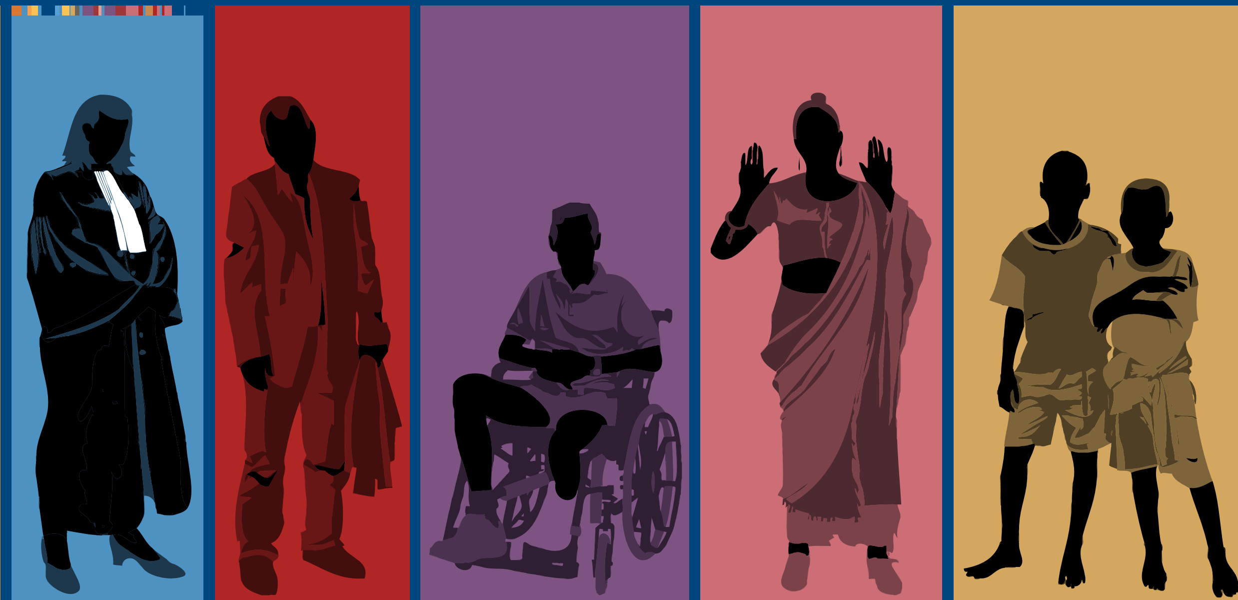
Décision relative à la requête du Bureau du conseil public pour les victimes aux fins de modification partielle de l'Ordonnance de réparation rendue en vertu de l'article 75 du Statut de Rome (Trial Chamber II), No. ICC-01/04-01/07-3801-Red, 12 July 2018

Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018 (Trial Chamber II), No. ICC-01/04-01/07-3804-Red-tENG, 19 July 2018

Final decision on the reparations proceedings (Trial Chamber III), No. ICC-01/05-01/08-3653, 3 August 2018

Decision on TFV Request for Clarification Regarding Individual Reparations for Economic Harm (Trial Chamber VIII), No. ICC-01/12-01/15-280, 31 August 2018

Decision on the Application by the Legal Representative for Victims regarding Compliance with Ethical Rules by the Parties and the Trust Fund for Victims in the Reparations Proceedings (Trial Chamber II), No. ICC-01/04-01/07-3807-Red-tENG, 7 September 2018



Part 3
Practical issues

1.	Filing documents in proceedings before the Court	531
2.	Filing an application for participation or for reparations in proceedings before the Court	537
3.	Requesting legal assistance paid by the Court	538
4.	Constituting a team	538
5.	How the OPCV may provide support and assistance to legal representatives?	540
6.	Resources information on research methodology	540
7.	The different sections of the Court dealing with victims	543
8.	Useful websites	544
9.	Selected book references	546

1. Filing documents in proceedings before the Court

All documents and material pertaining to the proceedings in a situation and/or case have to be filed through the Court Management Section (CMS) in order to be registered in the relevant situation and/or case record.

In accordance with regulation 24(1) of the Regulations of the Registry, "*documents* [and] *material* […] *may be filed with the Registry by hand, by post or by electronic means*". In accordance with regulation 24(5) of the Regulations of the Registry, if filed electronically, documents and materials shall be sent to the following email address: judoc@icc-cpi.int.

The Regulations of the Court and the Regulations of the Registry provide guidance regarding the format of the documents to be filed, their level of confidentiality, and time limits.

1. Format of documents filed with the Court

Regulation 36 of the Regulations of the Court

Format of documents and calculation of page limits

"1. Headings, footnotes and quotations shall be counted in calculating the page limits.

2. The following shall not be counted in calculating the page limits:

(a) Any addendum containing verbatim quotations of the Statute, Rules or these Regulations;

(b) Any appendix containing references, authorities, copies from the record, exhibits and other relevant, non-argumentative material. An appendix shall not contain submissions;

(c) The cover page and the notification page.

3. All documents shall be submitted on A4 format. Margins shall be at least 2.5 centimetres on all four sides. All documents that are filed shall be paginated, including the cover sheet. The font shall be any of the following: Palatino Linotype, Times New Roman, Century Schoolbook, Bookman Old Style, Cambria, Georgia or Courier. The typeface of all documents shall be 12 point with 1.5 line spacing for the text and 10 point with single spacing for footnotes. No substantial submissions may be placed in the footnotes of a document".

Participants in the proceedings shall use a specific template to file written submissions before the Court. Please refer to the Annex for the template and guidance concerning its use.

2. Time limits for documents filed with the Court

Regulation 24 of the Regulations of the Registry

Filing of documents, material, orders and decisions with the Registry

"1. Documents, material, orders and decisions may be filed with the Registry by hand, by post or by electronic means. When filed by electronic means, they should be provided in full-text searchable format.

2. Documents, material, orders and decisions filed with the Registry shall state the information referred to in regulation 23, sub-regulation 1, of the Regulations of the Court and the level of confidentiality. Templates shall be used if available.

*3. The Presidency, a Chamber or a participant filing documents, material, orders or decisions which require urgent measures to be taken shall inform the relevant courtroom officer as soon as possible and insert the word "*URGENT*" on the cover page in capital letters. Outside the filing hours described in regulation 33, sub-regulation 2 of the Regulations of the Court, the Presidency, the Chamber or the participant requesting urgent measures shall contact the duty officer provided for in regulation 39.*

4. Where proceedings are held without notification of one or more of the participants or where they do not have an opportunity to voice their arguments, documents, material and orders shall be filed ex parte. *The words "*EX PARTE*" shall be inserted on the cover page in capital letters and the recipients other than the Chamber shall be specified after the phrase "only available to".*

5. If filed electronically, documents, material, orders and decisions shall be sent to the following email address: judoc@icc-cpi.int.

6. If filed by hand or by post, documents, material, orders and decisions shall be submitted to the court management section within the Registry.

7. Documents, material, orders and decisions filed after the filing hours described in regulation 33, sub-regulation 2 of the Regulations of the Court, shall be registered during filing hours on the next working day".

Regulation 33 of the Regulations of the Court

Calculation of time limits

"1. For the purposes of any proceedings before the Court, time shall be calculated as follows:

(a) Days shall be understood as calendar days;

(b) The day of notification of a document, decision or order shall not be counted as part of the time limit;

(c) Where the day of notification is a Friday, or the day before an official holiday of the Court, the time limit shall not begin to run until the next working day of the Court;

(d) Documents shall be filed with the Registry, at the latest, by 4pm on the first working day of the Court following expiry of the time limit.

2. Documents shall be filed with the Registry between 9am and 4pm The Hague time or the time of such other place as designated by the Presidency, a Chamber or the Registrar, except where the urgent procedure foreseen in regulation 24, sub-regulation 3 of the Regulations of the Registry applies.

3. Unless otherwise ordered by the Presidency or a Chamber, documents, decisions or orders received or filed after the filing time prescribed in sub-regulation 2 shall be notified on the next working day of the Court".

Regulation 34 of the Regulations of the Court

Time limits for documents filed with the Court

"Unless otherwise provided in the Statute, Rules or these Regulations, or unless otherwise ordered:

(a) A Chamber may fix time limits for the submission of the initial document to be filed by a participant;

(b) A response referred to in regulation 24 shall be filed within 10 days of notification in accordance with regulation 31 of the document to which the participant is responding;

(c) A request for leave to reply shall be filed within three days of notification in accordance with regulation 31 of the response. The participants may respond to the request for leave to reply within two days. A Chamber may grant the request to file a reply within such time as it may specify in its order".

Regulation 35 of the Regulations of the Court

Variation of time limits

"1. Applications to extend or reduce any time limit as prescribed in these Regulations or as ordered by the Chamber shall be made in writing or orally to the Chamber seized of the matter setting out the grounds on which the variation is sought.

2. The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control".

Examples

- If a decision giving the right to respond within 3 days is issued on a Monday, the time limit begins to run on the Tuesday of the same week, for 3 days, and the response shall thus be filed at the latest on the Friday of the same week, between 9am and 4pm (The Hague time).

- If a decision giving the right to respond within 3 days is issued on a Tuesday, the time limit will begin to run on the Wednesday of the same week, for 3 days, and expire on Saturday. The response shall thus be filed at the latest the following Monday (*i.e.* the next working day), between 9am and 4pm (The Hague time).

- If a decision giving the right to respond within 3 days is issued on a Wednesday, the time limit will begin to run on the Thursday of the same week, for 3 days, and expire on Sunday. The response shall thus be filed at the latest the following Monday (*i.e.* the next working day), between 9am and 4pm (The Hague time).

- If a decision giving the right to respond within 3 days is issued on a Thursday, the time limit will begin to run on the Friday of the same week, for 3 days, and expire on Monday, since Saturdays and Sundays are considered as calendar days and as such shall be counted in the calculation. The response shall thus be filed at the latest on Monday, between 9am and 4pm (The Hague time).

- If a decision giving the right to respond within 3 days is issued on a Friday (or on any other day preceding an official holiday of the Court), the time limit will begin to run from the next working day of the Court, so on Monday, for 3 days, and the response shall thus be filed at the latest the following Thursday, between 9am and 4pm (The Hague time).

The legal texts of the Court also refer to specific time limits as shown in the following tables:

Table I – General time limits[1]

Type of documents	Time limits	Person(s) or organ(s) submitting the documents	Relevant Provision(s) of the Regulations of the Court or the Rules of Procedure and Evidence	Specificities of the procedure
Response	Within 10 days of notification	Prosecutor or Defence Victims or their legal represent.	Regulation 24(1) & 34(b) Regulation 24(2) & 34(b)	• To any document filed by any participant in the case • When permitted to participate in the proceedings (article 68(3) & rule 89(1))
Request for leave to reply	Within 3 days of notification	Participants	Regulation 24(4) & (5), & 34(c)	Only with the leave of the Chamber
Response to request for leave to reply	Within 2 days of notification	Participants	Regulation 24(4) & (5), & 34(c)	Only with the leave of the Chamber
Reply	Within a time limit specified by the Chamber	Participants	Regulation 24(4) & (5), & 34(c)	Only with the leave of the Chamber
Submissions	Within a time limit specified by the Chamber	Participants	Regulation 28	As a consequence of a Chamber's order
Representations	30 days following information given	Victims	Regulation 50(1)	Under art. 15(3) & rule 50(3) (Prosecutor's request for authorization of an investigation)
Evidence in proceedings before the court	Whenever possible Prior to the hearing	Not specified Participant	Regulation 26(4) E-court Protocol as adopted by the Chambers	• For evidence other than live testimony • In electronic form
Applications to extend or reduce any time limit	Before the lapse of the time limit After The lapse of a time limit	Participants	Regulation 35	• If good cause is shown; for instance, if the document, decision or order is not received (Regulation 31(2)) • Only if demonstrated that the participant was unable for reasons outside his or her control to respect the deadline

[1] Please note that specific time limits have been applied by Chambers in several cases.

Table II – Time limits related to appeals

An appeal shall of itself not have suspensive effect – except the ones against convictions, acquittals, sentences (see art. 81(3)(a),(b) and (4))

Type of documents	Time limits	Person(s) or organ(s) submitting the documents	Relevant Provision(s) of the Regulations of the Court or the Rules of Procedure and Evidence	Specificities of the procedure
Appeals under rule 150	Within 30 days of notification	Not specified	Rule 150(1)	• Appeals under rule 150 are against convictions, acquittals, sentences and reparation orders
			Rule 150(2)	• The Appeals Chamber may extend the time limit "for good cause", following an application to this effect
			Rule 152(1)	• The Appellant can discontinue its appeal any time before judgment
Document in support of an appeal	Within 90 days of notification	Not specified	Regulation 58(1)	
Response to the document In support of the appeal	Within 60 days of notification of the document in support of the appeal	Participant	Regulation 59(1)	
Reply to a response to the document in support of the appeal	Within such time as the Appeals Chamber may specify in its order	Appellant	Regulation 60(1)	Whenever the Appeals Chamber considers it necessary in the interests of justice
Appeals against other decisions, that do not require the leave of the ourt	Not later than 5 days from the "notification date"	Appellant	Rule 154(1)	• For appeals filed under article 81(3)(c)(ii) [detention maintained in case of an acquittal] or 82(1)(a)or(b) [decision/jurisdiction, admissibility; granting, denying release of person investigated or prosecuted]
	No later than 2 days from the "notification date"	Appellant	Rule 154(2)	• For appeals filed under article 82(1)(c) [PTC decision to act on its own initiative under art. 56(3) / unique investigative opportunity]
				• The Appellant can discontinue its appeal any time before judgment

Type of documents	Time limits	Person(s) or organ(s) submitting the documents	Relevant Provision(s) of the Regulations of the Court or the Rules of Procedure and Evidence	Specificities of the procedure
Document in support of appeals under rule 154	Within 21 days of notification of the relevant decision	Appellant	Regulation 64(2)	
Response to a document in support of appeals under rule 154	Within 21 days of the notification date	Participant	Regulation 64(4)	
Appeals against other decisions, that do require the leave of the court	Within 5 days of the notification date	"A party" State concerned or prosecutor	Rule 155(1)	• For appeals against decision under article 82(1)(d) [that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings • For appeals against decision under article 82(2) [PTC decision under art. 57(3)(d)] • The Appellant can discontinue its appeal any time before the judgment
Response to appeals under rule 155	Within 3 days of notification of the application	Participants	Regulation 65(3)	
Document in support of appeals under rule 155	Within 10 days of notification of the decision granting leave to appeal	Appellant	Regulation 65(4)	
Application for revision	NOT SPECIFIED	Accused	Regulation 66	
Response to the application for revision	Within 40 days of notification date	Participants & any other person having a direct interest in the revision proceedings	Regulation 66(2)	
Reply (to the response to the application for revision)	Within such time as specified in the Appeals Chamber's order	Appellant	Regulation 66(4)	May be ordered by the Appeals Chamber if the latter considers it necessary in the interests of justice

3. Level of confidentiality of documents filed with the Court

Pursuant to regulation 14 of the Regulations of the Registry, documents and material may be classified as public (available to the public and to all participants), confidential (not disclosed to the public, but available to all participants), under seal (confidential and accessible and known only to a limited number of persons), and secret (accessible and known to a very limited number of persons).

Regulation 23*bis* of the Regulations of the Court

Filing of documents marked ex parte, under seal or confidential

"*1. Any document filed by the Registrar or a participant and marked "ex parte", "under seal" or "confidential", shall state the factual and legal basis for the chosen classification and, unless otherwise ordered by a Chamber, shall be treated according to that classification throughout the proceedings.*

2. Unless otherwise ordered by a Chamber, any response, reply or other document referring to a document, decision or order marked "ex parte", "under seal" or "confidential" shall be filed with the same classification. If there are additional reasons why a response, reply or any other document filed by the Registrar or a participant should be classified "ex parte", "under seal", or "confidential", or reasons why the original document or other related documents should not be so classified, they shall be provided in the same document.

3. Where the basis for the classification no longer exists, whosoever instigated the classification, be it the Registrar or a participant, shall apply to the Chamber to reclassify the document. A Chamber may also re-classify a document upon request by any other participant or on its own motion. In the case of an application to vary a protective measure, regulation 42 shall apply.

4. This regulation shall apply mutatis mutandis *to proceedings before the Presidency*".

Regulation 24(4) of the Regulations of the Registry

Filing of documents, material, orders and decisions with the Registry

"*4. Where proceedings are held without notification of one or more of the participants or where they do not have an opportunity to voice their arguments, documents, material and orders shall be filed* ex parte*. The words "*EX PARTE*" shall be inserted on the cover page in capital letters and the recipients other than the Chamber shall be specified after the phrase "only available to"*".

Pursuant to regulation 23*bis* of the Regulations of the Court, the participant filing a document *ex parte*, under seal or confidential shall set out the legal and factual basis of said classification in the document itself.

4. Page limits of documents filed with the Court

Documents filed shall usually not exceed 20 pages in accordance with regulation 37 of the Regulations of the Court. However, pursuant to regulation 38 of the Regulations of the Court, some submissions can exceed said page limit.

Regulation 37 of the Regulations of the Court

Page limits for documents filed with the Registry

"*1. A document filed with the Registry shall not exceed 20 pages, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.*

2. The Chamber may, at the request of a participant, extend the page limit in exceptional circumstances".

Regulation 38 of the Regulations of the Court

Specific page limits

"1. Unless otherwise ordered by the Chamber, the page limit shall not exceed 120 pages for the following documents and responses thereto, if any:

(a) A pre-trial brief;

(b) A trial brief;

(c) A closing brief.

2. Unless otherwise ordered by the Chamber, the page limit shall not exceed 60 pages for the following documents and responses thereto, if any:

[…]

(f) Representations under article 75;

[…]

3. Unless otherwise ordered by the Chamber, the page limit shall not exceed 30 pages for the following documents and responses thereto, if any:

(a) Representations made by victims to the Pre-Trial Chamber under article 15, paragraph 3, and rule 50, sub-rule 3;

[…]

(e) A request by any participant to the Pre-Trial Chamber to take specific measures or to issue orders and warrants or to seek State cooperation;

[…]".

Practical issues

2. Filing an application for participation or for reparations in proceedings before the Court

1. Use of the standards forms created by the Court

Applications for participation and/or for reparations shall be submitted in writing to the Victims Participation and Reparations Section (the "VPRS") within the Registry. Regulation 86 of the Regulations of the Court provides for the information that should be contained in a standard application form. The recent practice of the Court has seen the proliferation of standard application forms which have been created on a case-by-case basis. Therefore, to date, there is no unified standard application form applicable to all proceedings before the Court.

Relevant forms for participation and for reparations can be requested from the VPRS at:
VPRS.information@icc-cpi.int
https://www.icc-cpi.int/about/victims

2. Use of the booklet accompanying the forms

In order to assist victims, intermediaries and/or legal representatives, the VPRS prepared a booklet explaining how to fill out the standard form. The booklet is available on the Website of the Court at the following address:

https://www.icc-cpi.int/about/victims/Documents/VPRS_Victim-s_booklet.pdf.

3. Appropriate moment to file the applications

Pursuant to regulation 86(3) of the Regulations of the Court, the application for participation should be filed "*before the start of the stage of the proceedings in which* [victims] *want to participate*". As a matter of general practice, once an application process is opened, the relevant sections of the Registry proceed with outreach activities amongst affected communities in order to disseminate relevant information and invite all interested persons to apply for participation. The VPRS is in charge of collecting application forms, either directly or through its local intermediaries in the field, and of facilitating the application process for victims.

4. Submission of the completed applications

Once completed, the standards forms should be sent to the VPRS in The Hague or to the corresponding ICC Country Office, if present in the respective situation countries. The VPRS contact details are as follows:

International Criminal Court
Victims Participation and Reparation Section (VPRS)
P.O. Box 19519
2500 CM The Hague
The Netherlands
Fax: +31 (0)70 515 91 00
Tel: +31(0)70 515 95 55
Email: VPRS.information@icc-cpi.int

The contact details of the ICC Country Offices are provided in the Booklet referred to above

For further details on the completeness of the applications, please refer to Part II of this Manual.

3. Requesting legal assistance paid by the Court

Rule 90(5) of the Rules of Procedure and Evidence

Legal representative of victims

"5. A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance".

Regulation 113 of the Regulations of the Registry

Legal assistance paid by the Court

"1. For the purpose of participation in the proceedings, the Registry shall inform victims that they may apply for legal assistance paid by the Court, and shall supply them with the relevant form(s).

2. In determining whether to grant such assistance, the Registrar shall take into account, inter alia: (i) the means of the victims; (ii) the factors mentioned in article 68, paragraph 1; (iii) any special needs of the victims; (iv) the complexity of the case; (v) the possibility of asking the Office of Public Counsel for Victims to act; and (vi) the availability of pro bono legal advice and assistance.

3. Regulations 130 to 139 shall apply mutatis mutandis".

1. Applications for legal assistance paid by the Court

Pursuant to rule 90(5) of the Rules of Procedure and Evidence and regulation 113(1) of the Regulations of the Registry, when victims have no financial means to pay a counsel they may apply for legal assistance to be paid for by the Court. A standard form is available upon request. Please note that the declaration of indigence attached to the form ought to be signed by the victim himself or herself and that the legal representative of the said victim cannot sign on behalf of his or her client.

A specific section within the Registry – the Counsel Support Section (the "CSS") – deals with any matters related to the legal assistance paid by the Court, as well as with matters dealing with administrative support to counsel.

The CSS contact details are as follows:

International Criminal Court
Counsel Support Section (CSS)
P.O. Box 19519
2500 CM The Hague
The Netherlands
Tel: +31(0)70 515 87 87
Email: css@icc-cpi.int

2. Criteria used for the evaluation of applications for legal assistance

Pursuant to regulation 113(2) of the Regulations of the Registry, "[i]*n determining whether to grant such assistance, the Registrar shall take into account,* inter alia, *(i) The means of the victims; (ii) The factors mentioned in article 68, paragraph 1; (iii) any special needs of the victims; (iv) the complexity of the case; (v) the possibility of asking the Office of Public Counsel for Victims to act; and (vi) the availability of* pro bono *legal advice and assistance*".

Moreover, pursuant to regulation 84(1) of the Regulations of the Court, it is for the Registrar to determine whether or not a person applying for legal assistance has the appropriate means and whether or not full or partial payment should be made.

4. Constituting a team

Proceedings before the Court require constant attention. It is therefore essential to constitute a team in order to be able to fully follow the entire proceedings before the Court and to react in a timely manner. In order to help the Counsel to constitute their teams, the Registry has created and maintains, on the one hand, a list of assistants to Counsel and, on the other hand, a list of professional investigators. The list of assistants to Counsel is available on the Website of the Court at the following address: https://www.icc-cpi.int/about/registry/pages/list-of-assistants.aspx. The list of professional investigators is maintained by CSS and is available upon request.

1. Lists of assistants and professional investigators

Assistants are persons who support counsel in the proceedings before the Court. They have either five years of relevant experience in criminal proceedings or specific competence in international or criminal law and procedure.

Professional investigators are persons with established competence in international or criminal law and procedure and at least ten years of relevant experience in investigative work in criminal proceedings at the national or international level. Legal Representatives should consider seeking the assistance of professional investigators if investigative actions are needed for the representation of their clients' interests. Recourse to an investigator may be useful, for instance, during the reparations proceedings when victims will need to present to the relevant Chamber evidence of the harm suffered in support of their claims.

Regulation 127 of the Regulations of the Registry

Appointment of assistants to counsel

"*Persons who assist counsel in the presentation of the case before a Chamber shall be appointed by counsel and selected from the list maintained by the Registrar*".

Regulation 139 of the Regulations of the Registry

Selection of professional investigators

"*1. Where legal assistance is paid by the Court and includes the fee of a professional investigator, counsel shall select the professional investigator from the list referred to in regulation 137.*

2. A person not included in the list of investigators but who has relevant experience with regard to investigations in criminal proceedings, is fluent in at least one of the working languages of the Court and speaks at least one of the languages of the country in which the investigation is being conducted, exceptionally and after confirmation by the Registrar that the above criteria have been met, can be selected by counsel as a resource person in a given case. That resource person shall not be related to the person entitled to legal assistance, to the counsel or any person assisting him or her".

2. Language used in the proceedings

Since proceedings before the Court are conducted in English and French, it is essential that legal representatives constitute teams including people speaking both working languages. While decisions and orders are translated into both languages, such translations are not usually available at the same time the original decision is issued. Moreover, filings of the participants to the proceedings are normally not translated.

Legal representatives should also consider seeking the assistance of an interpreter, if they do not speak the language of the victim(s) they represent.

3. Composition of a team

The needs of the legal representatives with regard to their teams will necessarily vary according to the different stages of the proceedings and the modalities of participation of victims granted by Chambers.

Different factors need to be taken into account:

- The fact that Legal Representatives are usually present in the courtroom during hearings, but also need to be able to respond to any written submissions in the proceedings simultaneously;
- The need to maintain a constant contact with their clients – who are usually located outside The Netherlands and often reside in remote areas – in order to be able to collect their views and concerns and keep them updated on the proceedings;
- The need to collect evidence for the purposes of the proceedings;
- During the reparations stage, the prerogatives of the Legal Representatives are much wider than during the pre-trial and trial stages, giving rise to additional needs with regard to the composition of their teams.

5. How the OPCV may provide support and assistance to legal representatives?

In order to be able to fulfil its mandate with regard to the provision of support and assistance to external legal representatives, the Office of Public Counsel for Victims (the "OPCV") has developed several tools to enhance the effectiveness and promptness of the assistance provided.

The Office has created a Library for the use of its staff and of external legal representatives' teams. The sections of the library are divided by subject and include, *inter alia*, a section on gender issues, one on children issue, one on reparations issues, one on victims in general, and a section on each country where a situation or a case is ongoing, including national jurisprudence on crimes under the jurisdiction of the Court.

In order to assist external legal representatives acting in proceedings before the Court, the Office has also drafted research notes on several topics concerning victims' rights, as well as on the crimes under the jurisdiction of the Court. Special attention has been given to the analysis of the preparatory works of the Rome Statute, the Rules of Procedure and Evidence, the Regulations of the Court and the Regulations of the Registry.

In order to answer to the needs of each external legal representatives' team, the modalities and extent of the support and assistance provided by the Office are agreed upon on a case-by-case basis.

The Office can be contacted at: OPCV@icc-cpi.int

6. Resources information on research methodology

1. ICC Legal Tools Database

The ICC Legal Tools Database provides a comprehensive collection of resources relevant to the theory and practice of international criminal law.

The Legal Tools Database is composed of a wide range of electronic legal tools and services and contains repositories of key Court documents and collections of legal research resources in international criminal law. Said Database is available through the ICC website.

The Project comprises:

1. The Elements Digest: This is a doctrinal commentary on each element of the crimes and legal requirements of the modes of liability in the Rome Statute. It describes all main sources of international criminal law and seeks to give users access to the text of relevant sources for a proper understanding of the substantive law of the Rome Statute. The text in this tool does not necessarily represent the views of the ICC, any of its Organs or any participant in proceedings before the ICC. This tool is only available through the Case Matrix (see below).

2. The Proceedings Commentary: This is a detailed commentary on criminal procedural and evidentiary questions as contained in the Rome Statute, the Rules of Procedure and Evidence, and the Regulations of the Court. It provides an analysis of key legal issues that are relevant for proceedings before the ICC. This tool may be made publicly available in the future.

3. The Means of Proof Digest: This tool provides practical examples of the types or categories of evidence used in national and international criminal jurisdictions to satisfy the legal requirements of the crimes and modes of liability contained in the Rome Statute. It is a comprehensive document amounting to more than 6,000 A4 pages of text. The text in this tool does not necessarily represent the views of the ICC, any of its Organs or any participant in proceedings before the ICC. This tool is only available through the Case Matrix (see below).

4. The Case Matrix: a unique, law-driven case management application that provides an explanation of the elements of crimes and legal requirements of modes of liability for all crimes in the Rome Statute, serves as a user's guide to how one could prove international crimes and modes of liability, and provides a database service to organise and present the potential evidence in a case; the Case Matrix is only available to users who are working on core international crime cases, on the basis of an agreement with the ICC; and

5. The Legal Tools Database, available through the ICC website, containing more than 40,000 documents. It is the most comprehensive and complete database within the field of international criminal law. The tools in the Database are the following:

   - ICC Documents: This is a repository of basic ICC documents (such as founding instruments)

Practical issues

and case documents. It provides a one-stop location for finding materials used by the Court in its daily practice;

- ICC "Preparatory Works", containing more than 16,000 documents related to the negotiation and drafting of the Rome Statute, the Rules of Procedure and Evidence and the Elements of Crimes, issued by States, Non-Governmental Organisations (NGOs), academic institutions, the United Nations and other international organisations between December 1989 and September 2002;

- International Legal Instruments: This tool provides the full text of key international treaties in four areas relevant to work on core international crimes: public international law, international human rights, international humanitarian law, and international criminal law;

- International(ised) Criminal Jurisdictions: This tool contains the basic legal texts and background information of the International Military Tribunals of Nuremberg and Tokyo, the ICTY, the ICTR, UNMIK courts and tribunals, the Special Court for Sierra Leone, the East Timor Panels for Serious Crimes, the Iraqi High Tribunal, and the Extraordinary Chambers in the Courts of Cambodia;

- International(ised) Criminal Judgments: This tool contains the full text of indictments and judgments and other selected decisions issued by the International Military Tribunals of Nuremberg and Tokyo, the ICTY, the ICTR, UNMIK courts and tribunals, the Special Court for Sierra Leone, and the East Timor Panels for Serious Crimes. It also includes selected judgments of allied tribunals in trials for international crimes held immediately after World War II. Judgments of the Iraqi High Tribunal and the Extraordinary Chambers in the Courts of Cambodia will also be made available in the future;

- National Jurisdictions: This tool provides an overview of national legal systems. It contains information helpful for conducting comparative research on criminal law and procedure and on the legal status of core international crimes in the systems;

- National Implementing Legislation: This tool collects national legislation implementing the Rome Statute;

- National Cases Involving Core International Crimes: This tool compiles the most relevant decisions issued by domestic courts and tribunals concerning genocide, crimes against humanity and war crimes, both in civil and criminal matters;

- Publicists: This tool contains articles and opinions by prominent scholars on international criminal law. This tool will be made publicly available in the future;

- Internet Legal Resources: This tool provides a structured list of other Internet websites of relevance to research on international criminal law and related fields;

- Human Rights Decisions: This tool contains human rights decisions from United Nations and regional human rights mechanisms particularly relevant to criminal justice processes linked to core international crimes. This tool is under development and will only be made publicly available in the future;

- Other International Legal Decisions: This tool contains decisions by international courts that are not criminal jurisdictions on matters which may be relevant to criminal justice for core international crimes. This tool is under development and is only partially available to the public;

- Legal Kit: This is a mobile mini-library of international criminal law sources which fits on portable digital media and can be kept with the user at all times. This tool may be made publicly available in the future.

The Legal Tools are available at:
https://www.legal-tools.org/

2. Databases on the Law of the International Criminal Court

2.1. Annotated Leading Cases

This database is published under the editorial supervision of Prof. André Klip (Maastricht University, the Netherlands) and Prof. Göran Sluiter (University of Amsterdam, the Netherlands). It provides the full text of the most important decisions of the ICC, ICTY, ICTR, and other international courts. It is very useful for counsel practising at the ICC and is available through the ICC Library. However, the database is offered with charge for private users.

The web address is: http://www.annotatedleadingcases.com/index.aspx

The cases of the international courts are searchable through several filters.

The most valuable service offered by this database is the provision of commentaries of decisions by experts in the international criminal law. These commentaries provide lots of useful information about the case law, including general remarks on the decision, the main legal issues at stake, and the relevant statutory texts and jurisprudence on the subject.

2.2. Oxford Reports on International Law

This database is intended to constitute a single point of reference for all international law jurisprudence, providing researchers access to the widest possible range of international law jurisprudence. This service is available through the ICC Library. However, it is offered on a subscription basis for private users.

The web address is: http://www.oxfordlawreports.com/

One of the modules is the Oxford Reports on International Criminal Law, which focuses on decisions from of the international criminal courts including the ICC.

This module covers all decisions containing anything of jurisprudential importance, excluding decisions which do not contain any point of law.

The full case report contains a summary of the core facts discussed in the decision and holdings as well as an analysis of the legal issues at stake. The case report also contains citations of other relevant decisions.

2.3. War Crimes Research Office Reports

This database, which is maintained by the War Crimes Research Office of the American University Washington College of Law, is available at: https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/

Among the most useful resources available on the War Crimes Research Office website is the series of "Reports on Early Issues before the International Criminal Court". According to its website, this series aims at producing public, impartial, and legal analyses of critical issues raised by the ICC's early decisions. These reports are available free of charge. However, the last report has been issued in 2015 and the reports are not updated.

The series include:

- "Victim Participation Before the International Criminal Court";
- "Interlocutory Appellate Review of Early Decisions by the International Criminal Court";
- "The Gravity Threshold of the International Criminal Court";
- "Protecting the Rights of Future Accused During the Investigation Stage of ICC Operations",
- "The Confirmation of Charges Process at the International Criminal Court";
- "Victim Participation at the Case Stage of Proceedings";
- "Witness Proofing at the International Criminal Court";
- "The Relationship Between the International Criminal Court and the United Nations";
- "The Relevance of 'A Situation' to the Admissibility and Selection of Cases Before the ICC";
- "Defining the Case Against an Accused Before the ICC: Whose Responsibility Is It?";
- "The Practice of Cumulative Charging at the ICC";
- "The Case-Based Reparations Scheme at the International Criminal Court";
- "Mode of Liability and the Mental Element: Analysing the Early Jurisprudence of the ICC";
- "Expediting Proceedings at the International Criminal Court";
- "Ensuring Effective and Efficient Representation of Victims at the International Criminal Court";
- "Investigative Management, Strategies, and Techniques of the ICC's Office of the Prosecutor";

- "Regulation 55 and the Rights of the Accused at the International Criminal Court";
- "Obtaining Victim Status for Purposes of Participating in Proceedings at the ICC"; and
- "The Confirmation of Charges Process at the ICC: A Critical Assessment and Recommendations for Change".

2.4. Commentary on the Law of the International Criminal Court

The Commentary on the Law of the International Criminal Court (CLICC) provides a provision-by-provision analysis of the Rome Statute and the Rules of Procedure and Evidence of the International Criminal Court. Mark Klamberg is the Chief Editor and Jonas Nilsson is the Co-Editor of CLICC. A team of international law experts contributes as authors to the commentary. The commentaries are continuously updated by the authors under the supervision of the editorial team. All references are hyperlinked in order to allow for cross-checking of the relevant authorities.

The web address is: https://cilrap-lexsitus.org/clicc.

2.5. Westlaw International

Westlaw International is one of the primary online legal research services for legal professionals, available on subscription. Westlaw International offers a range of legal materials including US, Canadian and European legislations, case law, and law journals/reviews *etc.*

The advantage of this database is the fact that users may not only search documents by using key words (Terms and Connectors) but also by using Natural Language Method. According to the website, "*this method allows the user to use plain English by entering the description of the subject as Westlaw will then display the documents that best match the concepts in the user's description*". In other words, if the user does not know the exact legal terminology used within the subject of the research, he or she may still be able to conduct researches by typing the phrases or sentences containing such general descriptions commonly used in the subject area, which, in turn, will allow the search engine to retrieve the documents by following the natural usage of the English language.

This search method is particularly useful since the search results will be displayed in order of statistical relevancy. In other words, the document that most closely matches the search will be displayed first and, as the user moves down the list of retrieved documents, statistically they become weaker.

3. ICC Court Records Database

Please note that the ICC Court Records Database is accessible only to counsel acting before the Court via CITRIX and a simplified version is available at the following address: https://edms.icc.int/RMWebDrawer/Search. Alternatively, you can also research public filings and public transcripts directly on the ICC Website at the following address: https://www.icc-cpi.int/Pages/crm.aspx.

The Court Records Database is very useful when researching the jurisprudence of the Court itself. It allows users to focus their research by refining results on the basis of the source of the document to be found (for instance Trial Chamber I or Legal Representatives of victims, *etc*.), the case or situation concerned, key words in the title or in the content of the documents themselves, the document number, if known, the date of its notification, *etc*.

This tool is very useful to find filings pertaining to a topic through various cases or situations and filings or decisions regarding a specific issue or in a specific case, even at a specific stage of the proceedings. It is also possible to refine results based on the type of document, its language or its confidentiality level.

It is important to note that when using the Court Records Database for a research, only the documents to which a participant in the proceedings has access will be identified – and consequently accessible. In other words, even though there would be other documents filed in the records of the proceedings that could correspond to the criteria of the research, these documents will not appear in the result of the research if their confidentiality level does not allow the person making the research to access them.

7. The different sections of the Court dealing with victims

Within the remit of the Registry, the Office of the Public Counsel for Victims is not the only section dealing with victims. The Victims Participation and Reparation Section and the Victims and Witnesses Unit are also in charge of specific aspects concerning victims.

The Victims Participation and Reparation Section (the "VPRS") is a section within the Registry dealing with victims' participation and reparations, and responsible for assisting victims and affected communities to understand how they can exercise their rights under the Rome Statute and for assisting them in obtaining legal

assistance and representation, including, where appropriate, from the Office of Public Counsel for Victims. The VPRS can be seen as the first point of contact of victims with the Court, since the Section is in charge of assisting victims in completing their application forms for participation and/or reparations, as well as of providing victims with all information necessary to be able to exercise their rights under the Rome Statute.

The Victims and Witnesses Section (the "VWS") assists victims and witnesses testifying and/or participating in the proceedings and limits possible adverse effects due to their status by providing protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk because of their interaction with the Court. The VWS also takes appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims, witnesses and other persons at risk, and advises the participants in the proceedings and other organs and sections of the Court on appropriate protective measures, security arrangements, counselling and assistance, in accordance with article 68 of the Rome Statute.

8. Useful websites

1. International Courts

- International Court of Justice (www.icj-cij.org)

  See also: World Court Digest provided by the Max Planck Institute for Comparative Public Law and International Law www.mpil.de/en/pub/publications.cfm?100000000000.cfm

- Permanent Court of Arbitration (www.pca-cpa.org)
- European Court of Human Rights (www.echr.coe.int/Pages/home.aspx?p=home)
- African Court on Human and Peoples' Rights (http://en.african-court.org)
- African Commission on Human and Peoples' Rights (www.achpr.org)
- Inter-American Court of Human Rights (www.corteidh.or.cr/index-en.cfm)
- There exist many regional courts which jurisprudence may be relevant to counsel work on legal analysis and doctrine [Caribbean Court of Justice (www.ccj.org); Eastern Caribbean Supreme Court (www.eccourts.org); *etc.*]

2. International Criminal Tribunals

- International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda (https://cld.irmct.org/)

3. Hybrid Courts

- Special Court of Sierra Leone (SCSL) (www.rscsl.org/)
- Crimes Panels of the District Court of Dili in East Timor (https://hybridjustice.com/special-panels-of-the-dili-district-court/)
- Extraordinary Chambers in the Courts of Cambodia (EECC) (http://www.eccc.gov.kh/en)
- Special Tribunal for Lebanon (STL) (www.stl-tsl.org)
- Kosovo Specialist Chambers & Specialist Prosecutor's Office (www.scp-ks.org/en)
- "Regulation 64" Panels in the Courts of Kosovo (www.eulex-kosovo.eu/en/judgments)

4. Other Websites

- Commentary on the Law of the International Criminal Court (https://cilrap-lexsitus.org/clicc)
- Annotated Leading Cases of International Criminal Tribunals (www.annotatedleadingcases.com/index.aspx)
- The Nuremberg Trials Project (Harvard) (http://nuremberg.law.harvard.edu/)
- The Avalon Project (Yale) (https://avalon.law.yale.edu/)
- International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (https://iiim.un.org/)
- Peace Palace Library (www.ppl.nl)
- Resource guides focusing on international law and international criminal law:
  - https://web.law.duke.edu/lib/researchguides/intclaw/
  - http://nyulaw.libguides.com/c.php?g=773854&p=5551682
  - www.asil.org/resources/electronic-resource-guide-erg
  - www.nyulawglobal.org/globalex/International_Criminal_Courts1.html
  - https://gsp.yale.edu/

Practical issues

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N.B. : Cette liste est, bien entendu, non exhaustive

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Practical issues

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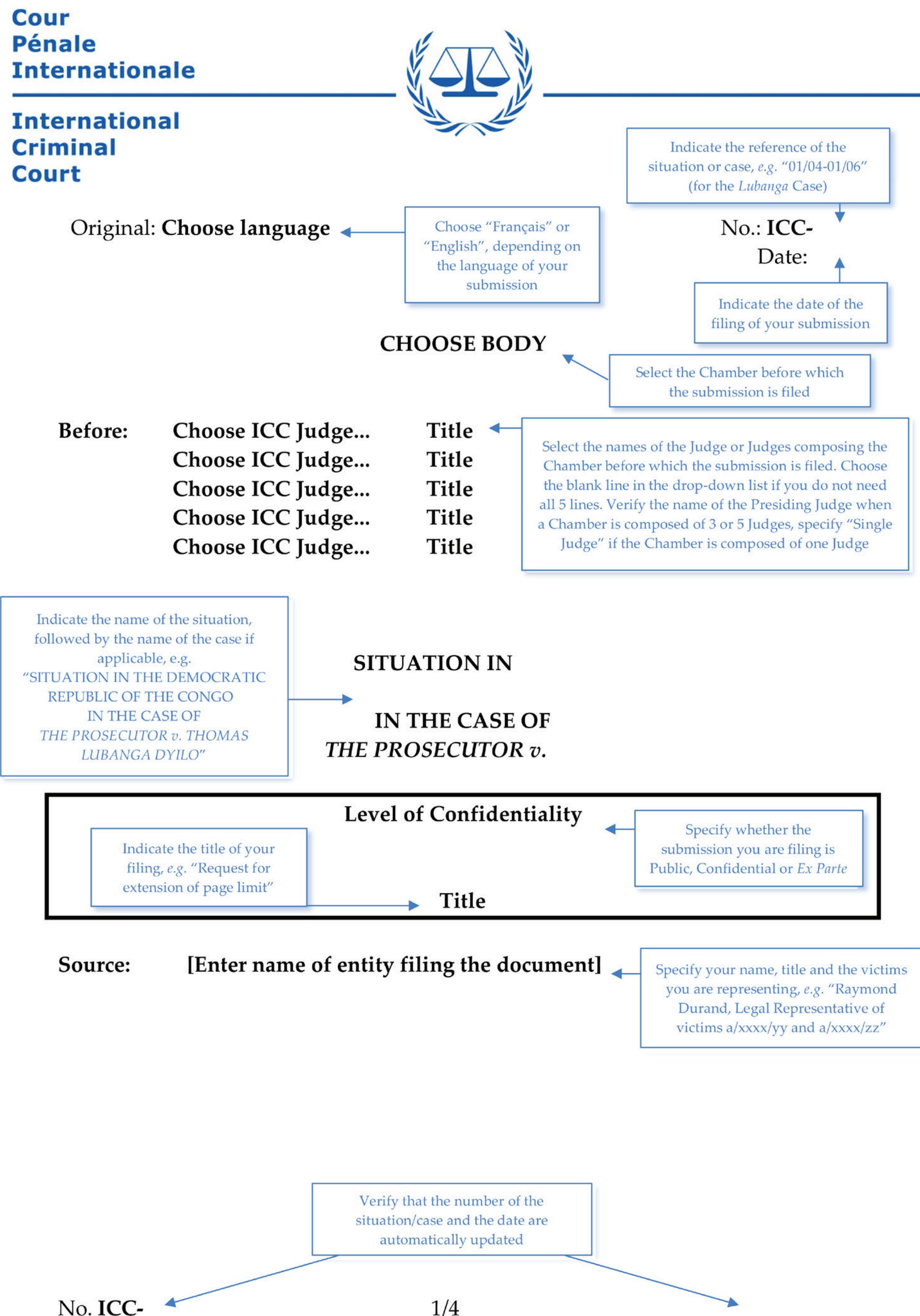
Annex

Template to be used in order to file documents or material in the proceedings



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

The Office of the Prosecutor [2 names maximum]	**Counsel for the Defence** [2 names per team maximum]
Erase the grey line if not applicable	
Legal Representatives of the Victims [1 name per team maximum]	**Legal Representatives of the Applicants** [1 name per team maximum]
Unrepresented Victims	**Unrepresented Applicants (Participation/Reparation)**
The Office of Public Counsel for Victims [2 names maximum]	**The Office of Public Counsel for the Defence** [2 names maximum]
States' Representatives	**Amicus Curiae**

REGISTRY

Registrar Mr Peter Lewis	**Counsel Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

No. **ICC-** 2/4

Practical issues

I. PROCEDURAL HISTORY

Indicate in individual paragraphs each procedural document relevant to your filing. End this part with a paragraph introducing the submissions you want to address.

Example:

1. On 5 May 2006, Pre-Trial Chamber I issued the "Decision on..."

2. On 16 June 2006, the Prosecution filed...

3. The Legal Representative submits that...

II. LEGAL BASIS OF THE FILING (IF NEED BE)

Specify the legal basis of your request, indicating when need be the reference to the relevant provision(s) of the texts of the Court and the criteria set by a Chamber that are related to it.

CONTINUE, in each section of your filing, to develop your arguments in the numerical order as began in your procedural history (e.g. if you end your procedural history with paragraph 3, your first paragraph under part II will be number 4).

Example:

4. Pursuant to article X of the Rome Statute...

5. The Legal Representative submits that in accordance with the Decision on...

II*bis*. CONFIDENTIALITY (IF NEED BE)

Specify the legal and factual basis if your document is *ex parte* or confidential in accordance with regulation 23*bis* of the Regulations of the Court.

N° : **ICC-** 3/4

Practical issues

III. CORE OF YOUR ARGUMENTS

The title should reflect your intention and objective with the filing (*e.g.* if your filing concerns observations with regard to parties' submissions, the title of this part could be "OBSERVATIONS IN RESPONSE TO THE PROSECUTIONS ARGUMENTS").

IV. CONCLUSION

Repeat your request to the Chamber. This paragraph won't usually bear any number, *e.g.*:

ACCORDINGLY, the Legal Representative respectfully submits / requests / *etc*.

____

[Enter name and title of person signing]
on behalf of
[Enter name and title of person on behalf of whom the document is signed, if applicable]

Erase the grey lines if not necessary

Dated this — Indicate the date of the filing of your submission

At [place, country] — Indicate the city and the country from which you are filing your submission

N° : **ICC-** 4/4