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# Representing Victims before the International Criminal Court

A Manual for legal representatives



The Office of Public Counsel for Victims



# **Representing Victims before the International Criminal Court**

**A Manual for legal representatives**

The Office of Public Counsel for Victims

**Second Edition**

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## Foreword to the Second Edition

In 2010, the Office of Public Counsel for Victims published “Representing Victims before the International Criminal Court. A Manual for Legal Representatives” aiming at providing some guidance on the main issues related to victims’ participation in the proceedings and therefore helping legal representatives in their daily work, representing the views and concerns of victims in the proceedings.

The Manual has become a useful tool not only for legal representatives but also for practitioners and theoreticians in the field of international criminal law.

The Office has therefore decided to publish a Second Edition of the Manual completely revised and updated at December 2012.

The structure of the Manual remains unchanged: Part One contains a general introduction to the International Criminal Court and to the role of victims in the proceedings before the Court. Part Two contains the practice before the Court by argument and includes the most important extracts of decisions from 2005 until 31 December 2012 with regard to victims. Decisions in this section are included in chronological order; if an official translation of the Court is available decisions are quoted as translated, otherwise a translation is provided. Part Three contains an explanation of practical issues relevant for the representation of victims in the proceedings before the Court.



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## Foreword

The *Rome Statute* expressly provides for a role to play by victims in the proceedings. The legal instruments of the Court, however, are not explicit in detailing the modalities of victims' participation in the 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".

The first proceedings before the Court have shown how complex this legal framework is and that effective participation of victims in proceedings depends mainly upon the interpretation of the provisions of the legal texts by the Chambers.

The question of what the purpose of the victims' participation in the context of the ICC proceedings scheme is and how it should be implemented to make effective such participation remains to some extent to be explored.

The goal behind victims' participation should be to consider the factors that have been consistently described as important to victims of crimes and devise a way to serve the interests of the largest number of victims possible. A review of the literature produced on this subject suggests that among the most important interests of victims in the context of their interaction with a criminal justice system, beyond the right to reparations, is the right to receive information regarding their case. Victims also value information and clarity concerning their role in the criminal proceedings, so to avoid creating erroneous hopes and expectations that cannot be fulfilled or that will leave victims frustrated. Another critical interest of victims in relation to their interaction with the criminal justice system is respect. Finally, it is commonly understood that victims are more likely to feel satisfied with the criminal justice system if they feel as though their voice has been heard.

These are the challenges that legal representatives of victims face in addressing the issue of victims' participation. Furthermore, involvement of victims at the ICC requires taking into account the realities of each specific country situation, as well as factors such as the prosecution of complex and lengthy trials, likely involving hundreds or thousands of victims, in locations far from where the relevant crimes have occurred; the need of keeping victims regularly informed in a language they can understand; the logistical difficulties in reaching victims and affected communities, in order to be able to present their views and concerns and therefore represent their interests in the proceedings.

In the light of these challenges and with the aim of providing a user-friendly, easy guide to be used by legal representatives appearing before the ICC, the Office of Public Counsel for Victims has drafted this Manual. Part One contains a general introduction to the International Criminal Court and to the role of victims in the proceedings before the Court. Part Two analyses the practice before the Court by argument and includes the most important extracts of decisions from 2005 until December 2010 with regard to victims. Decisions in this section are included in chronological order. Only the main decisions are quoted, while all decisions pertaining to each section are listed at the end of the said section. This Part will be updated regularly. It will be possible to be provided with such updates upon request. Part Three contains an explanation of practical issues relevant for the representation of victims in the proceedings before the Court.

This Manual does not pretend to be covering exhaustively the issues at stake before the Court but rather to give some guidance on the main issues related to victims' participation in the proceedings. I hope that this Manual will help legal representatives in their daily work representing the views and concerns of victims in the proceedings.

The existence of this 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 in their workload.

I would like to thank all of them for their invaluable contribution.

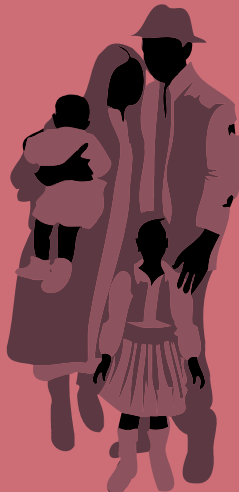


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# Part 1

## An Introduction to the International Criminal Court and the Role of Victims

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# 1. Introduction to the International Criminal Court

## 1. Creation of the Court and States Parties

Independent institution, 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 the 1<sup>st</sup> July 2002 after the 60<sup>th</sup> ratification, in accordance with its article 126. At the time of the publication of this Manual, there were 122 States Parties.

### 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 60<sup>th</sup> day following the date of the deposit of the 60<sup>th</sup> 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 60<sup>th</sup> instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60<sup>th</sup> day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.”*

The ICC is thus the only existing international court today whose jurisdiction targeted towards 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*, also 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.*

*2. An application or recommendation changing the place where the Court sits may be filed at any time after the initiation of an investigation, either by the Prosecutor, the defence or by a majority of the judges of the Court. Such an application or recommendation shall be addressed to the Presidency. It shall be made in writing and specify in which State the Court would sit. The Presidency shall satisfy itself of the views of the relevant Chamber.*

*3. The Presidency shall consult the State where the Court intends to sit. If that State agrees that the Court can sit in that State, then the decision to sit in a State other than the host State shall be taken by the judges, in plenary session, by a two-thirds majority”.*

## 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 has defined the crime, as well as the conditions for the exercise of the jurisdiction.

### Article 5 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**

## 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 the 1<sup>st</sup> of July 2002, “the first day of the month after the 60<sup>th</sup> day following the date of the deposit of the 60<sup>th</sup> 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 the States Parties or of the States having accepted the jurisdiction of the Court on an *ad hoc* basis. In addition to the 122 States Parties to the *Rome Statute*, the Ivory Coast accepted the jurisdiction of the Court on an *ad hoc* basis with respect to crimes committed on its territory since the events of 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<sup>st</sup> 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 for the purpose of article 12(3) of the *Rome Statute* were not fulfilled.

**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”.

An exception does however 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 have occurred on the territory of a non-State Party. In its Resolution 1593 (2005) of 1<sup>st</sup> March 2005, the Security Council referred to the Prosecutor the situation in Darfur, Sudan since the 1<sup>st</sup> July 2002, even if Sudan is not a State party to the *Rome Statute* and did not accept the jurisdiction of the Court pursuant to article 12(3) of the *Rome Statute*.

#### **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:*

*(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 the publication of this Manual, the Office of the Prosecutor is also conducting preliminary examination in a number of situations including Afghanistan, Georgia, Guinea, Honduras, Korea, Nigeria and Mali.

## **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”.*

For 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 15 bis 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 four 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 and by the Republic of Mali in July 2012. Furthermore, the Security Council acting under Chapter VII of the United Nations Charter referred to the Court the situation in Darfur, Sudan on 31<sup>st</sup> March 2005 and the situation in Libya on 26 February 2011. Moreover, pursuant to article 15 of the *Rome Statute*, on 31<sup>st</sup> March 2010 Pre-Trial Chamber II authorised the commencement of an investigation into the situation in the Republic of Kenya, while on 3 October 2011, Pre-Trial Chamber III granted the Prosecutor's request for authorisation to open investigations *proprio motu* into the situation in Ivory Coast.

## **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 established by the *Rome Statute* 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 in accordance with the *Rome Statute*. Nonetheless, States remain under the duty to exercise criminal jurisdiction over individuals responsible for international crimes (6<sup>th</sup> 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 (5<sup>th</sup> 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 the 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 enquiry 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 pattern 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 to 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 involving the commission of several and/or more serious crimes;
- sham proceedings established in respect of at least one out of numerous 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 this article 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 it 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*). This 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 it 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.*

*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 this 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, in accordance with the *Rome Statute*, 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 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 12 months through a resolution adopted under Chapter VII of the UN Charter.

### **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”.*

Moreover, pursuant to article 2 of the *Rome Statute*, the Court and the United Nations concluded in October 2004 an agreement concerning their cooperation. This 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 in which sit 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 Presidency may propose to increase the number of judges;
- 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 the Court may use 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 these 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.*

*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 indeed 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 the participation in the crimes could 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 commission of a crime. The *Rome Statute* further applies to all persons without any distinction based on official capacity which implies that the heads of States for instance or the members of Governments do not benefit, before the Court, from any immunity their national law could confer to them. Moreover, article 28 of the *Rome Statute* provides for responsibility of commanders and other superiors. The doctrine of superior responsibility prescribes the criminal liability of the persons who, being in command, have failed to either prevent or punish the crimes of their subordinates. This 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 this 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.*

*3 bis. 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 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 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 of the *Rome Statute* 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 the 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 request of the Prosecutor 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 the custody of this latter. 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*.

According to the current jurisprudence of the Court, it is possible to identify two different phases within the pre-trial stage. The phase of the situation 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 regards to the participation of victims in the proceedings for the purposes of the causal link – which necessarily differ from one instance to the other – a victim has to demonstrate in order to be allowed to participate.

### 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 being 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* establishes 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 protection of witnesses and victims. For the preparation of 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 of Procedure and Evidence*.

### 9.2.3 The Appeals 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 against 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 and 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 relation to interlocutory appeal, in order to participate at that stage, victims shall expressly request leave to participate.

#### **9.2.4 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*.

#### **9.2.5 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 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*

The ordinary usage of the term “*victim*” was revolutionalised after the UN General Assembly first adopted the Declaration on Basic Principles of Justice for Victims of Crimes and Abuse of Power (the “Victims Declaration”) on 29 November 1985. 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 on the *Rome Statute*, emphasis was placed on ensuring that the core values of the Court, which are to promote greater peace and security through accountability for crimes, as well as respect for the rights and the dignity of the victims, were to be respected. This issue was crucial and critical, given the clear recognition of 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 in it, 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”.*

Since the *Rome Statute* does not define the term “*victim*”, this task was left to the Preparatory Committee in charge of adopting the *Rules of Procedure and Evidence*. During the debate on the adoption of the said definition, delegates took into account that a definition based on the Victims Declaration will 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. 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 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 founder 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 protective measures.

It has to be noted that throughout the founder 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:

<b>Article 18(1) of the Rome Statute</b>	“where the Prosecutor believes it is necessary to protect persons”
<b>Article 43(6) of the Rome Statute</b>	“other who are at risk on account of testimony given by [...] witnesses”
<b>Article 54(3)(f) of the Rome Statute</b>	“protection of any person”
<b>Rule 16(3) of the Rules of Procedure and Evidence</b>	“victims who have expressed their intention to participate in relation to a specific case”
<b>Rule 59(1)(b) of the Rules of Procedure and Evidence</b>	“victims who have already communicated with the Court”
<b>Rule 92(2) of the Rules of Procedure and Evidence</b>	“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”
<b>Rule 93 of the Rules of Procedure and Evidence</b>	“the views of victims or their legal representatives participating [in the proceedings] [and] the views of other victims”
<b>Regulation 93(1) of the Regulations of the Registry</b>	“persons at risk on the territory of the State where an investigation is taking place”
<b>Regulation 95 of the Regulations of the Registry</b>	“person at risk of harm or death”
<b>Regulation 96 of the Regulations of the Registry</b>	“others considered at risk of harm and/or death on account of a testimony given by [...] witnesses or as a result of their contact with the Court”

Therefore, it seems that the term “*person*” is used to cover people in very different situations, namely, victims applying for participation in the proceedings 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 through the presentation of their views and concerns independently from the Prosecution. Article 68(3) of the *Rome Statute* does not prescribe a specific time frame within which victims are able to be involved in the proceedings, but reserves this at the 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 in which 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 about their rights and assisting them: in particular, in developing standard forms for the purpose of participation and reparations.

### **Article 68 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 from the Prosecutor or at the initiative of the Pre-Trial Chamber. Nothing in the Statute prevents the Chamber to request victims to present their views and concerns with regards to this matter.

Finally, rule 93 of the *Rules of Procedure and Evidence* sets 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 a more extensive participation of victims throughout the proceedings, and those who favoured a more restrictive approach. The formulation of such provision 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 legal representative provided that this latter meets the criteria of 10 years of professional experience in criminal proceedings whether as 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 potential 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 make sure 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 for 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 limits do not apply during the phase of the proceedings dealing with reparations of the harm suffered by the victims. During this phase, the restrictions on questioning do not apply, 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. Therefore, 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 the proceedings before the Court**

The legal instruments of the Court are not explicit in detailing the modalities for 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 draw more precisely the framework in which victims can exercise their right to participate in the proceedings before the Court. Indeed, victims, through their legal representatives, may:

- 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 the 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 possibility for victims to participate in the proceedings before the Court, to make observations or representations is made feasible by the fact that victims or their legal representatives shall receive notification of the proceedings at stake and/or of relevant decisions and/or materials pursuant to rule 92 of the *Rules of Procedure and Evidence*. This obligation binding on the Registrar and/or 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 were, 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 XX<sup>th</sup> century, it is only in 1991 that a compensation system for victims of a 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 the requests originated by the occupation of Kuwait and to decide on the compensation thereof.

Nowadays it is however recognised that victims of international crimes may claim reparations for the harm suffered. Indeed, the UN General Assembly adopted in December 2005 the 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 to grant 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 supplied by the product of confiscated goods and completed 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 report(s) of the experts.

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 the obligation to give publicity, as widely as possible, to the reparations proceedings, if need be seeking the cooperation of States Parties, in order for the highest number of victims to be able to make their request. If the number of victims is very important, the Court can consider that reparations on a collective basis is 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. The Trust Fund will also receive the compensation funds in case it is impossible to reach the individual 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 constitutes 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, as the *ad hoc* Tribunals, the Special Tribunal for East-Timor and the Special Tribunal for Sierra Leone cannot 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 administered by the Registry but 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 the granting of the reparations awards to victims in the case of collective awards or in cases 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 funds.

## 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 first importance in order to encourage them to communicate with the Court and to testify without endangering their security. However, these measures cannot be applied in a manner which 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 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, hold 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 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, 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 advices and researches, as well as the appearance at hearings on their behalf. Furthermore, the task of providing support and assistance to victims has included direct legal representation in the proceedings, and Chambers have maintained their practice in accordance to which the Office is appointed as legal representative for unrepresented applicants and, to some extent, for victims participating in the proceedings. The involvement of the Office in the different situations and cases and in its different capacities has allowed its members to gain a specific experience on victims issues, including the handling of potential high number of victims.

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 fulfillment 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. Such independence 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 the civil society in countries where investigations and/or cases are ongoing, as well as in other countries. The Office has also participated in several conferences and seminars on victims' issues and in several publications.

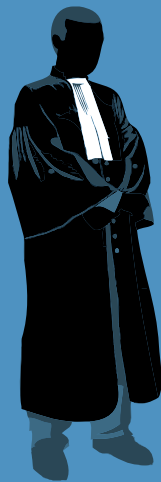
The Office has managed to promote numerous goals that champion victims' rights in international criminal law, including

- 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 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 helping to meet their need for international recognition as victim of crimes within the jurisdiction of the Court,
- iv) Paving the way through its active advocacy in the proceedings for victims' rights in international criminal law.

## Part 2

# Practice of the Court on matters pertaining to victims' participation

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## 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 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, par. 63. See also No. ICC-01/04-01/07-357, Pre-Trial Chamber I (Single Judge), 2 April 2008, p. 7.

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, par. 51. See also No. ICC-02/04-01/05-155, Pre-Trial Chamber II (Single Judge), 9 February 2007, p. 4.

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, par. 28. See also, No. ICC-01/04-01/06-824 OA7, Appeals Chamber, 13 February 2007, par. 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, par. 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, par. 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, par. 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, par. 13.

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, par. 102.

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, par. 98.

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, par. 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.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 34-36.

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.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 38-39.

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.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 41-43.

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, par. 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, par. 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, par. 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, par. 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, par. 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, par. 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, par. 9.

## 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, par. 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, 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, par. 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, par. 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, par. 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, par. 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, par. 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, par. 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, par. 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, par. 79. See also No. ICC-01/04-177, Pre-Trial Chamber I, 31 July 2006, p. 7; No. ICC-01/04-01/06-228, Pre-Trial Chamber I, 28 July 2006, p. 7; No. ICC-01/04-01/06-601, Pre-Trial Chamber I, 20 October 2006, p. 9; No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 4; No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 36; No. ICC-02/04-01/05-282, Pre-Trial Chamber II (Single Judge), 14 March 2008, par. 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, par. 12. See also No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, par. 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.

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

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.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, par. 14.

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, par. 15.

The Single Judge recalls that the applicants are only required to demonstrate that the elements established by rule 85 of the Rules are met *prima facie* and that its analysis 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 the merits 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, par. 5. See also, No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, par. 8 and No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, par. 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, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 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, par. 38 and No. ICC-01/04-01/06-1813-Red, Trial Chamber I, 8 April 2009, par. 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, par. 6. See also No. ICC-01/09-02/11-23, Pre-Trial Chamber II (Single Judge), 30 March 2011, par. 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, par. 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.](#)

### 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 11(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 not 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, par. 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, par. 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, par. 36.

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.

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

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, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 27.

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.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 87.

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. 91-92.

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, par. 6.

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, par. 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, par. 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, Trial Chamber I, 13 January 2009, par. 78. See also, No. ICC-01/04-01/06-2063, Trial Chamber I, 21 July 2009, par. 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 choose 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, par. 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, par. 33. See also No. ICC-01/04-01/06-2764-Red, Trial Chamber I, 25 July 2011, par. 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, par. 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, 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, par. 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, par. 17. See also, No. ICC-01/05-01/08-1590-Corr, Trial Chamber III, 21 July 2011, par. 35; and No. ICC-01/05-01/08-1862, Trial Chamber III, 25 October 2011, par. 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, par. 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 link between 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.

### 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, Pre-Trial Chamber I (Single Judge), 31 January 2008, paras. 140-143.

### 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, par. 85. See also See No. ICC-01/04-01/06-228, Pre-Trial Chamber I, 28 July 2006, p. 14; see also No. ICC-01/04-177, Pre-Trial Chamber I, 31 July 2006, p. 14; No. ICC-01/04-01/07-4, Pre-Trial Chamber I, reclassified as public pursuant to oral decision dated 12 February 2008, 6 July 2007, par. 11; No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 5; No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 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, par. 21.

### 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 par. 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.

See No. ICC-01/04-01/06-1432 OA9 OA10, Appeals Chamber, 11 July 2008, par. 1.

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.

See No. ICC-01/04-01/06-1432 OA9 OA10, Appeals Chamber, 11 July 2008, par. 32.

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, par. 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 victim of a crime. Given the opportunity to participate that is thus extended to indirect victims, 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, par. 28.

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, 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.

### 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, Pre-Trial Chamber I, 29 June 2006, p. 6. See also No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 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, Pre-Trial Chamber I, 29 June 2006, pp. 7-8. See also No. ICC-01/04-01/06-601, 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, par. 106.

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, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 25.

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, par. 93.

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, par. 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.

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

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 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. 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, par. 28. See also No. ICC-01/04-01/06-2764-Red, Trial Chamber I, 25 July 2011, par. 23.

## 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 par. 102.

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.

See No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, par. 6.

According to rule 89 of the Rules and regulation 86 of the *Regulations of the Court* 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.

See No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, par. 12.

Information 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.

See No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, par. 17.

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 witness in criminal proceedings.

The Single Judge also recalls that 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 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 application process.

See No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, paras. 5 and 20. See also No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, par. 22.

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.

Applicants do not have procedural standing to seek leave to appeal the decisions of the Chamber on the merits of their applications; therefore, they do not have standing to seek leave to appeal interlocutory decision 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.

The limited object and purpose of the application process is confined to the determination of whether the procedural status of victim can be granted to applicants in such ongoing proceedings. Consequently, the applicants are only required to use standard forms completed as mentioned in regulation 86(2)(e) of the *Regulations of the Court* and the exhaustion of domestic remedies is not a condition to be fulfilled by applicants. Thus, applicants should not be required to declare that they are not simultaneously pursuing a remedy before another entity or court.

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

It is not necessary to determine in any great detail at the investigation stage the precise nature of the causal link between the crime and the alleged harm. The determination of a single instance of harm suffered is sufficient.

See No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 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, par. 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, par. 10.

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.

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.

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, par. 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 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, par. 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 Judge 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, par. 30. See also No. ICC-01/04-01/06-2764-Red, Trial Chamber I, 25 July 2011, par. 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, par. 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, par. 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, par. 27. See also No. ICC-01/05-01/08-1590-Corr, Trial Chamber III, 21 July 2011, par. 26; No. ICC-01/05-01/08-1091, Trial Chamber III, 23 December 2010, par. 34; and No. ICC-01/05-01/08-1017, Trial Chamber III, 18 November 2010, par. 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.

#### 4.2. Completeness of the applications

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.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 9.

The Registry shall submit to the Chamber the applications together with the Report only after receiving the missing relevant information. 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.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, paras. 10-11.

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.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 12. 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, par. 8; and No. ICC-02/05-02/09-255, Pre-Trial Chamber I (Single Judge), 19 March 2010, par. 4 and No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, par. 22.

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, par. 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, 36, 60, 68, 85, 91 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-t-ENG, Trial Chamber II, 23 September 2009, par. 98.

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.

See No. ICC-01/05-01/08-1022, Trial Chamber III, 19 November 2010, paras. 8-9.

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.

See No. ICC-01/05-01/08-1022, Trial Chamber III, 19 November 2010, par. 13.

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, par. 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*".

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, Trial Chamber III, par. 5.

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.

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, par. 7.

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, par. 10.

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 emphasizes that for efficiency purposes, it is the responsibility of the VPRS to ensure that *all* applications are filled in with pertinent information and completely and, in case of missing information, request, pursuant to regulation 86(4) of the *Regulations of the Court*, such information or documentation within two weeks after receipt of the application. If those requests prove to be unsuccessful within a reasonable period of time, the Registrar shall submit those applications to the Chamber for the Single Judge's consideration.

The Single Judge further concurs with the findings of other Chambers as regards the information which must be covered by the applications submitted. An application is considered 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 a crime against humanity;
- (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.

See No. ICC-01/09-01/11-17, Pre-Trial Chamber II (Single Judge), 30 March 2011, paras. 18-19. See also No. ICC-01/09-02/11-23, Pre-Trial Chamber II (Single Judge), 30 March 2011, paras. 17-19.

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;
- (ii) 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;
- (iii) 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.

#### 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, 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, par. 79 and No. ICC-02/05-01/09-62, Pre-Trial Chamber I (Single Judge), 10 December 2009, par. 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 extrinsic to the applications themselves.*"

See No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, paras. 14-15 and No. ICC-01/04-417, Pre-Trial Chamber I (Single Judge), 7 December 2007, par. 10. See also No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, par. 20; and No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 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, par. 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 special 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, par. 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, Trial Chamber II, 4 May 2009, paras. 6-7; No. ICC-01/04-01/07-1129, Trial Chamber II, 12 May 2009, paras. 6-7; No. ICC-01/04-01/07-1151, Trial Chamber II, 19 May 2009, par. 8; and No. ICC-01/04-01/07-1206, 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, par. 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, par. 22. See also No. ICC-01/09-02/11-23, Pre-Trial Chamber II (Single Judge), 30 March 2011, par. 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(l)(a) of the Statute. This is equally true for the Prosecutor's 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's 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 identify 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, Trial Chamber IV, 17 October 2011, paras. 31-37.

#### 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, par. 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-01/04-01/06-2592-Red, Trial Chamber I, 17 November 2010, par. 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, par. 30.

#### 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 performed by a legal representative.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 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, par. 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.

### 5. Issues related to the security of victims

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, Pre-Trial Chamber II (Single Judge), 12 July 2007, p. 4.

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, 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, 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, Pre-Trial Chamber I (Single Judge), 17 July 2007, p. 4; and No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, p. 59.

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, par. 97.

Protective measures for victims are often the legal means by which the Court can secure the participation of victims in the proceedings. Such measures do not constitute favours but are instead the rights of victims, enshrined in article 68(1) of the Statute.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 128-129.

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.

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. 130-131.

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 at 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, "*an appearance*" for the purpose of article 43(6) of the Statute has occurred. 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.

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

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, par. 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, par. 67. See also No. ICC-01/04-01/06-172, 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, par. 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, 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.

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



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.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, par. 95.

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, par. 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, 42. See also No. ICC-01/04-101-tEN Pre-Trial Chamber I, 17 January 2006, par. 73.

It is clear from 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, par. 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, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 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-tEN, 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/038109/ and a/036309/ 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 “*everything leads [it] to believe that pan/036309/ 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 “*the credibility of pan/036309/ 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, Trial Chamber II, (reclassified as public pursuant to the decision dated 15 August 2011), 7 July 2011, paras. 41-50.

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 apply to 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, par. 25; No. ICC-01/09-02/11-498, Trial Chamber V, 3 October 2012, par. 24.

## 6.2 Participation in relation to a request for authorisation of an investigation

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, par. 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, par. 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, par. 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, par. 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, par. 45. See also No. ICC-02/05-121, Pre-Trial Chamber I (Single Judge), 6 February 2008, pp. 6, 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 Judge 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, par. 126.

## 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, 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.

## 6.6. Participation in interlocutory appeals

Participation of victims in interlocutory appeals can, in principle, be permitted if it can be shown that their personal interests are affected by the issues on appeal and if the Appeals Chamber deems such participation to be appropriate. Previously the Appeals Chamber determined that it cannot automatically be bound by the previous determination of the Pre-Trial Chamber that it was

appropriate for the victims to participate before the court of first instance.

The Appeals Chamber will examine each application for participation in the appeals in light of its earlier interpretation of the framework provided by article 68(3) of the Statute, for granting participation, namely,

- (i) whether the individuals seeking participation are victims in the case,
- (ii) whether they have personal interests which are affected by the issues on appeal,
- (iii) whether their participation is appropriate and lastly
- (iv) that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

See No. ICC-01/04-01/06-1335 OA9 OA10, Appeals Chamber, 16 May 2008, paras. 35-36; No. ICC-01/04-01/06-824 OA7, Appeals Chamber, 13 February 2007, par. 43. See also No. ICC-02/05-138 OA OA2 OA3, Appeals Chamber, 18 June 2008, par. 23; No. ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, paras. 88-98; No. ICC-01/04-450 OA4, Appeals Chamber, 13 February 2008, par. 1; No. ICC-02/05-129 OA, Appeals Chamber, 29 February 2008, par. 1; No. ICC-01/04-480 OA5, Appeals Chamber, 29 February 2008, par. 1; No. ICC-01/04-01/06-1239 OA9 OA10, Appeals Chamber, 20 March 2008, par. 1 and No. ICC-01/04-01/10-509 OA4, Appeals Chamber, 2 April 2012, paras. 6-9.

The majority of the Appeals Chamber is of the view that in appeals proceedings pursuant to article 82(1)(b) of the Statute participation of victims who have participated in the proceedings that gave rise to the appeal is dependent upon an application by these victims and on subsequent authorisation by the Appeals Chamber. On that basis, the majority authorised victims to participate in the present appeal. In my view, the approach of the majority is not warranted by the relevant provisions of the Statute, the *Rules of Procedure and Evidence* and the *Regulations of the Court* and leads to unnecessary procedural steps that are bound to slow down the appellate process.

In my view, no application by the victims is necessary to file a response to the document in support of the appeal in appeals proceedings pursuant to article 82(1)(b) of the Statute, provided that the victims in question have participated in the proceedings that gave rise to the appeal. This results from regulation 64(4) and (5) of the *Regulations of the Court*, pursuant to which participants may file a response to the document in support of the appeal within five days of the notification of that document. There is no reason why the word “*participant*” in these provisions should not include *all* participants to the proceedings that gave rise to the appeal, including victims.

That victims may file a response to the document in support of the appeal without prior authorisation is further supported by regulation 86(8) of the *Regulations of the Court*, which provides that decisions on the participation of victims shall apply throughout the proceedings in the same case. An appeal under article 82(1)(b) of the Statute is an extension of the proceedings before the Pre-Trial Chamber regarding interim release and therefore it is appropriate to qualify the appeal as being the “*same case*” in the sense of regulation 86(8) of the *Regulations of the Court*. For that reason, the Appeals Chamber should not overturn lightly a decision of the Pre-Trial Chamber regarding the appropriateness of victims’ participation in relation to proceedings on interim release or even rule on the issue again without good reason to do so.

I am not persuaded by the majority’s interpretation of regulation 86(8) of the *Regulations of the Court*, which “*reads regulation 86(8) to be confined to the stage of the proceedings before the Chamber taking the decision referred to in the text of the regulation*”. This reading renders regulation 86(8) of the *Regulations of the Court* superfluous because it states the obvious: the decision of a Chamber is applicable throughout the proceedings before the same Chamber unless and until it is modified.

Nor am I convinced by the majority’s reasoning that the Appeals Chamber cannot be bound by the Pre-Trial Chamber’s determination that the participation of victims is appropriate (paragraph 43 of the Judgment). An appeal pursuant to article 82(1)(b) of the Statute addresses issues arising from proceedings before the Pre-Trial Chamber. Therefore, the assumption of regulation 86(8) of the *Regulations of the Court* that decisions on victims’ participation taken by the Pre-Trial Chamber also apply to appellate proceedings is justified and logical. Clearly, if the Appeals Chamber considers that in specific appeals, 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*, which



is “subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1”. Furthermore, any participation of victims that would go beyond the filing of a response pursuant to regulation 64 (4) and (5) of the *Regulations of the Court* would require prior authorisation by the Appeals Chamber. I am not convinced by the opinion of the majority of the Appeals Chamber that a separate application by victims to participate in the appeal and a decision by the Appeals Chamber thereupon is necessary because article 68(3) of the Statute “mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration”. I note that article 68(3) of the Statute provides that the Court shall permit the participation of victims. The word “Court” does not necessarily refer solely to the Appeals Chamber, acting in a particular interlocutory appeal. In the present context, I read the word “Court” to include the plenary of the Judges of this Court. Pursuant to article 52(1) of the Statute read with rule 4 of the *Rules of Procedure and Evidence*, the plenary of the Judges has a mandate to adopt *Regulations of the Court* “necessary for its routine functioning”.

The regulation of the participation of victims when a case moves from one Chamber to another Chamber squarely falls within this mandate. Thus, the plenary of the Judges of this Court, by adopting regulation 64(4) and (5), determined how victims who have participated in the proceedings that gave rise to the impugned decision may participate appropriately in interlocutory appeals: they may file a response, as may any other participant. The majority ignores this decision of the plenary of the Judges. regulation 64(4) and (5) of the *Regulations of the Court* not only saves time and resources of the Court. It also is fully consistent with the wording and spirit of article 68(3) of the Statute. The personal interests of the victims are necessarily affected if they have participated in the proceedings before the Pre-Trial Chamber in relation to interim release, arguing that the detainee should not be released, and the resulting decision denying release subsequently is appealed: on appeal, the decision of the Pre-Trial Chamber could be reversed, leading to the release of the detainee. Therefore, it is appropriate that the victims submit their views and concerns to the Appeals Chamber by way of filing of a response to the document in support of the appeal.

See No. ICC-01/04-01/06-824 OA7, Appeals Chamber, Dissenting opinion by Judge Song, 13 February 2007, paras. 2-8. See also No. ICC-01/04-01/06-1335 OA9 OA10, Appeals Chamber, Dissenting opinion by Judge Song, 16 May 2008, paras. 3-7; No. ICC-01/05-138 OA OA2 OA3, Appeals Chamber, Partly dissenting opinion by Judge Song, 18 June 2008, par. 3; No. ICC-02/04-503 OA4 OA5 OA6, Appeals Chamber, Partly dissenting opinion by Judge Song, 30 June 2008, paras. 1 and 2; No. ICC-01/04-01/06-1452 OA12, Appeals Chamber, Separate opinion of Judge Song, 6 August 2008, par. 1; No. ICC-01/05-01/08-623 OA2, Appeals Chamber, Dissenting opinion by Judge Song, 27 November 2009, paras. 3-4 and No. ICC-01/04-01/07-2124 OA11, Appeals Chamber, Separate opinion of Judge Song, 24 May 2010, p. 8.

The present case clearly indicates the impracticability of the approach taken by the majority of the Appeals Chamber in respect of participation of victims in appeals under article 82(1)(d) of the Statute. Had the Appeals Chamber accepted the Response of the Legal Representatives of Victims as properly filed under regulations 65(5) and 64(4) of the *Regulations of the Court*, the filing would have been before the Appeals Chamber already on 15 February 2008. The view taken by the majority leads to delays in the appellate process that are difficult to reconcile with the principle of expeditious proceedings (see rule 156(4) of the *Rules of Procedure and Evidence*).

See No. ICC-02/05-138 OA OA2 OA3, Appeals Chamber, Partly dissenting opinion by Judge Song, 18 June 2008, par. 5.

We agree with the majority of the Appeals Chamber that the 27 victims who seek to participate in the present appeals should be allowed to make submissions. However, as first explained in Judge Song’s dissenting opinion of 13 February 2007, we are of the view that the victims have a right to make their submissions under regulation 65(5) of the *Regulations of the Court* because they participated in the proceedings that gave rise to the present appeals. Therefore, there is no need for the victims to apply for participation, nor for the Appeals Chamber to rule on the applications.

See No. ICC-01/04-01/06-2205 OA15 OA16, Appeals Chamber, Separate opinion of Judge Song and Judge Van den Wyngaert, 8 December 2009, p. 42.

Victims a/0090/06 and a/0098/06 were granted the status of victim based in part on the psychological trauma, constituting emotional harm, suffered on account of “witnessing events of an exceedingly violent and shocking nature”. As characterised by the Chamber these ‘events of an exceedingly violent and shocking nature’ generally included events wherein the victims witnessed people being killed or injured and were consequently found to have suffered emotional harm.

Victims a/0118/06 and a/0122/06 were also recognized as victims on account of *inter alia*, emotional harm suffered as a result of physical injury suffered by a specific person or persons, notwithstanding the absence of proof of the identity and /or relationship of the latter to the applicants.

In 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 notes that in the present case the submissions made on personal interests were of a broad and general nature. Notwithstanding that factor, the Appeals Chamber accepts the essence of the submissions of the victims that both the status and the right to participate of the four victims, a/0090/06, a/0098/06, a/0118/06 and a/0122/06, may be prejudiced should the resolution of the issue on appeal result in a reversal of the Chamber's decision on the issue.

The Appeals Chamber considers the participation of the four victims to be appropriate in light of the consequences that the outcome of the appeal may have on their personal interests. The four victims permitted to participate in appeal proceedings may submit their views and concerns with regard to their personal interests on the issues arising for determination. This manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Thereafter, the *Ad Hoc* Counsel for the Defence and the Prosecutor will be at liberty to make responses to the submissions of the victims.

See No. ICC-02/04-01/05-324 OA2, Appeals Chamber, 27 October 2008, paras. 11-14. See also No. ICC-01/04-01/10-509 OA4, Appeals Chamber, 2 April 2012, par. 9.

It is appropriate to seek the views of the victims a/0090/06, a/0098/06, a/0118/06 and a/0122/06 pursuant to rule 93, second sentence, of the *Rules of Procedure and Evidence*. Victims a/0090/06 and a/0098/06 were recognised as victims by Pre-Trial Chamber II *inter alia* because of psychological trauma suffered as a result of "*witnessing events of exceedingly violent and shocking nature*" (Decision of 10 August 2007, paragraphs 31 and 40, respectively). Victims a/0118/06/06 and a/0122/06 were recognised as victims by Pre-Trial Chamber II *inter alia* because of the mental harm suffered as a result of harm suffered by third persons (see Decision of 10 August 2007, paragraphs 60 and 76, respectively). The four victims were therefore recognised on grounds closely related to the issue in respect of which the Pre-Trial Chamber granted leave to appeal, namely whether "*in order to establish mental harm suffered as a result of physical harm suffered by another person, should the identity of the latter and the relationship the applicant has with the person be required*". Submissions by the four victims on the issue on appeal may therefore be useful for its proper disposal.

See No. ICC-02/04-01/05-324 OA2, Appeals Chamber, Separate opinion of Judge Song, 27 October 2008, par. 3. See also No. ICC-02/04-164 OA, Appeals Chamber, 27 October 2008, paras. 7-8.

The rulings by the Appeals Chamber were predicated on the view that in order for victims to participate in appeals proceedings under article 82(1)(d) of the Statute, they have to make an application to the Appeals Chamber, setting out why they wish to participate. I do not share this view. In the separate and partly dissenting opinion to the "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'" of 16 May 2008, I explained that in my analysis, victims who have participated in the proceedings giving rise to appeals under article 82(1)(d) of the Statute have the right, pursuant to regulations 65(5) and 64(4) of the *Regulations of the Court*, to file a response to the document in support of the appeal because they are participants in the meaning of these provisions.

In the present case, the situation is different in that not all of those seeking participation in the appeal proceedings have been recognised as victims by the Pre-Trial Chamber yet. This is, however, irrelevant for their right to file a response to the document in support of the appeal in the present proceedings. The right to file such a response follows from the fact that their applications to participate under article 68(3) of the Statute have resulted in the decisions of the Pre-Trial Chamber that are now the subject of the present appeals. Without these applications, the proceedings before the Pre-Trial Chamber would not have taken place. In such circumstances, and given that the decision of the Appeals Chamber on the present appeals is likely to have a direct impact on the eventual disposal of their applications for participation by the Pre-Trial Chamber, they must be considered participants in the meaning of regulations 65(5) and 64(4) of the *Regulations of the Court*.

No. ICC-02/05-138 OA OA2 OA3, Appeals Chamber, Partly dissenting opinion by Judge Song, 18 June 2008, paras. 3-4. See also No. ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, Partly dissenting opinion by Judge Song, 30 June 2008, par. 5.

The Appeals Chamber directs that in future cases and until such time as the matter is regulated in the

constituent documents 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 02/05-138 OA OA2 OA3, Appeals Chamber, 18 June 2008, par. 26. See also No. ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, par. 39.

Participation of victims in interlocutory appeals can, in principle, be permitted if it can be shown that their personal interests are affected by the issues on appeal and if the Appeals Chamber deems such participation to be appropriate. It is for the Appeals Chamber to ensure that their participation occurs 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 will now proceed to examine the Application to Participate in these appeals in light of its interpretation of article 68(3) of the Statute for granting participation, namely, (i) whether the individuals seeking participation are victims in the situation phase of the proceedings, (ii) whether they have personal interests that are affected by the issues on appeal, (iii) whether their participation is appropriate and lastly, (iv) that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

See also No. ICC-02/05-138 OA2 OA3, Appeals Chamber, 18 June 2008, paras 49 and 51.

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.

See No. ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, par. 89.

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, par. 93.

### **6.6.1. Interlocutory appeals lodged under article 82(1)(b) of the Rome Statute**

In order for victims to participate in an appeal under article 82(1)(b) of the *Rome Statute*, an application seeking leave to participate in the appeal must be filed. Accordingly, the ability of victims to participate was held not to be automatic, but to depend upon a determination by the Appeals Chamber that participation was appropriate. The application to participate "*should include a statement from the victims in relation to whether and how their personal interests are affected as well as why it is 'appropriate' for the Appeals Chamber to permit their views and concerns to be presented*".

See No. ICC-01/04-01/06-925 OA8, Appeals Chamber, 13 June 2007, par. 23. See also No. ICC-01/04-01/06-824 OA7, Appeals Chamber, 13 February 2007, paras. 1 and 38.

The Appeals Chamber explained that there are four criteria that need to be considered in respect of applications by victims for participation in appeals brought under article 82(1) of the Statute, namely: (i) whether the individuals seeking participation are victims in the case (ii) whether they have personal interests which are affected by the issues on appeal, (iii) whether their participation is appropriate and lastly (iv) that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. In the present case, all the criteria for participation are fulfilled.

See No. ICC-01/04-01/06-1452 OA12, Appeals Chamber, 6 August 2008, paras. 7-8.

The Appeals Chamber concludes that the Confirmation Decision is not a "*decision granting or denying release*" and therefore cannot be appealed under article 82(1)(b) of the Statute.

For these reasons, the appeal of the Confirmation Decision is inadmissible.

[...]

Any delay for procedural reasons in the delivery of this admissibility decision could have an effect on the release of the person and potentially could jeopardize his fundamental right to liberty.

Therefore, the Appeals Chamber finds it unacceptable to delay the delivery of the decision and cannot, in this specific appeal, allow victims to participate.

Consequently, the Victims' Request for Participation is denied.

See No. ICC-01/04-01/10-483 OA3, Appeals Chamber, 24 January 2012, paras. 23-24, 34-35.

### 6.6.2. Interlocutory appeals lodged under article 82(1)(d) of the *Rome Statute*

In order for victims to participate in an interlocutory appeal, victims shall file application for participation. Such applications shall include a statement in relation to whether and how the personal interests of the victims concerned are affected by this appeal, indicating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings and why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence.

See No. ICC-01/04-450 OA4, Appeals Chamber, 13 February 2008, par. 1.

Applications for participation in an appeal lodged under article 82(1)(d) of the *Rome Statute* shall include a statement in relation to whether and how the personal interests of the victims concerned are affected by this appeal, indicating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings and why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence.

See No. ICC-01/04-480 OA5, Appeals Chamber, 29 February 2008, pp. 2-3. See also No. ICC-02/05-129 OA, Appeals Chamber 29 February 2008, p. 3 and No. ICC-01/04-01/06-1335 OA9 OA10, Appeals Chamber, 16 May 2008, paras. 37-50.

The 16 May 2008 Appeals Chamber decision stated that the 13 February 2007 Appeals Chamber decision, which provided that victims shall file an application seeking leave to participate in article 82(1)(b) appeals, is equally applicable to interlocutory appeals under article 82(1)(d).

See No. ICC-01/04-01/06-1335 OA9 OA10, Appeals Chamber, 16 May 2008, par. 13. See also No. ICC-01/04-01/06-1453 OA13, Appeals Chamber, 6 August 2008, paras. 7-8.

For the purpose of appeals under rule 155 of the *Rules of Procedure and Evidence*, the Appeals Chamber does not interpret the reference to a "participant" or to the filing of "a response" within regulation 65(5) of the *Regulations of the Court* to mean that victims have an automatic right to participate in an interlocutory appeal under article 82(1)(d) of the Statute.

See No. ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, par. 34.

The Appeals Chamber notes that the other victims have been granted victim status in the case and considers that these victims satisfy the remaining requirements for participation. Regarding their personal interests, the Appeals Chamber finds that a decision to stay the proceedings impacts the victims' ability to present their views and concerns and could ultimately preclude them from the opportunity to claim reparations, should the accused be convicted. The Appeals Chamber also considers that the present appeal is an appropriate stage of the proceedings for their participation. 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 relating to the issues raised in this appeal. The Appeals Chamber further considers that the participation of the victims in the present appeal, in the manner prescribed, is not inconsistent with the rights of the accused and a fair and impartial trial. Furthermore, the accused and the Prosecutor will have the right to respond to the views and concerns of the victims pursuant to rule 91(2) of the *Rules of Procedure and Evidence*. Should the Appeals Chamber consider that an oral hearing is necessary, it will decide on the manner in which the victims may participate in the hearing, at that time.

See No. ICC-01/04-01/06-2556 OA18, Appeals Chamber, 18 August 2010, par. 9.

## 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. 1-4 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.

## 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.

## 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-tEN, 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

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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

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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

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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, 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 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-02/04-01/05-312, 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

Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-02/04-164 OA, 27 October 2008

Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-545, 4 November 2008

Third Decision on the Question of Victims' Participation Requesting Observations from the Parties (Pre-Trial Chamber III, Single Judge) No. ICC-01/05-01/08-253, 15 November 2008

Decision on victims' applications for participation a/0066/06, a/0067/06, a/0069/06, a/0070/06, a/0083/06, a/0088/06, a/0091/06, a/0092/06, a/0102/06, a/0114/06, a/0115/06, a/0125/06 and a/0126/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-170, 17 November 2008

Decision on victims' 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-02/04-172, 21 November 2008

Decision on victim's 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-02/04-01/05-356, 21 November 2008

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

Decision on the applications by 3 victims to participate in the proceedings (Trial Chamber I), No. ICC-01/04-01/06-1562, 18 December 2008

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, 13 January 2009

Decision on the treatment of applications for participation (Trial Chamber II), No. ICC-01/04-01/07-933-tENG, 26 February 2009

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

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-02/04-01/05-375, 10 March 2009

Redacted version of "Decision on 'indirect victims'" (Trial Chamber I), No. ICC-01/04-01/06-1813, 8 April 2009

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

Order issuing public redacted annexes to the Decisions on the applications by victims to participate in the proceedings of 15 and 18 December 2008 (Trial Chamber I), No. ICC-01/04-01/06-1861, 8 May 2009

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, 19 May 2009

Fourth 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-01/04-01/07-1206-tENG, 12 June 2009

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

Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Pre-Trial Chamber III), No. ICC-01/05-01/08-424, 15 June 2009

Decision on the applications by 7 victims to participate in the proceedings (Trial Chamber I), No. ICC-01/04-01/06-2035, 10 July 2009

Decision on the supplementary information relevant to the applications of 21 victims (Trial Chamber I), No. ICC-01/04-01/06-2063, 21 July 2009

Order issuing confidential and public redacted versions of Annex A to the "Decision on the applications by 7 victims to participate in the proceedings" of 10 July 2009 (ICC-01/04-01/06-2035) (Trial Chamber I), No. ICC-01/04-01/06-2065, 23 July 2009

Corrigendum du dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure (Trial Chamber II), No. ICC-01/04-01/07-1347-Corr, 5 August 2009

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, 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

Annex A to Order issuing public and confidential redacted annex to the Decision on the applications by 2 victims to participate in the proceedings of 10 September 2009 (ICC-01/04-01/06-2115) (Trial Chamber I), No. ICC-01/04-01/06-2115-AnxA-Red, 27 October 2009

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

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*” (Appeals Chamber) No. ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009

Decision on Applications a/0011/06 to a/0013/06, a/0015/06 and a/0443/09 to a/0450/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-01/09-62, 10 December 2009

Order to the Victims Participation and Reparations Section Concerning 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-012/05-01/09-93, 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

Decision on the Participation of Victims in the Appeal against Trial Chamber I's Oral Decision of 15 July 2010 to Release Thomas Lubanga Dyilo (Appeals Chamber), No. ICC-01/04-01/06-2555 OA17, 17 August 2010

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's Decision 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

Quatrième décision relative à 2 demandes de participation de victimes à la procédure (Trial Chamber II), No. ICC-01/04-01/07-2516, 8 November 2010

Decision authorising the appearance 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, 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  
 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-01/09-02/11-40, 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

Décision relative au maintien du statut de victime participant à la procédure des victimes a/0381/09 et a/0363/09 et à la demande de Me Nsita Luvengika en vue d'être autorisé à mettre fin à son mandat de Représentant légal desdites victimes (Trial Chamber II), No. ICC-01/04-01/07-3064, 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, 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

Corrigendum of the decision on the applications to resume action submitted by the family members of deceased Victims a/0025/08 and a/0311/09 (Trial Chamber II), No. ICC-01/04-01/07-3185-Corr-tENG, 18 November 2011

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

Decision on victims' representation and participation (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012

Decision on 799 applications to participate in the proceedings (Trial Chamber III), No. ICC-01/05-01/08-2401, 5 November 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

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

## 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, 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, par. 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.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 49.

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, par. 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.

## 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, par. 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, par. 5. See also No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, par. 8; No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, par. 2 and No. ICC-01/04-417, Pre-Trial Chamber I (Single Judge), 7 December 2007, par. 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.

### 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.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 56.

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, par. 78.

The specific procedural rights for the pre-trial stage of a case 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 Defense pursuant to rule 121 of the Rules. This access includes 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"*. The first group also includes the right to be notified on the same basis as the Prosecution and the Defense 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"*. 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, with the exception of *ex parte* transcripts. The first group also includes the right to be notified 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. The right to have access to the evidence proposed by the Prosecution and the Defense 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. 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.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 127-133.

The second group of rights 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 Defense intend to rely at the confirmation hearing; and (ii) to examine such evidence at the confirmation hearing.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 134.

The third group relates to the examination of witnesses. 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 Defense, as this is part of the evidentiary debate that takes place at the confirmation hearing.

The examination of witnesses by those granted the procedural status of victims should take place after their examination by the Prosecution and within the amount of time allocated by the Chamber. Moreover, the victims are not required to file the list of questions that they intend to pose to the relevant witness prior to the examination of the witness.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 135 and 137-138.

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.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 140.

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 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 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 representative has been excluded by the Statute and Rules.

The fifth and 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. 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 falls outside the last two groups of rights.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 141-144.

The set of procedural rights [outlined by the Single Judge] 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.

The scope of any such limitation shall be carefully delimited on the basis of the principle of proportionality.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 147-148.

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.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 150.

#### 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 the accused, 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.

See No. ICC-01/04-01/06-462-tEN, Pre-Trial Chamber I, 22 September 2006, p. 5. See also No. ICC-02/05-02/09-136, Pre-Trial Chamber I, 6 October 2009, paras. 16-20.

Since victims have requested that their identities remain confidential at the confirmation hearing, in order not to violate the principle prohibiting anonymous accusations, they will only receive notification of the public documents contained in the record of the case *The Prosecutor v. Thomas Lubanga Dyilo* and will only assist to public sessions of the confirmation hearing.

See No. ICC-01/04-01/06-462-tEN, Pre-Trial Chamber I, 22 September 2006, pp. 7-8.

##### 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 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, par. 8 and No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, paras. 49-60.

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. 6-7. 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.



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 also 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, par. 101. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, par. 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 [the 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(l)(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) concerned, 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, par. 60. See also No. ICC-02/11-01/11-211, Pre-Trial Chamber I (Single Judge), 15 August 2012, par. 12.

## 5. Modalities of participation at the trial stage

The right to introduce evidence during trials before the Court is not limited to the parties. 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.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 108. See also No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 81-84; No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 29-37; No. ICC-01/04-01/07-2288 OA11, Appeals Chamber, 16 July 2010, paras. 37-40 and No. ICC-01/05-01/08-2138, Trial Chamber III, 22 February 2012, par. 18.

Rule 91(3) of the *Rules of Procedure and Evidence* enables participating victims to question witnesses with the leave of the Chamber (including experts and the defendant) whenever their personal interests are engaged by

the evidence under consideration; thus questioning by victims won't be restricted to reparations issues.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 108. See also No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 72-78; and No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 38-40.

The right to make submissions on matters of admissibility or relevance of evidence is not reserved to the parties, consequently, in appropriate circumstances, the victim's Legal Representatives may have the opportunity to challenge evidence.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 109. See also No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, par. 104.

To give effect to article 68(3) of the 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, provided that: victims asking for such materials have been granted the right to participate in the proceedings; the material requested are relevant to the personal interests of the victims; the Chamber have permitted that the material targeted be investigated during the proceedings; and the victims have identified with precision in writing the materials requested.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 111.

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.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 113-114.

Victims' participation may include opening and closing statements.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 117. See also No. ICC-01/04-01/07-1665, 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.

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, 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.

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.

See No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 86-93.

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, Trial Chamber II, 20 November 2009, paras. 45-48.

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.

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.

See No. ICC-01/05-01/08-1023, Trial Chamber III, 19 November 2010, par. 19.

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, par. 20.

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 victims' 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, 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 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. 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*".

See No. ICC-01/04-01/07-2288 OA11, Appeals Chamber, 16 July 2010, paras. 43-48.

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.

See No. ICC-01/04-01/07-2288 OA11, Appeals Chamber, 16 July 2010, paras. 72 and 75.

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, par. 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, 14- 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.

See Oral decision, Trial Chamber III, No. ICC-01/05-01/08-T-45-Red-ENG CT WT, 12 January 2011, from p. 25, line 15 to p. 26, line 11.

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-Red-ENG CT WT, 12 January 2011, 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-Red-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-Red-ENG WT, 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 victims, 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, par. 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 V01 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.

See No. ICC-01/05-01/08-1729, Trial Chamber III, 9 September 2011, paras. 13-14.

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. 15-17.

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 Management 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, 19-21.

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.

See No. ICC-01/05-01/08-2140, Partly Dissenting Opinion of Judge Sylvia Steiner, Trial Chamber III, 22 February 2012, paras. 13-17.

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 WT, Trial Chamber III, 25 June 2012, pp. 20-21.

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 Sylvia Steiner, Trial Chamber III, 22 February 2012, paras. 18-23.

[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.

See No. ICC-01/05-01/08-2220, Trial Chamber III, 24 May 2012, paras. 7-8.

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.

See No. ICC-01/05-01/08-2220, Trial Chamber III, 24 May 2012, paras. 9-11.

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, par. 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.

## 6. Modalities of participation during interlocutory appeals

The Appeals Chamber directs that in future cases and until such time as the matter is regulated in the constituent documents 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-02/05-138 OA OA2 OA3, Appeals Chamber, 18 June 2008, par. 26; See also No. ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, par. 39; and No. ICC-01/05-01/08-2098 OA10, Appeals Chamber, 1 February 2012, par. 10.

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, par. 101; No. ICC-01/04-01/06-1452 OA12, Appeals Chamber, 6 August 2008, par. 12; No. ICC-01/04-01/06-1453 OA13, Appeals Chamber, 6 August 2008, par. 11; No. ICC-01/04-01/06-1335 OA9 OA10, Appeals Chamber, 16 May 2008, par. 50 and No. ICC-01/04-01/10-509 OA4, Appeals Chamber, 2 April 2012, par. 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.

In the instant case, the application does not meet the first criterion for two reasons: (i) it does not make clear which victims are applying to participate in the appeal; and (ii) it does not indicate the decisions in which those victims were granted victim status. The Appeals Chamber has on previous occasions, underscored the importance of Legal Representatives specifying the victims they represent in an appeal and referring to the decisions that granted the victims such status.

In the absence of the information referred to in the above paragraph, the Appeals Chamber is unable to determine which individuals are seeking participation in this appeal and whether they are victims in the case. As the criterion for determining victim participation is cumulative, the Appeals Chamber will not examine the remaining criteria. The Victims' Application is thus rejected.

See No. ICC-01/05-01/08-2098 OA10, Appeals Chamber, 1 February 2012, paras. 12-13.

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, par. 3.

## 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 V01 and V02.

See No. ICC-01/04-01/06-2951 A4 A5 A6, Appeals Chamber, 13 December 2012, par. 5

## 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, par. 6; and No. ICC-01/04-423-Corr, 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.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 88-89.

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.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 118.

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, par. 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 victims in the trial, the legal representatives must be able to consult all of the public and confidential decisions and documents in the record of the case, with the exception of any document classified as *ex parte*.

See No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, par. 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 its activities, it is necessary that this opportunity is subject to the restriction that necessary protective measures or the security of individuals or organisations will not be adversely affected. 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, par. 47. See also No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, par. 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, par. 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(l)(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 confidentially, 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.

## 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, par. 14.

## 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, par. 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, par. 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.

#### 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, par. 111. See also No. ICC-01/04-01/06-1368, Trial Chamber I, 2 June 2008, paras. 27-35.

## 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 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

Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-423, 24 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 (Appeals Chamber), No. ICC-02/05-138 OA OA2 OA3, 18 June 2008 and Partly dissenting opinion of Judge Sang-Hyun Song

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

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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

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, 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 appearance 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-01/04-01/07-2275-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

Order on applications for victim participation (Appeals Chamber), No. ICC-01/05-01/08-1587 OA7, 5 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 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 site 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, 12 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
- Décision relative à la nature du "Procès-verbal de l'opération de transport judiciaire en République démocratique du Congo" (Trial Chamber II), No. ICC-01/04-01/07-3240, 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, ICC-01/05-01/08-2138 (Trial Chamber III), No. ICC-01/05-01/08-2140, 22 February 2012
- Décision relative à la requête aux fins de prorogation du délai de dépôt des conclusions finales du représentant légal commun du groupe principal de victimes (Trial Chamber II), No. ICC-01/04-01/07-3256, 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 WT, 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



### 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

The Office of Public Counsel for Victims shall be automatically appointed by the Registrar as Legal Representative to provide support and assistance to unrepresented applicants at the stage of the proceedings which precedes a decision by the relevant Chamber on their status until such time as the procedural status of victim is granted to them and a Legal Representative is chosen by them or appointed by the Court.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, paras. 43-44.

Anonymity is incompatible with the functions to be performed by a Legal Representative.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 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, par. 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, par. 39.

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-01/04-01/07-2517-tENG, Pre-Trial Chamber II, 23 November 2010, paras. 18 to 21 and 23 to 27.

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.

See No. ICC-01/05-01/08-1020, Trial Chamber III, 19 November 2010, par. 21.

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.

See No. ICC-01/05-01/08-1020, Trial Chamber III, 19 November 2010, par. 22.

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.

See No. ICC-01/05-01/08-1020, Trial Chamber III, 19 November 2010, par. 23.

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, par. 26.

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.

## 2. Common legal representation

The appointment of a Legal Representative for victims allowed to participate in the case is appropriate as it will prevent any adverse impact on the expeditiousness of the proceedings. In particular, at this stage, the appointment of a common Legal Representative is appropriate since the victims in question claim to have suffered from the same attack, and with the view of ensuring the effectiveness of the proceedings pursuant to rule 90(2) of the *Rules of Procedure and Evidence*. The appointment of a common Legal Representative for the victims allowed to participate in the situation is also appropriate since the statements of the two victims present numerous similarities as regards the type of crimes involved.

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 ICC-02/04-01/05-282, Pre-Trial Chamber II (Single Judge), 14 March 2008, par. 192.

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.

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.

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 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.

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, par. 42 and ICC-01/04-01/07-1328, Trial Chamber, 22 July 2009, par. 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 OPCVs 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 4. 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.

### 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 conducted 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 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, par. 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. 1-9, 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, par. 22.

### 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, 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, 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, Registrar, 9 June 2008 and No. ICC-01/04-01/07-563, 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. 01/04-01/06-460, Pre-Trial Chamber I, 22 September 2006, pp. 2-3.

## 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.

## 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. 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. 02/05-47, 2 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

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

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-tEN, 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 Investigations in the Democratic Republic of Congo by a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06" (Pre-Trial Chamber I), No. ICC-01/04-423-Corr-tENG, 31 January 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/00070/06, 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-tEN, 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.02/04-01/05-290, 4 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 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

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 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 the legal representation of victim applicants at trial (Trial Chamber III), No. ICC-01/05-01/08-1020, 19 November 2010

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 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 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-01/09-01/11-419 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 common legal representation (Trial Chamber IV), No. ICC-02/05-03/09-337, 25 May 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-01/09-01/11-479, 23 November 2012

## 4. 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***

### 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 and, therefore, it is appropriate for victims to benefit from any form of support and assistance which may be offered by the Office.

See No. ICC-02/04-01/05-134, Pre-Trial Chamber II (Single Judge), 1 February 2007, par. 13.

For the purpose of the tasks entrusted to the OPCV in the Decision [of 1<sup>st</sup> 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, par. 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, par. 10. See also No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, par. 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 Counsel 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, par. 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, par. 72.

## 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 and 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, par. 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, par. 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, par. 194 as well as the operative part of the decision.

## 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, 49-50 as well as the operative part of the decision. See also ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, par. 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, par. 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 prejudice 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, par. 18; No. ICC-01/05-01/08-103, Pre-Trial Chamber III, 12 September 2008, par. 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 reclassified as public on 28 January 2010, paras. 9 and 18.

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

#### 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, 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), par. 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, par. 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, par. 41 and 43; see also No. ICC-01/09-02/11-498, Trial Chamber V, 3 October 2012, par. 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, par. 7. See also No. ICC-01/09-01/11-479, Trial Chamber V, 23 November 2012, par. 8.

## 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, par. 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.

## 6. The participation in reparations proceedings

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.

## Relevant decisions regarding the role of the Office of Public Counsel for Victims

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 "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 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

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

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

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 victims' application 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/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, 14 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, Single Judge), No. ICC-02/04-132 and No.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 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 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

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 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, 4 April 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-01/09-02/11-40, 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 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 the Registry Report on six applications to participate in the proceedings (Trial Chamber IV), No. ICC-02/05-03/09-231, 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 defence request for leave to appeal (Trial Chamber I), No. ICC-01/04-01/06-2874, 4 May 2012 (dated 3 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 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 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

## 5. 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, par. 9.

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 to 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.

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, par. 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-US-Exp, Unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13.10.2005, 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.

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 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, par. 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, 20 July 2011, Pre-Trial Chamber I (Single Judge), paras. 15, 17, 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 assignment 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, 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, 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.

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, par. 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 of the *Regulations of the TFV*, the TFV shall be considered to be seized when:

- (a)(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 indispensable 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 also, No. ICC-01/09-01/11-472, Trial Chamber V, 12 November 2012, paras. 3-12.

## 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-US-Exp, 18 July 2005 (Unsealed pursuant to Decision No. ICC-02/04-01/05-52 dated 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. 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 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

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

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 "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 KATANGA 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 Pre-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-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, 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

Décision relative à la demande d'enregistrement au dossier de décisions et requêtes communiquées uniquement par courriel (Trial Chamber II), No. ICC-01/04-01/07-3237-tENG, 8 February 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 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 the defence request for a temporary stay of proceedings (Trial Chamber IV), No. ICC-02/05-03/09-410, 26 October 2012

Decision on the supplementary protocol concerning the handling of confidential information concerning victims and contacts of a party with victims (Trial Chamber V), No, ICC-01/09-01/11-472, 12 November 2012



## 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.

See No. ICC-01/04-01/06-772 OA4, Appeals Chamber, 14 December 2006, paras. 28-29.

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.

See No. ICC-01/04-01/06-772 OA4, Appeals Chamber, 14 December 2006, par. 30.

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 inseparable 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.

See No. ICC-01/04-01/06-772 OA4, Appeals Chamber, 14 December 2006, paras. 33-35. See also No. ICC-01/04-01/07-1666-Red-tENG, Trial Chamber II, 3 December 2009, par. 36.

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.

See No. ICC-01/04-01/06-772 OA4, Appeals Chamber, 14 December 2006, par. 36.

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.

See No. ICC-01/04-01/06-772 OA4, Appeals Chamber, 14 December 2006, par. 37.

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, par. 39. See also No. ICC-01/04-01/07-1666-Red-tENG, Trial Chamber II, 3 December 2009, par. 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 at some 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.

See No. ICC-01/04-01/06-1401, Trial Chamber I, 13 June 2008, paras. 90-91.

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.

See No. ICC-01/04-01/06-1401, Trial Chamber I, 13 June 2008, par. 94.

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, par. 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, par. 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, 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.

See No. ICC-01/04-01/06-1486 OA13, Appeals Chamber, Separate Opinion of Judge Georghios M. Pikiş, 21 October 2008, par. 23.

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 Georghios M. Pikiş, 21 October 2008, par. 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, par. 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.

See No. ICC-01/04-01/06-2582 OA18, Appeals Chamber, 8 October 2010, par. 3.

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. 55-56, 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*".

See No. ICC-02/05-03/09-410, Trial Chamber IV, 26 October 2012, paras. 74-79.

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.

See No. ICC-02/05-03/09-410, Trial Chamber IV, 26 October 2012, par. 95.

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, par. 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.

## 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-02/11-01/011-321 OA2 (Appeals Chamber), 12 December 2012

### 3. *Ex parte* proceedings

**Article 72 of the Rome Statute  
Rules 74, 81, 83, 88 and 134 of the Rules of Procedure and Evidence  
Regulation 23bis of the Regulations of the Court  
Regulation 24(4) of the Regulations of the Registry**

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, par. 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, par. 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.

See No. ICC-01/04-01/06-108-Corr, Pre-Trial Chamber I (Single Judge), 19 May 2006, par. 13.

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, par. 17.

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, par. 67.

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, par. 12.



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, par. 32.

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.

## Relevant decisions regarding *ex parte* proceedings

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

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 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 Request 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), See No. ICC-01/04-01/06-963-Anx1, 26 September 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

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

## 4. 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, 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 motu* power is warranted in a given case.

See No. ICC-02/04-01/05-377, Pre-Trial Chamber II, 10 March 2009, par. 14.

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. 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 aforementioned 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, 87 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.

See No. ICC-01/04-01/07-1213-tENG, Trial Chamber II, 15 July 2009, paras. 30 and 33-45.

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. 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 *"striking 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; 97-98. See also No. ICC-01/09-02/11-274 OA, Appeals Chamber, 30 August 2011, paras. 1-3; 95-99; 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, 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, par. 33 and No. ICC-01/09-01/11-414 OA3 OA4, Appeals Chamber, 24 May 2012, par. 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, par. 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, par. 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. 11-13.

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.

## Relevant decisions regarding jurisdiction and admissibility

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

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

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-tEN, 10 February 2006

Warrant of Arrest [Bosco Ntaganda] (Pre-Trial Chamber I), No. ICC-01/04-02/06-2-tEN, 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'incompétence 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-tEN, 29 January 2007

Warrant of arrest for Ahmad Harun (Pre-Trial Chamber I), No. ICC-02/05-01/07-2, 27 April 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 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-tEN, 2 July 2007

Warrant of Arrest for Mathieu Ngudjolo Chui (Pre-Trial Chamber I), No. ICC-01/04-01/07-260-tEN, 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, 27 August 2009

Summons to appear for Abdallah Banda Abakaer Nourain (Pre-Trial Chamber I), No. ICC-02/05-03/09-3,

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-01/11-01/01-239, 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-02/11-01/01-323 OA2, Appeals Chamber, 12 December 2012

## 5. Evidence

### Articles 61(7), 68 and 69 of the Rome Statute Rules 63-75 of the Rules of Procedure and Evidence

#### 5.1. 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 particular 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 the 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.

See No. ICC-01/04-01/06-1084, Trial Chamber I, 13 December 2007, paras. 5-6.

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, par. 8.

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.

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.

See No. ICC-01/04-01/06-1127, Trial Chamber I, 24 January 2008, par. 19.

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.

See No. ICC-01/04-01/06-1127, Trial Chamber I, 24 January 2008, paras. 22-23.

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, par. 27.

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, par. 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.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 17.

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.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 101.

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.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 103.

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, par. 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, par. 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, par. 59.

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.

See also No. ICC-01/05-01/08-55, Pre-Trial Chamber III, 31 July 2008, paras. 54-63.

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.

See No. ICC-01/05-01/08-55, Pre-Trial Chamber III, 31 July 2008, paras. 64-66.

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.

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(l)(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, 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 Kuniko 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. 3-19.

## 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) of the 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 from 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 from article 69(8) of the Statute which states that “when deciding on the relevance or admissibility of evidence collected 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 the home. As a result, the Chamber finds that the unlawfulness of the search and seizure was a breach of a procedural rule, but cannot be considered so serious as to amount to a violation of internationally recognized human rights. However, the Chamber finds that in this case, in light of the ECHR jurisprudence, the search and seizure of hundreds of documents and items pertaining to the situation in the Democratic Republic of the Congo 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. The Chamber has to 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. As a consequence, the Chamber decides that for the purpose of the confirmation hearing the seized items are admitted, without prejudice to the Trial Chamber’s exercise of its functions and powers to make a final determination as the admissibility and probative value of such items.

See No. ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, 29 January 2007, paras. 69-70, 77-78, 81-84, 89-90.

Nothing in the Statute and in the *Rules of Procedure and Evidence* expressly states that the absence of information about the chain of custody and transmission affects the admissibility or probative value of Prosecution evidence. Therefore, it is assumed 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 the confirmation hearing.

See No. ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, 29 January 2007, paras. 96-97.

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 addition, 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. In accordance with the ECHR jurisprudence, 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. 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 assess 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, par. 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, article 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 the Court must take into account, under article 21(l)(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 its 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 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 effect.

See No. ICC-01/04-01/06-2693-Red, Trial Chamber I, 8 March 2011 (dated 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, 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, par. 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, 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, 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.

## 5.3. Witnesses

### 5.3.1. 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.

See No. ICC-01/04-01/06-1351, Trial Chamber I, 23 May 2008, paras. 32-33.

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. 34-35.

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, par. 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, par. 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, par. 13. See also No. ICC-01/05-01/08-813-Red, Trial Chamber III, 20 July 2010, par. 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, par. 23. See also No. ICC-01/04-01/06-2192-Red, Trial Chamber I, 20 January 2010, par. 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.

### 5.3.2. 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 assist the witness in the experience of giving oral evidence before the Court so as to prevent the witness from finding himself or herself in a disadvantageous position, or from being taken by surprise as a result of his or 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 light of the above-mentioned provisions of the Statute and the Rules, but are mandatory according to such provisions. Moreover, it is the view of the Chamber that labelling this practice as "*witness proofing*" is not suitable for 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, par. 24. See also No. ICC-01/04-01/06-1049, Trial Chamber I, 30 November 2007, par. 33 and No. ICC-01/04-01/07-1134, Trial Chamber II, 14 May 2009, par. 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, par. 18, and No. ICC-01/05-01/08-1016, Trial Chamber III, 18 November 2010, paras. 21-25.

### 5.3.3. 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, par. 42. See also No. ICC-01/04-01/06-1049, Trial Chamber I, 30 November 2007, par. 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.

See No. ICC-01/04-01/06-1049, Trial Chamber I, 30 November 2007, paras. 31-32.

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.

See No. ICC-01/04-01/06-1049, Trial Chamber I, 30 November 2007, par. 34.

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.

See No. ICC-01/04-01/06-1049, Trial Chamber I, 30 November 2007, paras. 41-42.

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.

See No. ICC-01/04-01/06-1049, Trial Chamber I, 30 November 2007, par. 45.

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. 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 encourage witness 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, 25.

#### 5-3-4. 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.

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 examination-in-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 cross-examination, 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, Trial Chamber II, 20 November 2009, par. 60-83.](#)

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.

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 CT WT, 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, par. 75; and No. ICC-01/09-02/11-498, Trial Chamber V, 3 October 2012, par. 74.

### 5.3.5. 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, par. 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, par. 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, par. 48.

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, par. 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 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

See No. ICC-01/05-01/08-1023, Trial Chamber III, 19 November 2010, par. 23.

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, par. 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, 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, par. 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, 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, par. 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 CT WT, 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.

### 5.3.6. 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.

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*.

[...]

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 and impartial 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.

### **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 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.

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 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, par. 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.](#)

### 5.3.7. 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 ET, 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, par. 18-20, 22-24.

## 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

Decision 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, 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-tFRA, 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 ET, 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-OTPWVWW-0108 by video-link" (Trial Chamber III), No. ICC-01/05-01/08-947, 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, 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, 8 March 2011 (dated 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

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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 CT WT, 1 May 2012

Oral Decision (Trial Chamber III), No. ICC-01/05-01/08-T-222-ENG CT WT, 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 against 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

Public Redacted version of the Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court (Pre-Trial Chamber I), No. ICC-02/11-01/11-286-Red, 2 November 2012

## 6. Issues related to the procedure of appeals

**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, par. 12.

### 6.1. 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-US-Exp, Reclassified as public on 02.02.2007 pursuant to No. ICC-02/04-01/05-135, Pre-Trial Chamber II, 10 July 2006, paras. 17-21.

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. According 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 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, 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, par. 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), 11 October 2012, par. 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, 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 to the Chamber's instruction dated 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, 63-64.

## 6.2. 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, 15-16.

## 6.3. 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, par. 16, No. ICC-02/04-01/05-20, Pre-Trial Chamber II, 19 August 2005, par. 20 and No. ICC-01/04-135, Pre-Trial Chamber I, 31 March 2006, par. 26; No. ICC-02/04-01/05-90-US-Exp, Reclassified as public pursuant to No. ICC-02/04-01/05-135, Pre-Trial Chamber II, 10 July 2006, par. 40; 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, 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, par. 7; and No. ICC-02/11-01/11-265, Pre-Trial Chamber (Single Judge), 11 October 2012, par. 14.

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 inseparable 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, par. 11; No. ICC-02/04-01/05-90-US-Exp, Reclassified as public pursuant to No. ICC-02/04-01/05-135, Pre-Trial Chamber II, 10 July 2006, par. 24. 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.

See No. ICC-01/04-168 OA3, Appeals Chamber, 13 July 2006, par. 12.

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.

See No. ICC-01/04-168 OA3, Appeals Chamber, 13 July 2006, par. 13.

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, par. 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, par. 18. See also No. ICC01/05-01/08-75, Pre-Trial Chamber III (Single Judge), 25 August 2008, paras. 19-20.

The 16 May 2008 Appeals Chamber decision stated that the 13 February 2007 Appeals Chamber decision, which provided that victims shall file an application seeking leave to participate in article 82(1)(b) appeals, is equally applicable to interlocutory appeals under article 82(1)(d).

See. No. ICC-01/04-01/06-1335 OA9 OA10, Appeals Chamber, 16 May 2008, par. 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, 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, par. 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, par. 71.

#### 6.4. 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, par. 4. See also No. ICC-02/04-01/05-92 OA, 13 July 2006, Appeals Chamber, paras. 3-5 (Reclassified as Public pursuant to No. ICC-02/04-01/05-266) and No. ICC-01/04-01/06-1347 OA9 OA10, Appeals Chamber, 22 May 2008, par. 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, par. 11. See also No. ICC-01/04-01/06-1290 OA11, Appeals Chamber, 22 April 2008, par. 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, par. 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.

## 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-US-Exp, 10 July 2006 (Reclassified as public on 02.02.2007 pursuant to No. ICC-02/04-01/05-135, dated 02 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 admissibility 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

Decision on the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-149, 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 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  
Corrigendum to Decision on the defense request for leave to appeal the Oral Decision on redactions



and disclosure of 18 January 2008 (Trial Chamber I), No. ICC-01/04-01/06-1210-Corr, 14 March 2008

Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008 (Appeals Chamber), No. ICC-01/04-01/06-1290 OA11, 22 April 2008

Decision on the Defence request for leave to appeal “Decision on disclosure by the defence” (Trial Chamber I), No. ICC-01/04-01/06-1313, 8 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 the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I’s Decision on Victim’s Participation of 18 January 2008 (Appeals Chamber), No. ICC-01/04-01/06-1347 OA9 OA10, 22 May 2008

Decision on the Defence Application for Leave to Appeal the 14 March 2008 Decision on Victims’ Applications for Participation (Pre-Trial Chamber II, Single Judge) No. ICC-02/04-01/05-296, 2 June 2008

Decision on the Procedure for Leave to Appeal pursuant to article 82 (l)(d) of the Statute, rule 155 of the Rules and regulation 65 of the Regulations and on the Pending Requests for Leave to Appeal Concerning Witnesses 132 and 287 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-601, 17 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

Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the “Decision on the release of Thomas Lubanga Dyilo” (Appeals Chamber), No. ICC-01/04-01/06-1444 OA12, 22 July 2008

Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure (Pre-Trial Chamber III, Single Judge), No. ICC 01/05-01/08-75, 25 August 2008

Decision on the Request of the Prosecutor for Suspensive Effect (Appeals Chamber), No. ICC-01/05-01/08-499 OA2, 3 September 2009

Decision on the Request of M. Bemba to Give Suspensive Effect to the Appeal Against the “Decision on the Admissibility and Abuse of Process Challenges” (Appelas Chamber), No. ICC-01/05-01/08-817 OA3, 9 July 2010

Decision on three applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June 2011 (Trial Chamber II), No. ICC-01/04-01/07-3073-tENG, 14 July 2011

Decision on two requests for leave to appeal the “Decision on two request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application” (Trial Chamber I), No. ICC-01/04-01/06-2779, 4 August 2011

Judgement 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 on the defence request for leave to appeal (Trial Chamber I), No. ICC-01/04-01/06-2874, 4 May 2012 (dated 3 May 2012)

Decision on the “Demande d’autorisation d’interjeter appel de la décision de la Juge unique portant sur la question de la participation des victimes à la procédure relative à l’état de santé du Président Gbagbo et à son aptitude à être jugé” (ICC-02/11-01/11-211) (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-265, 11 October 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, No. ICC-01/04-01/06-2953 A A2 A3 OA21, Appeals Chamber, 14 December 2012

## 7. 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 the suspect. 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.

See No. ICC-01/04-01/06-102, Pre-Trial Chamber I (Single Judge), 16 May 2006, paras. 29-37.

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, par. 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.

See No. ICC-01/04-01/06-437, Pre-Trial Chamber I (Single Judge), 15 September 2006, p. 7.

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, p. 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*.

See No. ICC-01/04-01/06-568 OA3, Appeals Chamber, 13 October 2006, par. 1.

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*.

See No. ICC-01/04-01/06-568 OA3, Appeals Chamber, 13 October 2006, paras 34-35.

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, par. 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.

See No. ICC-01/04-01/06-773 OA5, Appeals Chamber, 14 December 2006, paras. 1-2.

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.

See No. ICC-01/04-01/06-773 OA5, Appeals Chamber, 14 December 2006, par. 21.

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, par. 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.

See No. ICC-01/04-01/06-773 OA5, Appeals Chamber, 14 December 2006, par. 48.

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. 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*.

See No. ICC-01/04-01/06-774 OA6, Appeals Chamber, 14 December 2006, paras. 1-2 and 31.

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. 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, par. 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, par. 22. See also No. ICC-01/04-01/07-249, Pre-Trial Chamber I (Single Judge), 5 March 2008, par. 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.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, par. 27.

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 than 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, par. 30. See also No. ICC-01/04-01/07-249, Pre-Trial Chamber I (Single Judge), 5 March 2008, par. 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 confidentiality 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.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, paras. 41-42. See also No. ICC-01/04-01/07-249, Pre-Trial Chamber I (Single Judge), 5 March 2008, par. 26; and No. ICC-01/04-01/07-312, Pre-Trial Chamber I (Single Judge), 11 March 2008, p. 6.

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, par. 52.

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, par. 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, par. 55. See also No. ICC-01/04-01/07-249, Pre-Trial Chamber I (Single Judge), 5 March 2008, par. 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, par. 30; and No. ICC-01/04-01/07-425, Pre-Trial Chamber I (Single Judge), 21 April 2008, par. 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, par. 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 (reasonable grounds to believe that they have suffered harm e.g.) 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, par. 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.

See No. ICC-01/04-01/07-160, Pre-Trial Chamber I, 23 January 2008, par. 31.

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.

See No. ICC-01/04-01/07-160, Pre-Trial Chamber I, 23 January 2008, paras. 35-36.

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, par. 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, par. 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.

See No. ICC-01/04-01/06-1368, Trial Chamber I, 2 June 2008, para. 30-31.

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.

See No. ICC-01/04-01/06-1368, Trial Chamber I, 2 June 2008, par. 34.

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, p. 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.

See No. ICC-01/04-01/06-1401, Trial Chamber I, 13 June 2008, par. 71.

The right to a fair trial - which is without a doubt a fundamental right - includes an entitlement to disclosure of exculpatory material.

See No. ICC-01/04-01/06-1401, Trial Chamber I, 13 June 2008, par. 77.

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, par. 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 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, 138-140. See also No. ICC-01/04-01/06-2595-Red, Trial Chamber I, 17 November 2010, par. 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-Corr, Trial Chamber II, 14 September 2010, paras. 36-43, 47-48, 50-53, 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, paras. 4-5.

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, par. 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 disclose. 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's 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 a 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; 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.

See No. ICC-02/11-01/11-195, Pre-Trial Chamber I (Single Judge), 26 July 2012, par. 10.

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, par. 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, 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.

## 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. 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
- Redacted Decision on the prosecution's applications for redactions (Trial Chamber III), No. ICC-01/05-01/08-815, 20 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, 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
- Redacted Version of the Decision on the "Defence Motion for Disclosure Pursuant to Rule 77" (Trial Chamber III), No. ICC-01/05-01/08-1594-Red, 29 July 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
- 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

## 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**

### A. INTRODUCTORY REMARKS

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.

### 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.

## C. OTHER SUBSTANTIVE AND PROCEDURAL ISSUES

### 1. Chamber for the purposes of reparations

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 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.

### 2. Experts pursuant to rule 97 of the Rules

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 d) 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.

### 3. Participants in the reparations proceedings

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.

### 4. Reparations orders against the convicted person or through the Trust Fund for Victims

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.

## 5. Other financing methods

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 9<sup>th</sup> 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.

## 6. Implementation of the reparations plan and role of the Judiciary

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. 176-288.](#)

The Chamber repeats and emphasises that the Decision of 7 August 2012 does not constitute an “*order for reparations*” in the sense of article 82(4), given reparations were not ordered in the Decision. Rather, the Decision establishes principles and procedures relating to reparations, pursuant to article 75(1).

[See No. ICC-01/04-01/06-2911, Trial Chamber I, 29 August 2012, par. 20.](#)

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.

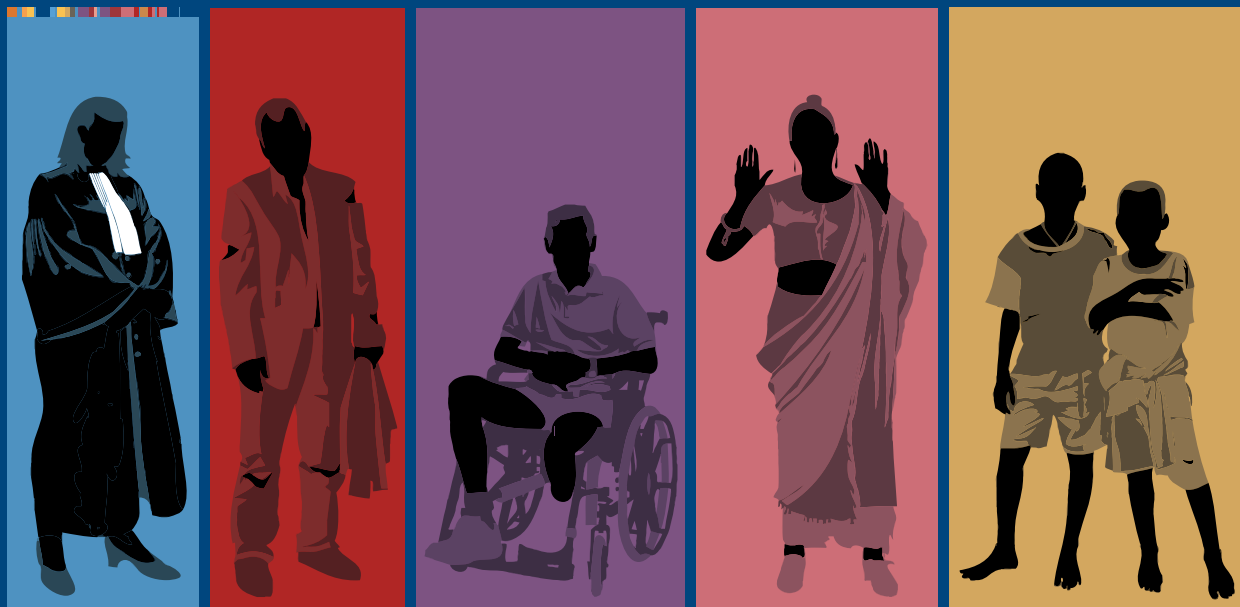
## Relevant decisions regarding issues related to reparations

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



## Part 3

# Practical issues

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## 1. How to file a document in the 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”. If filed electronically, documents and materials shall be sent to the following email address: [judoc@icc-cpi.int](mailto:judoc@icc-cpi.int).

The *Regulations of the Court* and the *Regulations of the Registry* provide for specificities 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

*“4. 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 typeface of all documents shall be 12 point with 1.5 line spacing for the text and 10 point with single spacing for footnotes. An average page shall not exceed 300 words”.*

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 the explanations for its use.

### 2. Time limits for documents filed with the Court

#### **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, 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 21 days of notification in accordance with regulation 31 of the document to which the participant is responding;*
- (c) Subject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days of notification in accordance with regulation 31 of the response”.*

#### **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.”*

### **Regulation 24 of the Regulations of the Registry:**

Responses and replies

*“3. The Presidency, a Chamber or a participant filing a document or material which requires urgent measures to be taken shall 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, a Chamber or the participant requesting urgent measures shall contact the duty officer provided for in regulation 44.”*

#### **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 Friday (or on the day before an official holiday of the Court), the time limit will begin to run from the next working day of the Court, so on next Monday, for 3 days, and the response shall thus be filed at the latest on the next Thursday, 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 the response shall thus be filed at the latest on the next Monday, 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 the response shall thus be filed at the latest on the next Monday (the next working day), between 9am and 4pm The Hague time, since Saturdays and Sundays are considered as calendar days and as such shall be counted in the calculation.

The legal texts of the Court also refer to specific time limits as shown in the following tables:

**Table I – General time limits**

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
<b>Response</b>	Within 21 days of notification	Prosecutor or defence Victims or their legal represent.	Regulation 24(1) & 34(b) Regulation 24(2) & 34(b)	<ul style="list-style-type: none"> <li>To any document filed by any participant in the case</li> <li>When permitted to participate in the proceedings (article 68(3) &amp; rule 89(1))</li> </ul>
<b>Reply</b>	Within 10 days of notification	Participants	Regulation 24(4) & (5), & 34(c)	Only with the leave of the Chamber
<b>Submissions</b>	Within a time limit specified by the Chamber	Participants	Regulation 28	As a consequence of a Chamber's order
<b>Representations</b>	30 days following information given	Victims	Regulation 50(1)	Under art. 15(3) & rule 50(3) (Prosecutor's request for authorization of an investigation)
<b>Evidence in proceedings before the court</b>	Whenever possible Prior to the hearing	Not specified Participant	Regulation 26(4) E-court Protocol as adopted by the Chambers	<ul style="list-style-type: none"> <li>For evidence other than live testimony</li> <li>In electronic form</li> </ul>
<b>Applications to extend or reduce any time limit</b>	Before the lapse of the time limit After The lapse of a time limit	Participants	Regulation 35	<ul style="list-style-type: none"> <li>If good cause is shown For instance, if the document, decision or order is not received (Regulation 31(2))</li> <li>Only if demonstrated that the participant was unable for reasons outside his or her control to respect the deadline</li> </ul>

**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
<b>Appeals under rule 150</b>	30 days from the date on which the party filing the appeal is notified of the relevant document	Not specified	Rule 150(1) Rule 150(2) Rule 152(1)	<ul style="list-style-type: none"> <li>• Appeals under rule 150 are against convictions, acquittals, sentences and reparation orders</li> <li>• The Appeals Chamber may extend the time limit “for good cause”, following an application to this effect</li> <li>• The Appellant can discontinue its appeal any time before judgment</li> </ul>
<b>Document in support of an appeal</b>	Within 90 days of notification date	Not specified	Regulation 58(1)	
<b>Response to the document In support of the appeal</b>	Within 60 days of notification of the document in support of the appeal	Participant	Regulation 59(1)	
<b>Reply to a response to the document in support of the appeal</b>	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
<b>Appeals against other decisions, that do not require the leave of the court</b>	Not later than 5 days from the “notification date”  No later than 2 days from the “notification date”	The party filing the appeal  The party filing the appeal	Rule 154(1)  Rule 154(2)	<ul style="list-style-type: none"> <li>• 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]</li> <li>• For appeals filed under article 82(1)(c) [PTC decision to act on its own initiative under art. 56(3) / unique investigative opportunity]</li> <li>• The Appellant can discontinue its appeal any time before judgment</li> </ul>



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)	<ul style="list-style-type: none"> <li>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]</li> <li>For appeals against decision under article 82(2) [PTC decision under art. 57(3)(d)]</li> <li>The Appellant can discontinue its appeal any time before the judgment</li> </ul>
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 or *ex parte* (confidential and only available to a limited number of persons).

#### **Regulation 23bis 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 of the Regulations of the Registry:**

Responses and replies

"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 legal and factual basis of the document filed shall be stated in the latter itself by the participant filing a document *ex parte*, under seal or confidential.

### 4. Page limits of documents filed with the Court

#### **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 100 pages for the following documents and responses thereto, if any:

[...]

(f) Representations under article 75.

2. Unless otherwise ordered by the Chamber, the page limit shall not exceed 50 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;

[...]".

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 such page limit.

## 2. How to file an application for participation or for reparations in the 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 within the Registry. Pursuant to regulation 86 of the *Regulations of the Court*, a standard form has been developed to this effect and is available on the Website of the Court at the following addresses:

Participation:  
<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Forms.htm>

### 2. Use of the Booklet accompanying the forms

In order to help victims and/or intermediaries and/or legal representatives, the Victims Participation and Reparations Section (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:

<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Participation/Booklet>.

### 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”.

### 4. Address where to send the applications

Once completed, the standards forms should be sent to:

Victims Participation and Reparations Section (VPRS)  
P.O. Box 19519, 2500 CM The Hague  
The Netherlands  
Fax: + 31 (0)70 515 9100  
Email: [vprsapplications@icc-cpi.int](mailto:vprsapplications@icc-cpi.int)

For further details on the completeness of the applications, please refer to Part II of this Manual.

### 3. How to ask for legal assistance paid by the Court?

#### **Rule 90 of the Rules of Procedure and Evidence:**

Legal representative of victims

*"5. 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, the factors mentioned in article 68, paragraph 1, any special needs of the victims, the complexity of the case, the possibility of asking the Office of Public Counsel for Victims to act, and the availability of pro bono legal advice and assistance.*

*3. Regulations 130 - 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 for his or her client.

A specific section within the Registry – the Counsel Support Section (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.

##### **By mail**

[css@icc-cpi.int](mailto:css@icc-cpi.int)

##### **By postal mail**

ICC – Counsel Support Section  
P.O. Box 19 19519  
2500 CM, The Hague  
The Netherlands

##### **By phone:**

+31-(0)705158787

#### 2. Criteria used for the evaluation of such applications

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, the factors mentioned in article 68, paragraph 1, any special needs of the victims, the complexity of the case, the possibility of asking the Office of Public Counsel for Victims to act, and 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 means and whether or not full or partial payment should be made.

Details on the payment scheme can be found in the reports of the Committee of Budget and Finance to the Assembly of State Parties (See the Report on the principles and criteria for the determination of indigence for the purposes of legal aid (pursuant to paragraph 116 of the Report of the Committee on Budget and Finance of 13 August 2004), ICC-ASP/6/INF.1, 31 May 2007).

## 4. How to constitute 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 legal representatives 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. These lists are 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 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 to be assisted by professional investigators if investigative actions are needed for the representation of the interests of their clients. Appeal to an investigator may be useful, for instance, during the reparations proceedings when victims will need to present evidence of the harm suffered in support of their claims to the relevant Chamber.

#### **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. The issue of the language used in the proceedings

Considering that the proceedings before the Court are conducted in English and French, it is essential that legal representatives constitute teams including people speaking both working languages. Despite the fact that decisions and orders are translated into both languages, such translations are not 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 to be assisted by an interpreter, if they do not speak the language of the victim(s) they represent.

### 3. Examples for the constitution 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 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 they also need to be able to respond to any written submissions in the proceedings at the same time;
- The need for maintaining a constant contact with their clients – who are usually located outside The Netherlands and in remote areas of the country of their residence - in order to be able to collect their views and concerns and to keep them updated of 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 the trial stages. The possibility for legal representatives to question witnesses, experts and the accused, to submit evidence as well as a list of witnesses and experts gives 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 regards to the provision of support and assistance to external legal representatives, the Office of Public Counsel for Victims (OPCV) has developed several tools with the aim of enhancing effectiveness and promptness of answers.

The Office has created a Library for the use of its staff and for the use of external legal representatives' teams. The sections of the library are divided per subject and include, *inter alia*, a section on gender issues, one on children issue, one on reparations issues, one on victims in general, and section per 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 in the proceedings before the Court, the Office has also drafted researches 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 for the draft 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](mailto:OPCV@icc-cpi.int)

## 6. Some information on research methodology

### 1. ICC Legal Tools Project

Since 2002, work has steadily progressed at the ICC on a range of electronic legal services known as the Legal Tools Project. The Project provides a comprehensive collection of resources relevant to the theory and practice of international criminal law and brings modern technologies into the investigation, prosecution and defence of core international crimes.

The Legal Tools Project is composed of a wide range of electronic legal tools and services. The Project has developed the Legal Tools Database which contains repositories of key Court documents and collections of legal research resources in international criminal law. This 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) 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.

## How are the Legal Tools being maintained?

The Legal Tools undergo continuous content and technical development in order to keep improving their quality, scope and relevance. Given the limited human resources available in the operational environment of a court such as the ICC, this development work has been outsourced without cost to the Court to institutions with expertise in this field. The ICC draws on the support of outside partners for the development and maintenance of the Legal Tools. With the assistance of these partners, who raise their own funds, the Court expects to stimulate further contributions and engage new partners to expand and improve the Legal Tools. Currently, the governments of Austria, Germany, Norway and Switzerland have contributed to the Legal Tools activities of the outsourcing partners. The Legal Tools Advisory Committee oversees that user needs within the different organs of the Court properly guide future development work. In addition, an external Legal Tools Expert Advisory Group comprising leading legal technology experts has been established to serve as a sounding board for the future development of the Legal Tools.

**The Legal Tools are available at:**

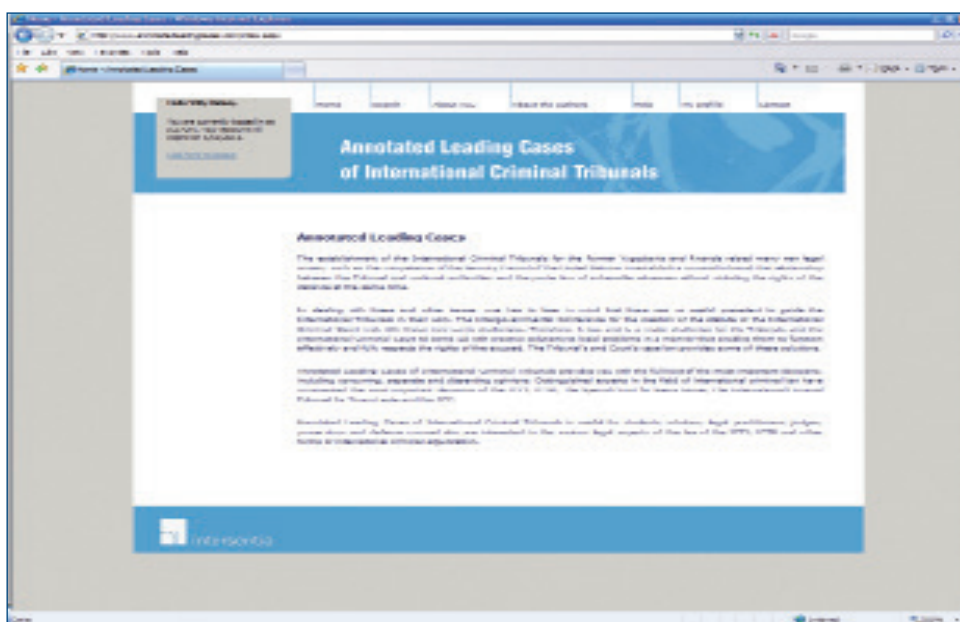
[www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/](http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/)

## 2. Databases on the Law of the International Criminal Court

### 2.1. Annotated Leading Cases

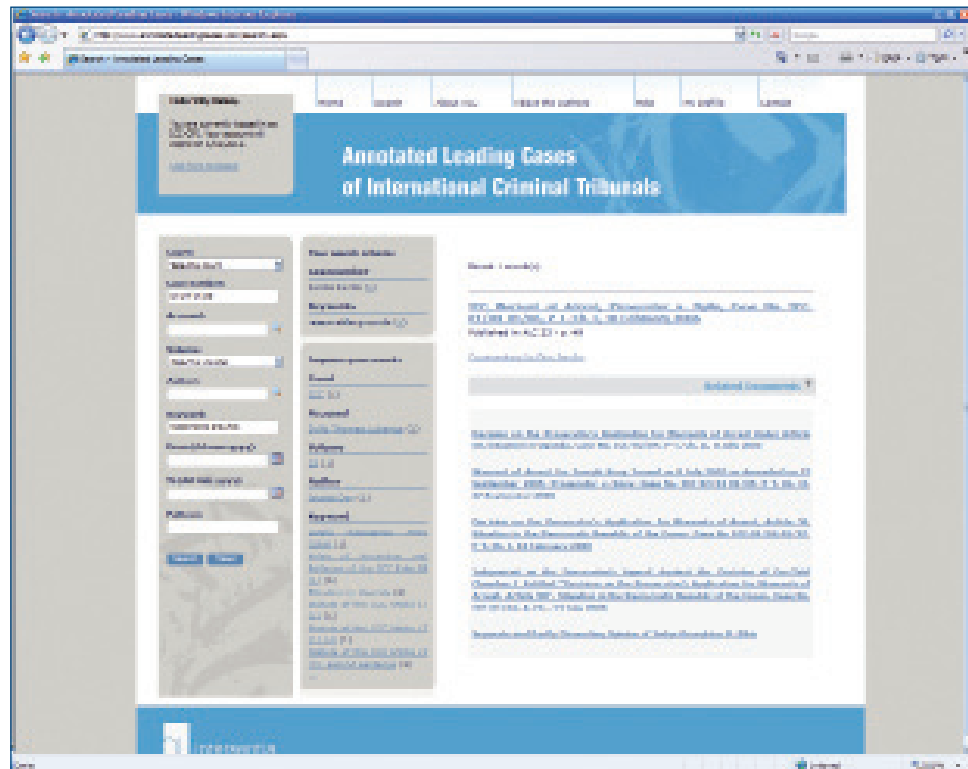
This database is published under the editorial supervision of Prof. André Klip (Maastricht University, the Netherlands) and Prof. Göran Sluiter (University of Amsterdam, the Netherlands). It provides the full text of the most important decisions of the ICC, ICTY, ICTR, and other international courts. 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>

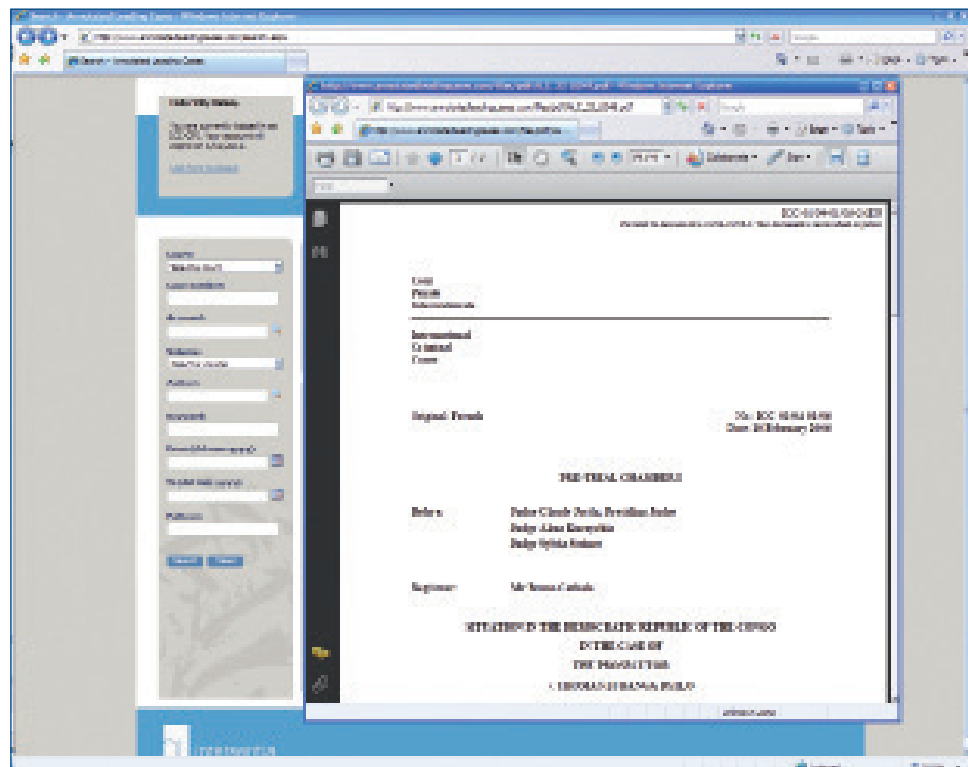




The cases of the international courts are searchable through several filters.



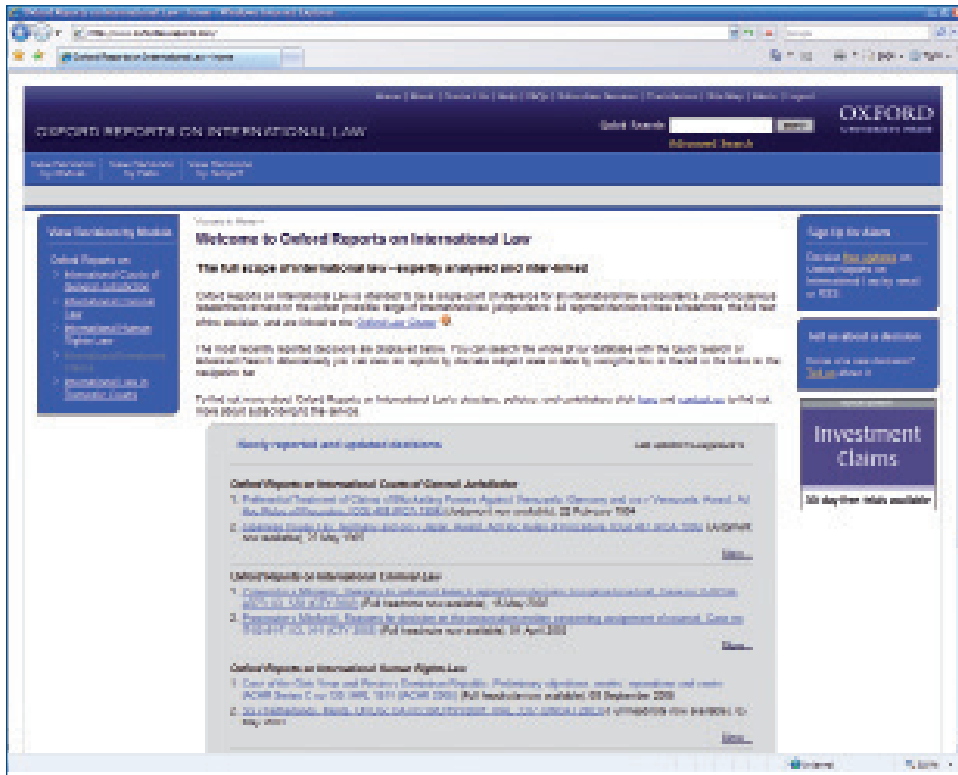
The most valuable service offered by this database is the provision of commentaries of decisions by experts in the international criminal law. These commentaries provide lots of useful information about the case law, including general remarks on the decision, the main legal issues at stake, and the relevant statutory texts and jurisprudence on the subject.



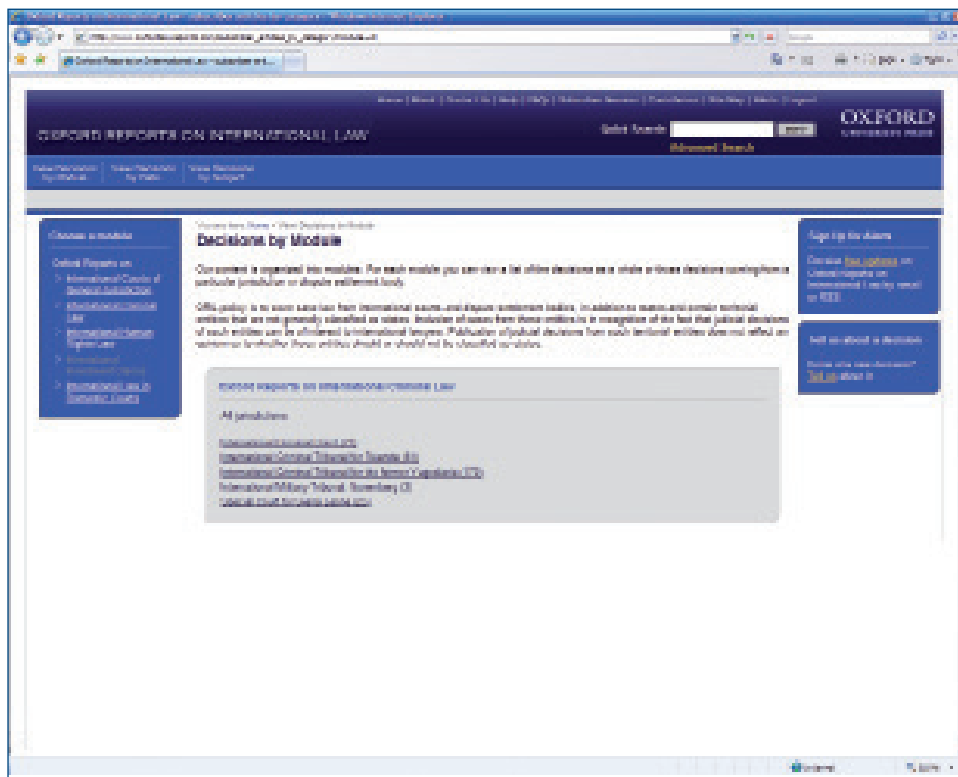
## 2.2. Oxford Reports on International Law

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

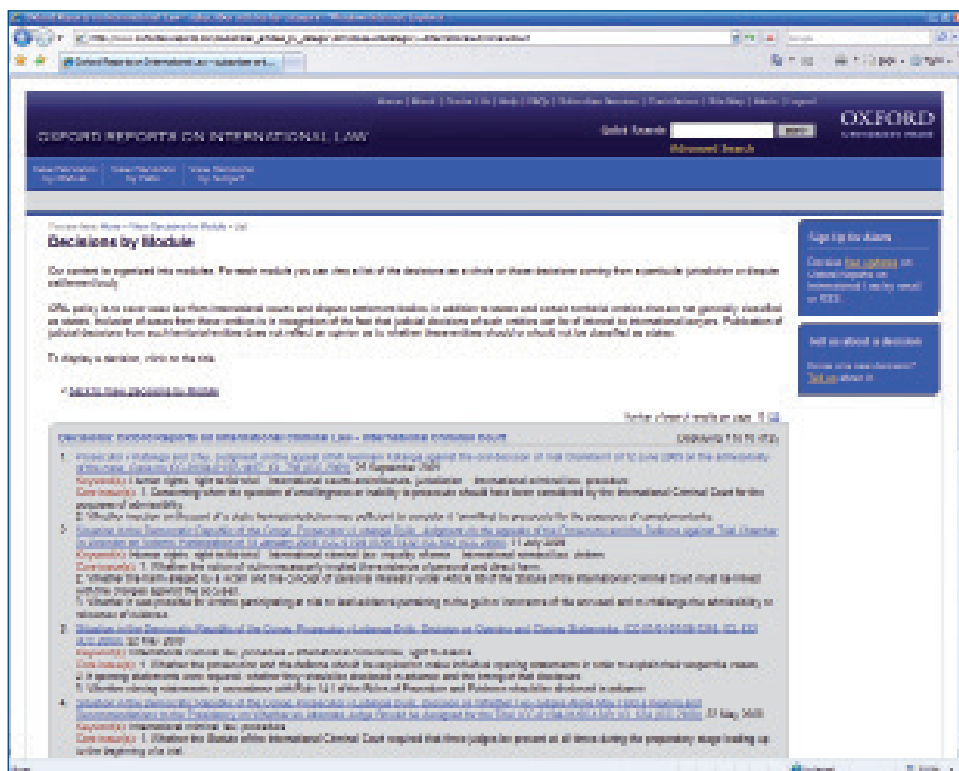
service is available through the ICC Library. However, it is offered on a subscription basis for private users. <http://www.oxfordlawreports.com/>



One of the modules is the Oxford Reports on International Criminal Law, which focuses on decisions from 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.

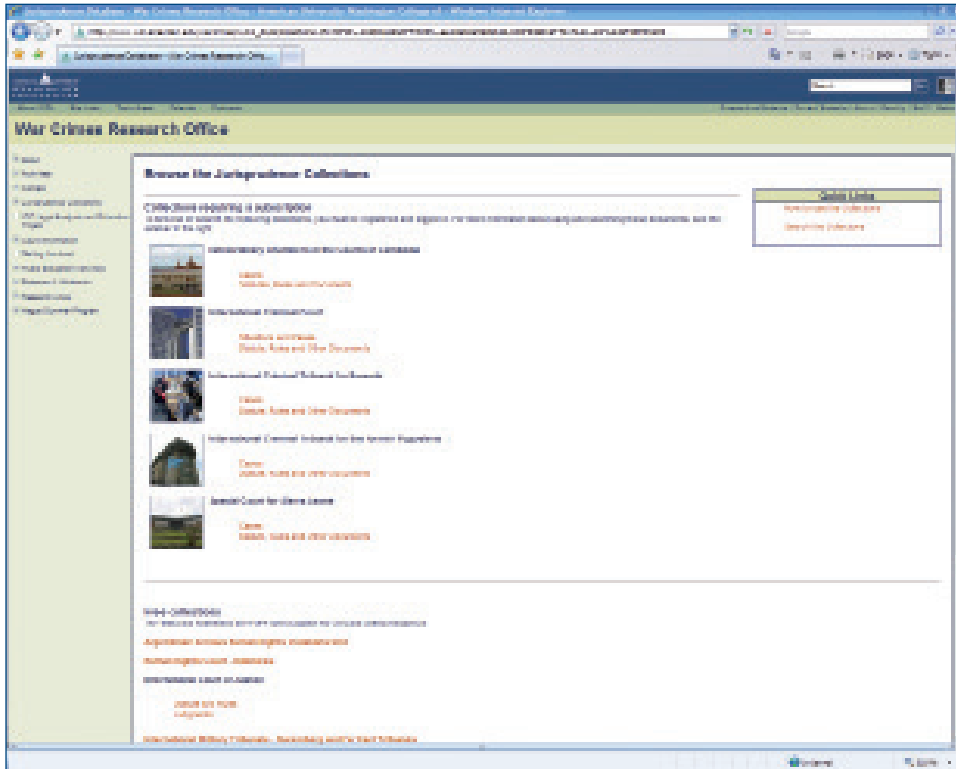


### 2.3. Jurisprudence Collections by the War Crimes Research Office

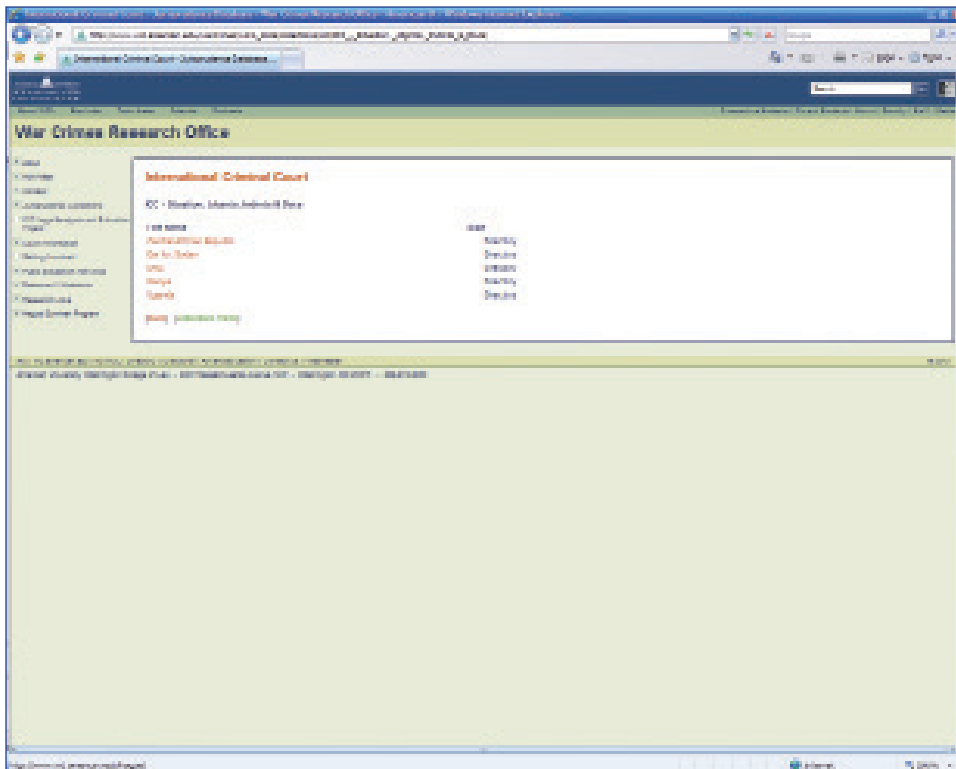
This database, which is maintained by the War Crimes Research Office of the American University Washington College of Law, provides a regularly updated, searchable database of jurisprudence

and key documents relating to international criminal courts and tribunals including the ICC. This database is available through the ICC Library. However, it is offered on a subscription basis for private users. The web address is:

[https://www.wcl.american.edu/warcrimes/wcro\\_docs/collections.cfm](https://www.wcl.american.edu/warcrimes/wcro_docs/collections.cfm).



The Jurisprudence Collections of this website also offers a searchable engine on the case law of the ICC.



Moreover, one of the most useful works done by the War Crimes Research Office 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.



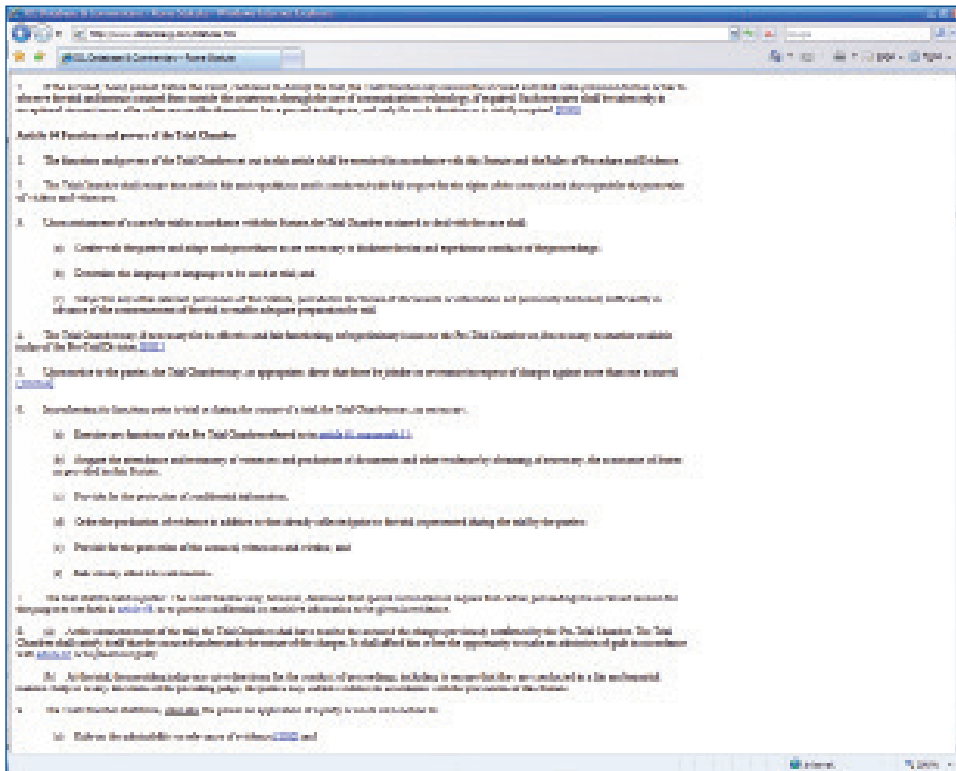
The series now include “Victim Participation Before the International Criminal Court”, “Interlocutory Appellate Review of Early Decisions by the International Criminal Court”, “The Gravity Threshold of the International Criminal Court”, “Protecting the Rights of Future Accused During the Investigation Stage of International Criminal Court 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”.

#### 2.4. ICL Database & Commentary

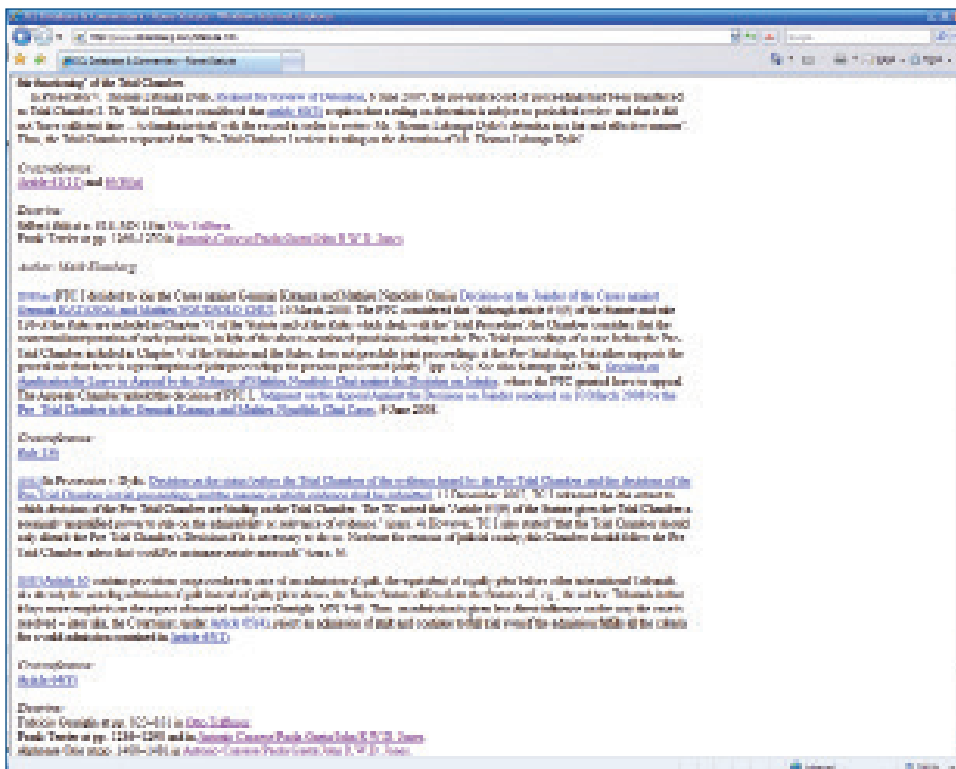
This is very useful database on the interpretation of the statutory texts and the case law of the ICC. The database is free of charge and available online. According to the website, the database developed by Dr. Mark Klamberg, aims at providing scholars, as well as practitioners, with a starting point for legal research in the field of international criminal law. The web address is <http://www.iclklamberg.com/>. The ICL Database & Commentary firstly offers a commentary to the *Rome Statute* and other statutory instruments, including the *Rules of Procedure and Evidence*.



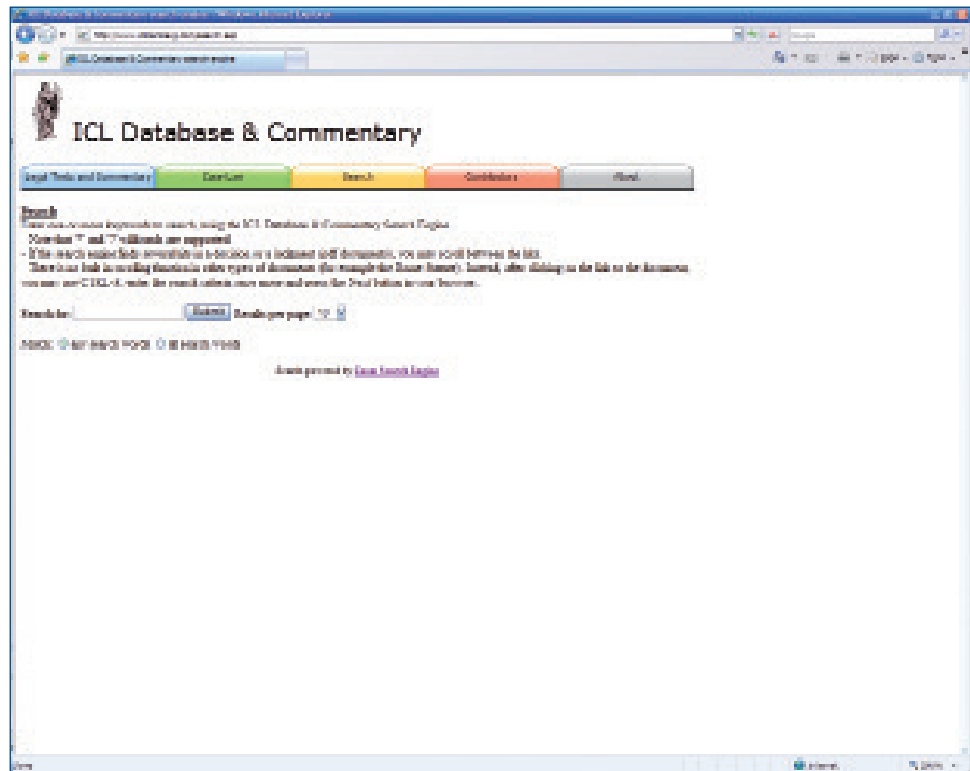
The commentaries are sorted under the relevant provisions of the *Rome Statute* and other statutory instruments. The commentaries also mention the relevant doctrines by quoting specific citations of the literature on the subject, and refer to relevant official documents of the Court on the provisions and decisions by ICC Chambers interpreting the said provisions.



All references are hyperlinked in order to allow for cross-checking of the relevant authorities.

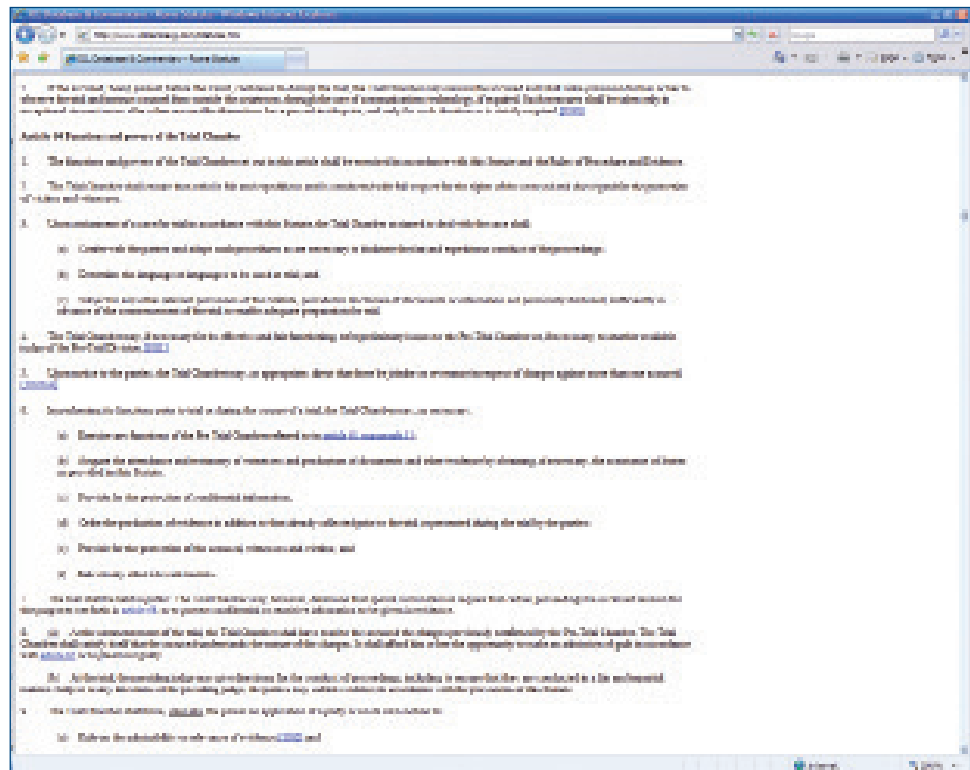


Secondly, the database offers the collection of the ICC case law. Lastly, the database also offers a Search Engine which allows the users to search by using key words in both the commentary and the case law sections at once.

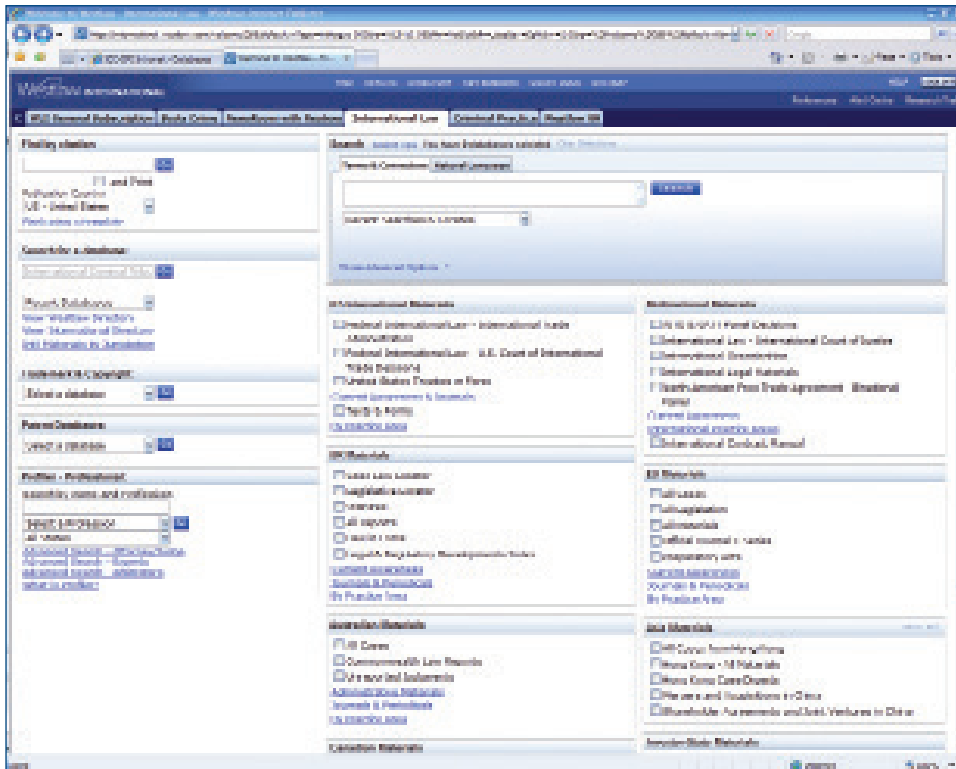


## 2.5. Westlaw International

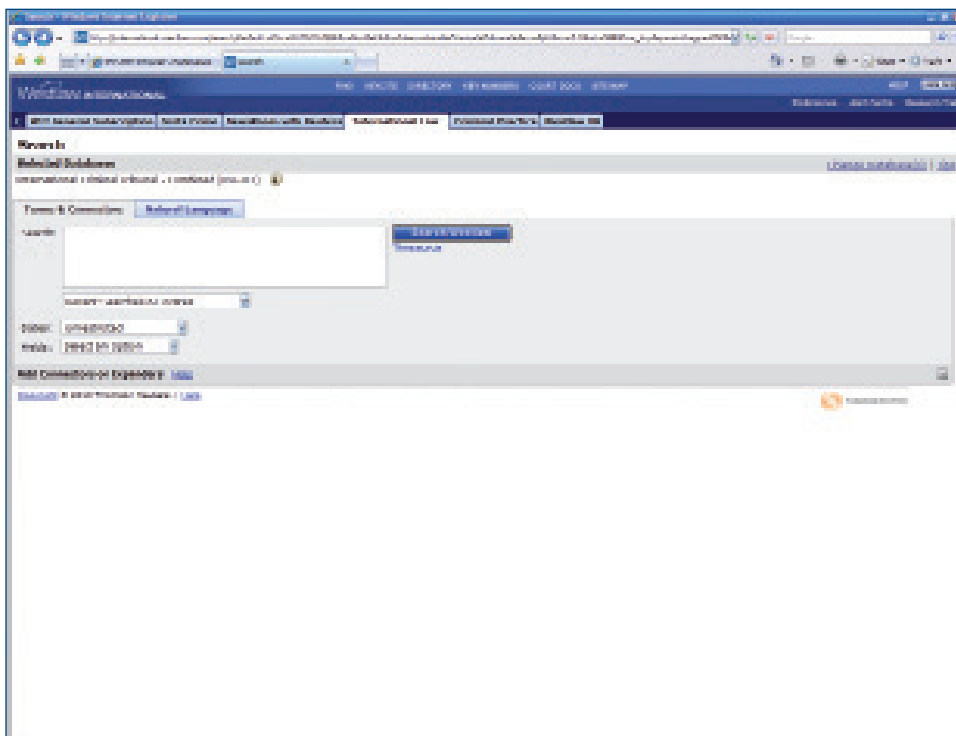
*Westlaw International* is one of the primary online legal research services for legal professionals, otherwise available on subscription. *Westlaw International* offers a range of legal materials including US, Canadian and European legislations, case law, and law journals/reviews etc.



However, to this day, the Westlaw does not have a specific database for the ICC. Nonetheless, the most important feature of Westlaw for lawyers practising before the ICC is the database on the case law of the *ad hoc* Tribunals - “International Criminal Tribunal - Combined (INT-ICT)”

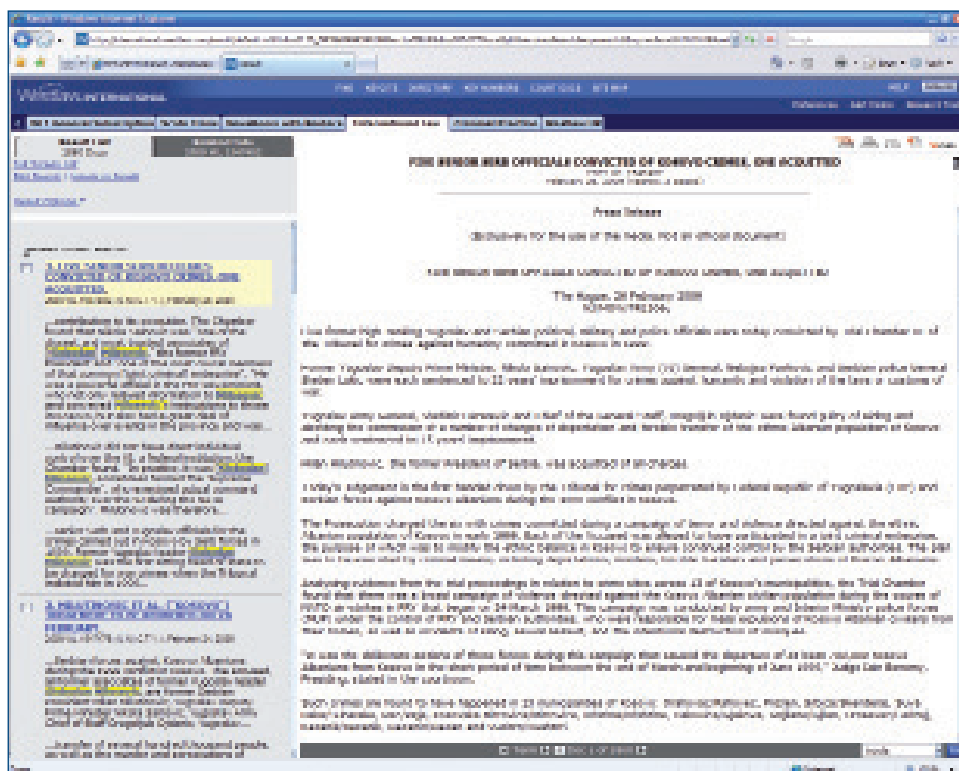


The advantage of this database is the fact that users may not only search documents by using key words (Terms and Connectors) but also by using Natural Language Method. According to the website, “*this method allows the user to use plain English by entering the description of the subject as Westlaw will 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/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

**N.B. Please note that this Database is accessible only to counsel acting before the Court via CITRIX**

In order to make a research of the jurisprudence of the Court itself, the use of the Court Records Database is very useful. It allows for a greater focus on the research by giving either 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 isolate the type of document, the language of the document 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 a proceeding 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 do not allow the person making the research to have access to them.

## 7. What are the specificities of the different sections of the Court dealing with victims?

Within the remit of the Registry, the Office 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 (VPRS) is a section within the Registry dealing with victims' participation and reparations, with the responsibility for assisting victims and groups of victims to understand how victims 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 filling in their application forms for participation and/or reparations, as well as of providing them with all information necessary to be able to exercise their rights under the *Rome Statute*.

The Victims and Witnesses Unit (VWU) 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 on account of testimony. The VWU 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 advise 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](http://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/ww/en/pub/research/details/publications/institute/wcd.cfm?100000000000.cfm](http://www.mpil.de/ww/en/pub/research/details/publications/institute/wcd.cfm?100000000000.cfm)
- Permanent Court of Arbitration ([www.pca-cpa.org](http://www.pca-cpa.org))
- European Court of Human Rights ([www.echr.coe.int](http://www.echr.coe.int))
- African Commission on Human and Peoples' Rights ([www.achpr.org](http://www.achpr.org)) [An African Court on Human and Peoples' Rights has been established but it does not have any website yet]
- Inter-American Court of Human Rights ([www.corteidh.or.cr/](http://www.corteidh.or.cr/))
- There are many regional courts which jurisprudence may be relevant to counsel work on legal analysis and doctrine [Caribbean Court of Justice ([www.caribbeancourtjustice.org/](http://www.caribbeancourtjustice.org/)); Eastern Caribbean Supreme Court ([www.eccourts.org/](http://www.eccourts.org/)); etc.]

### 2. International Criminal Tribunals

- International Criminal Tribunal for the Former Yugoslavia (ICTY) ([www.un.org/icty/](http://www.un.org/icty/))
- International Criminal Tribunal for Rwanda (ICTR) ([www.unicttr.org](http://www.unicttr.org)) ([www.icttr.org](http://www.icttr.org))

### 3. Mixed Courts

- Special Court of Sierra Leone (SCSL) ([www.sc-sl.org](http://www.sc-sl.org))
- East Timor – Dili District Courts on the Judicial System Monitoring Programme ([www.jsmp.minihub.org/](http://www.jsmp.minihub.org/))
- Extraordinary Chambers in the Courts of Cambodia (EECC) ([www.cambodia.gov.kh/krt/english/index.htm](http://www.cambodia.gov.kh/krt/english/index.htm)) [See also: United Nations Assistance to Khmer Rouge Trials ([www.un.org/law/khmerougetrials/](http://www.un.org/law/khmerougetrials/)); Khmer Rouge Trial Web Portal ([www.krtrial.info/](http://www.krtrial.info/)) (website in Cambodian)]
- Special Tribunal for Lebanon (STL) ([www.stl-tsl.org](http://www.stl-tsl.org))

#### 4. Other Websites

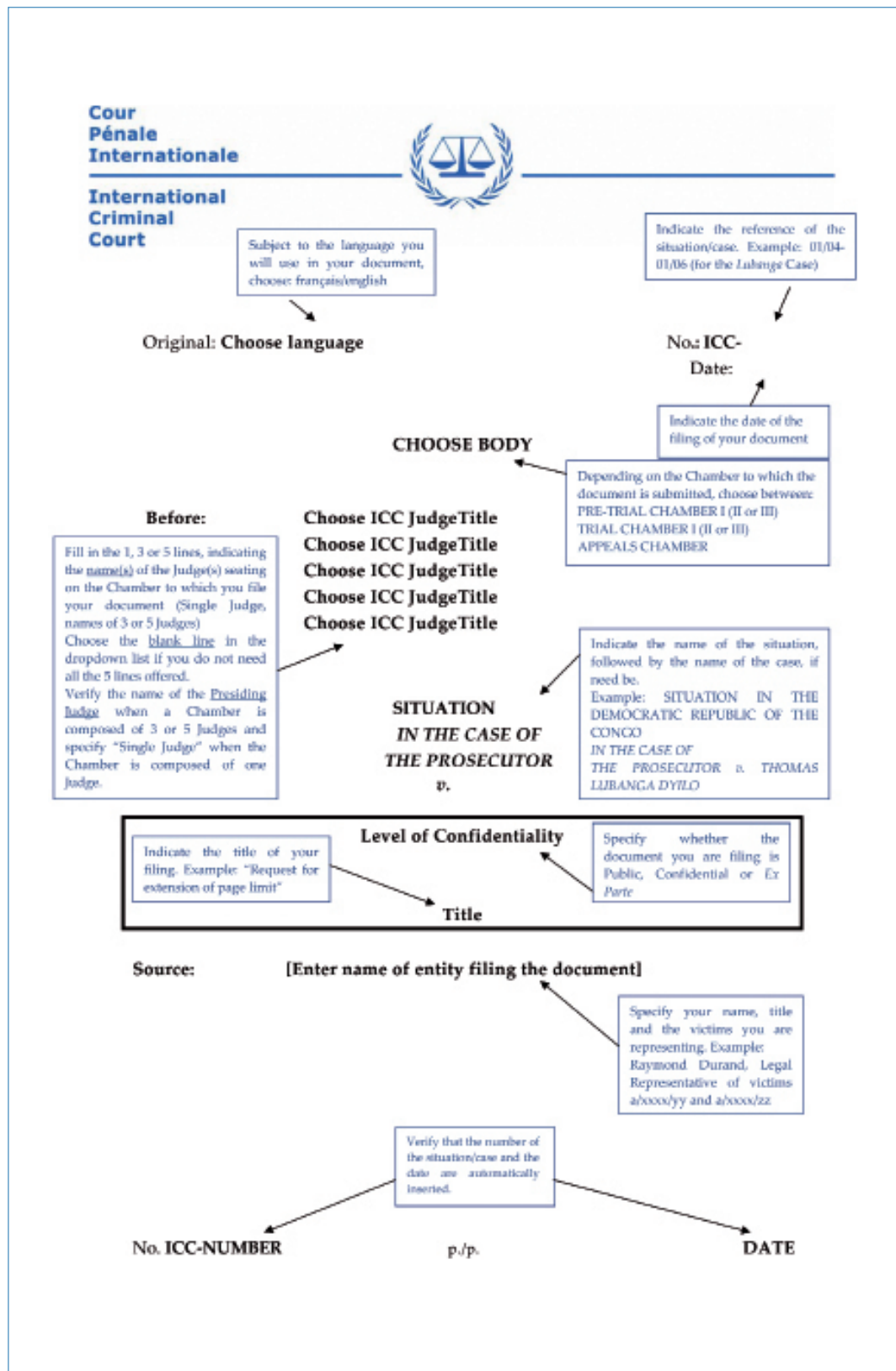
- Iraqi Special Tribunal ([www.iraqspecialtribunal.org](http://www.iraqspecialtribunal.org))
- African International Courts and Tribunals ([www.aict-ctia.org](http://www.aict-ctia.org))
- Peace Palace Library ([www.ppl.nl](http://www.ppl.nl))
- Project on International Courts and Tribunals ([www.pict-pcti.org](http://www.pict-pcti.org))
- Harvard University (Law School), ILS Websites – Foreign & International Law Resources: An Annotated Guide to Websites Around the World ([www.law.harvard.edu/library/services/research/guides/international/web\\_resources/index.php](http://www.law.harvard.edu/library/services/research/guides/international/web_resources/index.php))
- Georgetown University, Law Library – Researching International & Foreign Law ([www.ll.georgetown.edu/intl/guides/index.html](http://www.ll.georgetown.edu/intl/guides/index.html))

## 9. Basic book references

- ASCENCIO (H.), DECAUX (E.) et PELLET (A.) (dir.), *Droit international pénal*, Pedone, 2000, 1053 pp.
- BASSIOUNI (C.), *Introduction au droit pénal international*, Bruylant, 2002, 364 pp.
- BOURDON (W.), *La Cour pénale internationale: le Statut de Rome*, Paris, Editions du Seuil, 2000, 364 pp.
- CASSESE (A.), GAETA (P.) & JONES (J.R.W.) (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, 2018 pp.
- CRYER (R.), *Prosecuting International Crimes: Selectivity and the International Criminal law Regime*, Cambridge University Press, 2005, 392 pp.
- CURRAT (P.), *Les crimes contre l'humanité dans le Statut de la Cour pénale internationale*, Bruylant, 2006, 806 pp.
- FERNANDEZ (J.) & PACREAU (X.), *Statut de Rome de La Cour Pénale Internationale*, Commentaire Article par Article, Editions A. Pedone, 2012, 2459 pp.
- JONES (J.R.W.) & POWLES (S.), *International Criminal Practice*, Oxford University Press, 3rd edition, 2003, 1085 pp.
- LEE (R.S.) (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, 1999, 657 pp.
- LEE (R.S.) (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, N.Y., Transnational Publishers, 2001, 857 pp.
- METTRAUX (G.), *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, 2005, 474 pp.
- POLITI (M.) & NESI (G.) (dir.), *The International Criminal Court and the Crime of Aggression*, Ashgate Publishing Limited, 1999, 193 pp.
- SCHABAS (W.), *An Introduction to the International Criminal Court (Third Edition)*, Cambridge University Press, 2007, 562 pp.
- SCHABAS (W. A.), *Genocide in International Law: The Crime of Crimes (Second Edition)*, Cambridge, 2009, 760 pp.
- SCHABAS (W. A.), *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, 1336 pp.
- TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (Second Edition)*, Hart Publishing, Oxford, 2008, 1954 pp.

# 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 non  
applicable

**Legal Representatives of Victims**  
[1 name per team maximum]

**Legal Representatives of Applicants**  
[1 name per team maximum]

**Unrepresented Victims**

**Unrepresented Applicants for  
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**

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**Registrar**

**Defence Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**No. ICC-NUMBER**

**p./p.**

**DATE**

## I. PROCEDURAL HISTORY

Indicate in individual paragraphs each procedural document relevant for 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...”<sup>4</sup>
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 (example: if you end your procedural history with paragraph 3, your first paragraph under your part II will be number 4).

4. Pursuant to article X of the Rome Statute, ...
5. The Legal Representative submits that in accordance with the Decision on ...,

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<sup>4</sup> “Footnotes”: Word templates do not allow adding footnotes to the text. The document will need to be unprotected to allow footnotes.

No. ICC-NUMBER

p./p.

DATE

**II Bis. LEGAL AND FACTUAL BASIS FOR CONFIDENTIAL AND EX PARTE FILING (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.

**III. CORE OF YOUR ARGUMENTS**

The title should reflect your intention and objective with the filing. Example, 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 and thus falls out the numerical order followed for the others paragraphs. For instance:

**ACCORDINGLY**, the Legal Representative respectfully submits/requests/etc....

Erase the grey lines if not necessary

\_\_\_\_\_  
 [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]

Dated this Indicate the date of the filing of your document

At [place, country] Indicate the city and the country from which you are filing your document

No. ICC-NUMBER p./p. DATE



