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THE APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

Public Document

Consolidated Statement of Views and Concerns of the Legal Representatives of the Participating Victims (a/0011/06 to a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07 to a/0038/07) With Respect to the Appeal Chamber's 18 June 2008 Decision on Victim Participation in the Interlocutory Appeals of the Office of Public Counsel for the Defence and the Office of the Prosecutor

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

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**Victims Participation and Reparations
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Introduction

The following sets forth the consolidated “views and concerns” of the Participating Victims concerning: (1) the “single overarching issue” relating to victim participation which Pre-Trial Chamber I certified for appeal in its 23 January 2008 decision¹ and (2) the two appeal issues with respect to which Pre-Trial Chamber I granted leave to the Office of the Prosecution and the Office of Public Counsel for the Defence in its 6 February 2008 decision². As the Appeals Chamber will recall, it granted leave to the Legal Representatives of the Victims to present their “views and concerns” by its 18 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”³.

The Single Judge of Pre-Trial Chamber I granted leave to appeal with respect to the following two issues:

[W]hether Article 68(3) of the Statute can be interpreted as providing for a ‘procedural status of victim’ at the investigation stage of a situation and the pre-trial stage of a case; and (i) if so, whether rule 89 of the Rules and regulation 86 of the Regulations provide for an application process which only aims to grant the procedural status of victim and is thus distinct and separate from the determination of the procedural rights attached to such status; and what are the specific

¹ See the “Decision on the 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), No. ICC-02/05-118, 23 January 2008.

² See the “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), No. ICC-02/05-121, 6 February 2008.

³ See the “Decision on Victim Participation in the appeal of the Office of Public Counsel for Defense 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 Defense against the Pre-Trial Chamber I’s Decision of 6 December 2007” (Appeals Chamber), No. ICC-02/05-138, 18 June 2008.

procedural features of the application process? or (ii) if not, how applications for participation at the investigation stage of a situation and the pre-trial stage of a case must be dealt with.⁴

[W]hether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of a specific proceedings [sic] on the personal interest of the applicants and an assessment as to the propriety of their participation.⁵

Because of the fundamental importance of these two issues with respect to further participation of the Victims in this proceeding, and because these issues self-evidently involve a matter “where the personal interests of the victims are affected”, we respectfully request the Appeals Chamber to “consider” these views and concerns, as provided by Article 68(3) of the Statute.

Pertinent Procedural History

1. On 6 December 2007, the Single Judge of Pre-Trial Chamber I issued the “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”⁶, granting the status of victims in the situation of Darfur, Sudan, to applicants a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07 and a/0038/07⁷.

2. On 23 January 2008, the Single Judge of Pre-Trial Chamber I issued the “Decision on the Request for leave to appeal the “Decision on the Requests of the

⁴ ICC-02/05-118, p. 8.

⁵ ICC-02/05-121, pp. 4-5.

⁶ See the “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), No. ICC-02/05-111, 6 December 2007. See the “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”, No. ICC-02/05-111-Corr, 14 December 2007.

⁷ *Id.*, p. 23.

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”, granting the Office of Public Counsel for the Defence’s (the “OPCD”) request for leave to appeal.⁸

3. On 4 February 2008, the OPCD filed its document in support of the appeal on the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”.⁹

4. On 6 February 2008, the Single Judge of Pre-Trial Chamber I issued the “Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation”, granting the Prosecution and the OPCD requests for leave to appeal.¹⁰

5. On 18 February 2008, the Prosecution¹¹ and the OPCD¹² filed their respective documents in support of their appeals on the “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”.

⁸ See ICC-02/05-118.

⁹ See the OPCD’s Appeals Brief on the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”, No. ICC-02-05-119, 4 February 2008.

¹⁰ See ICC-02/05-121.

¹¹ See the “Prosecution’s Document in Support of Appeal against the 6 December 2007 Decision on the Victims’ Applications for Participation in the Proceedings”, No. ICC-02/05-125, 18 February 2008.

¹² See the “OPCD Appeal Brief on the “Decision on the Application for Participation in the Proceedings of Applicant 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”, No. ICC-02/05-126, 18 February 2008.

6. On 29 February 2008, the Appeals Chamber issued two “Order[s] 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”.¹³

7. On 10 March 2008, the Legal Representatives of Victims (the “Legal Representatives”) filed a “Request of the Legal Representatives of Victims a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/071 to Participate in the Interlocutory Appeals of the Office of the Prosecutor and Office of Public Counsel for the Defence”.¹⁴

8. On 20 March 2008, the Prosecution filed the “Prosecution’s Response to Legal Representative of Victim’s Request to Participate in OPCD’s Appeal against the 3 December 2007 Decision on Production and Disclosure of Material and in the Appeals of the Prosecution and OPCD against the 6 December 2007 Decision on the Victims’ Applications for Participation in the Proceedings”.¹⁵

9. On 20 March 2008, the OPCD filed the “OPCD’s Consolidated Response to the Legal Representatives’ Application to Participate in the Appeals of 4 February 2008 and 18 February 2008”.¹⁶

10. On 18 June 2008, the Appeals Chamber issued the “Decision on Victim Participation in the appeal of the Office of Public Counsel for Defense against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor

¹³ See the “Order[s] 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-02/05-132, 29 February 2008 and No. ICC-02/05-133, 29 February 2008.

¹⁴ See the “Request of the Legal Representatives of Victims a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/071 to Participate in the Interlocutory Appeals of the Office of the Prosecutor and Office of Public Counsel for the Defence”, No. ICC-02/05-134, 10 March 2008.

¹⁵ See the “Prosecution’s Response to Legal Representative of Victim’s Request to Participate in OPCD’s Appeal against the 3 December 2007 Decision on Production and Disclosure of Material and in the Appeals of the Prosecution and OPCD against the 6 December 2007 Decision on the Victims’ Applications for Participation in the Proceedings”, No. ICC-02/05-135, 20 March 2008.

¹⁶ See the “OPCD’s Consolidated Response to the Legal Representatives’ Application to Participate in the Appeals of 4 February 2008 and 18 February 2008”, No. ICC-02/05-136, 20 March 2008.

and the Office of Public Counsel for the Defense against the Pre-Trial Chamber I's Decision of 6 December 2007"¹⁷, granting victims a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07 and a/0038/07 to a/0033/07 and a/0035/07 to a/0038/07 the right to participate in the three appeals by filing their submissions by 25 June 2008¹⁸.

Relevant Arguments of the OPCD and the OTP

I. The OTP Claims

11. The OTP contended that the impugned decisions of the Pre-Trial Chamber involve a "series of interlocking errors of law"¹⁹ which, it submits, "allow[s] formal procedural status to be granted to victims in an investigation solely on the basis of the findings made in the Decision, and in particular without fulfilling the criteria and complying with the requirements of Rule 89(1)"²⁰. According to the OTP, Article 68(3) and Rule 89(1) preclude the granting of procedural status to a victim and to permit such a victim's participation in the proceedings at the situation and investigation stage, without *simultaneously* making findings with respect to the "specific proceedings in which victims could exercise meaningful rights" and on the "modalities through which those rights could be exercised"²¹. Moreover, the OTP contended that the impugned Decision failed to make proper determinations that the "the personal interests of the victims are affected in general at the investigation stage of the proceedings"²², and whether the participation of the victims was "appropriate" within the meaning of the term in Article 68(3)²³.

¹⁷ See the "Decision on Victim Participation in the appeal of the Office of Public Counsel for Defense 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 Defense against the Pre-Trial Chamber I's Decision of 6 December 2007" (Appeals Chamber), No. ICC-02/05-138, 18 June 2008.

¹⁸ *Id.*, para. 63.

¹⁹ ICC-02/05-125, para.10.

²⁰ ICC-02/05-125, para.11.

²¹ *Id.*

²² *Id.*, para. 20. The OTP further argues, *inter alia*, that the investigation of a Situation is not a "stage of the proceedings" as contemplated by Article 68(3), but rather is a "phase" of the proceeding, and that "stages" of the proceedings "by contrast, are times within a proceeding or phase of proceedings". *Id.*, paras. 11, 42-45. On behalf of the Participating Victims we respectfully submit that such artificial distinctions are nowhere supported by Article 68(3) or Rules 89-93. Indeed, if resort be made to textual analysis outside of the overall structure and context of the Statute, we would note that Rule 92 clearly contemplates victim participation at the situation and investigation stages of the proceedings, inasmuch as Rule 92 requires notification to victims even of decisions of the Prosecutor not to initiate

II. The OPCD Claims

12. The OPCD claims that the Single Judge's decisions result in victims being granted the right to participate based only on fulfilling the definition of victim under Rule 85(a).²⁴ The OPCD also claims that the Single Judge's methodology eschews the necessity to make a "specific determination as to whether it is appropriate for the applicants to participate at the situation stage"²⁵. The OPCD asserts that "there can be no procedural status of 'victim' during the investigative and pre-confirmation stage"²⁶ and, indeed, more broadly contends that there can be no recognized victim participation at the situation stage²⁷ but rather such participation "would be more appropriately deferred to case proceedings"²⁸.

III. Views and Concerns of the Victims on Appeal

13. We respectfully submit that: (1) the decisions of the Single Judge properly considered and applied the elements of Article 68(3) of the Statute and Rule 89, and were not erroneous; (2) the jurisprudential approach to victim participation suggested by the OTP and the OPCD is unsupported by Article 68(3) and Rules 89-93, is unworkable in practice, and would effectively bar the door to victim participation at the very gateway to the proceedings. As a practical matter, such an approach would almost certainly overwhelm the limited resources of vulnerable victims. It threatens to cause a needless multiplicity of proceedings within

an investigation or not to prosecute pursuant to Article 53, "to allow victims to apply for participation in the proceedings". Indeed, "such a notification shall be given to victims or their legal representatives *who have already participated* in the proceedings" (emphasis added). These provisions of the rules would have no meaning if victim participation were excluded at the situation stage.

²³Id., paras. 36-45. Elsewhere, in the Situation in the DRC, the OTP has flatly argued that there are no "proceedings" within the meaning of Article 68(3) during the investigation stage within which a victim may participate and that in any event victim participation at this stage is "inappropriate". See "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", No. ICC-01/04-101-tEN-Corr 22-03-2006, para. 25.

²⁴ ICC-02/05-126, paras 13-14.

²⁵ Id., para. 8.

²⁶ Id., para. 11.

²⁷ Id., paras. 25-47.

²⁸ Id., para. 47.

proceedings. In the end, it would fundamentally thwart the central role for victim participation contemplated by the Statute.

- i. The Decisions of the Single Judge Properly Considered and Applied the Criteria of Article 68(3) and Rule 89 and Did Not Improperly Collapse Them Into a Single Determination of "Victim"*

14. Both the OTP and the OPCD argue that the Decisions of the Single Judge fail to apply the criteria of Article 68(3) and Rule 89. They suggest that the Decisions improperly collapsed evaluation of "affected personal interests" and the "appropriateness" of the proceedings into the determination of the status of "victim"²⁹. We respectfully submit that, to the contrary, the Decision properly considered and applied the criteria in a manner appropriate to the context of proceedings as the situation stage.

15. We wish to underline the *rationale* behind Article 68(3) and Rule 89 of the Rules of Procedure and Evidence. If rule 89 of the Rules of Procedure and Evidence indeed establishes that the Chamber "shall then [after the determination of the rule 85's criteria] specify the proceedings and manner in which participation is considered appropriate", it does not specifically require that this determination be made simultaneously with the assessment of the criteria established in rule 85 of the Rules of Procedure and Evidence. Such reasoning finds its basis in the relevant texts of the Court which specifically detach the two procedures (*i.e.* the determination of the status of victim and the determination of the modalities of participation), organizing the respective criteria to be fulfilled in two distinct provisions, rule 85 of the Rules of Procedure and Evidence on the one hand, and Article 68(3) of the Rome Statute on the other hand. In this regard, the analysis of Article 68(3) and Rule 89 conducted by the Single Judge of Pre-Trial Chamber I is perfectly in compliance with these provisions. The Single Judge found that "the assessment of the personal interests of

²⁹ ICC-02/05-126. para. 13. "Pursuant to the methodology employed by the Honourable Single Judge, if applicants meet the definition of victim under rule 85, then they are automatically granted a right to participate in the proceedings, since the elements of personal interests and propriety of participation are *ipso facto* fulfilled". *Id.*

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.”³⁰ The Single Judge’s complementary finding that the application process has a “distinct and specific nature and [a] limited object and purpose”³¹ is in line with the binary procedure by which the status of victim and modalities of participation must be determined.

16. According to the Prosecution, the “[f]irst Error [would be that] article 68(3) of the Rome Statute and Rule 89(1) of the Rules of Procedure and Evidence do not establish a process in which formal status in the proceedings can be granted in the absence of specified proceedings and a finding on the modalities of participation.”³² Our reading of rule 89(1) of the Rules of Procedure and Evidence differs from the Prosecution’s. Moreover, the Prosecution, paradoxically, lines up with our interpretation too, admitting that “once this status has been determined for a given and specific set of proceedings, there is no need to re-address this status as the initial determination can be used in subsequent proceedings; only personal interests, appropriateness and modalities of participation need to be revisited”³³. Furthermore, Judge Blattmann’s statements regarding the requirement of two applications (one to be granted the status of victim and the other to indicate the specific stage of the proceedings victims may participate in) sets forth our argument about the difficulty such a system would place on the victim. Judge Blattman states that a dual application process would “plac[e] too large a burden on victims. It should be possible for victims to apply to participate fully in their original application. Any information needed by the Trial Chamber to determine their right to participate and

³⁰ ICC-02/05-111-Corr, para. 13.

³¹ ICC-02/05-121, pp. 9-10.

³² ICC-02/05-126, paras. 12-19.

³³ ICC-02/05-125, para. 19.

the appropriate moment at which to do so should be extracted by the Chamber from the information provided in the original victim application”³⁴.

17. We submit also that the evaluation of the personal interests’ criterion cannot be made before, or even concurrently with, the evaluation of the criteria established in rule 85 of the Rules of Procedure and Evidence without being in contradiction with all the other relevant provisions of the texts of the Court foreseeing the participation of victims at different stages of the proceedings. Some of these provisions³⁵ allow the participation of victims without an evaluation of the criteria pertaining to article 68 or rule 85 being needed. The Legal Representatives further argue that the general presumption should be, as set by the Pre-Trial Chamber, that the personal interests of victims are generally affected at this stage of the proceedings, and that the burden of proving the contrary lies with adverse parties. Such an approach is not only coherent with the letters of the relevant texts of the Court relating to the rights of victims but is also the only logical one allowing these rights to be exercised efficiently and in the respect of the principle of fair and expeditious proceedings.

18. We believe that the Appeals Chamber’s evaluation of how the criteria must be applied should properly take into account the nature and characteristics of the stage of the proceedings in which such evaluation takes place, rather than to compel the Chamber to adopt a “one-size-fits-all” methodology which might be appropriate for the trial stage, but wholly inappropriate for the situation and investigation stage.

19. The Decisions of the Single Judge did not improperly collapse consideration and evaluation of the criteria of “affected personal interests” and “stages of the proceedings determined to be appropriate” into merely a determination of victim status at the situation stage. To the contrary, the Single Judge, following the

³⁴ See the Separate and Dissenting Opinion of Judge René Blattmann, accompanying the “Decision on victim's participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, para. 22.

³⁵ See the Rome Statute of the International Criminal Court, Articles 15(3) and 19(3). See also Rules of Procedure and Evidence ICC-ASP/1/3, 119.

jurisprudence of Pre-Trial Chamber I and the Appeals Chamber, considered each criterion separately and applied each one correctly to the applications for participation before her.

20. First, in relying upon the Pre-Trial Chamber I Decision on Victim Participation of 17 January 2006³⁶, which “established the core principles and requirements for victim participation at the situation stage”³⁷, the Single Judge correctly recognizes that the situation stage, including the investigation, constitute “proceedings” within the meaning of Article 68(3). We respectfully refer the Court to the Pre-Trial Chamber I Decision on Victim Participation (hereafter, “Pre-Trial Chamber I Decision”) paragraphs 28-54.

21. Second, it is likewise apparent that the Pre-Trial Chamber carefully evaluated whether the participation of victims is “appropriate” during the investigation of a situation, and considered it as a separate criterion for evaluation³⁸. In this regard, the Pre-Trial Chamber recognized that the situation stage, including investigation, is *sui generis*, and is more open, flexible and wide-ranging by its very nature. It decided that “the Chamber considers that giving persons with the status of victims the right to present in general terms their views and concerns regarding the situation and to submit material to the Pre-Trial Chamber cannot have an adverse effect on the investigation”³⁹. Thus, the Chamber recognized the generality and broad nature of the situation stage, and in the Situation in the DRC accordingly granted a scope of victim participation consonant with that generality and breadth: to “present in general terms their views and concerns regarding the situation” and to “submit

³⁶ See ICC-01/04-101-tEN-Corr.

³⁷ ICC-02/05-111-Corr, para. 1.

³⁸ ICC-01/04-101-tEN-Corr, paras. 56-60. We note that Pre-Trial Chamber I was not called upon to formulate a fully-developed jurisprudence on victim participation as part of its decision and thus cannot properly be criticised on that basis. Such a fully-developed jurisprudence can only evolve, or be discovered, in the fullness of time, as issues raised by such participation require resolution. Rather, the decision of Pre-Trial Chamber I in the DRC situation only addressed and resolved those specific challenges and objections to victim participation presented by the parties to that matter.

³⁹ *Id.*, para. 59.

material to the Pre-Trial Chamber". This approach is not inconsistent with, but rather is obedient to, the dictates of Rule 89 which require the Chambers to "specify the proceedings and manner in which participation is considered appropriate". Moreover, the Pre-Trial Chamber I's Decision notes that "if the Chamber decides to give victims the right to participate in specific procedural activities, it will take such measures as are necessary, under Articles 56 and 57 of the Statute, to preserve the integrity of the proceedings"⁴⁰. This recognizes that the Pre-Trial Chamber should have discretion, given its more detailed familiarity with the parties, the situation and the matters presented before it, to shape the nature of victim participation at the situation stage as specific procedural activities arise. The Chamber should not be burdened with the imposition of the needless and impossible task of both predicting the details of such procedural activities in advance and determining in a vacuum how victims and their representatives may participate in them. It is this impossible task which the OTP would impose upon the Pre-Trial Chamber at the situation stage, in its insistence that the Chamber cannot permit victim's participation in the proceedings at the situation and investigation stage, without simultaneously making findings with respect to the "specific proceedings in which victims could exercise meaningful rights" and on the "specific modalities of participation"⁴¹.

22. Finally, it is clear that Pre-Trial Chamber I's jurisprudence on victim participation expressly recognizes that the "personal interests" criterion set out in article 68(3) "constitutes an additional criterion to be met by victims, over and above the victim status accorded to them"⁴². Nevertheless, it was entirely appropriate for the Pre-Trial Chamber to conclude that such "personal interests" of persons who have been determined to be victims of a crime within the Court's jurisdiction in a particular situation⁴³ are affected by the investigation of such jurisdictional crimes at the situation stage. Moreover, as the Pre-Trial Chamber I decision stated: "This

⁴⁰ Id., para. 60.

⁴¹ ICC-02/05-125, paras. 36-45.

⁴² ICC-01/04-101-tEN-Corr, para. 62.

⁴³ This determination, of course, is for the purpose of participation in the proceedings under Article 68, based on a standard of "grounds to believe".

general assessment, pertaining to the scope of the application filed with the Court which relates to the whole of the proceedings before it, does not rule out the possibility of a more specific assessment of victims' personal interests based on the applications filed by victims in accordance with the modalities of the participation of victims in the proceedings set out below"⁴⁴.

ii. The jurisprudential approach to victim participation suggested by the OTP and the OPCD is unworkable in practice and threatens to cause a needless multiplicity of applications, proceedings and appeals.

23. With respect to the multiplicity of individualized proceedings, for example, the OTP submits that the Appeals Chamber's decision in *Prosecutor v. Lubanga* dated 13 June 2007⁴⁵, "demonstrates that within a particular phase of proceedings (even as confined as an interlocutory appeal), there were different proceedings or stages of proceedings against which the personal interests of the victims were to be analyzed separately"⁴⁶. Thus, according to the OTP's line of reasoning, each victim would be required to file separate applications for participation with respect to each such "different proceeding" or separate "stages of proceedings", and each such application would require a demonstration of, and judicial evaluation of, the particular interests of the victim which may be affected at such different proceeding, and a subsequent separate analysis and approval by the Chamber with jurisdiction.⁴⁷

⁴⁴ICC-01/04-101-tEN-Corr, para. 64.

⁴⁵ See "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007" No. ICC-01/04-01/06-925, 13 June 2007.

⁴⁶ *Id.*, para. 34.

⁴⁷ The OTP attempts to reassure the Appeals Chamber that "there is no need to re-argue and re-decide the status of a person as victim by connecting, as required by law, the determination of victim participation to concrete proceedings within a situation: once this status has been determined for a given and specific set of proceedings, there is no need to re-address this status as the initial determination can be used in subsequent proceedings; only personal interests, appropriateness and modalities of participation need to be revisited". Prosecution's Document in Support of Appeal, No. ICC-02/05-125, para. 19. However, it is difficult to reconcile this view with the Prosecution's categorical rejection of a general "procedural status of victim" and its insistence that such a status can only be recognized in the context of specific proceedings and together with the ascertainment of modalities of participation. *See, e.g., id.*, Prosecution's Document in Support of Appeal, paras. 11, 15, 18. Inevitably, there would be arguments that one or more applicants are not "victims" for purposes of a particular proceeding. This would be particularly true under the OPCD's regime of victim participation under which such participation must be "deferred"-- and thus limited -- to specific case proceedings.

If such a cumbersome procedure were adopted, the Appeals Chamber might well face appeals from each and every such determination.

24. Similarly, with respect to the criterion under Article 68(3) that victim participation be “appropriate”, the OTP submits that: “For example, a proper finding that participation is appropriate in relation to a trial would not be that the trial itself is a stage of the proceedings throughout the entirety of which the expression of views and concerns is appropriate; rather it would require determinations of the stages of the trial at which those expressions of views and concerns by victims would be appropriate”⁴⁸. Thus, the OTP would require seriatim applications by each victim for each “stage-within-a-trial” in order to participate. While the Legal Representatives do not question the power of the Chamber to control the conduct of the trial (subject of course to the Statute and the Rules and Regulations of the Court), we believe that the Prosecution’s formulation necessarily imposes upon victims an undue and burdensome requirement to make separate and distinct applications for participation at each “appropriate” stage of the proceedings, rather than to allow the Chamber to determine the *manner* of participation in the proper exercise of its discretion based on the facts and circumstances as they may exist at the time.

25. However, Rule 89 does not contemplate that each victim shall file seriatim applications to participate at each such separate procedural step; rather Rule 89 contemplates but one *single* application to the Registrar for participation in “the proceedings”⁴⁹. Moreover, the standard application for participation itself requires the victim to identify the stages of the proceedings in which the victim wishes to participate⁵⁰. The submission of the application to the Registrar then sets into motion

⁴⁸ ICC-02/05-125, para. 34.

⁴⁹ Indeed, where the Rules *do* contemplate a separate application to participate in a specific procedural step, they are explicit on this point. For example, where a legal representative “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”. Rule 91(3). The Rule then sets forth further provisions which indicate the significant discretion of the Chamber on how to proceed in such a case.

⁵⁰ Standard Application Form to Participate in Proceedings Before the International Criminal Court for Individual Victims and Persons Acting on their Behalf, Form Participation-1 (“Stage of

a series of events including transmission of the application to the Prosecutor and the Defence, who may then reply to the application. Following the decision of the Chambers on the application, the parties (as did the OTP and OPCD here) may invoke steps of appeal. If each victim were required to submit to the Registrar or a Chamber a separate application to participate in each such separate procedural step, setting forth the details of the specific personal interests affected by each such procedural step, to which the Prosecution and Defence have the right of reply, and possible rights of appeal, it is apparent that virtually no victim would have the resources to engage in such participation. Surely under such circumstances, their resources would be exhausted in simply *attempting* to participate, rather than actually “participating”. The barriers to *any* participation by victims in a complex criminal justice system situated so far away from the situation-on-the-ground in cases involving genocide, crimes against humanity and war crimes, are exceedingly high indeed. Such barriers include, by way of obvious example only, physical and psychological harm suffered by the victims, fear of death and reprisal, lack of information, impaired or difficult communications, and concern for family, friends and other loved ones who may still be at risk in the involved areas.⁵¹ The challenges posed to victims by such a separate application process would undoubtedly defeat many victims seeking to apply on their own or with “intermediaries” untrained in the ensuing complex procedural matrix. Even victims able to locate Legal

Participation”, *See Part C of the Booklet*. During which of the following stages of the proceedings do you wish to participate? Preliminary Examination Stage, Pre-Trial Stage, Trial Stage, Appeal Stage”). This standard form, of course, was promulgated by the Registrar pursuant to Regulation of the Court, No. 86. We note also that Regulation 86 also states: “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”.

⁵¹ The OTP itself has stated that with respect to the Court’s outreach activities concerning the Situation in Sudan, that “there is worrisome information that Sudanese participants in such activities have been threatened upon returning to Sudan.” *Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, 5 December 2007, OTP-RP-20071205-UNSC-ENG, p.4. The same report stated that “[t]he Registrar travelled to Chad, to refugee camps, to explain the Court’s activities and in particular the rights of victims to participate in the proceedings”. *Id.*, p.3. It would be a cruel irony if victims were to place themselves and surviving family members at greater risk by attempting to participate in the proceedings at the situation stage following such outreach activities, only to learn that the Court has determined that the situation (including investigation) stage is not an “appropriate” stage of the proceedings in which victims may participate.

Representatives familiar with the Court's own jurisprudence would be overwhelming an environment in which Court resources are minimal. The notion that traumatized and vulnerable victims, under such circumstances, could be expected to submit multiple complex applications for participation -- each of which, it must be remembered, presents risks of disclosure and loss of security -- truly renders the concept of victim participation a "dead letter".⁵²

IV. The Decision of the Single Judge Is Consistent with Prior Decisions of the Appeals Chamber

26. The separate opinion of the Honourable Judge Georghios M. Pikis of this Appeal Chamber has previously noted that "Participating victims' views and concerns are referable to the cause which legitimizes their participation, the cause which distinguishes them from other victims, namely their personal interests to the extent they are affected by the proceedings. The decision of the Appeals Chamber of 12 December 2006 supports this proposition. Victims have an interest that the loss or injury they have suffered, a matter of individual concern, should surface in the proceedings and be brought to light. Such evidence would presage any claim to reparations as well as illuminate the gravity of the crime".⁵³

27. Judge Pikis, in his separate opinion, sets forth the view that the "personal interests" of a victim which may be affected by a proceeding and which are thus cognizable under Article 68(3) include the interests of a victim that his or her own suffering – his or her own loss, injury and harm – should "surface in the proceedings and be brought to light". It cannot be gainsaid that such personal interests are affected by the proceedings at the situation and investigation stage. Indeed, it is precisely at the situation and investigation stage that victims must have an opportunity to participate to ensure that their own personal circumstances become

⁵² The OPCD states that it is "aware that this right [to present views and concerns to the Court] would become a dead letter if the Court were to pose insurmountable and impractical procedural and evidential requirements for potential applicants". No. ICC-02/05-126, p. 2.

⁵³ See the Separate Opinion of Judge Pikis accompanying No. ICC-01/04-01/06-925, para.16.

an object of investigation and judicial concern. For the victims, the situation stage and investigation stage is the gateway to justice.

28. In our view, the specificity with which victims must demonstrate their affected personal interests should be consonant with the nature of the proceedings in which the victims wish to participate. Inasmuch as the Prosecutorial function in ascertaining the truth and determining the facts is widest at the situation and investigation stage under Article 54, thus similarly the affected interests of victims is likely to range more widely. Therefore, decisions to grant participation of victims at this stage are likely to cover a wider range of victims and relevant affected interests. This does not mean, however, that each and every victim's interests will necessarily be affected by each procedural step which may be taken in the course of the investigation.⁵⁴ However, given the extant high barriers to participation, and the resource-intensive demands of participation in such complex criminal legal proceedings, we believe that the spectre of numerous victims wishing to present views and concerns on matters that, literally, do not concern them, is unfounded.

V. Specific submission in response to the OPCD's arguments regarding the application procedure

29. The Defence argues that article 68(3) and rule 89 should be revised to require that, in order to participate in the situation or pre-trial phase, applicants supply the Registry with extrinsic material to substantiate the claims made in their applications. The Defence further argues that victims must exhaust domestic remedies prior to applying before the Court⁵⁵.

30. Pre-trial Chamber I, interpreting rule 85(a), has established the requirements for victim participation at the situation stage as follows: (a) the victim be a natural

⁵⁴ For example, pursuant to its duties and powers under Article 54(3)f), the OTP may request that the Pre-trial Chamber take specific steps necessary for the preservation of a specific item of evidence, concerning which only a few participating victims may have any connection.

⁵⁵ See ICC-02/05-119.

person; (b) he or she must have suffered harm; (c) the crime from which the harm ensued must be within the jurisdiction of the Court; and (d) there must be a causal link between the crime and the harm suffered⁵⁶. Referring to participation at the situation phase, the Chamber decided that “it is not necessary to determine in any great detail at this stage the precise nature of the causal link”⁵⁷, and the “the determination of a single instance of harm is sufficient”⁵⁸.

31. The Legal Representatives note that, in granting rights to eleven victims, the Single Judge decided that “the elements established by rule 85 of the Rules are met *prima facie*”⁵⁹.

32. Furthermore, neither the rules nor the regulations require extrinsic information to the standard form. Regulation 86 provides that, “the standard forms or other applications described in sub-regulation 1 shall contain, *to the extent possible*, the following information”⁶⁰ (emphasis added). Subsection 2 lists eight types and forms of documents that *may* be requested to corroborate the facts detailed in the standard form. Regulation 86(7) provides that, “Before deciding on an application, the Chamber *may request*, if necessary with the assistance of the Registrar, additional information from, *inter alia*, States, the Prosecutor, the victims or those acting on their behalf or with their consent”⁶¹ (emphasis added).

33. Accordingly, the Chamber is *not required* to request additional information and may indeed review the standard form and determine whether an applicant may participate in the proceedings based, solely, on the information provided on and with the standard form.

⁵⁶ See ICC-01/04-100-Conf-Exp-tEn-Corr.

⁵⁷ *Id.* at para. 94.

⁵⁸ *Id.* at para. 82.

⁵⁹ ICC-02/05-111-Corr, para. 5.

⁶⁰ See Regulations of the Court ICC-BD/01-01-04, 86(2).

⁶¹ See Regulations of the Court ICC-BD/01-01-04, 86(7).

34. With respect to exhaustion of remedies, the Single Judge noted that “according to rule 89 of the Rules and regulation 86 of the Regulations, the exhaustion of domestic remedies is not a condition to be fulfilled by applicants, unlike what is provided for in article 35 of the *European Convention on Human Rights* and article 46 of the *American Convention on Human Right*.”⁶²

35. The Legal Representatives note that application procedure was adopted through painstaking research and investigation in the years proceeding the finalization and adoption of the Rome Statute.⁶³ The OPCD should not be permitted to reverse years of comprehensive discussions through an appeal.

VI. The Appeal Brief of the OPCD Does Not Faithfully Characterize the Impugned Decisions of the Single Judge and Presents Unfounded Concerns for the Rights of the Accused.

36. The Legal Representatives respectfully submit that the OPCD Appeal Brief of 18 February 2008⁶⁴ (hereafter the “OPCD Appeal Brief”) characterization of the decision of the Single Judge in her 14 December 2007 decision is not entirely faithful to that decision. For example, the OPCD Appeal Brief dated 18 February 2008 states that: “pursuant to the methodology employed by the Honorable Single Judge, if applicants meet the definition of victim under Rule 85, then they are automatically granted a right to participate in the proceedings, since the elements of personal interest and propriety of participation are ipso facto fulfilled”⁶⁵. This suggests that the Single Judge did not actually consider whether the victims’ personal interests are

⁶² ICC-02/05-111-Corr, 14 December 2007, para. 23.

⁶³ An examination of the preparatory works for the drafting of the Rome Statute and of the Rules of Procedure and Evidence lead to the same conclusion reached by the Single Judge in the Decision that victims have rights to participate in all phases of the proceedings, and therefore also at the investigation stage. See ICC-02/05-111-Corr, 14 December 2007. This approach was adopted on several occasions and shared by several delegations during the discussion of the then Part 5 of the Rules on Investigation and Prosecution. The Working Group dealing with the issue decided that a comprehensive discussion on the participation of victims in the proceedings was necessary. Prior to this, and International Criminal Court was held in Paris in April 1999, where the paradigm for the discussions of the Preparatory Commission was fashioned out. See UN Doc. PCNICC/1999/DP.2, 1st February 1999, See also UN Doc. PCNICC/1999/WGRPE/INF.1, 6 July 1999.

⁶⁴ See ICC-02/05-126.

⁶⁵ ICC-02/05-125. para. 13.

affected and whether the situation stage is appropriate. Such a claim does not consider the Single Judge's express consideration of the "core principles and requirements for victim participation at the situation stage" set out in the Pre-Trial Chamber I in its "Decision on the Applications for Participation in the Proceedings of VPRS1 [et al]" of 17 January 2006.⁶⁶

37. In such express consideration, the Single Judge noted that with respect to the situation stage, "the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered"⁶⁷. Moreover, the Single Judge made an express determination that the investigation of a situation and the pre-trial stage were "appropriate stages of the proceedings for victim participation as provided for in article 68(3) of the Statute"⁶⁸.

38. Thus, contrary to the submission of the OPCD, the decision of the Single Judge did not "constitute an abrogation of th[e] fundamental duty" to "assess[] each criteria [sic] set out in Article 68(3)".⁶⁹

39. With respect to the nature of the personal interests affected, the OPCD states that "applicants cannot claim to be affected by violations of these rights in a general or indirect nature"⁷⁰. We note that the Rule 85(a) definition of "victim" with respect to natural persons simply requires that such persons "have suffered harm as a result of the commission of any crime within the jurisdiction of the Court". Only "organizations and institutions" which qualify as "victims" under Rule 85(b) must have sustained direct harm to certain property. The absence of the additional

⁶⁶ ICC-01/04-101-tEN-Corr, paras. 1, 11.

⁶⁷ Id., para. 11.

⁶⁸ Id., para. 14, and fn. 43, referring also to No. ICC-02/05-110, para. 2; No. ICC-01/04-100-Conf-Exp-tEN-Corr, paras. 55-64; No. ICC-01/04-01/06-162-Conf-Exp-tEN and ICC-01/04-170-Conf-Exp-tEN.

⁶⁹ ICC-02/05-126, para. 16.

⁷⁰ Id., para. 18.

requirement of “direct” harm with respect to natural persons demonstrates that a showing of “direct”, as contrasted with “indirect,” harm is not required.

40. The OPCD Appeal Brief speculates at length upon the potential difficulties and consequences if certain applicants -- who have already been granted the right to participate -- seek clarification of the facts and seek the identification of the perpetrator, if they “did not personally suffer harm, and indeed, were not even present when the alleged crime took place”⁷¹. Does this mean, for example, that a surviving family member should lack standing and has no “affected interest” if the other members of her family were killed while she was away from her home during an attack?

41. Similarly, the OPCD raises numerous other speculative concerns which are not responsive to any aspect of the Single Judge’s decision. These include imagining a Chamber “taking into consideration extraneous allegations postulated by participating applicants”⁷², a Chamber “issuing public findings concerning the existence of crimes which might not be the subject of an actual prosecution investigation or prosecution – based solely on the applicant’s assertions”⁷³, “allowing applicants to fulfill [the Prosecutor’s] fact-finding function also usurps the role of the Prosecutor”⁷⁴, and “countless petitions filed *proprio motu* by the applicants”⁷⁵. It is thus deeply ironic that the OPCD warns against allowing victim participation which could “entangle the Chamber in endless speculative debates”⁷⁶.

42. We thus urge that the decision of the Single Judge must be considered on its *own* terms, not based upon the OPCD’s characterization of that decision nor based on its dark speculations about its implications.

⁷¹ Id., paras. 20-21, and fn. 24.

⁷² Id., paras. 27.

⁷³ Id., paras. 28.

⁷⁴ Id., paras. 29.

⁷⁵ ICC-02/05-126, para. 40.

⁷⁶ Id.

VII. Precluding Victim Participation at the Very Gateway of the Proceedings, the Situation Stage, Threatens to Deny Victims Their “Right to Truth”

43. The Preamble to the Statute pronounces the States Parties to be: “Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”. The drafters of the Statute made clear their intentions, expressed through Article 68(3), that victims participate effectively in the proceedings.

44. Judge Song expressed it clearly, recalling that “[t]he victim of a crime has a particular interest that the person allegedly responsible for his or her suffering is brought to justice; this interest goes beyond the general interest that any member of society may have in seeing offenders held accountable. This interest of victims is acknowledged in the Statute and the Rules of Procedure and Evidence.”⁷⁷

45. A common, and unfortunate, thread which implicitly runs through the arguments raised by the OPCD is that victim participation in this context is somehow to “give effect to a right of revenge or an *actio popularis*”⁷⁸. We must emphatically reject any such implications. To the contrary, victim participation at the earliest stages of these proceedings is necessary to vindicate the victims’ “right to truth”:⁷⁹

⁷⁷ See “Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the ‘Directions and Decision of the Appeals Chamber’ of 2 February 2007”, No. ICC-01/04-01/06-925, 13 June 2007, Separate opinion of Judge Sang-Hyun Song, par. 13, p. 26. See also the subsequent developments, par. 14-16, pp. 27-28: “*The interest of victims that justice is done also is recognized in the jurisprudence of the Inter-American Court of Human Rights (IACHR) and of the European Court of Human Rights (ECHR). (...) This jurisprudence should be taken into account when interpreting the term “personal interests of the victims” in article 68 (3) of the Statute, as article 21 (3) of the Statute obliges the Court to interpret and apply the Statute in consistence with internationally recognized human rights.*”

⁷⁸ ICC-02/05-126, para. 17. The OPCD Brief states: “The underlying purpose of participation is not to give effect to a right of revenge or an *actio popularis*”. See *id.*, para. 37 (“Judicial intervention is also required to ensure that the right to present views and concerns does not transform to a right to seek revenge[.]”) If the OPCD were not suggesting that victim participation at the situation stage implicates such a “right of revenge” or “*actio popularis*”, there would have been no point in invoking them.

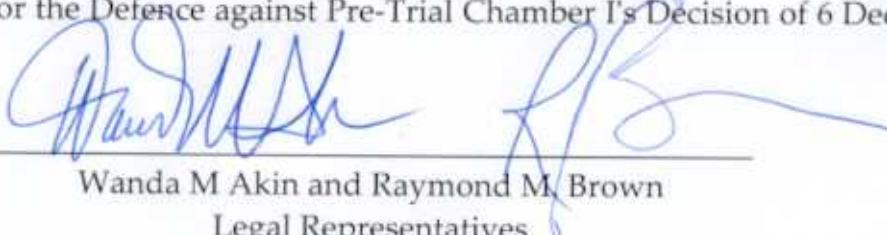
⁷⁹ See, e.g., Principles 11, 22(b), 24, 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Resolution 147, 21 March 2006, A/RES/60/147. Principle 22 states, *inter alia*: “Satisfaction should include, where applicable, any or all of the following: (a)

An important aspect of the guarantee of non-repetition [of the violations] includes the victims' right to access factual and other relevant information concerning the violation. Understanding and public disclosure of the truth is important to victims because the truth (1) alleviates the suffering of the surviving victims; (2) vindicates the memory or status of the direct victim of the violation; (3) encourages the State to confront its dark past; and (4) through it, to seek reform. Truth can help provide an historical record, educate people, promote forgiveness and prevent future victimization. Truth is an imperative, not an option to be displaced by political convenience.⁸⁰

46. Surely it is at the situation and investigation stage that the pathways are laid upon which the truth shall be ascertained, and upon which all future proceedings are necessarily based. From the perspective of victims, to categorically preclude their meaningful participation at this very stage may draw into question the legitimacy of all proceedings that follow.

Conclusion

The Legal Representatives respectfully request that the Appeals Chamber deny the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and deny 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.



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Done in English

Dated this 24th day of June, 2008

At Newark, NJ (USA)

Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations" Principle 24 provides, *inter alia*, "victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations." This "right to truth" has been described as one of the three overarching rights of a victim, which include "equal and effective access to justice", the "right to adequate, effective and prompt reparation for the harm suffered", and the "right to truth". Bassiouni, *International Recognition of Victims' Rights*, *Human Rights Law Review*, 6:2 (2006), p.260.
⁸⁰ Bassiouni, *International Recognition of Victims' Rights*, *Human Rights Law Review*, 6:2 (2006), pp. 275-276.