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Representing Victims before the International Criminal Court

A Manual for legal representatives

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



Update December 2011

The Office of Public Counsel for Victims

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Table of content

Introduction	01
1. Victims' participation in the proceedings	05
1. The notion of personal interests under article 68(3) of the <i>Rome Statute</i>	05
2. Appropriateness of the participation	05
3. Definition of victim	05
3.1 Interpretation of Rule 85 of the <i>Rules of Procedure and Evidence</i>	05
3.3 Natural person and the proof of identity	05
3.5 Crimes under the jurisdiction of the Court	10
3.6 Harms suffered	10
3.7 The causal link	11
4. The application process	11
4.1 In general	11
4.2 Completeness of the applications	13
4.3 Redactions of information about the applicants	15
4.4 Redactions of information about the intermediaries	18
5. Issues related to the security of victims	19
6. Participation	19
6.1 Participation in the proceedings in general	19
6.2 Participation in relation to a request for authorisation of an investigation	22
6.3 Participation at the investigation stage	22
6.4 Participation at the pre-trial stage, including at the confirmation of the charges hearing	22
6.5 Participation at the trial stage	24
2. Modalities of victims' participation in the proceedings	29
1. Modalities of participation in general	29
4. Modalities of participation at the confirmation of the charges hearing	29
5. Modalities of participation at the trial stage	31
7. Specific issues related to the modalities of participation	36
7.1 Access to documents in general	36
3. Legal representation	41
1. Legal representation in general	41
2. Common legal representation	41
4. Role and mandate of the Office of Public Counsel for Victims	45
1. Role of the Office in general	45
3. The legal representation of victims applying to participate	45
5. Procedural matters	47
1. Procedural matters in general	47
2. Ex parte proceedings	51
3. Jurisdiction and admissibility	53
4. Evidence	58
4.1 Evidence in general	58
4.2 Issues related to the admissibility of evidence	59
4.3 Witnesses	63
4.3.5 Protection and well-being of witnesses and other persons at risk because of their interaction with the Court	63
5. Issues related to the procedure of appeals	67
5.1 Appealable decisions	67
5.3 Interlocutory appeals lodged under article 82(1)(d) of the Rome Statute	69
6. Issues related to disclosure	71



Introduction

This document is the update of Part Two of the Manual for legal representatives published for the first time by the Office of Public Counsel for Victims (OPCV) in English in October 2010 and already updated once in December 2010.

This update does not pretend to cover exhaustively the issues at stake before the Court but rather to provide some guidance on the main issues related to victims' participation in the proceedings with the main goal of supporting external legal representatives in their daily work representing the views and concerns of victims in the proceedings.

The update follows the structure of Part Two of the Manual and it contains the main jurisprudential developments for the period January – December 2011. The decisions have been quoted, as far as possible, verbatim in the language in which the relevant decisions have been issued. A translation of the decision in the other working language of the Court is provided. However, said translation is not an official translation of the Court.



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Part 2 | Update December 2011

Practice of the Court on matters pertaining to victims' participation

1.	Victims' participation in the proceedings	05
2.	Modalities of victims' participation in the proceedings	29
3.	Legal representation	41
4.	Role and mandate of the Office of Public Counsel for Victims	45
5.	Procedural matters	47
6.	Issues related to disclosure	71





1. Victims' participation in the proceedings

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

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.

2. Appropriateness of the participation

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

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 on or about 24 January 2008 until 31 January 2008 in locations, including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), 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 and 20; 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 and 20. See also, No. ICC-01/05-01/08-1862, Trial Chamber III, 25 October 2011, paras. 31 and 32.

3-3 Natural person and the proof of identity

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 on or about 24 January 2008 until 31 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; 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-t-ENG, Trial Chamber II, 14 June 2011, paras. 18-20, 23, 24-27, 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; No. ICC-01/05-01/08-1862, Trial Chamber III, 25 October 2011, par. 25.

3.5 Crimes under the jurisdiction of the Court

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; No. ICC-01/04-01/10-351, Pre-Trial Chamber I (Single Judge), 11 August 2011, par. 21.

3.6 Harms suffered

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.

3.7 The causal link

The Chamber has [to take] 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

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

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

The Single Judge considers the sample declaration, together with the information contained in the

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

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

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

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

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

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

The issue pending before the Single Judge is whether or not the Registrar should file all applications, even when a request for additional information or documentation pursuant to regulation 86(4) of the *Regulations of the Court* proves to be unsuccessful, as stipulated in the First Decision on Victims' Participation. In this regard, the Single Judge first of all observes that the First Decision was taken *in abstracto*, with a view to instructing the VPRS in carrying out its task, by establishing the general framework governing victims' participation in the present case. Furthermore, the Single Judge recalls that the VPRS is entrusted with the task of processing victims' applications for participation and reparation in situations and cases currently pending before the Court. In this respect, the Single Judge observes that the same deadline of 8 July 2011 applies to both the present case and the case of *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, in which the number of applications received so far by the Registry is 550. This brings the total number of victims' applications in the two cases, to be transmitted to the Chamber by 8 July 2011, up to 2350, bearing in mind that this is a provisional estimate pending expiration of the said deadline.

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

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

Taking into account the information submitted by the Registrar, in particular the 2350 victims' applications to be processed in the two cases within the established deadline, and considering the responsibility of the Chamber to effectively organize the management of victims' applications as envisaged in rule 89(4) of the Rules, the Single Judge believes that it is appropriate to instruct the VPRS that only complete applications be transmitted to the Chamber for its consideration. However, the Single Judges expect 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. 28-38.

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 and 7.

4.2 Completeness of the applications

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. 17–19. 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. 31-39.

4.3 Redactions of information about the applicants

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 are 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 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(l)(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. 106-113.](#)

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's preference"*.

[See No. ICC-01/09-01/11-249, Pre-Trial Chamber II \(Single Judge\), 5 August 2011, paras. 114-121.](#) 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

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.

5. Issues related to the security of victims

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

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 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 "[TRANSLATION] led him [...] to question the veracity, in part or in whole, of the person's account". He stated that, despite these "[TRANSLATION] serious doubts", he had not yet reached the conclusion that the person in question "[TRANSLATION] 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, "[TRANSLATION] 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 the victim in order to obtain further explanations on the matter, but that "[TRANSLATION] after several discussions with those persons, [he] did not obtain satisfactory responses which would allow him to explain the situation". He therefore concluded that "[TRANSLATION] all of this affects his relationship of trust with the representative of the victim, pan/0363/09, such that, at this stage, he is not in a position to defend effectively the interests of the victim in question"

The Chamber has noted the removal of a/0381/09 and a/0363/09 from the list of victims it had authorised to appear, in light of the explanations provided by the Legal Representative, thereby giving credence to the questions he raised as to their credibility. In respect of the latter victim, the Chamber also decided, in its Decision of 11 February 2011, not to authorise the appearance of the person acting on the victim's behalf as a witness of the Chamber, on the basis of the information provided by the Legal Representative. As a result of the emergent contradiction between that person's statements and the photograph submitted in support of those statements, the Chamber found that "[TRANSLATION] everything leads [it] to believe that pan/0363/09 did not tell the entire truth on at least one aspect of her account". In light of the specific nature of the circumstances, and of the Legal Representative's submissions in particular, the Chamber was then moved to conclude that "[TRANSLATION] the credibility of pan/0363/09 has been questioned by her own Legal Representative to such an extent that it is impossible for him, or the Chamber, to consider that her testimony could make a useful contribution to the determination of the truth".

In response to the Legal Representative's stated intention to have his team conduct in-depth investigations into these two files, the Chamber requested the Legal Representative to transmit to it the "[TRANSLATION] 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 "[TRANSLATION] 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 Chamber's 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.

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

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. 8-10.

6.3 Participation at the investigation stage

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.

6.4 Participation at the pre-trial stage, including at the confirmation of the charges hearing

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. 6-12.](#)

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 and 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

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.](#)

Relevant decisions regarding victims' participation in the proceedings

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

2. Modalities of victims' participation in the proceedings

1. Modalities of participation in general

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, 12 December 2011, paras. 11-17.

4. Modalities of participation at the confirmation of the charges hearing

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 and 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(l)(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. 5-13. See also, See No. ICC-01/09-01/11-274, Pre-Trial Chamber II (Single Judge), 19 August 2011 (considering a previous request premature).

5. Modalities of participation at the trial stage

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 and 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.

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 and 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.

7. Specific issues related to the modalities of participation

7.1 Access to documents in general

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;

ORDER 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 and 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 “[a]llowing [...] [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 “[r] equiring 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 “[a]ccess 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.

Relevant decisions regarding the modalities of victims' participation in the proceedings

Order determining the mode and order of examination for the witnesses called by the Defence teams (regulations 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

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 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

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

3. Legal representation

1. Legal representation in general

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. 45- 47.

2. Common legal representation

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(l)(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 *"counsel's 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. 63-81. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, paras. 77-95; No. ICC-02/05-03/09-209, Trial Chamber IV, 7 September 2011.

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(l)(b) and 90(2) of the Rules. According to the latter provision, the Registrar “[i]n 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.](#)

Relevant decisions regarding Legal Representation

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

4. Role and mandate of the Office of Public Counsel for Victims

1. Role of the Office in general

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 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.

3. The legal representation of victims applying to participate

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.

Relevant decisions regarding the Office of Public Counsel for Victims

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

5. Procedural matters

1. Procedural matters in general

The Single Judge recalls article 12(l)(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 "*privity 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 OA 3, 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(l)(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(l)(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 “[n]o 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.

Relevant decisions regarding procedural matters in general

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

2. *Ex parte* proceedings

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

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



3. Jurisdiction and admissibility

The Chamber is well aware that the concept of complementarity and the manner in which it operates goes to the heart of States' sovereign rights. It is also conscious of the fact that States not only have the right to exercise their criminal jurisdiction over those allegedly responsible for the commission of crimes that fall within the jurisdiction of the Court, they are also under an existing duty to do so, as explicitly stated in the Statute's preambular paragraph 6.

However, it should be borne in mind that a core rationale underlying the concept of complementarity aims at *"strik[ing] a balance between safeguarding the primacy of domestic proceedings vis-à-vis the Court on the one hand, and the goal of the Rome Statute to 'put an end to impunity' on the other hand. If States do not investigate, the Court must be able to step in"*.

Therefore, in the context of the Statute, the Court's legal framework, the exercise of national criminal jurisdiction by States is not without limitations. These limits are encapsulated in the provisions regulating the inadmissibility of a case, namely articles 17-20 of the Statute. Thus, while the Chamber welcomes the express will of the Government of Kenya to investigate the case *sub judice*, as well as its prior and proposed undertakings, the Chamber's determination on the subject-matter of the present challenge is ultimately dictated by the facts presented and the legal parameters embodied in the Court's statutory provisions.

[...]

The Chamber has previously stated that the admissibility test envisaged in article 17 of the Statute has two main limbs: (i) complementarity (article 17(l)(a)-(c) of the Statute); and (ii) gravity (article 17(l)(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(l)(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(l)(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(l)(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(l)(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; 82-84; 97-101. See 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 (*"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 and 42.



Relevant decisions regarding jurisdiction and admissibility

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

4. Evidence

4.1 Evidence in general

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. 5-10.

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, 10-12 and 14-15.](#)

4.2 Issues related to the admissibility of evidence

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 "[t]he 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: "[t]he 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.

Article 69(4) of the Statute confers on the Chamber a broad power to make decisions as regards evidence: "[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of 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, summarizing 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-01/04-01/06-2693-Red, Trial Chamber I, 8 March 2011 (dated 7 March 2011), paras. 15-16; 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; 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 [ICC-01/04-01/06-2595-Red], 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 OA 5 OA 6, Appeals Chamber, 3 May 2011, paras. 43, 44, 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 OA 5 OA 6, Appeals Chamber, 3 May 2011, paras. 76, 77, 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.

4.3 Witnesses

4.3.5 Protection and well-being of witnesses and other persons at risk because of their interaction with the Court

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, 83-88.

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-01/04-01/06-2834, 15 December 2011, Trial Chamber I, par. 14.

Relevant decisions regarding evidence

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 OA 5 OA 6, 31 May 2011

Order on the procedure relating to the submission of evidence (Trial Chamber III), No. ICC-01/05-01/08-1470, 31 May 2011

Partly Dissenting Opinion of Judge Kuniko Ozaki on the Order on the procedure relating to the submission of evidence (Trial Chamber III), No. ICC-01/05-01/08-1471, 31 May 2011

Decision on the Defence Request to Redact the Identity of the Source of Three Items of Documentary Evidence (Trial Chamber II), No. ICC-01/04-01/07-3057, 4 July 2011

Redacted Decision on the Prosecution's Request for Non-Disclosure of Information in Six Documents (Trial Chamber I), No. ICC-01/04-01/06-2763-Red, 25 July 2011

Redacted Registry transmission of information in relation to the "Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application" (ICC-01/04-01/06-2766-Conf) (Trial Chamber I), No. ICC-01/04-01/06-2766-Red, 5 August 2011

Decision on the Defence Request to Redact the Identity of the Source of DRC-D03-0001-0707 (Trial Chamber II), No. ICC-01/04-01/07-3122, 22 August 2011

Decision (i) ruling on legal representatives' applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses (Trial Chamber III), No. ICC-01/05-01/08-1729, 9 September 2011

Decision on the Joint Submission regarding the contested issues and agreed facts (Trial Chamber IV), No. ICC-02/05-03/09-227, 28 September 2011

Decision on the Bar Table Motion of the Defence of Germain Katanga (Trial Chamber II), No. ICC-01/04-01/07-3184, 21 October 2011

Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims (Trial Chamber III), No. ICC-01/05-01/08-2027, 21 December 2011

5. Issues related to the procedure of appeals

5.1 Appealable decisions

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*. 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).

5.3 Interlocutory appeals lodged under article 82(1)(d) of the Rome Statute

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.

Relevant decisions regarding procedure of appeals

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-t-ENG, 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 OA 3, 10 November 2011

6. Issues related to disclosure

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 11 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 71. 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 and 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(l)(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 ('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 ('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 ('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(l)(a) and (3), 61(3) and 67(2) of the Statute and rules 77 and 121(2) of the Rules.

The Single Judge recalls that the scope of disclosure of evidence between the parties is regulated by various provisions of the applicable law. In this respect, it is worth clarifying at the outset that when a provision provides for an obligation of disclosure, any such items which may fall within its scope shall be disclosed to the Defence by virtue of that provision itself. For the purposes of the present decision, article 67(2) of the Statute and rule 77 of the Rules are of particular relevance. Article 67(2) of the Statute obliges the Prosecutor to disclose to the Defence such evidence in his possession or control which he or she believes shows or tends to show the innocence of the accused, to mitigate the guilt of the accused, or which may affect the credibility of Prosecution evidence; and rule 77 of the Rules requires the Prosecutor to permit the Defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are, *inter alia*, material to the preparation of the Defence. Consequently, if a piece of evidence is to be disclosed to the Defence by virtue of any such provision it is not necessary that an order to this effect be issued by the Chamber. Nevertheless, the principle that disclosure takes place pursuant to the Statute and the Rules and that no order by the Chamber is necessary to create disclosure obligations for the Prosecutor does not mean that the Chamber will never be able to issue orders compelling the Prosecutor to disclosure. To the contrary, in case that the Prosecutor fails to properly disclose evidence, the Chamber is called, pursuant to article 61(3) of the Statute and rule 121(2) of the Rules, to issue such orders as may be necessary for disclosure to proceed satisfactorily. Equally, pursuant to article 67(2), the Chamber shall decide in case of doubt as to the application of the said article. For this purpose, the Defence has to allege in concrete terms how the Prosecutor has violated his disclosure obligations. In the present instance, however, the Defence does not allege that any particular contravention of disclosure obligations occurred. Therefore, the Single Judge considers that the Request cannot be granted under article 61(3) of the Statute and rule 121(2) of the Rules.

See No. ICC-01/09-01/11-196, Pre-Trial Chamber II (Single Judge), 14 July 2011, paras. 7-9.

Under rule 77 of the Rules, the Prosecution is required to permit the Defence to inspect any books, documents, photographs and other tangible objects in its possession or control that (i) are material to the preparation of the Defence; (ii) are intended for use by the Prosecution as evidence for the purposes of the confirmation hearing or at trial; or (iii) were obtained from or belonged to the person. Here, the Requested Items did not come from the accused and the Prosecution does not intend to submit them as evidence in the trial. Thus, the question for the Chamber is whether the Requested Items are "*material to the preparation of the Defence*".

To this end, the Chamber begins by reviewing the relevant jurisprudence on the scope of rule 77's materiality requirement.

The Chamber is guided first and foremost by the Appeals Chamber's judgment in the Lubanga case. The Appeals Chamber held in that case that *"material relating to the general use of child soldiers in the DRC [was] material to the preparation of [the accused's] Defence", and was therefore subject to disclosure under rule 77*". Relying on jurisprudence from the ICTY and ICTR, the Appeals Chamber also delineated the scope of rule 77's materiality requirement, holding that *"the term 'material to the preparation of the Defence' should be understood as referring to all objects that are relevant for the preparation of the Defence"*.

Also instructive are decisions of Trial Chamber I in the Lubanga case and Trial Chamber II in the Katanga and Ngudjolo case. In the Lubanga case, Trial Chamber I ordered the Prosecution to disclose any material in its possession that *"is relevant and concerns Defence witnesses"*, including material that the Prosecution intended to use in the questioning of Defence witnesses. In doing so, Trial Chamber I discussed the scope of rule 77's materiality requirement in the following terms:

The Prosecution'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. 15-31.

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.

Relevant decisions regarding disclosure

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

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