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International
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Court

Representing Victims before the International Criminal Court

A Manual for legal representatives



The Office of Public Counsel for Victims

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Foreword

The *Rome Statute* expressly provides for a role to play by victims in the proceedings. The legal instruments of the Court, however, are not explicit in detailing the modalities of victims' participation in the said proceedings. According to rule 89(1) of the *Rules of Procedure and Evidence*, "[t]he Chamber shall specify the proceedings and manner in which participation [of victims] is considered appropriate". Moreover, article 68(3) of the *Rome Statute* specifies that "[w]here the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".

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

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

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

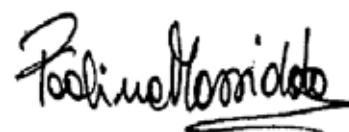
These are the challenges that legal representatives of victims face in addressing the issue of victims' participation. Furthermore, involvement of victims at the ICC requires taking into account the realities of each specific country situation, as well as factors such as the prosecution of complex and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

In the light of these challenges and with the aim of providing a user-friendly, easy guide to be used by legal representatives appearing before the ICC, the Office of Public Counsel for Victims has drafted this Manual. Part One contains a general introduction to the International Criminal Court and to the role of victims in the proceedings before the Court. Part Two analyses the practice before the Court by argument and includes the most important extracts of decisions from 2005 until 16 July 2010 with regard to victims. Decisions in this section are included in chronological order. Only the main decisions are quoted, while all decisions pertaining to each section are listed at the end of the said section. This Part will be updated regularly. It will be possible to be provided with such updates upon request. Part Three contains an explanation of practical issues relevant for the representation of victims in the proceedings before the Court.

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

The existence of this Manual is the result of the dedication and extensive work of all members of the Office, past and present, who dedicated time and energy to this important project despite the constant increase in their workload.

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



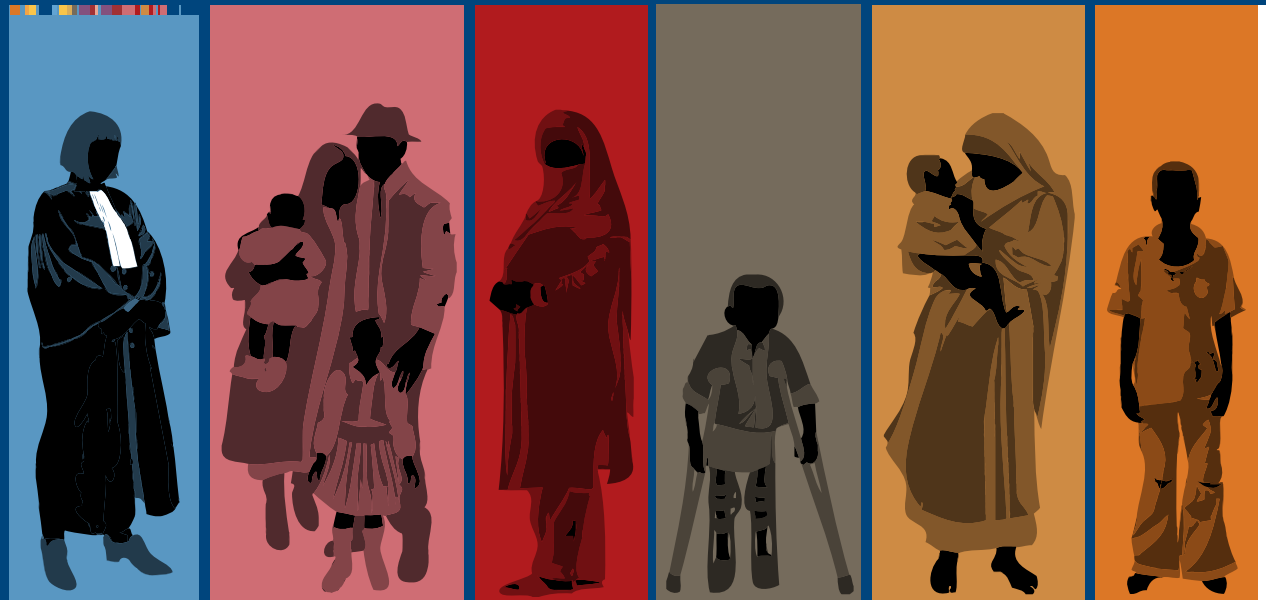
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Part 1

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

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1. Introduction to the International Criminal Court

1. Creation of the Court and States Parties

Independent institution, the International Criminal Court (the “ICC”) results from the adoption of the *Rome Statute* by the diplomatic conference organised by the United Nations on 17 July 1998. Its Statute entered into force the 1st July 2002 after the 60th ratification, in accordance with its article 126. At the time of publication there were 113 States Parties.

Article 126 of the *Rome Statute*:

Entry into force

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

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

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

Article 3 of the *Rome Statute*:

Seat of the Court

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

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

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

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

Rule 100 of the *Rules of Procedure and Evidence*:

Place of the proceedings

“1. In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State.

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

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

2. Crimes within the jurisdiction of the Court

Pursuant to article 5 of the *Rome Statute*, the Court has jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression. With regard to the latter, the Review Conference held in Kampala (Uganda) in June 2010 has defined the crime, as well as the conditions for the exercise of the jurisdiction.

Article 5 of the *Rome Statute*:

Crimes within the jurisdiction of the Court

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

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations”.

Article 8 bis (NOT YET INTO FORCE)

Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 bis, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 ter, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.
2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court’s jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 bis, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

Domestic jurisdiction over the crime of aggression

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.
5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

Other understandings

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.
7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself.

3. Jurisdiction *ratione temporis*, *ratione loci* and *ratione personae*

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

Article 11 of the *Rome Statute*:

Jurisdiction *ratione temporis*

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

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

The jurisdiction of the Court is not universal. It is limited to the nationals or territories of the States Parties or of the States having accepted the jurisdiction of the Court on an *ad hoc* basis. In addition to the 113 States Parties to the *Rome Statute*, the Ivory Coast and Palestine have accepted the jurisdiction of the Court on an *ad hoc* basis with respect to crimes committed on their territory respectively since the events of 19 September 2002 and since 1st July 2002. These acceptances had been lodged with the Registrar through a declaration in accordance with article 12(3) of the *Rome Statute*.

Article 12 of the *Rome Statute*:

Preconditions to the exercise of jurisdiction

- "1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9".

An exception does however exist. Indeed, when the Security Council acting under Chapter VII of the Charter of the United Nations refers a situation to the Prosecutor, in accordance with article 13(b) of the *Rome Statute*, the situation concerned may have occurred on the territory of a non-State Party. In its Resolution 1593 (2005) of 31st March 2005, the Security Council referred to the Prosecutor the situation in Darfur, Sudan since the 1st July 2002, even if Sudan is not a State party to the *Rome Statute* and did not accept the jurisdiction of the Court pursuant to article 12(3) of the *Rome Statute*.

Article 13 of the *Rome Statute*:

Exercise of jurisdiction

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

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

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

Article 13 of the Rome Statute:

Exercise of jurisdiction

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

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;*
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or*
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15".*

Article 14 of the Rome Statute:

Referral of a situation by a State Party

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

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

Article 15 of the Rome Statute:

Prosecutor

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

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

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

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

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

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

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

Article 15 bis (NOT YET INTO FORCE)

Exercise of jurisdiction over the crime of aggression

(State referral, *proprio motu*)

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

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

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

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

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

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 ter (NOT YET INTO FORCE)

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

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.
5. The following text is inserted after article 25, paragraph 3, of the Statute:
3 bis. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.
6. The first sentence of article 9, paragraph 1, of the Statute is replaced by the following sentence:
1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 bis.
7. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:
3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

At the time of publication, the Court has been seized three times on the basis of article 14 of the Statute: by Uganda in January 2004; by the Democratic Republic of the Congo in April 2004 and by the Central African Republic in January 2005. Furthermore, on 31st March 2005, the Security Council acting under Chapter VII of the United Nations Charter referred to the Court the situation in Darfur, Sudan. Moreover, on 26 November 2009, the Prosecutor lodged a request for authorisation of an investigation on the territory of Kenya pursuant to Article 15 of the *Rome Statute*. On 31st March 2010, Pre-Trial Chamber II authorised the commencement of an investigation into the situation in the Republic of Kenya in relation to the alleged commission of crimes against humanity between 1st June 2005 and 26 November 2009.

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

Under the *Rome Statute*, the principle of complementarity governs the relationship between the Court and national jurisdictions. In substance, the system established by the *Rome Statute* is that of “successive” jurisdictions, first of national authorities and then of the Court, which implies a primacy recognised to domestic jurisdictions. However, when the Court is satisfied that the relevant State, or States, are unwilling or unable to genuinely carry out national proceedings, the Court is entitled to exercise its jurisdiction in accordance with the *Rome Statute*. Nonetheless, States remain under the duty to exercise criminal jurisdiction over individuals responsible for international crimes (6th preambular paragraph of the Statute). It is therefore only when national action is lacking, or does not meet certain basic requirements of genuineness and fairness that the Court is meant to come into play. The fundamental objective is “to put an end to impunity” for crimes of concern to the international community as a whole and “thus to contribute” to their deterrence (5th preambular paragraph of the Statute).

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

Article 17 of the *Rome Statute*:

Issues of admissibility

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

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;*
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;*
- (d) The case is not of sufficient gravity to justify further action by the Court.*

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

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;*
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;*
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.*

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

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

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

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

- personal relationship of a judge or other authority handling the case to the suspect or accused or the victims;
- appointment of a special investigator empowered to bypass ordinary criminal procedures;
- appointment of a secret tribunal;
- proceedings limited to one offence, when the situation appears involving the commission of several and/or more serious crimes;
- sham proceedings established in respect of at least one out of numerous alleged perpetrators;
- promotions or other benefits awarded to officials involved in the case;
- refusal to cooperate or insufficient cooperation by enforcing authorities;
- manifest inadequacy of the investigative strategy and of specifically undertaken investigative measures;
- intimidation of victims and witnesses, etc.

Article 18 of the Rome Statute:

Preliminary rulings regarding admissibility

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

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

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

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

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

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

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

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

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

Article 20 of the Rome Statute:

Ne bis in idem

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

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

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

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

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

6. International cooperation and judicial assistance

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

Article 86 of the Rome Statute:

General obligation to cooperate

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

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

Article 87 of the Rome Statute:

Requests for cooperation: general provisions

"1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

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

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

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

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

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

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

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

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

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

7. Relations with the United Nations

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

The Security Council has a particularly important role with regard to the ICC. In fact, in accordance with the *Rome Statute*, it can refer situations to the Court when acting under Chapter VII of the Charter of the United Nations, including situations occurring on the territory of non-States Parties to the Statute.

Article 13 of the *Rome Statute*:

Exercise of the jurisdiction

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

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

The Security Council can also request the Court to delay investigation or prosecution for a period of 12 months through a resolution adopted under Chapter VII of the UN Charter.

Article 16 of the *Rome Statute*:

Deferral of investigation or prosecution

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

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

Article 2 of the *Rome Statute*:

Relationship of the Court with the United Nations

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

8. Internal functioning

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

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

Article 34 of the Rome Statute:

Organs of the Court

"The Court shall be composed of the following organs:

- (a) The Presidency;*
- (b) An Appeals Division, a Trial Division and a Pre-Trial Division;*
- (c) The Office of the Prosecutor;*
- (d) The Registry".*

9. Proceedings before the Court

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

Article 21 of the Rome Statute:

Applicable law

"1. The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;*
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;*
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.*
- 2. The Court may apply principles and rules of law as interpreted in its previous decisions.*
- 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".*

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

9.1 General principles of criminal law

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

Article 22 of the Rome Statute:

Nullum crimen sine lege

- "1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.*
- 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.*
- 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute".*

Article 23 of the Rome Statute:

Nulla poena sine lege

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

Article 24 of the Rome Statute:

Non-retroactivity *ratione personae*

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

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

The principles of individual criminal responsibility are expressly recalled in articles 25 to 29 of the *Rome Statute*. The Court has indeed jurisdiction over natural persons, whether the crimes they are charged with have been committed by an individual alone, or by a group of individuals, and the Statute enumerates the various ways the participation in the crimes could have occurred (commission, solicitation, incitation, assistance, contribution). The jurisdiction of the Court is excluded for persons who were minor (under 18) at the time of the alleged commission of a crime. The *Rome Statute* further applies to all persons without any distinction based on official capacity which implies that the heads of States for instance or the members of Governments do not benefit, before the Court, from any immunity their national law could confer to them. Moreover, article 28 of the *Rome Statute* provides for responsibility of commanders and other superiors. The doctrine of superior responsibility prescribes the criminal liability of the persons who, being in command, have failed to either prevent or punish the crimes of their subordinates. This concept does not differentiate between military officers and civilians placed in positions of command, since the duty to prevent and punish the offences of their subordinates in situations of armed conflict is considered to bind on both. In addition to this principle, a person acting pursuant to a superior order is not relieved from his or her own criminal responsibility pursuant to article 33 of the *Rome Statute*.

Article 25 of the Rome Statute:

Individual criminal responsibility

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

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

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

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

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

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

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

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

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

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

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

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

Article 26 of the Rome Statute:

Exclusion of jurisdiction over persons under eighteen

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

Article 27 of the Rome Statute:

Irrelevance of official capacity

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

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

Article 28 of the Rome Statute:

Responsibility of commanders and other superiors

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

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

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

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

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

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

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

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

Article 29 of the Rome Statute:

Non-applicability of statute of limitations

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

Article 33 of the Rome Statute:

Superior orders and prescription of law

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

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

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

(c) The order was not manifestly unlawful.

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

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

Article 30 of the Rome Statute:

Mental element

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

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

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

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

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

Article 31 of the Rome Statute:

Grounds for excluding criminal responsibility

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

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

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

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

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

(i) Made by other persons; or

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

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

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

Article 32 of the Rome Statute:

Mistake of fact or mistake of law

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

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

9.2 The different stages of the proceedings

The proceedings before the Court are organised in different stages, namely: the Pre-Trial stage, the Trial stage and the Appeals stage. The *Rome Statute* also provides for revision and enforcement of sentences.

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

9.2.1 The Pre-Trial stage

Before initiating an investigation, under his or her own initiative pursuant article 15 of the *Rome Statute* or upon referral made by a State in accordance with article 14 of the *Rome Statute* or by the Security Council pursuant to article 13(b) of the *Rome Statute*, the

Prosecutor shall consider whether the three criteria set out in article 53 of the *Rome Statute*, namely reasonable and sufficient legal or factual basis, admissibility under article 17 of the *Rome Statute* and the interests of justice, are met. During an investigation, the Prosecutor has specific powers and duties under articles 54 and 55 of the *Rome Statute*.

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

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

According to the current jurisprudence of the Court, it is possible to identify two different phases within the pre-trial stage. The phase of the situation during which events are investigated by the Prosecutor without someone having been identified as a possible perpetrator of some alleged crimes committed within a territory under the jurisdiction on the Court (*the situation*) and the phase which starts once the Prosecutor requests the Pre-Trial Chamber to issue a warrant of arrest or a summons to appear against a person who has allegedly committed crimes under the jurisdiction of the Court (*the case*). Even with the issuance of warrants of arrest or summons to appear, the investigation continues since the Prosecutor may still identify other crimes committed and/or other alleged perpetrators. The distinction between a situation and a case is of particular relevance with regards to the participation of victims in the proceedings for the purposes of the causal link – which necessarily differ from one instance to the other – a victim has to demonstrate in order to be allowed to participate.

9.2.2 The Trial stage

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

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

Article 68 of the *Rome Statute* constitutes the core provision for the protection of victims and witnesses, while article 75 of the *Rome Statute* provides for reparations to victims. The Trial Chamber is responsible for matters of disclosure between the Prosecution and the Defence before the commencement of the trial, and for any matter related to the evidence and to protection of witnesses and victims. For the preparation of the trial, status

conferences may be held in accordance with rule 132 of the *Rules of Procedure and Evidence* and regulation 54 of the *Regulations of the Court*. See also rules 131 to 148 of the *Rules of Procedure and Evidence*.

9.2.3 The Appeals stage

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

A legal representative of victims may appeal against an order for reparations issued under article 75 of the *Rome Statute*. Proceedings in appeal are regulated by article 83 of the *Rome Statute*. See also rules 148 to 158 of the *Rules of Procedure and Evidence*.

As per the current jurisprudence of the Court, no appeal against a negative decision concerning the participation of victims is possible and in this case, the only available remedy for a “[v]ictim whose application has been rejected” is to “[f]ile a new application later in the proceedings” in accordance with rule 89(2) of the *Rules of Procedure and Evidence*. Moreover, in relation to interlocutory appeal, in order to participate at that stage, victims shall expressly request leave to participate.

9.2.4 The possibility of revision

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

9.2.5 The enforcement of sentences of imprisonment

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

2. The International Criminal Court and victims

1. Notion and role of Victims in the framework of the *Rome Statute*

The ordinary usage of the term “*victim*” was revolutionalised after the UN General Assembly first adopted the Declaration on Basic Principles of Justice for Victims of Crimes and Abuse of Power (the “*Victims Declaration*”) on 29 November 1985. The definition adopted in the *Victims Declaration* laid the foundation for the negotiations on the definition to be adopted in the texts of the ICC during the Preparatory Committee discussions.

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

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

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

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

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

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

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

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

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

Rule 85 of the Rules of Procedure and Evidence:

Definition of victims

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

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

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

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

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

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

2. Participation of victims in the proceedings before the Court

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

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

Article 68 of the Rome Statute:

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

“3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence”.

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

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

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

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

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

Rule 90 of the Rules of Procedure and Evidence:

Legal representatives of victims

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

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

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

4. *The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.*
5. *A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.*
6. *A legal representative of a victim or victims shall have the qualifications set forth in rule 22, sub-rule 1”.*

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

In accordance with rule 91(3) of the *Rules of Procedure and Evidence*, legal representatives of victims have to be authorised by the relevant Chamber if they wish to question a witness, an expert or the accused. These limits do not apply during the phase of the proceedings dealing with reparations of the harm suffered by the victims. During this phase, the restrictions on questioning do not apply, in accordance with rule 91(4) of the *Rules of Procedure and Evidence*.

Rule 91 of the Rules of Procedure and Evidence:

Participation of legal representatives in the proceedings

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

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

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

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

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

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

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

The legal instruments of the Court are not explicit in detailing the modalities for victims’ participation in the proceedings. According to rule 89(1) of the *Rules of Procedure and Evidence*, “[t]he Chamber shall [...] specify the proceedings and manner in which participation is considered appropriate”. Moreover, article 68(3) of the *Rome Statute* specifies that “[w]here the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.

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

- Attend and participate in the hearings before the Court *“[u]nless, in the circumstances of the case, the Chamber concerned is of the view that the representative’s intervention should be confined to written observations or submissions”* pursuant to rule 91(2) of the *Rules of Procedure and Evidence*;
- Make opening and closing statements in accordance with rule 89(1) of the *Rules of Procedure and Evidence*;

- Present their views and concerns pursuant to article 68(3) of the *Rome Statute* and rule 89 of the *Rule of Procedure and Evidence*;
- Make representations in writing to a Pre-Trial Chamber in relation to a request for authorisation of an investigation pursuant to article 15(3) of the *Rome Statute* and rule 50(3) of the *Rules of Procedure and Evidence*;
- Submit observations in the proceedings dealing with a challenge to the jurisdiction of the Court or the admissibility of a case in accordance with article 19(3) of the *Rome Statute*;
- Request a Chamber to order measures to protect their safety, psychological well-being, dignity and privacy in accordance with article 68(1) of the *Rome Statute* and rule 87(1) of the *Rules of Procedure and Evidence*; and
- Request a Chamber to order special measures in accordance with article 68(1) of the *Rome Statute* and rule 88(1) of the *Rules of Procedure and Evidence*.

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

4. Reparations of the harm suffered

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

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

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

The Statute of the ICC provides for the possibility to grant reparations to victims.

Article 75 of the Rome Statute:

Reparations to victims

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

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

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

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

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

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

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

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

Rule 97 of the Rules of Procedure and Evidence:

Assessment of reparations

- "1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.*
- 2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.*
- 3. In all cases, the Court shall respect the rights of victims and the convicted person".*

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

5. The Trust Fund for Victims

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

Article 79 of the Rome Statute:

Trust Fund

- "1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.*
- 2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.*
- 3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties".*

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

Rule 98 of the Rules of Procedure and Evidence:

Trust Fund

- "1. Individual awards for reparations shall be made directly against a convicted person.*
- 2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each*

victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.

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

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

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

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

6. The right of victims and witnesses to protection

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

Article 68 of the *Rome Statute* is the central article relating to the protection of victims and witnesses.

Article 68 of the Rome Statute:

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

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

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

[...]

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

[...]”.

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

Article 43 of the Rome Statute:

The Registry

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

Chambers “[m]ay order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness” or measures aimed at facilitating the testimony of witnesses or the appearance of victims before them.

Rule 87 of the Rules of Procedure and Evidence:

Protective measures

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

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

- (a) Such a motion or request shall not be submitted ex parte;
 - (b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of whom shall have the opportunity to respond;
 - (c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;
 - (d) When the Chamber proceeds on its own motion, notice and opportunity to respond shall be given to the Prosecutor and the defence, and to any witness or any victim or his or her legal representative, if any, who would be affected by such protective measure; and
 - (e) A motion or request may be filed under seal, and, if so filed, shall remain sealed until otherwise ordered by a Chamber. Responses to motions or requests filed under seal shall also be filed under seal.
3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, inter alia:
- (a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;
 - (b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;
 - (c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;
 - (d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or
 - (e) That a Chamber conduct part of its proceedings in camera".

Rule 88 of the Rules of Procedure and Evidence:

Special measures

"1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.

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

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

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

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

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

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

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

Regulation 80 of the Regulations of the Court:

Appointment of legal representatives of victims by a Chamber

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

Regulation 81 of the Regulations of the Court:

Office of Public Counsel for victims

- "1. The Registrar shall establish and develop an Office of Public Counsel for victims for the purpose of providing assistance as described in sub-regulation 4.*
- 2. The Office of Public Counsel for victims shall fall within the remit of the Registry solely for administrative purposes and otherwise shall function as a wholly independent office. Counsel and assistants within the Office shall act independently.*
- 3. The Office of Public Counsel for victims may include a counsel who meets the criteria set out in rule 22 and regulation 67. The Office shall include assistants as referred to in regulation 68.*
- 4. The Office of Public Counsel for victims shall provide support and assistance to the legal representative for victims and to victims, including, where appropriate:*
 - (a) Legal research and advice; and*
 - (b) Appearing before a Chamber in respect of specific issues".*

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

Since its inception in September 2005, the Office has, as of July 2010, represented approximately 2000 victims and has submitted approximately 300 submissions in the various proceedings before the Court. The Office has also assisted 30 external legal representatives in all situations and cases and provided close to 600 legal advices/researches to them. Furthermore, the task of providing support and assistance to victims has included direct legal representation by the Office in the proceedings, and Chambers have maintained their practice in accordance to which the Office is appointed as legal representative for unrepresented applicants and, to some extent, for victims participating in the proceedings. It is noteworthy to mention that the above number of victims represented by the Office does not include victims and affected communities contacted through joint efforts with other sections of the Court in order to reach targeted groups and increase awareness of the proceedings before the Court and encourage victims' applications for participation.

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

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

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

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

- ii) Contributing to the general perception by victims of their ability to influence the proceedings before the Court by actively responding to any requests for information and by helping them navigate the procedural steps required for their participation, thereby promoting their sense of empowerment,
- iii) Legally advocating victims' rights to hold the dual status of victims and witnesses before the Court, thereby promoting their sense of dignity as a witness while at the same time helping to meet their need for international recognition as victim of crimes within the jurisdiction of the Court,
- iv) Paving the way through its active advocacy in the proceedings for victims' rights in international criminal law.



Part 2

Practice of the Court on matters per- taining to victims' participation

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1. Victims' participation in the proceedings

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

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

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

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

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

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

The requirement that “*personal interest*” of the victims have to be affected is generally met whenever a victim applies for participation in proceedings following the issuance of a warrant of arrest or of a summons to appear (*i.e.* in a case). In fact, that the personal interests of a victim are affected in respect of proceedings relating to the very crime this victim was allegedly involved seems entirely in line with the nature of the Court as judicial institution with a mission to end impunity for the most serious crimes.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 9, 10 and 12.

Specifying the nature and scope of the proceedings in which victims may participate in the context of a situation, prior to, and/or irrespective of, a case, is critical to ensuring the predictability of proceedings and ultimately the certainty and effectiveness of victims' participation, and therefore there is a need to indicate how the victims' personal interests could be affected in those proceedings.

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

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

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, par. 98, pp. 37-38.

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

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

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

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

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

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

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

See No. ICC-01/04-01/06-925, Appeals Chamber, 13 June 2007, par. 28. See also No. ICC-01/04-01/06-824, Appeals Chamber, 13 February 2007, par. 39; No. ICC-01/04-01/06-1335, Appeals Chamber, 16 May 2008, paras. 34-36; No. ICC-01/05-01/08-566, Appeals Chamber, 20 October 2009, paras. 15-17 and No. ICC-01/04-01/06-2205, Appeals Chamber, 8 December 2009, paras. 34-36.

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

See No. ICC-01/047-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 32.

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

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

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

See No. ICC-01/047-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, para. 34-36.

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

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

See No. ICC-01/047-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, para. 38-39.

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

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

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

See No. ICC-01/047-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, para. 41-43.

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

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

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

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 45. See also, No. ICC-01/04-444, Pre-Trial Chamber I (Single Judge), 6 February 2008, pp. 8 and 10 and No. ICC-02/05-121, Pre-Trial Chamber I (Single Judge), 6 February 2008, p. 6.

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

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

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

See No. ICC-01/04-503, Appeals Chamber, 30 June 2008, par. 97.

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

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

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

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

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

Against this background, the proper safeguard for the defence lies not in attempting to apply varying standards or definitions to the concept of the victims' personal interests based on the party or participant calling a particular witness, but instead in ensuring that the manner and the timing of the questioning is not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial. This is a quintessentially

fact-based issue, which cannot be determined in advance, absent a detailed examination of the proposed manner of questioning of all the participating victims who have applied to examine the witness in question. The Chamber must take a global view for each witness, to ensure that the overall effect of the questioning by victims does not undermine the rights of the accused and his fair and impartial trial.

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

2. Appropriateness of the participation

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

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

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

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

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

See No. ICC-01/04-01/06-824, Appeals Chamber, 13 February 2007, par. 43, pp. 13-14.

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

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

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

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

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

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

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

See No. ICC-01/04-503, Appeals Chamber, 30 June 2008, par. 36.

3. Definition of victim

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

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

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

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

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

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

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

In assessing the merits of the applications, the Single Judge analyses:

- (i) Whether the identity of the applicant as a natural person appears duly established;
- (ii) Whether the events described by each applicant constitute a crime within the jurisdiction of the Court;
- (iii) Whether the applicant claims to have suffered harm; and
- (iv) Whether such harm appears to have arisen "*as a result*" of the event constituting a crime within the jurisdiction of the Court.

Points (i) and (iii) are an analysis of fact based on adequacy of the supporting evidence and points (ii) and (iv) are assessed in light of the legal provisions of the Statute.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, par. 12.

The Statute provides no general rules on the basis of which the reliability of relevant elements is to be assessed, except in respect of specific instances. Therefore, the Chamber has a broad discretion in assessing the soundness of a given statement or other evidence in the absence of any such rules. Such an assessment has to comply with the general principle of law that the burden of proof of elements supporting a claim lies on the party making the claim.

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

The Single Judge adopts a pragmatic, strictly factual approach, whereby the alleged harm will be held as 'resulting from' the alleged incident when the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent.

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

The victims can not always be expected to fully substantiate their claim. The Single Judge accepts as a general principle of law that indirect proof (*i.e.* inferences of fact and circumstantial evidence) is

admissible if it shows that the applicants were hampered by objective obstacles from gathering direct proof supporting their claim, and if such indirect evidence appears to be based on a series of facts linked together and leading logically to a single conclusion. Each statement by applicants is assessed on the merits of its intrinsic coherence, as well as on the basis of information available to the Chamber.

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

The assessment of the criteria under rule 85 of the *Rules of Procedure and Evidence* is only that these criteria are met *prima facie* and consequently, the analysis of the applications for participation will assess each statement by victims applying to participate first and foremost on the merits of its intrinsic coherence and on information available, without assessing the credibility of the statements or engaging in a process of corroboration *stricto sensu*.

See No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, par. 5. See also, No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, par. 8.

At the investigation stage of the proceedings it is sufficient to determine whether applicants have demonstrated that there are grounds to believe that a harm allegedly suffered by them results from a crime under the Court's jurisdiction, and that such a crime had been committed within timing, geographical and, if appropriate, personal parameters which define the situation at stake.

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

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

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

only victims who are victims of the crimes charged may participate in the trial proceedings pursuant to article 68(3) of the Statute read with rule 85 and 89(1) of the Rules. Once the charges in a case against an accused have been confirmed in accordance with article 61 of the Statute, the subject matter of the proceedings in that case is defined by the crimes charged.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2 The notion of “victims having communicated with the Court”

Victims who have applied to participate in the proceedings by submitting the standard application form duly filed in the situation record by the relevant sections of the Registry qualify as “*victims having communicated with the Court*”.

Three meaningful elements can be inferred from rules 59(l)(b), 92(2) and (3) and 119(3) of the *Rules of Procedure and Evidence*:

- (i) Firstly, in respect of crucial stages such as challenges to the jurisdiction or the admissibility of a case, the confirmation of the charges, conditional release and proceedings under article 53 of the Statute, a decision pursuant to rule 89 of the Rules and ensuing participation is not a pre-condition for victims being granted procedural rights as significant as notification, a right to be formally informed of procedural developments which is typically granted to individuals or entities entitled to some role in the proceedings;
- (ii) Secondly, “*victims having communicated with the Court*” are mentioned in rule 92(2) and (3) of the Rules as a separate and additional group of victims besides those who “*have already participated in the proceedings*”;
- (iii) Thirdly, and mostly significantly, only rule 92(2) refers to communication by victims with the Court having occurred “*in respect of the situation or case*”, while the other provisions only refer to victims having communicated with the Court in respect of a case.

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

3.3 Natural person and the proof of identity

The first determination to make is whether the identity of an applicant has been satisfactorily established. Simultaneously, the Single Judge acknowledges that it would be inappropriate to expect Ugandan applicants to be able to provide a proof of identity of the same type as would be required of individuals living in non-conflict territories. However, the Single Judge also recognises that it would be equally inappropriate not to require some kind of proof from the applicants since victims' participation will have profound impact on the parties and on the overall fairness of the proceedings.

Thus, the Single Judge decides that the identity of an applicant should be confirmed by a document:

- (i) Issued by a recognised public authority;
- (ii) Stating the name and the date of birth of the holder, and
- (iii) Showing a photograph of the holder.

Further, the Single Judge considers that certain documents meet the three conditions and, therefore, they are adequate proof when they properly correspond to the information submitted in the standard application form. When documents provided do not meet the above three criteria, the Single Judge considers that the assessment on those applications shall be deferred until adequate proof of identities is submitted and/or a report on the identity documents available in the Ugandan legal and administrative system is provided by the VPRS to the Chamber.

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

The proof of identity, kinship, guardianship and legal guardianship must be submitted with an application. However, in areas of recent conflict where communication and travel may be difficult it would be inappropriate to expect applicants to be able to provide proof of identity of the same type as would be required of individuals living in areas not experiencing the same types of difficulties.

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

The following list of documents can be considered, at the investigation stage of the situation, as a proof of identity:

- (i) National identity card, passport, birth certificate, death certificate, marriage certificate, family registration booklet, will, driving licence, card from a humanitarian agency;
- (ii) Voting card, student identity card, pupil identity card, letter from local authority, camp registration card, documents pertaining to medical treatment, employee identity card, baptism card;
- (iii) Certificate/attestation of loss of documents (loss of official documents), school documents, church membership card, association and political party membership card, documents issued in rehabilitation centres for children associated with armed groups, certificates of nationality, pension booklet; or
- (iv) A statement signed by two witnesses attesting to the identity of the applicant or the relationship between the victim and the person acting on his or her behalf, providing that there is consistency between the statement and the application. The Statement should be accompanied by proof of identity of the two witnesses.

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

Deceased persons cannot be included in the category of "natural persons". There is no provision in the Court's legal texts that permit applications to be made on behalf of deceased persons.

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

Rule 89(3) of the *Rules of Procedure and Evidence* provides with the possibility to lodge an application for participation by a person acting with the consent of the victim or on behalf of the latter. However, no provision provides with the possibility to lodge an application for participation on behalf of a dead person, since a dead person cannot give a required consent.

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

Dead persons cannot be considered as natural persons within the meaning of rule 85(a) of the *Rules of Procedure and Evidence*. However, relatives of dead persons and disappeared persons can be considered as victims within the meaning of the Statute, the Rules of Procedure and Evidence and the Regulations of the Court provided that they comply with required criteria.

See No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, paras. 24-25.

It should be noted that the Single Judge granted the status of victim to a family member of a deceased person who relates to the second degree of family relationship, namely to a nephew of the latter.

See No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 15.

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

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

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

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

While recognising the need for proper identification documents of all victims who apply to participate in the early stage of the Court proceedings, it would be inappropriate to expect applicants to be able to provide a proof of identity of the same type as would be required of individuals living in areas not experiencing the same kind of difficulties.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 87-89.

The Trial Chamber notes from the difference in wordings between rule 85(a) and (b) that people can be direct or indirect victims of a crime within the jurisdiction of the Court. Furthermore, it refers to Principle 8 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (General Assembly resolution 60/147, 16 December 2005) to establish that the harm suffered by victims' applicants may have been so individually or collectively, physically, mentally, emotionally, economically or consist in a substantial impairment of his or her fundamental rights.

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

The following documents are accepted as proof of identity of the applicants:

(i) passport, (ii) voter card, (iii) certificate of registration issued by the Electoral Commission, (iv) driving permits, (v) graduated tax ticket, (vi) «short» birth certificate or «long» birth certificate, (vii) birth notification card, (viii) certificate of amnesty, (ix) resident permit or card issued by a Local Council, (x) identification letter issued by a Local Council, (xi) letter issued by a leader of an IDP Camp, (xii) «Reunion letter» issued by the Resident District Commissioner, (xiii) identity card issued by a workplace or an educational establishment, (xiv) camp registration card and card issued by humanitarian relief agencies, such as the United Nations High Commissioner for Refugees and the World Food Programme, (xv) baptism card, (xvi) letter issued by a Rehabilitation Centre.

See No. ICC-02/04-01/05-282, Pre-Trial Chamber II (Single Judge), 14 March 2008, par. 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See No. ICC-01/04-01/07-1737, Trial Chamber II, 22 December 2009, par. 30 (not an official translation).

3.4 Organisations or institutions

Rule 85(b) of the *Rules of Procedure and Evidence* establishes four criteria that have to be met in order to obtain the status of victim, irrespective of the stage of the proceedings in which the applicants wish to participate: (i) the victim must be an organisation or an institution the property of which is dedicated to religion, education, art or science or charitable purposes, and to its historical monuments, hospitals and other places and objects for humanitarian purposes; (ii) the organisation or the institution must have suffered harm; (iii) the crime from which the harm ensued must fall within the jurisdiction of the Court; and (iv) there must be a causal link between the crime and the harm suffered. At the investigation stage a causal link required by rule 85(b) of the *Rules of Procedure and Evidence* is being established once the victim presents sufficient evidence allowing to establish grounds to believe that the harm suffered is the result of the commission of crimes falling within the jurisdiction of the Court.

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

See No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, paras. 139-143.

3.5 Crimes under the jurisdiction of the Court

The term "jurisdiction" in rule 85(a) of the *Rules of Procedure and Evidence* refers to the provision of the Statute regarding jurisdiction *ratione materiae*, *ratione temporis* and *ratione personae* or *loci*.

See No. ICC-01/04-01/06-228, Pre-Trial Chamber I, 28 July 2006, p. 14.

To fall within the jurisdiction of the Court, a crime must meet the following conditions: it must be included in the crimes enumerated in article 5 of the Statute, namely, the crime of genocide, crimes against humanity and war crimes; it must satisfy the requirements of article 11 of the Statute and, finally, it must meet one of the two conditions set out in article 12 of the Statute.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, paras. 83-93. See also No. ICC-01/04-177, Pre-Trial Chamber I, 31 July 2006, p. 14; See also No. ICC-01/04-01/07-4, Pre-Trial Chamber I, reclassified as public pursuant to oral decision dated 12 February 2008, 6 July 2007, par. 11; No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 5; No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 37.

3.6 Harms suffered

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

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

Harm includes economic loss, physical suffering and emotional suffering.

See No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, paras. 30 and 38-50.

The harm suffered by a natural person is harm to that person, *i.e.* personal harm. Material, physical, and psychological harm are all forms of harm that fall within Rule 85 if they are suffered personally by the victim. The issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims.

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

Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is evident for instance, when there is a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child. The recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child.

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

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

See No. ICC-01/04-01/06-1432, Appeals Chamber, 11 July 2008, par. 107.

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

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

The death of a victim should not extinguish the opportunity for the Chamber to consider his or her views and concerns, in that it would be markedly unjust if an alleged perpetrator in these circumstances prevented the ICC from receiving relevant representations from the person fatally affected. Participation by victims is not a one-sided exercise: although it is specifically intended to benefit those whose personal interests are engaged, it also enhances the Court's understanding of the relevant events. In the Lubanga case victims have given evidence relevant to the trial, and their advocates have questioned witnesses about issues germane to the case. Given that legal representatives can act for participating victims under Article 68(3) of the Statute, it is an unexceptional extension of that approach to allow an appropriate individual (not necessarily a relative) to provide the Chamber with relevant information (reflecting the views and concerns of the victim who died), whether through counsel or otherwise. The most fundamental restriction is that this participation should not be prejudicial to or inconsistent with the rights of the accused, and a fair and impartial trial. Accordingly, the Chamber endorses the approach of Trial Chamber I and Pre-Trial Chamber III and in the circumstances this applicant meets the requirements of Rule 89(3) of the Rules. Sufficient information has been provided as to the identity of, and the kinship between, the dead victim and the person acting on his behalf. *Prima facie*, the applicant (the deceased) is a victim under Rule 85(a) of the Rules, given, in addition to his death, his home was allegedly looted as part of the commission of crimes included in the charges against the accused, following the activities of the Banyamulengués in the period between 26 October 2002 to 15 March 2003.

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

For these applications, the information and documents have enabled the Chamber to establish the identity of, and the kinship between, the deceased victim and the person acting on his behalf. Thus, these applicants satisfy the requirements of Rule 89(1) and (3) of the Rules. Prima facie, the deceased and the individuals acting on their behalf are victims under Rule 85(a) of the Rules: they suffered personal harm as a result of the commission of crimes included in the charges against the accused, on account of the activities of the Banyamulengués in the period between 26 October 2002 to 15 March 2003.

See No. ICC-01/05-01/08-2063, Trial Chamber III, 30 June 2010, paras. 83-85. See also, No. ICC-01/05-01/08-320, Pre-Trial Chamber III, 12 December 2008, paras. 39-40 and No. ICC-01/05-01/08-424, Pre-Trial Chamber III, 15 June 2009, paras. 71, 72 and 210-212.

3.7 The causal link

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

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

The causal link required by rule 85 of the *Rules of Procedure and Evidence* at the case stage is substantiated when a victim, and where applicable, close family or dependants, provide sufficient evidence to allow the Chamber to establish that the victim has suffered harm directly linked to the crimes contained in the arrest warrant or that the victim has suffered harm whilst intervening to help direct victims of the case or to prevent the latter from becoming victims because of the commission of this crimes.

See No. ICC-01/04-01/06-172, Pre-Trial Chamber I, 29 June 2006, pp. 7-8. See also No. ICC-01/04-01/06-601, Pre-Trial Chamber I, 20 October 2006, p. 9.

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

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

Relatives of a dead person shall be able to demonstrate the existence of a harm which is directly linked to them.

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

As regard to the crimes to which the alleged harm shall be linked, rule 85 of the *Rules of Procedure and Evidence* should be read in light of article 68(3) of the *Rome Statute*. Consequently the Chamber concludes that rule 85 does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I and that doing so would be to introduce a limitation not found anywhere in the regulatory framework of the Court.

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

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

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

4. The application process

4.1 In general

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

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

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

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, par. 102.

The application process is not related to questions pertaining to the award of reparations, which are the subject of the proceedings provided for in article 75 of the Statute and rule 94 of the Rules.

No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, par. 6, p. 7.

According to rule 89 of the Rules and regulation 86 of the Regulations [of the Court] the exhaustion of domestic remedies is not a condition to be fulfilled by applicants, unlike what is provided for in article 35 of the European Convention on Human Rights and article 46 of the American Convention on Human Rights.

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

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

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

The role of Applicants in the application process can by no means be confused with that of witnesses in criminal proceedings and therefore the Prosecution's obligation under rule 77 of the *Rules of Procedure and Evidence* is not applicable in the context of the application process. Applicants make requests to be granted the procedural status of victim in situation and case proceedings. Such requests constitute the object of the application process. Witnesses in criminal proceedings are a mean or evidence to prove the factual allegations on which the requests for the conviction or acquittal of the defendant are based. The application process is not related to questions pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witnesses and hence article 67(2) of the Statute is not applicable in this context.

See No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, paras. 5, p. 6 and 20, p. 13. See also No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, par. 22.

Due to the specific object and purpose of the application process, victims applying to participate are neither entitled to reply to the observations of the Prosecution and the Defence nor to request leave to appeal the decision of the Chamber on the merits of their applications. Applicants are only entitled to submit new applications should their applications be rejected.

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

Applicants do not have procedural standing to seek leave to appeal the decisions of the Chamber on the merits of their applications; therefore, they do not have standing to seek leave to appeal interlocutory decision of the Chamber addressing potential procedural matters relating to the application process prior to a decision on the merits of their applications.

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

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

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

It is not necessary to determine in any great detail at the investigation stage neither the precise nature of the causal link nor the identity of the person(s) responsible for the crimes. The determination of a single instance of harm suffered is sufficient.

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

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

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

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

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

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

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

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

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

approach is broadly consistent with the approach of Trial Chamber I in the Lubanga case, in that in its Decision of 18 January 2008 on victims' participation, the Chamber observed:

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

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

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

Additionally, the VPRS is to review each of the applications to participate rejected by the Pre-Trial Chamber, to establish whether, in light of events or information received subsequent to the original rejection, the application should be reconsidered by the Trial Chamber, following a report from the VPRS to the Chamber.

If new documents or information are received by the VPRS which may have a material impact on the decision permitting a victim to participate, the Chamber is to be advised immediately. The Chamber understands, however, that for the 54 current participants, no new documents have been submitted.

Otherwise, as set out above, the victims authorised to participate in the proceedings at the pre-trial stage shall automatically participate at trial, without the need to re-file their applications for assessment by the Trial Chamber.

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

The Chamber notes that no provision of the Court's statute, or of its rules and regulations, requires applications for participation to be completed by the applicants themselves. Furthermore, it accepts that the role of intermediaries in completing the application forms for participation is important, in that they provide persons who may be illiterate with explanations about the content of a form which is long, and complicated in places by the use of legal terms, and may indeed help them to produce a sketch describing the location where the events occurred. At this stage in the proceedings the Chamber has assessed the veracity of the facts reported by applicants by conducting a *prima facie* analysis of their consistency, and their relation to the charges confirmed by the Pre-Trial Chamber. In the Chamber's view, the fact that one statement is similar to others is not in itself sufficient to affect its credibility, but means that the statement needs to be scrutinised in light of the other information contained in the application for participation.

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

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

4.2 Completeness of the applications

Where there are a number of applications, by requesting that only complete applications are transmitted, the Chamber would be able to deal more efficiently with applications submitted with all relevant information and documentation.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 9. See also, No. ICC-01/04-374, Pre-Trial Chamber I (Single Judge), 3 July 2008, par. 16.

The Registry shall submit to the Chamber the applications together with the Report only after receiving the missing relevant information. Regarding the applications which remain incomplete after requests for additional information have been made, the Registry shall, within a reasonable period of time following the request for additional information, present the incomplete applications to the Chamber together with a report thereon.

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

An application is deemed complete when it includes the following information:

- (i) The identity of the applicant;
- (ii) The date of the crime(s);
- (iii) The location of the crime(s);
- (iv) A description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court;
- (v) Proof of identity;
- (vi) If the application is made by a person acting with the consent of the victim, the express consent of that victim;
- (vii) If the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship;
- (viii) A signature or thumb-print of the Applicant on the document, at the very least, on the last page of the application.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 12. See also No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, paras. 24 and 26; No. ICC-01/04-374, Pre-Trial Chamber I (Single Judge), 3 July 2008, par. 17; No. ICC-02/05-01/09-255, Pre-Trial Chamber I (Single Judge), 10 December 2009, par. 8; and No. ICC-02/05-02/09-255, Pre-Trial Chamber I (Single Judge), 19 March 2010, par. 4.

When the Applicant is a minor, if the application is submitted by a person who is not the next-of-kin or legal guardian of the Applicant, the application must contain the consent of the next-of-kin or legal guardian that an application has been made on the minor's behalf. In other words, the minor's consent to have a third-party submit an application on his or her behalf is insufficient.

See No. ICC-01/04-505, Pre-Trial Chamber I (Single Judge), 3 July 2008, par. 31.

While considering the specific applications for participation under the criteria of rule 85 of the *Rules of Procedure and Evidence*, the Single Judge recalls that when an applicant is a minor, his or her application must be submitted on his or her behalf by a person who has attained the age of majority

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

The Single Judge denies the victim status in the following cases: (i) the application has been submitted by a minor himself; (ii) the applicant provides no evidence to substantiate his allegations; (iii) the applicant acting on behalf of another person provides neither his proof of identity or the consent of the latter to act on his behalf; (iv) the application has been submitted on behalf of a deceased person; and (v) the applicant provides no proof of his identity.

See No. ICC-01/04-545, Pre-Trial Chamber I (Single Judge), 4 November 2008, paras 33, 36, 60, 68, 85, 91 and 102.

The Chamber recalls that, as far as minors are concerned, the provisions of rule 89(3) of the Rules do not exclude the possibility of a minor submitting an application for participation in the proceedings as victim on his or her own initiative. In the Decision of 26 February 2009, the Chamber held that minors and disabled persons were capable of submitting their own applications for participation and that proof of legal guardianship could be provided by two credible witnesses. It will nonetheless

assess the admissibility of such applications on a case-by-case basis, in accordance with the information gathered specifically by the Registry in relation to the minor's maturity and powers of discernment.

See No. ICC-01/04-01/07-1491-Red-t-ENG, Trial Chamber II, 23 September 2009, par. 98.

4.3 Redactions of information about the applicants

The Applicants are currently facing serious security risks in the Democratic Republic of the Congo; these current circumstances require that the *ad hoc* counsel for the Defence be provided with a redacted copy of the applications after having expunged any information that could lead to their identification, including the Applicants' identity and the place and time in which they have allegedly been victimized being understood that the scope of the redactions allows for a meaningful exercise by the *ad hoc* counsel for the Defence of his right to reply to the Applications and it is in no way prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial.

See No. ICC-04/01-73, Pre-Trial Chamber I, 22 July 2005, p. 4

The issue of whether to redact the Applications before transmitting them to the Prosecution and the Defence requires it to balance competing obligations: its obligations under article 57(3)(c) of the Statute to protect the privacy of victims and witnesses and under rule 86 of the *Rules of Procedure and Evidence* to take into account the needs of victims and witnesses in making orders, and its general obligation to ensure the fairness of the proceedings, as well as the requirement under rule 89(1) of the *Rules of Procedure and Evidence* to transmit copies of the Applications to the Prosecution and the 'defence', who shall be entitled to reply. The scope of the redactions cannot exceed what is strictly necessary.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, paras. 20, 21, 28, 29 and 31. See also No. ICC-01/04-73, Pre-Trial Chamber I, 21 July 2005, pp. 3-5; No. ICC-01/04-01/06-494, Pre-Trial Chamber I, 29 September 2006, p. 4; No. ICC-01/05-01/08-320, Pre-Trial Chamber III (Single Judge), 12 December 2008, par. 79 and No. ICC-02/05-01/09-62, Pre-Trial Chamber I (Single Judge), 10 December 2009, par. 12

The role of the Chamber regarding the application process is to provide the Prosecution and the Defence with copies of the applications and not with information extrinsic to the applications themselves.

See No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, par. 15 and No. ICC-01/04-417, Pre-Trial Chamber I (Single Judge), 7 December 2007, par. 10. See also No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, par. 20; and No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 7.

The Single Judge considers that the Statute and the Rules do not embrace two different notions of 'victims', one for protection purposes pursuant to article 68(1) and rules 81, 87 and 88 of the Statute, and the other for the purpose of participation in situation and case proceedings. On the contrary, in the view of the Single Judge, the notion of «victim» is the same both in respect of protection and participation in the proceedings.

See No. ICC-01/04-01/07-361, Pre-Trial Chamber I (Single Judge), 3 April 2008, par. 35.

As regards protective and special measures, applying the general principle contained in Rule 86 of the Rules, the Trial Chamber recognises there are particular special needs to be taken into account for child and elderly victims, victims with disabilities, and victims of sexual and gender violence when they are participating in the proceedings. Generally, the Chamber will take into account to the fullest extent possible the needs and interests of victims or groups of victims, and it recognises that these may sometimes be different or in opposition. Under Rule 88 of the Rules the Chamber may order special measures to assist victims and witnesses, including measures to facilitate the testimony of a traumatized victim or witness, children, the elderly and victims of sexual and gender violence.

Similarly, the Trial Chamber accepts the submission of the Office of Public Counsel for Victims that protective and special measures for victims are often the legal means by which the Court can secure the participation of victims in the proceedings, because they are a necessary step in order to

safeguard their safety, physical and psychological well-being, dignity and private life in accordance with Article 68(1) of the Statute.

The Chamber also accepts the suggestion of the legal representatives of victims that protective measures are not favours but are instead the rights of victims, enshrined in Article 68(1) of the Statute. The participation of victims and their protection are included in the same statutory provision, namely Article 68 in its paragraphs 1 and 3, and to a real extent they complement each other.

Both the prosecution and the defence resisted any suggestion that victims should remain anonymous as regards the defence during the proceedings leading up to and during the trial. However, the Trial Chamber rejects the submissions of the parties that anonymous victims should never be permitted to participate in the proceedings. Although the Trial Chamber recognizes that it is preferable that the identities of victims are disclosed in full to the parties, the Chamber is also conscious of the particularly vulnerable position of many of these victims, who live in an area of ongoing conflict where it is difficult to ensure their safety.

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

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras; 127-131. See also No. ICC-01/05-01/08-699, Trial Chamber III, 22 February 2010, par. 24; and No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 61-69.

In accordance with Rule 89(1) of the Rules, the Office of the Prosecutor and the defence are to be provided with a copy of the applications, and they have the right to reply to them within the time-limit set by the Chamber.

However, when making these applications available to the parties the Chamber must apply Article 68(1) of the Statute, which mandates the Court to take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims.

Most of the applicants request that their identity, along with other information included in their application forms, is not disclosed to the prosecution, the defence, the State Parties or the general public. Most applicants refer to their fears of retaliation and the safety of their own lives and those of their families as the main reasons for requesting these protective measures.

The Trial Chamber has not received specific detailed information as to the individual security risks of the applicants, although it is aware of the potential high levels of insecurity in relevant parts of the Democratic Republic of Congo.

In order to make an informed decision on individual protective measures for each applicant the Trial Chamber would need the assistance of the Victims and Witnesses Unit so as to assess the individual levels of risk that each applicant faces. Nonetheless, the Chamber is aware of the cost and time involved in the Victims and Witnesses Unit carrying out this procedure as regards all 105 applicants.

At this stage the Chamber is essentially conducting a preliminary assessment on the merits of the applications that may lead to some of them being rejected and this could result in applicants not being granted the status of participants in the proceedings. For this limited purpose, the Chamber adopts the observations of Single Judge Politi when addressing a similar issue, namely that «[g]iven the practical and financial obstacles necessarily associated with measures other than redactions (in particular, measures in the field or relocation)[...] the adoption of any measures other than redactions would exceed the scope of the present proceedings and would therefore be unjustified».

The Trial Chamber has carefully applied the principle of proportionality approved by the Appeals Chamber, that protective measures should:

- i) restrict the rights of the suspect or accused only as far as necessary;
- ii) be put in place where they are the only sufficient and feasible measure. The Trial Chamber deems that the above two requirements are met given that:
- iii) In light of the current and significant insecurity situation in relevant parts of the Democratic Republic of Congo, non-disclosure of the applicants' identities is necessary. This will not restrict the rights of the accused at this moment, or create an irreversible situation that cannot be corrected in due course, given that the Trial Chamber will make any necessary judgements as to these redactions at the time any of the applicants are granted status as victims, in order to guarantee the fairness of proceedings.

Consistent with the Chamber's 18 January Decision on victims' participation, if victims are granted status to participate in the proceedings, their active role in the trial will depend on additional discrete applications in which they must set out specifically how their interests are affected at a given phase of the proceedings. At that stage the Chamber will take into account whether the victim is requesting continued anonymity for the purposes of determining the appropriate form of participation. At this preliminary juncture, however, redactions to applications are necessary and appropriate and are the only feasible and appropriate measures at this stage of the proceedings, namely the initial application process.

Therefore, all applications for participation must be provided to the prosecution and defence in a confidential redacted form, whereby all information which may lead to the identification of the applicants and their individual whereabouts has been expunged. The Trial Chamber concurs with the reasoning of Pre-Trial Chamber I in a decision on a similar issue, in that «the scope of the redactions cannot exceed what is strictly necessary in light of the applicant's security situation and must allow for a meaningful exercise by the Prosecution and the Defence of their right to reply to the application for participation».

Hence, the following redactions are authorised:

- i) name of applicant;
- ii) name of parents;
- iii) place of birth;
- iv) exact date of birth (year of birth shall not be redacted);
- v) tribe or ethnic group;
- vi) occupation;
- vii) current address;
- viii) phone number and email address;
- ix) name of other victims of, or of witnesses to, the same incident;
- x) identifying features of the injury, loss or harm allegedly suffered;
- xi) name and contact details of the intermediary assisting the victim in filing the application.

As set out above, these redactions shall be further considered by the Trial Chamber for those applicants granted victim status. At that moment in time the Chamber will then re-evaluate the appropriateness of the protective measures in light of the participation of victims in the proceedings on a fact-specific basis.

Redacted applications are to be transmitted to both parties alike in light of fundamental considerations of fairness (namely, the need to preserve the equality of arms), which require that both parties be

placed on an equal footing in respect of the exercise of a right which is bestowed on them both by the statutory texts.

See No. ICC-01/04-01/06-1308, Trial Chamber I, 6 May 2008, paras. 19-30. See also No. ICC-01/05-01/08-699, Trial Chamber III, 22 February 2010, paras. 27 and 33. See also No. ICC-01/04-01/07-933-ENG, Trial Chamber II, 26 February 2009, paras. 49 and 51-52. See also No. ICC-01/04-01/07-1094, Trial Chamber II, 4 May 2009, paras. 6-7; No. ICC-01/04-01/07-1129, Trial Chamber II, 12 May 2009, paras. 6-7; No. ICC-01/04-01/07-1151, Trial Chamber II, 19 May 2009, par. 8; No. ICC-01/04-01/07-1206, Trial Chamber II, 12 June 2009, paras. 11 and 13.

4.4 Redactions of information about the intermediaries

Although the safety of the intermediaries is an important concern, the Chamber must balance this concern against its general obligation to ensure the fairness of the proceedings as well as the requirement under rule 89(1) of the *Rules of Procedure and Evidence* to transmit copies of the applications to the Prosecutor and the defence, who are entitled to reply to them. [...] A distinction can be made between the Chamber's obligation to protect victims and witnesses in the proceedings under the Statute, Rules and Regulations, and a further obligation to protect staff members of nongovernmental organisations who choose to act as intermediaries. [...] Thus, in balancing these issues, the Chamber considers that the *rationale* for redacting information concerning the intermediaries before it is transmitted to the Prosecution and the OPCD is not very persuasive at the stage of the situation.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 31.

The Chamber is alive to the potential risks to the intermediaries employed by the prosecution once their identities are revealed to the accused, as well as the possible adverse implications as regards their future usefulness, but there is now a real basis for concern as to the system employed by the prosecution for identifying potential witnesses. On the evidence, there was extensive opportunity for the intermediaries, if they wished, to influence the witnesses as regards the statements they provided to the prosecution, and, as just set out, there is evidence that this may have occurred. In the circumstances it would be unfair to deny the defence the opportunity to research this possibility with all of the intermediaries used by the prosecution for the relevant witnesses in this trial, where the evidence justifies that course.

On the basis of the history and the submissions set out extensively above, and applying the Rome Statute framework and the analysis just rehearsed, the Chamber has adopted the following approach:

- a. Given the markedly different considerations that apply to each intermediary (or others who assisted in a similar or linked manner), disclosure of their identities to the defence is to be decided on an individual-by-individual basis, rather than by way of a more general, undifferentiated approach.
- b. The threshold for disclosure is whether *prima facie* grounds have been identified for suspecting that the intermediary in question had been in contact with one or more witnesses whose incriminating evidence has been materially called into question, for instance by internal contradictions or by other evidence. In these circumstances, the intermediary's identity is disclosable under Rule 77 of the Rules. Given the evidence before the Chamber that some intermediaries may have attempted to persuade individuals to give false evidence, and that some of the intermediaries were in contact with each other, the Chamber considers that in these circumstances the defence should be provided with the opportunity to explore whether the intermediary in question may have attempted to persuade one or more individuals to give false evidence. However, in each instance the Chamber has investigated, and will investigate, the potential consequences of an order for disclosure for the intermediary and others associated with him, and whether lesser measures are available. Applications in this regard will be dealt with by the Chamber on an individual basis.
- c. The identities of intermediaries (or others who assisted in a similar or linked manner) who do not meet the test in b. are not to be disclosed.
- d. Disclosure of the identity of an intermediary (or others who assisted in a similar or linked manner) is not to be effected until there has been an assessment by the VWU, and any protective measures that are necessary have been put in place.

- e. The identities of intermediaries who did not deal with trial witnesses who gave incriminating evidence are not to be revealed, unless there are specific reasons for suspecting that the individual in question attempted to persuade one or more individuals to give false evidence or otherwise misused his or her position. Applications in this regard will be dealt with by the Chamber on an individual basis.
- f. The threshold for calling intermediaries prior to the defence abuse submissions is that there is evidence, as opposed to *prima facie* grounds to suspect, that the individual in question attempted to persuade one or more individuals to give false evidence.

See No. ICC-01/04-01/06-2434-Red2, Trial Chamber I, 31 May 2010, paras. 138-140.

4.5 Redactions of the name of legal representatives

A legal representative is entitled to participate in the proceedings in accordance with the terms set by the Chamber and anonymity is incompatible with the functions to be performed by a legal representative.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 48.

4.6 Registry's Report filed in accordance with regulation 86(5) of the *Regulations of the Court*

There is no express provision in the *Rome Statute* or the *Rules of Procedure and Evidence* requiring the Chamber to transmit the Report to the participants. The function of the Report is to assist the Chamber in issuing only one decision regarding the granting of the victims status, on a number of applications.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 38. See also No. ICC-02/05-93, Pre-Trial Chamber I (Single Judge), 21 August 2007, p. 4; and No. ICC-02/05-01/09-62, Pre-Trial Chamber I (Single Judge), 10 December 2009, paras. 16-18.

The report will not, as a rule, be disclosed to the parties or the participants. However, should the Chamber consider that the Report contains particular fact or matter which can be disclosed, it will decide subject to having secured an appropriate level of protection for confidential information, the disclosure of which could be harmful to the welfare of individual victims.

See No. ICC-01/04-01/06-1022, Trial Chamber I, 9 November 2007, paras. 25-27.

The report [of the Victims Participation and Reparations Section] filed in accordance with regulation 86(5) of the *Regulations of the Court*] should contain, *inter alia*: (i) summaries of the matters contained in the original applications, set out on an applicant-by-applicant basis (these will take the form of narrative summaries, along with a grid or a series of boxes dealing with formal matters, for ease of reference but in each case based solely on the application forms); (ii) a grouping of applications in one report when there are links founded on such matters as time, circumstance or issue; (iii) any other information which may be relevant to the chamber's decision on the application (for instance, as supplied by States, the Prosecutor and intergovernmental or non-governmental organisations pursuant to Regulation 86(4) [of the *Regulations of the Court*]); and (iv) any other assistance the Victims Participation and Reparations Section can give to assist the Chamber in its task of assessing the merits of the applications, whilst carefully the avoiding expressing any views on the merits. Moreover, the reports should not contain any comment or expression of views on the overall merits of the application to participate. But this is not to prevent the [VPRS], for instance, from directing the attention of the Trial Chamber in a neutral way to particular issues or facts that it is considered are likely to be relevant to the Chamber's decision.

See No. ICC-01/04-01/06-1022, Trial Chamber I, 9 November 2007, paras. 19-20.

5. Issues related to the security of victims

The Victims and Witnesses Unit has a duty first and foremost to the interests of victims and witnesses and to act impartially in the exercise of this duty.

See No. ICC-02/04-01/05-77-US-Exp, Pre-Trial Chamber II, 9 March 2006 *quoted* in ICC-02/04-98, Pre-Trial Chamber II (Single Judge), 12 July 2007, p. 4.

When the safety of an applicant so requires, the Pre-Trial Chamber may instruct the Registrar to transmit to the Prosecutor and the Defence a redacted copy of the applicant's application for participation expunged of any information which could lead to his or her identification.

See No. ICC-01/04-01/06-494, Pre-Trial Chamber I, 29 September 2006, p. 4.

The OPCV is entitled to seek and obtain any information relating to victims' safety and security, as well as the overall assessment of the general situation in Uganda whenever such information may be necessary and/or appropriate for the purposes of the proper discharge of the Office's statutory tasks.

See No. ICC-02/04-01/05-222, Pre-Trial Chamber II (Single Judge), 16 March 2007, p. 5.

Pursuant to article 57(3)(c) of the Statute, one of the functions of the Pre-Trial Chamber is, where necessary, to provide for the protection and privacy of victims and witnesses. Rule 86 [of the *Rules of Procedure and Evidence*] establishes as a general principle that a Pre-Trial Chamber, in making any determination or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68 of the Statute.

See No. ICC-01/04-329, Pre-Trial Chamber I (Single Judge), 23 May 2007, p. 3. See also No. ICC-01/04-342, Pre-Trial Chamber I (Single Judge), 19 June 2007, p. 5.

In order not to expose them to further risks, the applicants should not be contacted directly by any organ of the Court, but only through their legal representatives or through the Victims Participation and Reparations Section if they have no legal representatives and, if necessary, through the Victims and Witnesses Unit.

See No. ICC-01/04-329, Pre-Trial Chamber I (Single Judge), 23 May 2007, pp. 3-4. See also No. ICC-01/04-358, Pre-Trial Chamber I (Single Judge), 17 July 2007, p. 4; No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, p. 59.

Article 57(3)(c) empowers the Pre-Trial Chamber to provide "[w]here necessary, for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information". The only functions which may affect the "personal interests" of victims and may be exercised prior to a case pertain to the protection and privacy of victims themselves and possibly the preservation of evidence.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 97-98.

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

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

In order to make an informed decision on individual protective measures for each applicant, the Trial Chamber seeks the assistance of the Victims and Witnesses Unit in order to assess the individual risk that each participating victim faces. The Chamber is aware of the extensive nature of this undertaking, since it currently involves 91 applicants, and accordingly the VWU is to inform the Chamber if it will be unable to complete this task in advance of the trial.

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

[...]

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

The Trial Chamber instructs the Registry to consult with the victims and their legal representatives generally as regards the level of protection that is necessary during the trial. The Registry is to remind the victims and

their legal representatives of the availability of protective and special measures other than complete anonymity, which may enable a greater degree of participation by them in the proceedings, consistent with the rights of the accused and a fair trial (e.g. confidentiality of the victims' identity towards the public).

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

See No. ICC-01/04-01/06-1556-Corr-Anx1, Trial Chamber I, 13 January 2009, paras. 126-133. See also No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 70 – 73.

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

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 130-131.

The process of appearing before the Court is not dependent on either an application to participate having been accepted or the victim physically attending as a recognised participant at a hearing. The critical moment is the point at which the application form is received at the Court, since this is a stage in a formal process all of which is part of 'appearing before the Court', regardless of the outcome of the request. Therefore, once a completed application to participate is received by the Court, "an appearance" for the purpose of article 43(6) of the Statute has occurred. [...] To the extent that protection can realistically be provided by the Court during the application process, the responsibility for this rests with the Victims and Witnesses Unit.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 137.

Given the security situation in the areas where the victims lived, the Single Judge found that that the victims were taking an inherent risk by appearing before the Court to exercise the rights attached to the procedural status of victim without requesting that their identities not be disclosed to the Defense. The Single Judge further found that pursuant to articles 57(3)(c) and 68(1) of the Statute, it is the duty of the Single Judge to minimize the risk. One way to minimize the risk faced by victims is to not disclose their identities to the public or media.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 20-22.

The security situation has repercussions on the range of protective measures currently available and which can be implemented to protect Victims who are particularly vulnerable and live in a risk area in the DRC.

See No. ICC-01/04-01/07-628, Pre-Trial Chamber I (Single Judge), 23 June 2008, pp. 8-9.

6. Participation

6.1 Participation in the proceedings in general

If a victim applying for the status of victims in respect of a situation and mentioning, pursuant to regulation 86(2)(g) of the *Regulations of the Court*, that he/she wishes to participate to all the stages of the proceedings, the Chamber automatically takes into account this request as soon as a case exists, so that it is unnecessary to file a second application.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, par. 67. See also No. ICC-01/04-01/06-172, Pre-Trial Chamber I, 29 June 2006, p. 6.

The use of the present tense in the French version of the text ('la Cour permet') of article 68(3) of the *Rome Statute* makes it clear that the victims' guaranteed rights of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, par. 71.

In the absence of an explicit indication of the intention to participate at the pre-trial stage, the applications of victims cannot be considered.

See No. ICC-01/04-01/06-601, Pre-Trial Chamber I, 20 October 2006, p .8.

The purpose of a decision under rule 89 of the *Rules of Procedure and Evidence* is not to make a final determination of the harm suffered by the victims, of the nature of the crimes described by the applicant or of whether the constituent elements of each such crime are present, because these analyses relate to the determination of the accused's guilt rather than to the assessment of the victim's status whose personal interests are affected under article 68(3) of the *Rome Statute*.

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

The logical interpretation of rule 92(2) of the *Rules of Procedure and Evidence* implies that victims in the context of a situation may be entitled to play a specific role in proceedings under article 53 of the *Rome Statute*. This would apply to all victims whose status in that context has been recognised by a Chamber either prior to or during such proceedings. In addition, the views and concerns which may be submitted by such victims relate not only to the review procedures triggered by a State or the Security Council referrals (article 53(3)(a) of the *Rome Statute*), but also to the exercise of the *proprio motu* review powers vested in the Pre-Trial Chamber under article 53(3)(b) of the Statute. Thus, article 53 of the Statute seems to provide the most significant scenario where victims may play an influential role outside the context of a case due to the concrete possibility that their personal interests would be affected by the decisions of the Prosecutor.

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

There is a possibility that, in special circumstances, article 56 of the *Rome Statute* may also be applied prior to the case stage and "views and concerns" by victims could also be submitted in the context of such proceedings.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, par. 100.

The Decision [on victims' applications for participation] does not create a procedure which enables victims in the context of a situation to participate in 'evidence gathering'. The Decision only permits victims to play a role in the process of the 'preservation of evidence' under articles 56(1) and 57(3)(c) of the Statute. Moreover, the Decision, does not establish a right for victims in the context of a situation to trigger proceedings pursuant to those provisions.

[...]

The process of victims' participation is neither automatic nor unconditional. It is regulated and governed by the provisions of the Statute and the Rules, in particular article 68(3) of the [Rome] Statute, which is also applicable in the context of articles 56 and 57. Article 68(3) entrusts the Chamber with wide supervisory powers to first assess and then grant requests for participation and presentation of "views and concerns". [...] Thus, the participation procedure, far from granting an automatic right to victims, is subject to rigorous judicial scrutiny aimed at ensuring proper and effective participation.

[...]

If the Single Judge acknowledges that some persons might try to obtain information or interfere with the proceedings through the victim participation procedure, it couldn't lead to the categorical denial of victims' rights in absence of concrete evidences establishing such risks. [...] Moreover, victims may decide to engage in preparatory enquiries regardless of the approach taken in the Decision. Neither the Single Judge (nor the Chamber or the Prosecutor) can evidently monitor victims' activities outside the framework of judicial proceedings.

See No. ICC-02/04-112, Pre-Trial Chamber II, 19 December 2007, paras 31, 32, 35, 41 and 42. See also No. 01/04-101-Corr Pre-Trial Chamber I, 17 January 2006, par. 73.

It is clear from article 68(3) of the *Rome Statute* that victims have the right to participate directly in the proceedings since their views and concerns may be presented by a legal representative.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 115.

The granting of the procedural status of victim in situation or case proceedings automatically gives the applicants the right to participate in such proceedings. However, the extent of their participation must be subsequently determined by the Chamber because article 68(3) of the *Rome Statute* does

not pre-establish a set of procedural rights (*i.e.* modalities of participation) that those granted the procedural status of victim may exercise, but rather leaves their determination to the discretion of the Chamber; according to article 68(3) of the Statute, the Chamber must determine such procedural rights in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Once, in exercising its discretion, the Chamber decides on the set of procedural rights that are attached to the procedural status of victim, such rights belong to all applicants for whom the procedural status of victim has been granted.

See No. ICC-01/04-01/07-357, Pre-Trial Chamber I (Single Judge), 2 April 2008, p. 12. See also No. ICC-02/05-118, Pre-Trial Chamber I (Single Judge), 23 January 2008, p. 5; No. ICC-02/05-121, Pre-Trial Chamber I (Single Judge), 6 February 2008, p. 9; No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 5; No. ICC-01/04-438, Pre-Trial Chamber I (Single Judge), 23 January 2008, p. 5; No. ICC-01/04-444, Pre-Trial Chamber I (Single Judge), 6 February 2008, p. 11.

At the outset, the Single Judge notes that neither the Statute nor the Rules expressly prohibit the recognition of the procedural status of victim to an individual who is also a witness in the case. Indeed, the Single Judge observes that among the criteria provided for in rule 85 of the Rules for the granting of the procedural status of victim in any given case, there is no clause excluding those who are also witnesses in the same case. Moreover, the Single Judge also notes that neither the Statute nor the Rules contain any specific prohibition against the admissibility of the evidence of individuals who have been granted the procedural status of victim in the same case. In this regard, the controlling provision is article 69(4) of the Statute, which provides that: «[T]he Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.»

See No. ICC-01/04-01/07-632, Pre-Trial Chamber I (Single Judge), 23 June 2008, paras. 18-19.

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

The *Rome Statute* enables victims to participate in the proceedings even before the Prosecutor asks the Pre-Trial Chamber an authorisation to conduct *proprio motu* investigation. In this scenario, the victims' personal interests may be affected since victims' representations to the Chamber can provide factual and legal elements for the decision to authorise the investigation into the situation within which the same victims claim to have suffered harm as a result of the commission of crimes within the jurisdiction of the Court. Rule 50(1) of the *Rules of Procedure and Evidence* clarifies who these "victims" may be. In fact it specifies that the Prosecutor has the general duty to inform "*victims, known to him or her or to the VWU, or their legal representatives*". Therefore,

- (i) victims, as well as any other subject, may contact the Court (in particular the Office of the Prosecutor) prior to and irrespective of whether a situation or a case is pending before it, with the view of triggering the exercise of the Prosecutor's *proprio motu* powers;
- (ii) if the Prosecutor considers appropriate to exercise such powers, victims may be involved in the proceedings under article 15 of the *Rome Statute* provided only that they be known to the Court (either the Prosecution or the Victims and Witnesses Unit).

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 90-92.

The Chamber further notes that according to article 15(3) of the Statute in conjunction with rule 50(3) of the Rules and regulation 50(1) of the *Regulations of the Court*, in response to the notification provided by the Prosecutor, victims may make representations in writing to the Chamber within 30 days following the date of their notification, which took place on 23 November 2009.

The Chamber considers that one of its fundamental functions is to ensure the proper conduct of the proceedings throughout the pre-trial process. In particular, pursuant to rule 50(4) of the Rules, the Chamber may decide on the procedure to be followed with respect to any issue related to the Prosecutor's Request, including victims' representations. Thus, it is essential to organize the procedure of receiving, if any, victims' representations in accordance with article 15(3) of the Statute and rule 50(3) of the Rules.

The Chamber notes that article 15(3) of the Statute and rule 50(3) of the Rules use the term «victims» as defined in rule 85 of the Rules. Accordingly, it is the Chamber's view that representations made in accordance with article 15(3) of the Statute and rule 50(3) of the Rules must be confined to those who qualify as "victims" within the meaning of this rule, bearing in mind the specific nature of the article 15 proceedings. As the Appeals Chamber stated, «[t]he location of rule 85 in the Rules is indicative of a general provision relating to victims, applicable to various stages of the proceedings (...) [and that] the object and purpose [of this rule] is to define who are victims».

The Chamber thus considers that for the purpose of representations at this stage and given the limited scope of article 15 proceedings, the conditions set out in rule 85 of the Rules should be assessed on the basis of the intrinsic coherence of the information given by the victim(s).

The Chamber is duty bound to ensure that proceedings are carried out in an expeditious manner. Being mindful that victims' representations at this particular stage is a procedure of limited scope, which is merely confined to the Prosecutor's request for authorization of an investigation, the Chamber finds it appropriate to request the Victims Participation and Reparations Section (the VPRS) to: (1) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations (collective representation); (2) receive victims' representations (collective and/or individual); (3) conduct an assessment, in accordance with paragraph 8 of this order, whether the conditions set out in rule 85 of the Rules have been met; and (4) summarize victims' representations into one consolidated report with the original representations annexed thereto.

See No. ICC-01/09-4, Pre-Trial Chamber II, 10 December 2009, paras. 5-9

6.3 Participation at the investigation stage

It is systematically consistent to interpret the term 'procédure' in the French version and 'proceedings' in the English version of article 68(3) of the Statute as including the stage of investigation of a situation, and therefore as giving victims a general right of access to the Court at this stage.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, par. 46.

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

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

Participation of victims during the investigation of a situation may stem from rule 93 of the *Rules of Procedure and Evidence*, which allows a Chamber to "[s]eek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue" and to "[s]eek the views of other victims, as appropriate". Thus, it can be inferred that victims may be invited by the Chamber to express their views on one or more issues at any stage of the proceedings (including the stage of the investigation of a situation) provided that the Chamber considers it appropriate.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, par. 102.

The participation of victims at the investigation stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered; hence, the investigative stage of a situation and the pre-trial stage of a case are appropriate stages of the proceedings for victims' participation. As a consequence, there is a procedural status of victim in relation to situation and case proceedings before the Pre-Trial Chamber.

See No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, paras. 11 and 14.

Granting victims a procedural status at the pre-trial stage of a case is neither mandatory nor prohibited by internationally recognized standards concerning the rights of the accused and a fair and impartial trial.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 72.

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

At the outset, the Single Judge notes that the Prosecution and Defences' proposition is contrary to the latest empirical studies conducted amongst victims of serious violations of human rights, which show that the main reason why victims decide to resort to those judicial mechanisms which are available to them against those who victimised them is to have a declaration of the truth by the competent body.

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

The Single Judge does not intend to address in the present decision the question of whether or not this right, and the victims' core interests that underlie it, can at times also be satisfied through mechanisms alternative to criminal proceedings.

However, the Single Judge observes that when this right is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings:

- (i) bring clarity about what indeed happened; and
- (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth.

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

In this regard, the Single Judge considers that the victims' central interest in the search for the truth can only be satisfied if

- (i) those responsible for perpetrating the crimes for which they suffered harm are declared guilty; and
- (ii) those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can continue.

The Single Judge also notes that the above-mentioned empirical studies show that a large majority of victims wish to have those who victimised them prosecuted, tried and convicted, and subjected to a certain punishment.

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

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

The Single Judge does not intend to address in the present decision the question of whether these victims' interests can only be satisfied through the criminal investigation, prosecution and sanction of those responsible for serious violations of human rights or whether, under very specific conditions, alternative mechanisms, in which victims can confront and challenge those responsible for their harm, could also be feasible to satisfy such interests. Nevertheless, the Single Judge would like to emphasise that the Preamble of the Statute expressly recalls that «it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,» a duty that has been upheld by the Human Rights Committee, as well as by the case law of the Inter-American and European Courts of Human Rights.

Moreover, the Single Judge observes that when this right is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings lead to the identification, prosecution and punishment of those who have victimised them.

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

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

Moreover, the Single Judge also notes that this basic tenet that the issue of the guilt or innocence of the persons charged affects the very core interests of those granted the procedural status of victims in any case before the Court has also been affirmed by Pre-Trial Chamber II in its 10 August 2007 decision.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 31-44. See also No. 02/04-01/05-252, Pre-Trial Chamber II, 10 August 2007, paras. 9-11.

At the outset, the Single Judge would like to emphasise that the Chamber has repeatedly stated that:

- (i) the analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted in relation to stages of the proceedings, and not in relation to each specific procedural activity or piece of evidence dealt with at a given stage of the proceedings;
- (ii) the pre-trial stage of a case is a stage of the proceedings in relation to which the analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted;
- (iii) the interests of victims are affected at this stage of the proceedings since this is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspects are responsible for the crimes included in the Prosecution Charging Document, and consequently:
 - 1. this is an appropriate stage of the proceedings for victim participation in all cases before the Court;
 - 2. there is no need to review this finding each time a new case is initiated before the Court; and
 - 3. a procedural status of victim exists at the pre-trial stage of any case before the Court;
- (iv) article 68(3) of the Statute does not pre-establish a set of procedural rights (*i.e.* modalities of participation) that those granted the procedural status of victim at the pre-trial stage of a case may exercise, but rather leaves their determination to the discretion of the Chamber;
- (v) when determining the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case, the Single Judge:
 - 1. need not make a second assessment of the victims' personal interests; and
 - 2. must ensure that such procedural rights are determined «in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial»; and
- (vi) once the Chamber makes a decision on the set of procedural rights that are attached to the procedural status of victim at the pre-trial stage of a case, such rights belong to all natural and legal persons for whom the procedural status of victim has been granted in relation to such stage of the proceedings.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 45. See also No. ICC-02/05-121, Pre-Trial Chamber I (Single Judge), 6 February 2008, pp. 6, 8 and 9.

6.5. Participation at the trial stage

In a general sense, victims have multiple and varied interests, but it is critical to emphasise and repeat that for victims to participate in this trial these interests must relate to the evidence and the issues the Chamber will be considering in its investigation of the charges brought against the suspect: the extent of the evidence and the issues to be considered by the Chamber during this trial are defined by the alleged crimes the accused faces. In contrast, the general interests of the victims are very wide-ranging and include an interest in receiving reparations, an interest in being allowed to express their views and concerns, an interest in verifying particular facts and establishing the truth, an interest in protecting their dignity during the trial and ensuring their safety, and an interest in being recognised as victims in the case, among others. The crimes under the Chamber's jurisdiction, as international crimes, may have many and various consequences for victims, of a direct and an indirect nature. Against that background the Chamber will ensure that victims are provided appropriate access to justice within the context of the focus of the trial process, and it will bear in mind the wide-ranging particular needs and interests of individual victims and groups of victims.

In the view of the Trial Chamber it is necessary to stress that the participation of victims in the proceedings is not limited to an interest in receiving reparations: Article 68(3) of the Statute provides for participation by victims whenever their personal interests are affected, and these are self-evidently not limited to reparations issues. Therefore, as indicated during the hearing of 29 October 2007, the Trial Chamber considers that the participation by victims should encompass their personal interests in an appropriately broad sense, and, for the reasons analysed hereafter, whenever necessary they should be entitled to express their views and concerns through statements, examination of witnesses or by filing written submissions.

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

The Chamber is conscious that different considerations may apply at the trial, as opposed to the pre-trial stage. By the time applications to participate in the proceedings are made to the Trial Chamber a considerable amount will be known about the facts and issues that will arise. Accordingly, not only is the approach outlined above a correct interpretation of the relevant provisions but it is the procedure that will best enable the victims at this stage in the proceedings before the Court to present their views and concerns fairly.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 97-100. See also No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 53-57.

6.6 Participation in interlocutory appeals

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

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

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

See No. ICC-01/04-01/06-1335, Appeals Chamber, 16 May 2008, paras. 35-36; No. ICC-01/04-01/06-824, par. 43. See also No. ICC 02/05-138, Appeals Chamber, 18 June 2008, par. 23. See also No. ICC-01/04-503, Appeals Chamber, 30 June 2008, paras. 88-98; No. ICC-01/04-450, Appeals Chamber, 13 February 2008, par. 1; No. ICC-02/05-129, Appeals Chamber, 29 February 2008, par. 1; No. ICC-01/04-480, Appeals Chamber, 29 February 2008, par. 1 and No. ICC-01/04-01/06-1239, Appeals Chamber, 20 March 2008, par. 1.

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

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

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

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

Nor am I convinced by the majority’s reasoning that the Appeals Chamber cannot be bound by the Pre-Trial Chamber’s determination that the participation of victims is appropriate (paragraph 43 of the Judgment). An appeal pursuant to article 82(1)(b) of the Statute addresses issues arising from proceedings before the Pre-Trial Chamber. Therefore, the assumption of regulation 86(8) of the *Regulations of the Court* that decisions on victims’ participation taken by the Pre-Trial Chamber also apply to appellate proceedings is justified and logical. Clearly, if the Appeals Chamber considers that in specific appeals, the participation of victims would be inappropriate, it could issue an order to that effect. This is expressly acknowledged by regulation 86(8) of the *Regulations of the Court*, which is «subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1.» Furthermore, any participation of victims that would go beyond the filing of a response pursuant to regulation 64 (4) and (5) of the *Regulations of the Court* would require prior authorisation by the Appeals Chamber.

I am not convinced by the opinion of the majority of the Appeals Chamber that a separate application by victims to participate in the appeal and a decision by the Appeals Chamber thereupon is necessary because article 68(3) of the Statute “mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration”. I note that article 68(3) of the Statute provides that the Court shall permit the participation of victims. The word “Court” does not necessarily refer solely to the Appeals Chamber, acting in a particular interlocutory appeal. In the present context, I read the word “Court” to include the plenary of the Judges of this Court. Pursuant to article 52(1) of the Statute read with rule 4 of the *Rules of Procedure and Evidence*, the plenary of the Judges has a mandate to adopt *Regulations of the Court* «necessary for its routine functioning».

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

See No. ICC-01/04-01/06-824, Appeals Chamber, Dissenting opinion by Judge Song, 13 February 2007, paras. 2-8, pp. 55-57. See also No. ICC-01/04-01/06-1335, Appeals Chamber, Dissenting opinion by Judge Song, 16 May 2008, paras. 3-7; No. ICC-02/05-138, Appeals Chamber, Partly dissenting opinion by Judge Song, 18 June 2008, par. 3; No. ICC-02/04-503, Appeals Chamber, Partly dissenting opinion by Judge Song, 30 June 2008, paras. 1 and 2; No. ICC-01/04-01/06-1452, Appeals Chamber, Separate opinion of Judge Song, 6 August 2008, par. 1; No. ICC-01/05-01/08-623, Appeals Chamber, Dissenting opinion by Judge Song, 27 November 2009, paras. 3-4 and No. ICC-01/04-01/07-2124, Appeals Chamber, Separate opinion of Judge Song, 24 May 2010, p. 8.

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

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

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

See No. ICC-01/04-01/06-2205, Appeals Chamber, Separate opinion of Judge Song and Judge Van den Wyngaert, 8 December 2009, p. 43.

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

Victims a/0118/06 and a/0122/06 were also recognized as victims on account of *inter alia*, emotional harm suffered as a result of physical injury suffered by a specific person or persons¹⁷, notwithstanding the absence of proof of the identity and /or relationship of the latter to the applicants.

In seeking to demonstrate that their personal interests are affected, victims should generally ensure, *inter alia*, that express reference is made to the specific facts behind their individual applications, and the precise manner in which those facts are said to fall within the issue under consideration on appeal. The Appeals Chamber notes that in the present case the submissions made on personal interests were of a broad and general nature. Notwithstanding that factor, the Appeals Chamber accepts the essence of the submissions of the victims that both the status and the right to participate of the four victims, a/0090/06, a/0098/06, a/0118/06 and a/0122/06, may be prejudiced should the resolution of the issue on appeal result in a reversal of the Chamber's decision on the issue.

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

See No. ICC-02/04-01/05-324, Appeals Chamber, 27 October 2008, paras. 11-14.

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

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

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

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

No. ICC-02/05-138, Appeals Chamber, Partly dissenting opinion by Judge Song, 18 June 2008, par. 3 and 4 See also No. ICC-02/04-503, Appeals Chamber, Partly dissenting opinion by Judge Song, 30 June 2008, par. 5.

The Appeals Chamber directs that in future cases and until such time as the matter is regulated in the constituent documents of the Court, applications by victims for participation in appeals must be filed as soon as possible and in any event before the date of filing of the response to the document in support of the appeal.

See No. ICC 02/05-138, Appeals Chamber, 18 June 2008, par. 26. See also 01/04-503, Appeals Chamber, 30 June 2008, par. 39.

Participation of victims in interlocutory appeals can, in principle, be permitted if it can be shown that their personal interests are affected by the issues on appeal and if the Appeals Chamber deems such participation to be appropriate. It is for the Appeals Chamber to ensure that their participation

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

See also No. ICC 02/05-138, Appeals Chamber, 18 June 2008, paras 49, 51, 53-59.

In determining victim participation in interlocutory appeals arising in the situation phase of the proceedings before the Pre-Trial Chamber, article 68(3) as interpreted by the Appeals Chamber in the case of Mr. Lubanga should also be made applicable to interlocutory appeals in the situation phase of proceedings.

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

Applicants who have not been granted the status of victim in the situation do not meet the first criterion under the Court's interpretation of article 68(3) of the Statute and therefore are denied the right to participate in the appeal.

See No. ICC-01/04-503, Appeals Chamber, 30 June 2008, par. 93.

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

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

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

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

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

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

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

See No. ICC-01/04-450, Appeals Chamber, 13 February 2008, par. 1, p. 3.

Applications for participation in an appeal lodged under article 82(1)(d) of the *Rome Statute* shall include a statement in relation to whether and how the personal interests of the victims concerned are affected by this appeal, indicating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the

proceedings and why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence.

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

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

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

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

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



Relevant decisions regarding victims' participation in the proceedings

Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp (Pre-Trial Chamber I), No. ICC-01/04-73, 21 July 2005

Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006

Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo (Pre-Trial Chamber I), No. ICC-01/04-01/06-172-tEN, 29 June 2006

Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the Case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo (Pre-Trial Chamber I), No. ICC-01/04-01/06-228, 28 July 2006

Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo (Pre-Trial Chamber I), No. ICC-01/04-177-tENG, 31 July 2006

Decision on the Application for Participation of Victims a/0001/06 to a/0003/06 in the Status Conference of 24 August 2006 (Pre-Trial Chamber I), No. ICC-01/04-01/06-335-tEN, 17 August 2006

Decision on the application for participation of victims a/0001/06 to a/0003/06 in the status conference of 5 September 2006 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-380-tEN, 4 September 2006

Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, (Pre-Trial Chamber I), No. ICC-01/04-01/06-462-tEN, 22 September 2006

Decision on the Applications for Participation a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the Case of The Prosecutor v. Thomas Lubanga Dyilo (Pre-Trial Chamber I), No. ICC-01/04-01/06-601-tEN, 20 October 2006

Decision on «Prosecutor's Application to attend 12 February hearing» (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-155, 9 February 2007

Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo" (Appeals Chamber), No. ICC-01/04-01/06-824, 13 February 2007

Decision on the OPCV's "Request to access documents and material" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-222, 16 March 2007

Decision authorising the filing of observations on applications for participation in the proceedings (Pre-Trial Chamber I), No. ICC-01/04-329, 23 May 2007

Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning "directions and Decision of the Appeals Chamber" (Appeals Chamber), No. ICC-01/04-01/06-925, 13 June 2007

Decision on matters of confidentiality and the Request for extension of the page limit (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-342, 19 June 2007

Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-252, 10 August 2007

Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation (Pre-Trial Chamber I), No. ICC-01/04-374, 17 August 2007

Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007 (Appeals Chamber), No. ICC-01/04-503, 30 June 2008

Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga (Pre-Trial Chamber I), No. ICC-01/04-01/07-4, 6 July 2007

Order to the Prosecutor and the Victims and Witnesses Unit to submit observations on the unsealing of certain documents in the record both of the situation and of the case (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-98, 12 July 2007

Decision authorising the filing of observations on applications for participation in the proceedings (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-358, 17 July 2007

Decision on victims' application for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-101, 10 August 2007

Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation (Pre-Trial Chamber I), No. ICC-01/04-374, 17 August 2007

Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5) (Trial Chamber I), No. ICC-01/04-01/06-1022, 9 November 2007

Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-110, 3 December 2007

Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-417, 7 December 2007

Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-111-Corr, 14 December 2007

Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II), No. ICC-02/04-112, 19 December 2007

Corrigendum à la « Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06 » (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-423-Corr, 31 January 2008

Decision on victims' participation (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008

Decision on Request for leave to appeal the «Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor» (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-118, 23 January 2008

Decision on Request for leave to appeal the «Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor» (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-438, 23 January 2008

Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-423-Corr-tENG, 31 January 2008

Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-121, 6 February 2008

Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-444, 6 February 2008

Decision of the Appeals Chamber on the OPCV's request for clarification and the legal representatives' request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor (Appeals Chamber), No. ICC-01/04-450, 13 February 2008

Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor (Appeals Chamber), No. ICC-01/04-480, 29 February 2008

Decision of the Appeals Chamber on the OPCV's request for clarification And Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor (Appeals Chamber), No. ICC-02/05-129, 29 February 2008

Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-125, 14 March 2008

Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-282, 14 March 2008

Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification (Pre-Trial Chamber II), No. ICC-02/04-126, 19 March 2008

Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification (Pre-Trial Chamber II), No. ICC-02/04-01/05-283, 19 March 2008

Order of the Appeals Chamber on the date of filing of applications for participation by victims and on the time of the filing of the responses thereto by the Prosecutor and the Defence (Appeals Chamber), No. ICC-01/04-01/06-1239, 20 March 2008

Decision on the Application for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08 (Pre-Trial Chamber II), No. ICC-01/04-01/07-357, 2 April 2008

Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witnesses 166 and 233 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-361, 3 April 2008

Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08 (Trial Chamber I), No. ICC-01/04-01/06-1308, 6 May 2008

Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008

Decision, in limine, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation" (Appeals Chamber), No. ICC-01/04-01/06-1335, 16 May 2008

Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-537, 30 May 2008

Decision on the legal representative's request for clarification of the Trial Chamber's 18 January 2008 «Decision on victims' participation» (Trial Chamber I), No. ICC-01/04-01/06-1368, 2 June 2008

Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-579, 10 June 2008

Prosecution's Response to Legal Representative of Victim's Request to Participate in OPCD's Appeal against the 3 December 2007 Decision on Production and Disclosure of Material and in the Appeals of the Prosecution and OPCD against the 6 December 2007 Decision on the Victims' Applications for Participation in the Proceedings (Appeals Chamber), No. ICC 02/05-138, 18 June 2008

Decision on Victims' Requests for Anonymity at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-628, 23 June 2008

Decision on the Application for Participation of Witness 166 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-632, 23 June 2008

Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007 (Appeals Chamber), No. ICC-01/04-503, 30 June 2008

Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/03, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-505, 3 July 2008

Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (Appeals Chamber), No. ICC-01/04-01/06-1432, 11 July 2008

Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (Appeals Chamber), No. ICC-01/04-01/06-1432, 23 July 2008

Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-01/04-01/06-1452, 6 August 2008

Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-01/04-01/06-1453, 6 August 2008

Decision on Victim Participation (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-103-tENG-Corr, 12 September 2008

Decision on legal representation, appointment of counsel for the defence, criteria for redactions of applications for participation, and submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-312, 17 September 2008

Second Decision on the question of victims' participation requesting observations from the parties (Pre-Trial Chamber III), No. ICC-01/05-01/08-184, 23 October 2008

Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-02/04-01/05-324, 27 October 2008

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

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

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

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

- Decision on victims' applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-172, 21 November 2008
- Decision on victim's applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-356, 21 November 2008
- Fourth Decision on Victims' Participation (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-320, 12 December 2008
- Corrigendum to «Decision on the applications by victims to participate in the proceedings» (Trial Chamber I), No. ICC-01/04-01/06-1556-Corr, 13 January 2009
- Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-322, 16 December 2008
- Decision on the applications by 3 victims to participate in the proceedings (Trial Chamber I), No. ICC-01/04-01/06-1562, 18 December 2008
- Sixth Decision on Victims' Participation Relating to Certain Questions Raised by the Office of Public Counsel for Victims (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-349, 8 January 2009
- Decision on the treatment of applications for participation (Trial Chamber II), No. ICC-01/04-01/07-933-tENG, 26 February 2009
- Decision on victims' applications for participation a/0192/07 to a/0194/07, a/0196/07, a/0200/07, a/0204/07, a/0206/07, a/0209/07, a/0212/07, a/0216/07, a/0217/07, a/0219/07 to a/0221/07, a/02228/07 to a/0230/07, a/0234/07, a/0235/07, a/0237/07, a/0324/07 and a/0326/07 under rule 89 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-375, 10 March 2009
- Decision on victims' applications for participation a/0192/07 to a/0194/07, a/0196/07, a/0200/07, a/0204/07, a/0206/07, a/0209/07, a/0212/07, a/0216/07, a/0217/07, a/0219/07 to a/0221/07, a/02228/07 to a/0230/07, a/0234/07, a/0235/07, a/0237/07, a/0324/07 and a/0326/07 under rule 89 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-375, 10 March 2009
- Redacted version of «Decision on «indirect victims'» (Trial Chamber I), No. ICC-01/04-01/06-1813, 8 April 2009
- Décision invitant les parties à présenter leurs observations relatives aux demandes de participation (règle 89-1 du Règlement de procédure et de preuve) (Trial Chamber II), No. ICC-01/04-01/07-1094, 4 May 2009 (No English translation available)
- Order issuing public redacted annexes to the Decisions on the applications by victims to participate in the proceedings of 15 and 18 December 2008 (Trial Chamber I), No. ICC-01/04-01/06-1861 together with Annex A1 No. ICC-01/04-01/06-1861-AnxA1 and Annex A2 No. ICC-01/04-01/06-1861-AnxA2, 8 May 2009
- Deuxième décision invitant les parties à présenter leurs observations relatives aux demandes de participation (règle 89-1 du Règlement de procédure et de preuve) (Trial Chamber II), No. ICC-01/04-01/07-1129, 12 May 2009 (No English translation available)
- Troisième décision invitant les parties à présenter leurs observations relatives aux demandes de participation (règle 89-1 du Règlement de procédure et de preuve) (Trial Chamber II), No. ICC-01/04-01/07-1151, 19 May 2009 (No English translation available)
- Quatrième décision invitant les parties à présenter leurs observations relatives aux demandes de participation (règle 89-1 du Règlement de procédure et de preuve) (Trial Chamber II), No. ICC-01/04-01/07-1206, 12 June 2009 (No English translation available)
- Decision on issues relating to victims' applications in the Case (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-02/09-20, 12 June 2009
- Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Pre-Trial Chamber III), No. ICC-01/05-01/08-424, 15 June 2009
- Decision on the applications by 7 victims to participate in the proceedings (Trial Chamber I), No. ICC-01/04-01/06-2035, 10 July 2009

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

Order issuing confidential and public redacted versions of Annex A to the «Decision on the applications by 7 victims to participate in the proceedings» of 10 July 2009 (ICC-01/04-01/06-2035) (Trial Chamber I), No. ICC-01/04-01/06-2065 together with Annex 2, No. ICC-01/04-01/06-2065-Anx2, 23 July 2009

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

Decision on the «Legal Representative's Request to Expedite the Consideration of Applications for Victim Status» (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-01/09-36, 27 August 2009

Decision on the Participation of Victims in the Appeal against the «Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa» (Appeals Chamber), No. ICC-01/05-01/08-500, 3 September 2009

Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure (Trial Chamber II), No. ICC-01/04-01/07-1491-Red, 23 September 2009 (No English translation available)

Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-02/09-121, 25 September 2009

Public Redacted Version of «Decision on the 52 Applications for Participation at the Pre-Trial Stage of the Case» (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-02/09-147-Red, 9 October 2009

Decision on the «Request in respect of Information relevant to Victim Participation on the basis of the Decision on 52 Applications for Participation at the Pre-Trial Stage of the Case» (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-02/09-169, 14 October 2009

Reasons for the «Decision on the Participation of Victims in the Appeal against the «Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa»» (Appeals Chamber), No. ICC-01/05-01/08-566, 20 October 2009

Decision on the participation of victims in the appeals (Appeals Chamber), No. ICC-01/04-01/06-2168, 20 October 2009

Decision On the Applications by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the «Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir» and on the Request for an Extension of Time (Appeals Chamber), No. ICC-02/05-01/09-48, 23 October 2009

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

Dispositif de la deuxième décision relative aux demandes de participation de victimes à la procédure (Trial Chamber II), No. ICC-01/04-01/07-1669, 23 November 2009 (No English translation available)

Decision on the Participation of Victims in the Appeal against the «Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa» - Dissenting Opinion of Judge Sang-Hyun Song (Appeals Chamber), No. ICC-01/05-01/08-623, 27 November 2009

Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled «Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court» (Appeals Chamber) No. ICC-01/04-01/06-2205, 8 December 2009

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

Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute (Pre-Trial Chamber II), No. ICC-01/09-4, 10 December 2009

Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure (Trial Chamber II), No. ICC-01/04-01/07-1737, 22 December 2009 (No English translation available)

Decision on the Modalities of Victim Participation at Trial (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010

Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants (Trial Chamber III), No. ICC-01/05-01/08-699, 22 February 2010

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

Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims (Trial Chamber II), No. ICC-01/04-01/07-1491-Red-tENG, 10 March 2010

Decision on the defence observations regarding the right of the legal representatives of victims to question defence witnesses and on the notion of personal interest -and- Decision on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses (Trial Chamber I), No. ICC-01/04-01/06-2340, 11 March 2010

Motifs de la troisième décision relative à 8 demandes de participation de victimes à la procédure (Trial Chamber II), No. ICC-01/04-01/07-1967, 16 March 2010 (No English translation available)

Decision on Applications a/0655/09, a/0656/09, a/0736/09 to a/0747/09, and a/0750/09 to a/0755/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-02/09-255, 19 March 2010

Decision on the Participation of Victims in the Appeal of Mr Katanga Against the «Decision on the Modalities of Victim Participation at Trial» (Appeals Chamber), No. ICC-01/04-01/07-2124, 24 May 2010

Redacted Decision on Intermediaries (Trial Chamber I), No. ICC-01/04-01/06-2434-Red2, 31 May 2010

Decision on 8 Applications for Victims' Participation in the Proceedings (Pre-Trial Chamber I, Single Judge), No. ICC-012/05-01/09-93, 9 July 2010

Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 12 July 2010

2. Modalities of victims' participation in the proceedings

Articles 15(3), 19(3), 68(1) and (2), 68(3), 75(3), 87(4), 93(1)(j) of the *Rome Statute*
Rules 16, 69, 70 to 73, 87 to 91, 94, 95, 97 to 99, 101, 132(2), 136, 139, 143, 144(1) and (2),
145, 191, 217 and 221 of the *Rules of Procedure and Evidence*
Regulations 21(8), 24(2), 28(1) and (2), 31(1) and (2), 54, 79(2) and (3), 86(1) and (2), 86,
88 and 117(c) of the *Regulations of the Court*
Regulations 64(4), 66(4), 99(2) and (4) and 109(3) of the *Regulations of the Registry*

1. Modalities of participation in general

Pursuant to article 68(3) of the Statute, the Chamber considers that victims may present their views and concerns at the investigation stage of the situation in the Democratic Republic of the Congo once the Chamber grants them victim status.

See No. ICC-01/04-164, Pre-Trial Chamber I, 7 July 2006, p. 3.

Article 68(3) of the *Rome Statute* grants discretion to the Chamber to determine the modalities of participation which are attached to such procedural status. The Chamber must exercise its discretion to delineate the modalities of participation in a manner which is not prejudicial to or inconsistent with the rights of the accused.

See No. ICC-01/04-423, Pre-Trial Chamber I (Single Judge), 24 December 2007, par. 5 and No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 5.

The Single Judge embraces a systematic approach which consists of a clear determination of the set of procedural rights that those granted the procedural status of victims in the pre-trial stage of the case may exercise.

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

By adopting a systematic approach the Single Judge aims to ensure that the rule attributed to those granted the procedural status of victim at the pre-trial stage of a case before the Court is:...(iv) meaningful—and not purely symbolic—as would be the case if victims were required to ask for the leave of the competent Chamber to perform the most simple procedural activity, such as responding to the submissions of a party.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 51.

2. Modalities of participation at the investigation stage

In the light of the core content of the right to be heard set out in article 68 (3) of the Statute, persons accorded the status of victims will be authorised, notwithstanding any specific proceedings being conducted in the framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in the DRC.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, par. 71.

In exercising their procedural rights pursuant to article 68(3) of the *Rome Statute*, victims may, before the Pre-Trial Chamber and in connection with the investigation:

- (a) Present their views and concerns;
- (b) File documents;
- (c) Request the Pre-Trial Chamber to order specific measures.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, p. 42.

The Single Judge recalls that a) the investigation stage of a situation and the pre-trial stage of a case are appropriate stages of the proceedings for victim participation as provided for in article 68(3) of the Statute; and that b) it is therefore possible to have the status of victim authorised to participate in situation and case-related proceedings before the Pre-trial Chamber. Furthermore, the Chamber also held that a) article 68(3) of the Statute grants discretion to the Chamber to determine the modalities of participation which are attached to

such status; and b) that the Chamber must exercise its discretion to delineate the modalities of participation “in a manner which is not prejudicial to or inconsistent with the rights of the accused”.

See No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 5 and No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, par. 8. See also No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, par. 2 and No. ICC-01/04-417, Pre-Trial Chamber I (Single Judge), 7 December 2007, par. 2.

The notion of procedural status of victims is nowhere defined, and it is difficult to attach a specific meaning to it. Are there other forms of victim status? Is the term «procedural status of victim» used in order to distinguish such status from the status of a victim having a right to participate in concrete judicial proceedings? Moreover, is there a substantive victim status in contrast to a procedural one?

The term «procedural status of victim» is not a phrase with a distinct meaning or a word coined as a term of art. The word «procedural» indicates something pertaining to procedure. Procedure is the code regulating the exercise of judicial power, known as adjectival law. It is contrasted to substantive law, definitive of the rights, duties and obligations of a person. The word «status» signifies a person’s legal condition, whether personal or proprietary. Procedure is not of itself determinative of the status of any person.

The article of the Statute that confers power upon a victim to participate in any proceedings is article 68 (3). What emerges from the case law of the Appeals Chamber is that participation can take place only within the context of judicial proceedings. Article 68(3) of the Statute correlates victim participation to «proceedings», a term denoting a judicial cause pending before a Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible. The modalities of participation under article 68(3) of the Statute must be specified by the Chamber in a manner not prejudicial to the rights of the person under investigation or the accused, and in a way non-antagonistic to a fair and impartial trial. A person has the right to participate in proceedings if a) he/she qualifies as a victim under the definition of this term provided by rule 85 of the Rules, and b) his/her personal interests are affected by the proceedings in hand in, *i.e.* by the issues, legal or factual, raised therein.

Rules 89, 91 and 92 of the Rules relied upon by the Pre-Trial Chamber as supporting the position that victims can participate at the investigation stage of a situation outside the framework of judicial proceedings, far from supporting the position adopted, contradict it. Rule 89 of the Rules is specifically fashioned to the provisions of article 68 of the Statute and aims to regulate the steps that must be taken in order for a victim to participate in judicial proceedings. Rule 91 of the Rules acknowledges that victims may participate through a legal representative whereas rule 92 of the Rules adverts to notification of judicial proceedings to victims and their legal representatives in which they may have an interest to seek participation and decisions which may affect them. The class of victims to whom notification must be given is also specified.

Rule 92 of the Rules has one other aspect that merits reference to. It exempts from its provisions proceedings under Part 2 of the Statute (see rule 92(1) of the Rules). Articles 15(3) and 19(3) do belong to that Part of the Statute. They make provision, the former for representations by victims in relation to the authorisation of an investigation, and the latter for the submission of observations by victims with regard to the jurisdiction of the Court to take cognisance of a case or its admissibility. Rules 50 and 59 of the Rules regulate, respectively, the procedure applicable to a) victims’ representations, and b) the submission of victims’ observations.

Rule 93 confers power upon a Chamber to seek the views of victims or their legal representatives on any matter arising in the course of proceedings before it, including issues referred to it pursuant to rules 107, 109, 125, 128, 136, 139, and 199 of the Rules. The views of victims may be solicited independently of whether they participate or not in any given proceedings before the Court. Initiative for soliciting the views of victims under this rule rests entirely with a Chamber. Victims may express their views on any given subject identified by the Chamber. Here again, the process is distinguished from victim participation under article 68(3) of the Statute.

Regulation 86(6) of the *Regulations of the Court* does not envisage participation outside the confines of rule 89 of the Rules. It merely regulates victim participation under article 68(3) of the Statute.

There is yet another species of proceedings that must be distinguished from participation under article 68(3) of the Statute. These are proceedings which the victims may initiate themselves under statutory provisions. Pursuant to the provisions of article 75 of the Statute and rule 94 of the Rules, they may make a request for reparations against the convicted person in the manner envisaged by the aforesaid rule. Furthermore, victims as well as witnesses may move the Court to take protective measures for their safety, physical and psychological well-being, dignity and privacy as foreseen *inter alia* in article 68(1) and (2) of the Statute and rules 87 and 88 of the Rules. The protection of victims and witnesses and that of members of their families may justify the nondisclosure of their identity prior to the trial, as provided in rule 81 of the Rules.

The initial appraisal of a referral of a situation by a State Party, in which one or more crimes within the jurisdiction of the Court appear to have been committed as well as the assessment of information reaching the

Prosecutor and in relation to that the initiation by the Prosecutor of investigations *proprio motu* are the exclusive province of the Prosecutor (see, *inter alia*, articles 14, 15, 53, and 54 of the Statute).

The domain and powers of the Prosecutor are outlined in article 42 of the Statute, paragraph 1 of which reads: The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not see or act on instructions from any external source. Manifestly, authority for the conduct of investigations vests in the Prosecutor. Acknowledgment by the Pre-Trial Chamber of a right to victims to participate in the investigation would necessarily contravene the Statute by reading into it a power outside its ambit and remit.

[...]

Participation pursuant to article 68(3) of the Statute is confined to proceedings before the Court, and aims to afford victims an opportunity to voice their views and concerns on matters affecting their personal interests. This does not equate them, as the case law of the Appeals Chamber conclusively establishes, to parties to the proceedings before a Chamber, restricting their participation to issues arising therein touching upon their personal interests, and then at stages and in a manner not inconsistent with the rights of the accused and a fair and impartial trial.

The Pre-Trial Chamber also acknowledges in its decision that article 68(3) of the Statute is the provision that confers a right upon victims to participate in any proceedings before a Chamber. Nevertheless, the Pre-Trial Chamber adopts the position that the provision could be extended beyond its self-evident confines, to areas outside its ambit. Article 68(3) of the Statute is treated as a hybrid provision, allowing the participation of victims in any matter dealt with by the Statute, including investigations. This is a position that can find no justification under the Statute, the *Rules of Procedure and Evidence* or the *Regulations of the Court*. On the other hand, it must be clarified that victims are not precluded from seeking participation in any judicial proceedings, including proceedings affecting investigations, provided their personal interests are affected by the issues arising for resolution.

Having determined that the Pre-Trial Chamber cannot grant the procedural status of victim entailing a general right to participate in the investigation, the Appeals Chamber is not in a position to advise the Pre-Trial Chamber as to how applications for participation in judicial proceedings at the investigation stage of a situation should generally be dealt with in the future, in the absence of specific facts. It is for the Pre-Trial Chamber to determine how best to rule upon applications for participation, in compliance with the relevant provisions of the Court's texts. The Pre-Trial Chamber must do so bearing in mind that participatory rights can only be granted under article 68(3) of the Statute once the requirements of that provision have been fulfilled.

Having determined that victims cannot be granted procedural status of victim entitling them to participate generally in the investigation, leading to the collapse of the foundation of the decisions of the Single Judge, the particulars to be provided for a person to qualify as a victim on grounds of moral harm becomes a theoretical one and need not be answered.

In the result, the decisions of the Pre-Trial Chamber acknowledging procedural status to victims, entitling them to participate generally in the investigation of a situation are ill-founded and must be set aside. The reversal of the Impugned Decisions is the unavoidable outcome of these proceedings.

See No. ICC-01/04-556, Appeals Chamber, 19 December 2008, paras. 43-52 and 55-59. See also No. ICC-02/05-177, Appeals Chamber, 2 February 2009, paras. 43-51 and 55-59.

3. Modalities of participation at the pre-trial stage of a case

Although the Statute and Rules provide an indication on some of the procedural rights that the Chamber could attach to the procedural status of victim at the pre-trial stage of a case, they do not pre-establish *per se* any specific procedural right—apart from the general right to file requests with the competent Chamber.

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

Discretion granted to the Chamber in the determination of the role of victims in the pre-trial stage of a case before the Court must be exercised by applying, in addition to the general principle of interpretation set out in article 21(3) of the Statute, the interpretative criteria provided for in article 31(1) of the Vienna Convention

on the Laws of Treaties, according to which ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.’

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 78.

The specific procedural rights for the pre-trial stage of a case can be divided into six groups. The first group is comprised of the right to have access, prior to and during the confirmation hearing, to the record of the case kept by the Registry, including to the evidence filed by the Prosecution and the Defense pursuant to rule 121 of the Rules. This access includes access to all filings and decisions contained in the record of the case regardless of whether they are classified as public or as confidential. It does not, however, include the right to access those filings and decisions classified as *ex parte*. The first group also includes the right to be notified on the same basis as the Prosecution and the Defense of all decisions, requests, motions, responses and other procedural documents which are filed in the record of the case and are not classified *ex parte*. The right to have access to the transcripts of hearings contained in the record of the case regardless of whether such hearings were held in public or in closed session also falls within this first group, with the exception of *ex parte* transcripts. The first group also includes the right to be notified of all proceedings before the Court, including public and closed session hearings (including those held *ex parte*) and any postponements thereof, and the date of delivery of decisions. The right to have access to the evidence proposed by the Prosecution and the Defense and contained in the record of the case also falls within this first group. However, this right to have access to the evidence is limited to the format (unredacted versions, redacted versions or summaries, as well as electronic versions with the date required by the e-Court Protocol) in which the evidence is made available to the party which has not proposed it. The right to have access to non-public filings and decisions included in the Registry’s record of the situation to which the relevant case is related falls outside this first group of rights.

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

The second group of rights is comprised of the rights (i) to make submissions on all issues relating to the admissibility and probative value of the evidence on which the Prosecution and the Defense intend to rely at the confirmation hearing; and (ii) to examine such evidence at the confirmation hearing.

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

The third group relates to the examination of witnesses. When the limitations deriving from the principle of prohibiting anonymous accusations are not applicable, this third group includes the right to examine, at the confirmation hearing, any witness proposed by the Prosecution and the Defense, as this is part of the evidentiary debate that takes place at the confirmation hearing.

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

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

The fourth group is comprised of the right to attend all public and closed session hearings convened in the proceedings leading to the confirmation hearing, as well as in all public and closed sessions of the confirmation hearing. However, it does not include the right to attend those hearings held on an *ex parte* basis.

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

The fifth group includes the right to participate by way of oral motions, responses and submissions in: (i) all those hearings in which those granted the procedural status of victim have the right to attend; and (ii) in relation to all matters other than those in which their intervention has been excluded by the Statute and Rules—for instance, matters relating to the *inter partes* disclosure process or any discussion of the evidence which aims at extending the factual basis contained in the Prosecution Charging Document.

The sixth and last group is comprised of the right to file written motions, responses and replies in accordance with regulation 24 of the Regulations, in relation to all matters other than those in which the victim’s representative has been excluded by the Statute and Rules.

The fifth and sixth groups of rights also include the right to (i) file, in accordance with rule 121(7) of the Rules, written submissions with the Pre-Trial Chamber on evidentiary and legal issues to be discussed at the confirmation hearing; (ii) make opening and closing statements at the confirmation hearing as provided for in rule 89(1) of the Rules; and (iii) raise objections or make observations concerning issues related to the proper conduct of the proceedings prior to the confirmation hearing in accordance with rule 122(3) of the Rules.

The right to make challenges to, or raise issues relating to, the jurisdiction of the Court or the admissibility of a case pursuant to article 19(2) and (3) of the Statute and rule 122(2) of the Rules falls outside the last two groups of rights.

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

The set of procedural rights outlined by the Single Judge can be limited by the Chamber *proprio motu*, or at the request of the parties, the Registry or any other participant, if it is shown that the relevant limitation is necessary to safeguard another competing interest protected by the Statute and the Rules - such as national security, the physical or psychological well-being of victims and witnesses, or the Prosecution's investigations.

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

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

According to the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules, preventing victims, when victims are not granted anonymity, from accessing confidential materials is the exception and not the general rule—at least in relation to the pre-trial proceedings of a case, where the record of the case is certainly limited.

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

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

Subject to their intervention being restricted to the scope determined by the charges brought against the accused, the victims may participate in the confirmation hearing by presenting their views and concerns in order to help contribute to the prosecution of the crimes from which they allegedly have suffered.

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

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

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

1. *Public hearing on the confirmation of charges*

The Single Judge considers that legal representatives of victims recognised as participants in the present proceedings have the right to attend the public parts of the hearing on the confirmation of charges against Mr Jean-Pierre Bemba. In case the Chamber decides to hold parts of the hearing in camera or ex parte, the Chamber reserves its position on whether to grant legal representatives of victims the right to attend those sessions.

The Single Judge holds that pursuant to rule 89(1) of the Rules, legal representatives of victims recognised as participants in the present proceedings are granted the right to explain the reasons for their participation in a brief opening statement (20 minutes in total) at the confirmation hearing. They will also be allowed to make a closing statement.

2. *Access to public decisions and documents*

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

3. *Access to public evidence*

With a view to their proper preparation for the confirmation hearing and possible claim of reparations at a later stage, the Single Judge is of the view that victims should have access also to evidence adduced by the parties. Therefore, the Single Judge holds that legal representatives of victims recognised as participants in the present proceedings must have access to all public evidence disclosed by the Prosecutor and the Defence which is contained in the record of the case effective as of the date of their recognition to participate in the present proceedings. The right of access to evidence does not include the right of access to evidence filed on a confidential basis.

4. *Access to transcripts*

The Single Judge further considers that due to their presence in court, legal representatives of victims recognised as participants in the present proceedings must have access to the transcripts of the public part of the hearing on the confirmation of charges as well as previously held public hearings and status conferences. In case the Chamber decides to hold parts of the hearing in camera or ex parte, the Chamber reserves its position on whether to grant legal representatives of victims the right to access those transcripts.

5. *Notifications*

The Single Judge holds that pursuant to rule 92(6) of the Rules legal representatives of victims recognised as participants in the present proceedings must be notified of all public decisions and filings filed effective as of the date of their recognition to participate in the present proceedings. However, if a party or participant wishes to notify legal representatives of victims of a confidential document, this filing shall include the names of the legal representatives of the victims and be notified by the Registrar accordingly.

Further, this right includes that legal representatives of victims recognised as participants in the present proceedings be notified in a timely manner of the confirmation hearing and any postponement thereof as well as the date of delivery of the decision in accordance with rule 92(5) of the Rules.

[...]

8. *Written submissions*

The Single Judge is of the view that legal representatives of victims recognized as participants in the present proceedings have a right to make succinct written submissions to specific issues of law and fact if (i) victims prove first by way of application that their interests are affected by the issue under examination and (ii) it is deemed appropriate by the Chamber.

See No. ICC-01/05-01/08-320, Pre-Trial Chamber III (Single Judge), 12 December 2008, par. 103-107 and 110. See also ICC-02/05-02/09-136, Pre-Trial Chamber I, 6 October 2009, paras. 11-20 and 25 and No. ICC-02/05-02/09-136, Pre-Trial Chamber I, 6 October 2009, paras. 11-15.

The Victims' Representatives may:

- a. make opening and closing statements at the confirmation hearing;
- b. request leave to intervene during the public sessions of the confirmation hearing, but will not be able to add any point of fact or any evidence. Victims' representatives will not be able to question the witnesses.

See No. ICC-01/04-01/06-462, Pre-Trial Chamber I, 22 September 2006, pp. 6-7. See also No. ICC-01/05-01/08-320, Pre-Trial Chamber III (Single Judge), 12 December 2008, paras. 101-108.

In their opening and closing statements, the legal representatives may, *inter alia*, address any point of law, including the legal characterisation of the modes of liability with which the Prosecutor has charged the suspect under article 25 of the Statute.

See No. ICC-01/04-01/06-678, Pre-Trial Chamber I (Single Judge), 7 November 2006, p. 7.

Any victim's right to participate in the evidentiary debate held at the confirmation hearing must be subject to an absolute prohibition to extend the factual basis contained in the Prosecution Charging Document.

The same limitation does not apply in relation to the legal characterization of the facts contained in the Prosecution Charging Document, insofar as the Chamber can always, pursuant to article 61(7) of the Statute, adjourn the hearing and request the Prosecution to consider amending the legal characterization of such facts if it considers that the evidence submitted appears to establish a different crime.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 122-123.

The Prosecution has informed the Defence and the Chamber of its intention to call three witnesses to testify at the confirmation hearing. The Defence, according to its List of Evidence, also intends to call a witness to testify at the confirmation hearing.

At the outset, the Chamber wishes to recall that, bearing in mind the principle of prohibiting anonymous accusations, the victims who are granted anonymity throughout the pre-trial stage of a case, are not entitled to examine witnesses pursuant to the procedure provided for in rule 91(3) of the Rules.

However, when the identities of the victims are disclosed to the parties, the Chamber considers that the aforementioned limitation may not be applicable. Thus, pursuant to rule 91(3) of the Rules, if any of the victims' legal representatives wish to question any of the witnesses called to testify at the confirmation hearing, they must make an application to the Chamber.

If a request is made in that sense, the Chamber will decide, at that time, on the procedure that must be followed, taking into account, among other factors, the stage of the proceedings, the rights of the suspect, the interests of the witnesses, the need for a fair, impartial and expeditious trial and the requirements under article 68(3) of the Statute.

See also ICC-02/05-02/09-136, Pre-Trial Chamber I, 6 October 2009, paras. 21-24.

5. Modalities of participation at the trial stage

The right to introduce evidence during trials before the Court is not limited to the parties. Victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has "requested" the evidence.

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

Rule 91(3) of the *Rules of Procedure and Evidence* enables participating victims to question witnesses with the leave of the Chamber (including experts and the defendant) whenever their personal interests are engaged by the evidence under consideration; thus questioning by victims won't be restricted to reparations issues.

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

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

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

To give effect to article 68(3) of the Statute, upon request by the legal representatives of the victims, the Prosecution shall provide individual victims with any materials within the possession of the prosecution, provided that: victims asking for such materials have been granted the right to participate in the proceedings; the material requested are relevant to the personal interests of the victims; the Chamber have permitted that the material targeted be investigated during the proceedings; and the victims have identified with precision in writing the materials requested.

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

The Trial Chamber may permit victims to participate in closed and *ex parte* hearings, depending on the circumstances, after consultation with the parties when necessary. The Chamber may do so *proprio motu* or upon request by any of the parties or participants.

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

The Trial Chamber may permit victims to make confidential or *ex parte* written submissions, depending on the circumstances and after consultation with the parties when necessary. The Chamber may do so *proprio motu* or upon request by any of the parties or participants.

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

Victims' participation may include opening and closing statements.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 117. See also No. ICC-01/04-01/07-1665, Trial Chamber II, 20 November 2009, p. 9.

The three participating victims wish to address the court on four discrete issues, by way of presenting their views and concerns or by giving evidence:

- i. their individual histories, within the context of the charges faced by the accused;
- ii. the harm they individually experienced;
- iii. the approach to be taken to reparations, focussing particularly on any relevant facts not canvassed thus far during the trial (in accordance with Article 68(3) of the Statute); and
- iv. the issue, including the extent, of child recruitment in [REDACTED] region;

It will be necessary to determine in this Decision whether these issues properly arise for consideration in the context of this trial, and, if so, how each is to be presented by these participating victims, but first it is convenient to set out the principles that are to be applied to applications of this kind.

As rehearsed above, Article 68(3) establishes the unequivocal statutory right for victims to present their views and concerns in person when their personal interests are affected, although the opportunity is expressly created for their legal representatives to undertake this task on their behalf, if the Court considers that course appropriate. However, any intervention by victims must be in a manner which is not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial. Accordingly, the content and the circumstances of their participation must not undermine the integrity of these criminal proceedings.

[...]

Finally, it needs to be stressed that the process of victims "expressing their views and concerns" is not the same as "giving evidence". The former is, in essence, the equivalent of presenting submissions, and although any views and concerns of the victims may assist the Chamber in its approach to the evidence in the case, these statements by victims (made personally or advanced by their legal representatives) will not form part of the trial evidence. In order for participating victims to contribute to the evidence in the trial, it is necessary for them to give evidence under oath from the witness box. There is, therefore, a critical distinction between these two possible means of placing material before the Chamber.

In the result, careful decisions will need to be made by victims as to whether to give evidence under oath, or to present their views and concerns, or both. If they wish to express their views and concerns, they will need to determine whether they are best placed to undertake this exercise or whether the relevant matters would be more effectively introduced by their legal representatives. Furthermore, the Chamber will need to ensure that issues and facts are not unnecessarily repeated (e.g. first in a victims' personal presentation of his or her views and concerns, then repeated by them in evidence and finally addressed on a third occasion by the legal representatives in submissions). Although evidence can be commented upon in submissions or during the process of presenting views and concerns, overall this exercise must be proportionate and consistent with a fair trial.

[...]

It would be undesirable - indeed impossible - for the Chamber to describe in greater detail the circumstances in which the personal intervention by victims in order to express their views and concerns will be appropriate. Fact-specific decisions will be required, taking into account the circumstances of the trial as a whole. For

instance, the personal contributions of a few victims are unlikely have the same impact on the proceedings as when a large number of victims individually wish to express their views and concerns. To take an extreme example, if all the participating victims in this case (94) sought to present their views and concerns, depending always on the circumstances of their discrete interventions, that course may be antithetical to the fair trial of the accused. Accordingly, it will be necessary for the Chamber to consider these applications on their individual merits, balancing a wide variety of factors that will include the requirements and circumstances of the trial as a whole. This is an area in which the legal representatives have a crucial role to play: it is of undoubted importance that the participating victims receive careful and comprehensive advice as to the most appropriate form of participation by them in this trial.

Turning, first, to the merits of the requests to give evidence, written applications have been submitted and notified to the parties. Therefore, the first two requirements, as approved by the Appeals Chamber, have been satisfied.

As to whether the personal interests of the victims are affected and whether their testimony may be relevant to the charges against the accused, the issue of child recruitment in [REDACTED] region, and its extent, are of prima facie relevance to the suggested use, recruitment or enlistment of child soldiers during the relevant period by the accused. Moreover, this evidence may assist the Chamber in its consideration of reparations for certain victims, if these arise later in the proceedings. The [REDACTED] region is a relevant area in the Democratic Republic of Congo («DRC»), falling potentially under the alleged control or influence of the accused during the timeframe of the charges, and this evidence may therefore assist the Chamber in its determination of the truth.

[...]

In all the circumstances, these applicants have each demonstrated that the evidence they seek to present affects their personal interests and, in each instance, it is directly related to the charges brought against the accused. Therefore, they may give evidence.

Once the three participating victims have completed their evidence, they will be in the best position, at that stage, to determine whether they wish to express their views and concerns personally. As set out above, the Chamber expects the legal representatives to give detailed and careful advice on this issue, and it will entertain oral submissions at the relevant time. Although as a matter of principle it is open to these participating victims to request an opportunity to present their views and concerns personally on issues such as the harm they individually experienced and the approach to be taken to reparations, if they have chosen to give evidence on all relevant matters within their knowledge and experience, it may be more appropriate for any additional submissions (which may involve complex legal issues) to be advanced by their legal representatives. However, the Chamber will deal with the position of each victim following their evidence, once the individual circumstances of, and the detail of the requests from, each of these three participating victims are clear. At that stage the Chamber will determine, if relevant, when and by whom any views and concerns are to be presented, bearing in mind the situation of the victims and the need to ensure that the trial of the accused is fair.

See No. ICC-01/04-01/06-2032-Anx, Trial Chamber I, 9 July 2009, paras. 15-17, 25-29 and 39-40. See also No. ICC-01/04-01/06-1432, Appeals Chamber, 11 July 2008, paras. 4 and 104.

Victims may under certain circumstances be allowed to participate in the proceedings by way of giving oral testimony. This possibility is subject to authorisation by the Chamber.

1. Conditions

As a general principle, the Chamber will only grant applications on behalf of victims whose testimony can make a genuine contribution to the ascertainment of the truth. It is therefore important that the Legal Representative clearly explains the relevance of the proposed testimony of the victim in relation to the issues of the case and in what way it may help the Chamber to have a better understanding of the facts.

In determining whether and how the Legal Representatives are allowed to call victims they represent to testify, the Chamber will be guided by the overriding concern that this takes place in an expeditious manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Accordingly, the possibility for the Legal Representatives to call victims who participate in the proceedings to testify in person, is subject to three important limitations:

- a. The Chamber may not allow the participation by victims to infringe on the right of the accused to be tried without undue delay, in accordance with article 67(l)(c).
- b. The Chamber will only allow Victims' Legal Representatives to call witnesses to the extent that this does not in effect transform them into auxiliary prosecutors.
- c. Under no circumstances the Chamber will allow victims to testify anonymously vis-à-vis the Defence.

Furthermore, the Chamber must ensure that the Defence have adequate time to prepare, which implies that the participation by a victim may not be the cause of unfair surprise for the Defence, to which it is not able to respond adequately.

Bearing in mind these important pre-conditions, the Chamber may authorise the Legal Representatives of the victims to call one or more of their clients in order to testify in person before the Court and give evidence under oath. The Chamber will only allow this after the Prosecution has concluded its case and insofar as it does not undermine the integrity of the proceedings.

2. *Application for calling a victim to testify*

When a victim wishes to testify at trial, his or her Legal Representative must file a written application to the Chamber before the completion of the Prosecution case.

The application must be accompanied by a signed statement by the victim, containing a comprehensive summary of the testimony that is to be given by the victim. If the Chamber grants the application, the attached statement shall count as disclosure in accordance with regulation 54(f) of the Regulations [of the Court].

The Chamber urges the Legal Representatives to avoid the need for unnecessary redactions in the said statement. However, if it is necessary to protect the safety, physical or psychological well-being of the victims or third persons who are implicated by the participation of a victim, the Chamber may authorise redactions. Under no circumstances may the Legal Representatives apply redactions without prior authorisation by the Chamber.

The application and the statement must be notified to the parties, who will have seven days to make observations. The Chamber will rule on the application and determine the appropriate moment for the victim to testify.

In the event the Chamber authorises the application, the Legal Representative must enter into contact with the Victims and Witnesses Unit in order to make all necessary arrangements and discuss any possible security concerns.

3. *Criteria for evaluating applications for giving testimony by victims*

In evaluating applications for participation through oral testimony by victims, the Chamber may take into consideration, among others, the following factors:

- a. Whether the proposed testimony relates to matters that were already addressed by the Prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties.
- b. Whether the topic(s) on which the victim proposes to testify is sufficiently closely related to issues which the Chamber must consider in its assessment of the charges brought against the accused.
- c. Whether the proposed testimony is typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify, or whether the victim is uniquely apt to give evidence about a particular matter.
- d. Whether the testimony will likely bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges.

See No. ICC-01/04-01/07-1665, Trial Chamber II, 20 November 2009, paras. 19-30.

The Chamber will grant the Legal Representatives the opportunity to call one or more victims to give evidence under oath at trial. In its view, the most appropriate stage, having regard to the rights of the accused, to hear any victims called by the Legal Representatives is directly after the Prosecution has presented its case. Since the persons concerned will give evidence about the crimes with which the accused have been charged, and about any part played therein by the accused, the Defence should be given the opportunity to present its case once all victims of the crimes to which the accused must answer have given their evidence, including any victims called by the Legal Representatives.

Again, any application for this purpose must state the relevance of the testimony to the issues of the case and how it may help the Chamber to gain a better understanding of the facts.

[...]

Regarding the question whether their status as participating victims in the proceedings might preclude them from giving evidence under oath, the Chamber concurs with Trial Chamber I that the possibility of their giving evidence cannot be totally excluded. Furthermore, that Chamber authorized three of the victims participating in the Lubanga case to come to give evidence under oath after the conclusion of the Prosecution case. Indeed, it would be contrary to the Chamber's obligation to establish the truth if it were to exclude highly relevant and probative testimony of witnesses for the sole reason that they have also been authorised to participate in the proceedings as victims. Nevertheless, the Chamber is aware of the objections raised by the Defence in this regard. It is further mindful of the fact that, in those legal systems which attribute an active role to victims in criminal proceedings, such victims are usually not authorised to testify under oath. However, the Chamber notes that the fact that a victim gives evidence under oath – which in itself gives him or her the status of a witness – allows the Defence to cross-examine him or her, which acts as a safeguard and makes the said victim liable to prosecution under article 70(1)(a) of the Statute if he or she gives false testimony.

Furthermore, it should be noted that, if the victim were authorised merely to make a written statement, that could not be taken into account in the final judgment, which would be contrary to the objective of contributing to the determination of the truth that justifies intervention by victims.

It is therefore incumbent upon the Chamber, when determining whether it is appropriate to allow a particular victim to testify in person, to satisfy itself that his or her dual status as victim and witness does not compromise the probative value of the testimony. Prior to ruling on such a request, the Chamber may ask for the observations of the parties.

The Chamber recalls, in this respect, that the participation of victims in the fact-finding process of the Court is conditional upon their making a real contribution to the search for the truth. Consequently, if there are potential doubts as to the reliability of a victim's testimony, the Chamber may decide not to authorise the victim to testify under oath. This decision is entirely independent of the Chamber's discretion under article 69 of the Statute to determine the relevance and admissibility of the evidence the victim may give during his or her testimony.

The Chamber emphasises that it will not authorise testimony from any victims who wish to remain anonymous to the Defence. On this point, it recalls that, in its decisions of 6 and 18 November 2009, it ordered the disclosure of the identity of the majority of the victims who did not oppose such disclosure. Lastly, it points out that some victims have yet to specify whether or not they agree to their identity being disclosed to the parties.

Nevertheless, the Chamber does not rule out the possibility of anonymous victims participating in the proceedings. In the event that they are called to appear as witnesses in accordance with this Decision, they must relinquish their anonymity.

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

As a matter of principle, Victims' Legal Representatives will not be able to call witnesses other than the victims they represent. However, in case the Legal Representatives have identified persons other than participating victims, who may be able to give evidence to the Chamber about issues that concern the victims' interests, they may take the initiative to bring this to the attention of the Chamber.

If the Chamber considers that the proposed witness may indeed provide the Chamber with important information, that was not hitherto included in the evidence called by the parties, it may decide to call the witness on its own motion, in accordance with articles 64(6)(b),(d) and 69(3) of the Statute.

As a general rule, the Chamber will only call witnesses whose testimony can make a genuine contribution to the ascertainment of the truth. It is therefore important that the Legal Representatives clearly explain the relevance of the proposed testimony in relation to the contentious issues of the case.

When the Chamber has called a witness on the suggestion of one of a Legal Representative, it may allow that Representative to question the witness, either before or after the Chamber examines him or her. The remainder of the examination will follow the same order as for witnesses called by the Chamber *proprio motu*.

See No. ICC-01/04-01/07-1665, Trial Chamber II, 20 November 2009, paras. 45-48.

The questioning of witnesses by the victims' legal representatives pursuant to Rule 91(3) of the Rules is one example of the ways in which victims may participate in the proceedings. However, this rule only describes the procedure that the legal representatives are to follow in order to apply for leave to ask questions. In the absence of any relevant provisions in the *Rome Statute* framework, the manner of questioning falls to be determined by the Chamber.

The terms "examination-in-chief", "cross-examination" and "re-examination", which are used in common law and Romano Germanic legal systems, do not appear in the Statute. However, as set out in the procedural history above, these expressions have been used as terms of convenience by the parties and the participants when addressing the issue of how witnesses are to be questioned during their evidence before the Trial Chamber.

The purpose of the "examination-in-chief" is "to adduce by the putting of proper questions relevant and admissible evidence which supports the contentions of the party who calls the witness". It follows from this purpose that the manner of such questioning is neutral and that leading questions (*i.e.* questions framed in a manner suggestive of the answers required) are not appropriate. However, it needs to be stressed that there are undoubted exceptions to this approach, for instance when leading questions are not opposed. In contrast, the purpose of "cross-examination" is to raise relevant or pertinent questions on the matter at issue or to attack the credibility of the witness. In this context, it is legitimate that the manner of questioning differs, and that counsel are permitted to ask closed, leading or challenging questions, where appropriate.

The victims' legal representatives, however, fall into a category that is distinct and separate from the parties, and in this regard a description of the manner of questioning by the victims' legal representatives that uses the concepts of "examination in chief", "cross-examination" and "re-examination" is not necessarily helpful. This particular aspect of the proceedings at trial - the manner of questioning by the victims' legal representatives - is an example of the novel nature of the Statute, which is not the product of either the Romano Germanic or the common law legal systems. As participants in the proceedings, rather than parties, the victims' legal representatives have a unique and separate role which calls for a bespoke approach to the manner in which they ask questions.

By Article 66(2) of the Statute, one of the prosecution's primary functions is to prove the guilt of the accused: the onus is on the prosecutor to prove the guilt of the accused. However, the Appeals Chamber has held that this responsibility on the part of the prosecution does not preclude the possibility for victims to lead evidence pertaining to the guilt of the accused. It follows that, depending on the circumstances, the alleged guilt of the accused may be a subject that substantively affects the personal interests of the victims, and the Appeals Chamber has determined that the Trial Chamber may authorise the victims' legal representatives to question witnesses on subjects that relate to this issue:

In addition the Trial Chamber finds support for this approach in the provision under rule 91 (3) of the Rules. Under this rule the Trial Chamber may authorise, upon request, the legal representatives of victims to question witnesses or to produce documents in the restricted manner ordered. The Appeals Chamber considers that it cannot be ruled out that such questions or documents may pertain to the guilt or innocence of the accused and may go towards challenging the admissibility or relevance of evidence in so far as it may affect their interests earlier identified and subject to the confines of their right to participate.

It follows that the victims' legal representatives may, for instance, question witnesses on areas relevant to the interests of the victims in order to clarify the details of their evidence and to elicit additional facts, notwithstanding its relevance to the guilt or innocence of the accused.

Under the scheme of the Statute, questioning by the victims' legal representatives has been linked in the jurisprudence of the Trial and the Appeals Chambers to a broader purpose, that of assisting the bench in its pursuit of the truth. The framework establishing the rights of victims as regards their participation during trial has been coupled expressly with the statutory powers of the Trial Chamber, pursuant to Article 69(3) of the Statute, «[t]o request the submission of all evidence that it considers necessary for the determination of the truth». The Appeals Chamber explained that:

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

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

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

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

See No. ICC-01/04-01/06-2127, Trial Chamber I, 16 September 2009, paras. 20-30. See also No. ICC-01/05-01/08-807-Corr., Trial Chamber III, 30 June 2010, paras. 38-40.

As a matter of general principle, questioning by the Legal Representatives on behalf of victims who participate in the proceedings must have as its main aim the ascertainment of the truth. The victims are not parties to the trial and certainly have no role to support the case of the Prosecution. Nevertheless, their participation may be an important factor in helping the Chamber to better understand the contentious issues of the case in light of their local knowledge and socio-cultural background.

The following rules apply to questioning by Victims' Legal Representatives of witnesses called by other parties, participants or the Chamber.

1. Procedure for authorising questions by Victims' Legal Representatives

a) Questions under article 75

When a Victims' Legal Representative wants to question a witness in relation to matters that pertain to a potential order on reparations in accordance with article 75 of the Statute, the Legal Representative shall make a written application to that effect, which shall be notified to the parties. The application shall provide a written note of the questions, in accordance with rule 91(3)(a). The filing shall further explain the precise purpose and scope of the questions and include any relevant documents that will be used for questioning. Finally, the application shall indicate on behalf of which (group of) victim(s) the questions are being put.

The application shall be filed as early as possible in order to allow the Chamber to determine whether it is appropriate for the Defence to make observations. Under normal circumstances the Chamber will only consider applications that were received at least seven days before the witness' first appearance.

In case the Chamber grants the application, it will make a ruling under regulation 56 of the Regulations of the court, determining whether and to what extent rule 91(4) of the Rules will apply.

b) Anticipated questions by the Legal Representatives

When the Victims' Legal Representatives know in advance that they have certain specific questions for a particular witness, expert or the accused, which do not relate to issues of reparation, they shall notify the Chamber and the Prosecution about this in a written application, at least seven days before the witness appears for the first time. The application shall indicate which questions the Legal Representative proposes to ask and explain how they relate to the interests of the victims represented. If the Chamber considers that the application must be submitted to the Defence for observations, in accordance with rule

91(3)(a), it may decide to reclassify the application so as to allow the notification thereof to the Defence. In that case, the Defence will have three days to formulate its observations.

If, after examination-in-chief by the party calling the witness, the Chamber is of the view that the matters raised in the proposed question(s) of the victims have not been sufficiently addressed by the witness, it may authorise the Legal Representative to put the question(s) before cross-examination commences. In deciding whether it is appropriate to grant such authorisation, the Chamber will take into consideration the rights of the accused, the interests of the witness, the need for a fair, impartial and expeditious trial and the need to give effect to article 68(3) of the Statute, in accordance with rule 91(3)(b) of the Rules. The Chamber recalls, in this regard, that this provision also authorises it to put the question to the witness, expert or accused on behalf of the Victims' Legal Representative.

c) Unanticipated questions by the Legal Representatives

When the Victims' Legal Representatives did not anticipate putting questions to a particular witness, but during examination-in-chief by the party calling the witness, an unforeseen issue arises that directly pertains to the interests of the victims, the Victims' Legal Representatives may submit a question to the Chamber, which may decide to put it to the witness, if it considers this necessary for the ascertainment of the truth or to clarify the testimony of the witness.

2. Scope of questioning

In principle, questioning by Victims' Legal Representatives should be limited to questions that have as their purpose to clarify or complement previous evidence given by the witness. Nevertheless, Victims' Legal Representatives may be allowed to ask questions of fact that go beyond matters raised during examination-in-chief, subject to the following conditions:

- a) Questions may not be duplicative or repetitive to what was already asked by the parties.
- b) Questions must be limited to matters that are in controversy between the parties, unless the Victims' Legal Representative can demonstrate that they are directly relevant to the interests of the victims represented.
- c) In principle, Victims' Legal Representatives will not be allowed to ask questions pertaining to the credibility and/or accuracy of the witness' testimony, unless the Victims' Legal Representative can demonstrate that the witness gave evidence that goes directly against the interests of the victims represented.
- d) Unless the Chamber specifically gave authorisation under regulation 56 of the Regulations of the court, Victims' Legal Representatives are not allowed to put questions pertaining to possible reparations for specific individuals or groups of individuals.

3. Mode of questioning

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

See No. ICC-01/04-01/07-1665, Trial Chamber II, 20 November 2009, paras. 82-91. See also, No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras 108-111; and No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 30-40.

The Chamber considers that the aforementioned provisions of the Statute do not preclude the Legal Representatives from asking it to decide whether it should order that certain documentary evidence be tendered. Again, the Chamber considers this a means for the victims to express their "views and concerns" within the meaning of article 68(3) of the Statute. In the Chamber's view, making it possible for the Legal Representatives of the Victims to propose the presentation of documentary evidence would indeed assist it in its implementation of article 69(3) of the Statute, and by the same token in its search for the truth.

Accordingly, the Chamber will allow the Legal Representatives this possibility, provided that they comply with the following procedure. They must make a written application to the Chamber showing how the documents they intend to present are relevant and how they may contribute to the determination of the truth. This application, along with the evidence they wish to present, must be notified to the parties and other participants for their observations.

If the evidence which the Legal Representatives wish to tender is closely linked to the testimony of a named witness, the application must be submitted in sufficient time prior to said witness's testimony to allow the Chamber and the parties to take proper note of the application's content. In any other circumstance, which in principle should not arise until the close of the Defence case, the application must be filed as soon as possible.

It should be recalled that the Chamber will only authorise the presentation of such evidence provided that it is not prejudicial to the Defence or to the fairness and impartiality of the trial. It will assess the evidence thus tendered pursuant to its power to "[r]ule on the admissibility or relevance of evidence" under article 64(9) of the Statute.

See No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 98-101.

The Appeals Chamber underscores that the Statute and the *Rules of Procedure and Evidence* provide that disclosure by the Prosecutor should, in principle, take place prior to the commencement of trial. Pursuant to article 61(3) of the Statute and rules 121(3) and (5) of the Rules of Procedure and Evidence, the Prosecutor must disclose all of the evidence intended for use at the confirmation hearing prior to that hearing. After the confirmation hearing, pursuant to article 64(3)(c) of the Statute, the Trial Chamber shall «[p]rovide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial». The Statute, Rules of Procedure and Evidence and Regulations of the Court also emphasise the duty of the Chamber to ensure that the Prosecutor discloses, prior to the commencement of trial, any evidence not previously disclosed during the pre-trial phase of the case.

However, the possibility of the Trial Chamber requesting victims to submit evidence is contingent on (i) the Victims fulfilling the requirements of article 68(3) of the Statute, and (ii) the Trial Chamber deciding to exercise its authority under article 69(3) of the Statute. The submission of such evidence therefore falls within the regime provided for the Trial Chamber to exercise its authority to request the submission of «[e]vidence that it considers necessary for the determination of the truth». Since the Trial Chamber may not know in advance of the trial which evidence will be necessary for the determination of the truth and, as far as evidence submitted by victims is concerned, whether the victims' personal interests are affected, the Trial Chamber has the power to order the production of such evidence during the course of the trial. Thus, article 64 (6)(d) of the Statute provides that «[i]n performing its functions [...] during the course of a trial, the Trial Chamber may, as necessary: [...] (d) Order the production of evidence in addition to that already [...] presented during the trial by the parties». Because article 64(6)(d) of the Statute specifically refers to evidence in addition to that which has been presented during the trial by the parties, it is clear that it is intended to give effect to the power of the Trial Chamber under the second sentence of article 69(3) of the Statute.

In light of the above, the necessary implication is that there may be circumstances under which evidence called by the Trial Chamber may not be communicated to the accused before the commencement of the trial. Insisting otherwise would deprive the Trial Chamber of its ability to make its assessment as to what is necessary for the determination of the truth after having heard the evidence presented by the parties. Thus, while it is correct that the Statute emphasizes.

The Appeals Chamber underlines once again that victims do not have the right to present evidence during the trial; the possibility of victims being requested to submit evidence is contingent on them fulfilling numerous conditions. Firstly, their participation is always subject to article 68(3) of the Statute, which requires that they demonstrate that their personal interests are affected by the evidence they request to submit. Secondly, when requesting victims to submit evidence, the Trial Chamber must ensure that the request does not exceed the scope of the Trial Chamber's power under article 69(3) of the Statute. In addition, the Trial Chamber will «[e]nsure that [the] trial is fair and expeditious and is conducted with full respect for the rights of the so accused», which includes the right to «have adequate time and facilities for the preparation of the defence».

No. ICC-01/05-01/07-2288, Appeals Chamber, 16 July 2010, paras. 43 - 48.

As recalled by the Trial Chamber and conceded by the accused neither the Statute nor the Rules of Procedure and Evidence expressly oblige the Victims to disclose exculpatory evidence to the accused. Rather, article 67(2) of the Statute provides that the Prosecutor is responsible for disclosure of

exculpatory evidence. In addition, rule 77 of the *Rules of Procedure and Evidence* provides that the Prosecutor shall disclose evidence which is material for the preparation of the defence, and evidence which will be used at trial.

The Appeals Chamber also recalls that the drafting history of the Statute supports the notion that the Prosecutor's disclosure obligations to the accused are linked to the Prosecutor's role in conducting the investigation, and stem from the Prosecutor's obligation to investigate incriminating and exonerating circumstance equally under article 54(1)(a) of the Statute. In contrast, as explained in greater detail in the preceding section relating to the first ground of appeal, pursuant to article 68 (3) of the Statute, the victims' role in the proceedings is significantly more limited. The Appeals Chamber considers that imposing a general disclosure obligation on the victims to disclose evidence to the accused would disregard the limited role of the victims of presenting their views and concerns where their personal interests are affected. Bearing in mind the differing roles of the victims vis-à-vis the parties, the Appeals Chamber finds that it is inappropriate simply to extend the Prosecutor's statutory obligations to victims participating in the proceedings.

No. ICC-01/05-01/07-2288, Appeals Chamber, 16 July 2010, paras. 72 and 75.

The Appeals Chamber recalls that under article 54(1)(a) of the Statute, the Prosecutor has a duty to investigate exonerating and incriminating circumstances equally. Under article 54(3)(b) of the Statute, the Prosecutor may, with respect to his investigations «[r]equest the presence of and question persons being investigated, victims and witnesses». The Appeals Chambers therefore considers that it is reasonable that, in particular where the submissions in the victims' applications for participation indicate that victims may possess potentially exculpatory information, the Prosecutor's investigation should extend to discovering any such information in the victims' possession. Such information would then be disclosed to the accused pursuant to article 67(2) of the Statute and rule 77 of the *Rules of Procedure and Evidence*.

No. ICC-01/05-01/07-2288, Appeals Chamber, 16 July 2010, para. 81.

6. Modalities of participation during interlocutory appeals

It is for the Chamber to ensure that the manner in which victims present their views and concerns is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. [...] Accordingly, in ordering the manner of participation of victims to comply with the rights of future suspects or a fair and impartial trial, the Appeals Chamber will limit the victims to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal. Observations to be received by the victims must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings.

See No. ICC-02/05-138, Appeals Chamber I, 18 June 2008, paras. 60 and 62. See also No. ICC-01/04-503, Appeals Chamber, 30 June 2008, par. 101; and No. ICC-01/04-01/06-1452, Appeals Chamber, 6 August 2008, par. 12; No. ICC-01/04-01/06-1453, Appeals Chamber, 6 August 2008, par. 11; No. ICC-01/04-01/06-1335, Appeals Chamber, 16 May 2008, par. 50.

In ordering the manner of participation of victims to comply with the rights of future suspects or a fair and impartial trial, the Appeals Chamber will limit the victims to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal. Observations to be received by the victims must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings.

In light of the similarities, the number and the complexities of the issues on appeal the legal representatives of the relevant victims are each directed to file a consolidated document pertaining to their views and concerns in respect of all three appeals.

See No. ICC-01/04-503, Appeals Chamber, 30 June 2008, paras. 101-102.

7. Specific issues related to the modalities of participation

7.1 Access to documents in general

Legal representatives of victims participating in the proceedings shall not be given access to any non-public document contained in the record of the situation in the DRC.

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

01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, para.6; and No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, p. 60.

If the Prosecution has no obligation to provide the Defense with full access to the Prosecution situation and case files, the Prosecution cannot be under any obligation to provide such access to those granted the procedural status of victim at the pre-trial stage of a case. In other words, the latter's access rights can by no means exceed those access rights granted by the Statute and the Rules to the Defense.

The right to have full access to the Prosecution's situation and case files cannot be part of the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case.

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

If the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case were to include access, prior to the confirmation hearing, to the evidence proposed by the parties, such right could be satisfied by allowing victims to consult the record of the case kept by the Registry.

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

If victims were to be denied access to confidential filings, they would essentially be prevented from effectively participating in the evidentiary debate held at the confirmation hearing.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 151.

Only the Legal Representatives of non-anonymous victims shall have the rights to access the confidential part of the record of the present case and to attend closed session hearings; and that therefore non-anonymous victims shall not have access to the confidential part of the case record nor shall they attend closed session hearings.

See No. ICC-01/04-01/07-537, Pre-Trial Chamber I (Single Judge), 30 May 2008, p. 12.

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

See No. ICC-01/04-01/07-1788-tENG-, Trial Chamber II, 22 January 2010, para. 121.

The Chamber is persuaded that in order to facilitate full participation by victims, it is in the interests of justice that those who have been granted leave to participate are afforded access to the confidential material in the case, relevant to their views and concerns. However, given the obligation of the Court to protect those affected by its activities, it is necessary that this opportunity is subject to the restriction that necessary protective measures or the security of individuals or organisations will not be adversely affected. Therefore, in order to guarantee the effective expression of the views and concerns of participating victims, they are, through their legal representatives, to be notified in a timely manner of public and confidential filings whenever the Trial Chamber has resolved that their interests are engaged. In order to make this approach effective, the parties and participating victims are to inform the Chamber whenever confidential filings may engage the interests of particular participating victims. The legal representatives are not to communicate confidential information to their clients, or anyone else who is not authorised to receive it, without the permission of the Chamber.

See No. ICC-01/05-01/08-807-Corr-, Trial Chamber III, 30 June 2010, par. 47. See also No. ICC-01/04-01/07-1788, Trial Chamber II, 22 January 2010, par. 123.

7.2 Access to observations under rule 89 of the *Rules of Procedure and Evidence*

When confidential information concerns all applicants, this information shall not be notified to persons who are not connected to all of the applicants. The Single Judge further considers that the interest of the applicants in receiving the rule 89(1) observations should also be balanced with the further obligation of the Single Judge to ensure the expeditiousness and effectiveness of the proceedings. In particular, a system in which the legal representatives of the applicants receive redacted versions of the rule 89(1) observations which are specific to each applicant is not only impractical now, but will be extremely impractical as the number of applicants continues to increase.

See No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, paras. 13 and 15.

The Single Judge considers that not notifying the rule 89(1) observations does not unduly prejudice the applicants since pursuant to rule 89(2) of the Rules, applicants are entitled to submit new applications should their applications be rejected. At the same time, the Single Judge observes that the applicants are neither entitled to reply to the observations of the Prosecution and the Defence nor to request leave to appeal the decision of the Chamber on the merits of their applications. While admitting that the absence of notification of rule 89(1) observations will prevent applicants from knowing the specific challenges made in the parties' observations, the Single Judge observes that the Chamber's decision on their applications will indicate any further information required or the reasons for which the applications were rejected. In such circumstances, notification of the Chamber's decision will place applicants in a position to re-apply under rule 89(2) of the Rules to correct any deficiencies.

See No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, paras. 15-17. See, for different reasoning and on the contrary, No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, paras. 36-39.

While recognising that it may be helpful to the applicants to know the types of challenges directed at the applications, the Single Judge considers that the helpfulness of this information must also be balanced with the obligation of the Single Judge to provide, where necessary, for the protection and privacy of the victims and witnesses pursuant to article 57(3)(c) of the Statute and with the general principle prescribed in rule 86 of the Rules that the Chamber in making any order shall take into account the needs of all victims and witnesses in accordance with article 68.

See No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, par. 14.

7.3 Access to the index of the situation and case record

Rule 131(2) of the *Rules of Procedure and Evidence* provides participating victims the right to consult the record of the proceedings, including the index, subject to any restrictions concerning confidentiality and the protection of national security information.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 105.

Regarding the access by legal representatives of victims to the filings, the presumption will be the access to the public ones only. However, if confidential filings are of material relevance to the personal interests of participating victims, their legal representatives might have access to them, so long as it will not breach other protective measures that need to remain in place.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 106. See also Oral decision, Trial Chamber II, No. ICC-01/04-01/07-T-71-Red, 1st October 2009, pp. 4-6 and No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 118-125.

7.4 Access to documents in possession or control of the Prosecution

To give effect to article 68(3) of the *Rome Statute*, upon request by the legal representatives of the victims, the prosecution shall provide individual victims with any materials within the possession of the prosecution. The conditions set by the Chamber are as following: victims asking for such materials must have been granted the right to participate in the proceedings; the material requested shall be relevant to the personal interests of the victims; the Chamber shall have permitted that the material targeted be investigated during the proceedings; and the victims shall have identified with precision in writing the materials requested.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 111. See also No. ICC-01/04-01/06-1368, Trial Chamber I, 2 June 2008, paras. 27-35.

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

Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006

Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing (Pre-Trial Chamber I), No. ICC-01/04-01/06-462, 22 September 2006

Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo (Pre-Trial Chamber I), No. ICC-01/04-01/06-601, 20 October 2006

Decision on the Schedule and Conduct of the Confirmation Hearing (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-678, 7 November 2006

Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-110, 3 December 2007

Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-417, 7 December 2007

Decision on the Requests of the OPCV (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-418, 10 December 2007

Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-111-Corr, 14 December 2007

Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-423, 24 December 2007

Decision on victim's participation (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008

Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-423-Corr-tENG, 31 January 2008

Decision on the role of the Office of Public Counsel for Victims and its request to access to documents (Trial Chamber I), No. ICC-01/04-01/06-1211, 6 March 2008

Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008

Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-537, 30 May 2008

Decision on the legal representative's request for clarification of the Trial Chamber's 18 January 2008 «Decision on victims' participation» (Trial Chamber I), No. ICC-01/04-01/06-1368, 2 June 2008

Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007 (Appeals Chamber), No. ICC-02/05-138, 18 June 2008 and Partly dissenting opinion of Judge Sang-Hyun Song

Decision on Victims' Requests for Anonymity at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-628, 23 June 2008

Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007 (Appeals Chamber), No. ICC-01/04-503, 30 June 2008

Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (Appeals Chamber), No. ICC-01/04-01/06-1432, 11 July 2008

Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (Appeals Chamber), No. ICC-01/04-01/06-1432, 23 July 2008

Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-01/04-01/06-1452, 6 August 2008

Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-01/04-01/06-1453, 6 August 2008

Fourth Decision on Victims' Participation (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-320, 12 December 2008

Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007 (Appeals Chamber), No. ICC-01/04-556, 19 December 2008

Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007 (Appeals Chamber), No. ICC-02/05-177, 2 February 2009

Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial (Trial Chamber I), No. ICC-01/04-01/06-2032 and its Annex No. ICC-01/04-01/06-2032-Anx, 9 July 2009

Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims (Trial Chamber I), No. ICC-01/04-01/06-2127, 16 September 2009

Decision on victims' modalities of participation at the Pre-Trial Stage of the Case (Pre-Trial Chamber I), No. ICC-02/05-02/09-136, 6 October 2009

Directions for the conduct of the proceedings and testimony in accordance with rule 140 (Trial Chamber II), No. ICC-01/04-01/07-1665, 20 November 2009

Decision on the Modalities of Victim Participation at Trial (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010

Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 12 July 2010

Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled «Decision on the Modalities of Victim Participation at Trial» (Appeals Chamber), No. ICC-01/04-01/07-2288, 16 July 2010

3. Legal representation

**Rules 90, 91 of the *Rules of Procedure and Evidence*
Regulations 67-76, 79-80 and 83-85 of the *Regulations of the Court*
Regulations 122-134 and 140-142 of the *Regulations of the Registry***

1. Legal representation in general

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

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

Anonymity is incompatible with the functions to be performed by a legal representative.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 48.

The Single Judge considers that while a victim's participation in the proceedings is not conditional upon him or her being assisted by a legal representative, even after his or her application has been granted, it appears to be in the interests of justice to provide [the victims] with a legal representative, pending the appointment of a common legal representative in order to effectively enable [them] to exercise their right to file a response to the Application for Leave to Appeal" filed by the Prosecution.

See No. ICC-02/04-105, Pre-Trial Chamber II (Single Judge), 28 August 2007, pp. 4-5.

Prior to the Applications being forwarded to the Prosecutor and the defence in accordance with rule 89, sub-rule 1, of the *Rules of Procedure and Evidence*, there is a need to determine whether the applicants are entitled to rely on a legal representative during the time between the filing of the application and the Chamber's assessment of its merits, or whether the decision on the assignment of legal representation should be deferred until a determination on the merits of the applications has been rendered. The statutory instruments of the Court fail to address this issue specifically; accordingly, the solution to this issue requires a general assessment of the system of victim participation in the proceedings.

The statutory framework provides several elements supporting the view that a victim whose application has been granted by the Court may participate in proceedings with or without the assistance of a legal representative. This seems to flow first and foremost from article 68, paragraph 3, of the Statute, which provides that «where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial». This provision also states that such views and concerns «may be presented by the legal representatives of the victims when the Court considers it appropriate». Two elements are relevant in this context. First, the choice of the term «may», when referring to the role of the legal representative, entails that a victim's right to present his or her «views and concerns» is independent from that victim being or not being able to rely on a legal representative. Second, the very role of the legal representative, far from being presented as mandatory and inevitable, is made conditional upon a determination of its appropriateness, which determination is entrusted to the Court. The view that legal representation is *per se* not necessary in order for victims to participate in Court's proceedings appears further supported by the *Rules of Procedure and Evidence*. Rule 89, sub-rule 1, refers to the application filed by the victim and the decision by the Chamber rejecting or granting the application and, in the latter case, specifying the proceedings and manner of participation («which may include opening and closing statements»), without mentioning a legal representative.

As a result, it seems that participation (at least) in the form of «opening and closing statements» can be granted to a victim whether or not that victim is assisted by a legal representative. Similarly, rule 89, sub-rule 2, refers to the right of the victim whose application has been rejected by the Chamber to file a new application, again without mentioning a legal representative.

Equally significant *indicia* are to be found in the rules specifically devoted to the legal representation of victims. Rule 90, sub-rule 1, refers to the victim being «free» to choose a legal representative. While the provision seems to imply a right of every victim to choose his or her own legal representative, it does not go so far as to make it compulsory for the victim to make such a choice.

Moreover, despite the heading of rule 90, sub-rules 2, 3, 4 and 5 make no mention of individual legal representative(s) and focus instead on the issue of common legal representative(s). In this respect, it appears relevant that the Chamber retains the option (and is not under an obligation) to request the victims or particular groups of victims to choose a common legal representative or representatives, «where there are a number of victims» and «for the purposes of ensuring the effectiveness of the proceedings» (rule 90, sub-rule 2).

Rule 90, sub-rule 3, clarifies that a power to impose legal representation, whenever the victims are unable to make the choice, is bestowed on the Chamber in respect of a common legal representative. *A contrario*, as regards an individual legal representative, no such power seems vested in the Chamber under this provision. Accordingly, a victim's «freedom» to choose a legal representative includes the right not to proceed to such a choice and to exercise his or her right to participate on his or her own.

The optional nature of the role of the legal representative (whether individual or common) is also apparent in light of rule 91, which specifically addresses the methods of participation by legal representatives of victims. According to this rule, only victims assisted by legal representatives may be allowed to participate in the proceedings in a way which includes attending and participating in hearings and, subject to the Chamber's decision, may go so far as to entail the right to question a witness, an expert or the accused. Unlike other provisions, which envisage an alternative between the act being performed by the victim or by his or her legal representative, rule 91 states that acts such as the participation in hearings and the questioning of a party or witness shall be performed only by a legal representative. Therefore, victims acting on their own are precluded from performing those acts. As a result, it may be argued that, whilst victims as such are entitled to participate in the proceedings before the Court, «enhanced» rights of participation are vested exclusively in victims acting via legal representatives.

Pursuant to rule 90, sub-rule 6, victims' legal representatives «shall have the qualifications set forth in rule 22, sub-rule 1», *i.e.* the qualifications required for counsel for the defence (*i.e.* notably ten years of experience as mentioned in regulation 67 of the *Regulations of the Court*). This makes it clear that the legal representative can only be a person with satisfactory legal knowledge and background, with a view to shielding the Chamber from the risk that such participation might result in excessively disruptive effects on the overall conduct of proceedings. According to some commentators, the provision mirrors the need to create «incentives» for victims' participation via legal representation.

Finally, the idea of victims being able to participate either with or without a legal representative further emerges from rules 92 and 93. In its relevant part, rule 92, sub-rule 2, provides for notification of relevant decisions or documents to either victims or their legal representatives. Similarly, rule 93 enables the Chamber to seek the views of either victims or their legal representative.

In light of the above, the following twofold conclusion seems warranted: (i) first, a victim's participation in the proceedings is not conditional upon him or her being assisted by a legal representative, even after his or her application has been granted; (ii) second, there are at least two categories of victims entitled to some forms of participation in Court's proceedings: a. victims admitted to the proceedings and assisted by a legal representative, enjoying «enhanced» procedural rights under rule 91; b. victims admitted to the proceedings but not assisted by a legal representative, enjoying more limited rights of participation, in any event entitled to present their «views and concerns», possibly in the form of «opening and closing statements». Since the role of the legal representative is optional even after a decision allowing a victim to participate in the proceedings has been rendered, it appears *a fortiori* that applicant victims cannot claim to have an absolute and unconditional right to be provided with the assistance of a legal representative in respect of the phase preceding the Chamber's decision on the merits of the application.

Determining that the appointment of a legal representative is *per se* not necessary for a victim to be able to participate in the proceedings or, prior thereto, for that victim's application to be considered by the Chamber, is not tantamount to saying that the Chamber may never make such an appointment. Regulation 80, sub-regulation 1, of the Regulations of the court allows the Chamber to appoint a legal representative of victims where 'the interests of justice so require'. Whilst not mandated *per se*, the appointment of a legal representative may thus be required, under this regulation, by considerations of 'the interests of justice'. In light of the general terms in which regulation 80, sub-regulation 1, is formulated, the Single Judge acknowledges that the 'interests of justice' may recur also in the phase between the filing of the application and the decision on its merits.

See No. ICC-02/04-01/05-134, Pre-Trial Chamber II (Single Judge), 1 February 2007, paras. 2-12.

Pursuant to rule 90(1) of the Rules, a victim shall be free to choose his or her legal representative and that there is no provision in the Rules that, in principle, prohibits a victim from choosing the legal representative of a victim in another case.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 7.

Legal Representatives of non-anonymous victims shall be prohibited from transmitting to their clients copies of any document or evidence included in the confidential part of the case record, as well as any transcript of hearings held in closed session.

The above limitations shall not extend to a general prohibition on the Legal Representatives of non-anonymous victims from discussing with their clients the information, and evidence to which they are privy through accessing the confidential part of the case record and attending closed session hearings; and the Legal Representatives of non-anonymous victims shall only be prohibited from discussing with their clients the above-mentioned information and evidence insofar as it would allow the non-anonymous victims that they represent to identify the specific witnesses in the confirmation hearing of the present case.

See No. ICC-01/04-01/07-537, Pre-Trial Chamber I (Single Judge), 30 May 2008, p. 12-13.

In order to ensure the rights of the Defence, protect the interests of the victims and preserve the integrity of the proceedings, the Chamber is of the view the provisional separation of the legal representative from his functions as legal representative of victims [...] is necessary as a precautionary measure until the issue of an apparent conflict of interest is resolved.

See No. ICC-01/04-01/07-660, Pre-Trial Chamber I, 3 July 2008, p.9. See also No. ICC-01/04-01/07-683, Pre-Trial Chamber I, 16 July 2008.

The Legal Representatives of non-anonymous victims shall be prohibited from transmitting to their clients copies of any document or evidence included in the confidential part of the case record, as well as any transcript of hearings held in closed session;

[...]

- (i) the above limitations shall not extend to a general prohibition on the Legal Representatives of non-anonymous victims from discussing with their clients the information and evidence to which they are privy through accessing the confidential part of the case record and attending closed session hearings; and
- (ii) the Legal Representatives of non-anonymous victims shall only be prohibited from discussing with their clients the above-mentioned information and evidence insofar as it would allow the non-anonymous victims that they represent to identify the specific witnesses in the confirmation hearing of the present case.

See No. ICC-01/04-01/07-537, Pre-Trial Chamber I (Single Judge), 30 May 2008, pp. 12-13.

The presence of the representatives of participating victims during the evidence of defence witnesses when the court is sitting in closed session is an essential part of their right to participate in the proceedings, unless it is demonstrated that this will be inconsistent with the rights of the accused and a fair and expeditious trial. The Chamber notes that on 11 February 2010, it ruled that the legal representatives could remain in the courtroom during the examination of the defence witness when the issue of the possible exclusion of the representatives was raised by the defence in relation to that witness. The absence of the legal representatives from the Chamber could markedly undermine their ability to discharge their professional obligations to their clients because they would be unaware of potentially important evidence given during closed-session hearings. The restrictions, set out above, on the dissemination of any information that may reveal the identity of protected individuals means that the concerns of the defence in this regard are met. Nonetheless, the parties and participants are entitled to raise discrete concerns that may result from the participation or presence of particular legal representatives at any stage.

See No. ICC-01/04-01/06-2340, Trial Chamber I, 11 March 2010, par. 39.

2. Common legal representation

The appointment of a legal representative for victims allowed to participate in the case is appropriate as it will prevent any adverse impact on the expeditiousness of the proceedings. In particular, at this stage, the appointment of a common legal representative is appropriate since the victims in question claim to have

suffered from the same attack, and with the view of ensuring the effectiveness of the proceedings pursuant to rule 90-2 of the *Rules of Procedure and Evidence*. The appointment of a common legal representative for the victims allowed to participate in the situation is also appropriate since the statements of the two victims present numerous similarities as regards the type of crimes involved.

See No. ICC-02/04-01/05-252, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 80 and 162. See also No. ICC-02/04-125 and ICC-02/04-01/05-282, Pre-Trial Chamber II (Single Judge), 14 March 2008, par. 192.

Appointing a common legal representative for the victims in the case and a common legal representative for the victims in the context of the situation is deemed necessary at this stage to ensure the effectiveness of the proceedings. Where an applicant is granted the status of victim both in the context of the Situation and in the Case, the appointment of a legal representative entrusted with the task of representing and protecting the victim's interests both in the Situation and in the Case appears appropriate, in order to provide the victim with one interlocutor only and secure his or her uniform representation.

See No. ICC-02/04-117, Pre-Trial Chamber II (Single Judge), 15 February 2008, p. 5.

Rule 90(4) of the Rules provides that in the process of the selection of common legal representatives, the Chamber and the Registry shall take «[a]ll reasonable steps to ensure that [...] the distinct interests of the victims [...] are represented and that any conflict of interest is avoided.» In order to protect these individual interests effectively, it is necessary to apply a flexible approach to the question of the appropriateness of common legal representation, and the appointment of any particular common legal representative. As a result, detailed criteria cannot be laid down in advance. However, the Chamber envisages that considerations such as the language spoken by the victims (and any proposed representative), links between them provided by time, place and circumstance and the specific crimes of which they are alleged to be victims will all be potentially of relevance. In order to assist it in the consideration of this issue, the Trial Chamber directs the Victims Participation and Representation Section to make recommendations on common legal representation in its reports to the Chamber.

The Chamber agrees with the legal representatives of victims that the approach to decisions under Rule 90 of the Rules should not be rigid, and instead will depend on whether at a certain phase in the proceedings or throughout the case a group or groups of victims have common interests which necessitate joint representation. The Chamber accepts the defence submission that this approach should promote clarity, efficiency and equality in the proceedings.

The Chamber will take into consideration the views of victims under Article 68(3) of the Statute, along with the need to ensure that the accused's right to a fair and expeditious trial under Article 67 of the Statute is not undermined.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 124-126.

The Single Judge is of the view that, in application of rule 90(2) of the Rules, and considering the number of victims recognised as participants in the present case, a presentation of their views and concerns by a single common legal representative is deemed appropriate in order to ensure effectiveness of pre-trial proceedings.

The Single Judge is aware that in the selection of common legal representatives, following rule 90(4) of the Rules, the distinct interests of the victims participating in the present proceedings must be taken into consideration and that any conflict of interest should be avoided.

In order to appoint a common legal representative, criteria adapted to the circumstances of the case in question may be envisaged, such as (i) the language spoken by victims, (ii) links between them provided by time, place and circumstances, (iii) the specific crimes of which they allege to be victims, (iv) the views of victims, and (v) respect of local traditions.

To this end, the Single Judge notes that victims recognised as participants to participate in the present case allege to have suffered of mainly similar crimes, which occurred on the territory of the Central African Republic (the «CAR») and were allegedly committed by the same group of perpetrators. Under these circumstances the Single Judge holds that one common legal representative, preferably from the CAR, should be chosen by all victims recognised as participants in the present case with the assistance of the Registry pursuant to rule 90(2) of the Rules.

In case the victims participating in the present case are unable to choose a common legal representative, the Single Judge requests, pursuant to rule 90(3) of the Rules, the Registrar to choose one common legal representative from the CAR.

In case some of the victims participating in the present case object to being represented by the common legal

representative appointed by the Registrar, or a conflict of interest is shown by the common legal representative, the Single Judge wishes to appoint the Office of Public Counsel for Victims (the «OPCV») as legal representative of those victims not represented by the common legal representative, if need be.

Concerning the role of OPCV, the Single Judge notes that this office is established for the main purpose of providing assistance and support to victims and their legal representatives in proceedings before this Court pursuant to regulation 81(4) of the Regulations, which includes (a) legal research and advice, and (b) appearing before a Chamber in respect of specific issues. In addition, counsel of this office may act as legal representative of victims pursuant to regulation 80(2) of the Regulations.

In the present case the OPCV has been appointed by the Chamber as legal representative for those victims where no legal representative has been appointed by the victims. Thus, the Single Judge wishes to point out that the OPCV had been appointed by the Chamber only in case and for the time where victims could not organise their timely legal representation. The Single Judge finds it appropriate that at this stage of proceedings, where victims have been recognised to participate in the present case, be represented by a counsel from their country, unless those victims object to such legal representation.

In case all victims participating in the present case agree to be represented by one common legal representative from the CAR, the OPCV will fulfil its mandate as provided in regulation 81 of the *Regulations of the Court*. In case, one or more victims object to being represented by a counsel from the CAR, the OPCV will continue to act as legal representative for those victims, in addition to its mandate pursuant to regulation 81 of the Regulations.

See No. ICC-01/05-01/08-322, Pre-Trial Chamber III (Single Judge), 16 December 2008, paras. 7-15.

In formulating the following guidelines, the Chamber was guided by three overriding concerns:

- a. First, the Chamber attaches the greatest importance to the requirement that the participation of victims, through their legal representatives, must be as meaningful as possible as opposed to being purely symbolic. To that end, the Chamber considers it of utmost importance that there is a steady and reliable flow of information about the proceedings to the victims and that there is real involvement by the victims in terms of instructing the legal representatives on how their interests should be represented.
- b. Second, the Chamber is duty-bound to ensure that the proceedings are conducted efficiently and with the appropriate celerity. The Chamber must therefore guard against any unnecessary repetition or multiplication of similar arguments and submissions. This requirement also implies that victims' legal representatives must always be available to participate fully, even on short notice, in all stages of the proceedings when their clients' interests are engaged. This further requires that legal representatives who appear before it are completely familiar with all legal and factual aspects of the case.
- c. Third, the Chamber is of the view that its obligation under article 68(3) of the Statute to ensure that victims' participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, extends to the organisation of the legal representation of victims. It is important, in this respect, that the participation of victims does not impose too heavy a burden upon the Defence.

Furthermore, the Chamber emphasises that, although victims are free to choose a legal representative this right is subject to the important practical, financial, infrastructural and logistical constraints faced by the Court. Common legal representation is the primary procedural mechanism for reconciling the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible. The Chamber considers, therefore, that the freedom to choose a personal legal representative, set out in rule 90(1) is qualified by rule 90(2) and subject to the inherent and express powers of the Chamber to take all measures necessary if the interests of justice so require.

The Chamber analysed all applications for participation in light of the above and noted that:

- a. The number of applications is so large that, taking into consideration that (1) the Chamber has already authorised 57 victims who participated in the confirmation proceedings to continue participating in the trial proceedings and (2) that the Chamber will soon issue its decision on the new applications, which will multiply the number of participating victims, it would be entirely unfeasible for each of them to be represented individually.
- b. Apart from a limited number of applicants, all victims allege to have suffered harm as a consequence

of the attack on Bogoro on 24 February 2003. There do not seem to be tensions between them in terms of ethnicity, age, gender or the type of crimes they were allegedly the victim of.

- c. Falling outside of this large group, there is a small number of applicants who are former child soldiers, who allege to have participated in the attack of 24 February 2003. They may thus have perpetrated some of the crimes that victimised the other applicants. Moreover, these applicants have a different ethnic background to that of the other applicants.
- d. Apart from the applicants mentioned in (c), immediately above, a large proportion of victims allege to have been the victims of more than one of the crimes charged and to have suffered different types of harm. It is thus not possible to group the victims in entirely separate categories, as there are a number of victims who fall in more than one category.
- e. Most applicants are still living in the area in which the attack took place.

Given these factors, the Chamber considers it both necessary and appropriate to group all victims who have been admitted to participate in this case, with the exception of the victims mentioned in paragraph 12.c, into one group represented by one common legal representative. The common legal representative shall be responsible for both representing the common interests of the victims during the proceedings and for acting on behalf of specific victims when their individual interests are at stake. The common legal representative shall be accountable to the victims as a group, who may petition the Registry in case of significant problems with the representative function of the common legal representative. If the problem cannot be resolved by the Registry, the latter shall inform the Chamber.

As the Chamber noted earlier, it is vital that the common legal representative must be fully available throughout the entire duration of the proceedings. The Chamber is of the view that the quality of the legal representation of victims may not suffer as a result of other competing engagements of the (common) legal representatives. Before accepting his or her mandate, a (common) legal representative must give reasonable assurance that he or she will be available at the seat of the Court for the entirety of the expected duration of the hearings on the merits and the subsequent reparations phase. It would therefore be preferable for the common legal representative not to be involved in more than one case before this Court at once.

At the same time, the Chamber considers that it would be desirable if the common legal representative (or at least one member of his or her team) has a strong connection with the local situation of the victims and the region in general. This will assist the common legal representative in presenting the genuine perspective of the victims, as is his or her primary role.

In case the common legal representative receives conflicting instructions from one or more groups of victims, he or she shall endeavour to represent both positions fairly and equally before the Chamber. In case the conflicting instructions are irreconcilable with representation by one common legal representative, and thus amount to a conflict of interest, the common legal representative shall inform the Chamber immediately, who will take appropriate measures and may, for example, appoint the Office of Public Counsel for the Victims to represent one group of victims with regard to the specific issue which gives rise to the conflict of interest. The Chamber notes that nothing in the paragraph predetermines the modalities of participation which the Chamber will determine in a separate decision.

In order to allow the common legal representative to perform his or her duties efficiently, the Registry, in consultation with the common legal representative, shall propose a suitable support structure, in order to provide the common legal representative with the necessary legal and administrative support, both at the seat of the Court and in the field. This support structure must, to the extent possible and within the limits of the available legal aid structure, allow the common legal representative to:

- a. Keep his or her clients informed about the progress of the proceedings and any relevant legal or factual issues that may concern them, in accordance with article 15 of the Code of Conduct for Counsel. The support structure should also allow the common legal representative to respond to a reasonable number of specific legal inquiries from individual victims.
- b. Receive general guidelines or instructions from his or her clients as a group and particular requests from individual victims.
- c. Maintain up to date files of all participating victims and their whereabouts.
- d. Obtain qualified legal support on a need basis.
- e. Store and process any confidential filings or other information, including the identity of his or her

clients, in a safe and secure manner.

- f. Communicate with victims in a language they understand.

To the extent that this is reconcilable with the Registry's mandate and neutrality, and insofar as this does not affect the independence of the common legal representative, the support structure may rely on resources available to the Registry at the seat of the Court or in the field (e.g. facilities or support staff available in a field office). If the Registry seconds one or more members of its personnel to the support structure of the common legal representative, these persons, although belonging to the Registry for administrative purposes, shall operate under the instruction of the common legal representative.

No. ICC-01/04-01/07-1328, Trial Chamber II, 22 July 2009, paras. 10-18.

3. *Ad hoc* Counsel

Following an order by the Chamber, the Registrar shall appoint an *ad hoc* counsel to represent the general interests of the defence for the purpose of the forensic examinations.

See No. ICC-01/04-21, Pre-Trial Chamber I, 26 April 2005, p. 4.

Following an order by the Chamber, the Registrar shall appoint an *ad hoc* Counsel for the Defence to represent and protect the general interests of the Defence in the Situation in Darfur, Sudan, during the proceedings pursuant to rule 103 of the *Rules of Procedure and Evidence*.

See No. ICC-02/05-10, Pre-Trial Chamber I, 24 July 2006, p. 6. See also No. 02/05-47, Pre-Trial Chamber I, 2 February 2007, p. 5.

Regulation 76, sub-regulation 1, of the Regulations [of the Court] provides that «[a] Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require». [...] Considering that none of the warrants of arrest issued in the situation has yet been executed, the appointment of a counsel for the defence is required for the purpose of allowing the proper development of the procedure enshrined in rule 89, paragraph 1 of the Rules and preserving the overall fairness of the proceedings. [...] Since the same individuals are applying to be recognised as victims participating in the preliminary examination, pre-trial, trial and appeals stages, the Single Judge deems it appropriate that one counsel for the defence be appointed and entrusted with responsibility for all aspects relating to the Applications. Given the purpose of this appointment, the functions and powers of the appointed counsel will be restricted to those which may be necessary and appropriate within the context of the proceedings relating to the Applications, including in particular the right to receive a copy of the Applications and to submit observations thereon within the time-limit indicated by the Single Judge.

See No. ICC-02/04-01/05-134, Pre-Trial Chamber II (Single Judge), 1 February 2007, paras. 14-15.

4. Duty Counsel

Pursuant to regulation 73(2) of the *Regulations of the Court*, if any person requires urgent legal assistance and has not yet secured legal assistance, or where his or her counsel is unavailable, the Registrar may appoint duty counsel, taking into account the wishes of the person, and the geographical proximity of, and the languages spoken by, the counsel.

See No. ICC-01/04-01/07-52, Pre-Trial Chamber I, 5 November 2007, p. 4.

Pending appointment of a Counsel chosen by the person concerned and considering that proceedings should be conducted expeditiously and without undue delays, the Chamber orders the Registrar to appoint a Duty Counsel pursuant to regulation 73(2) of the *Regulations of the Court*, and decides that her/his mandate shall be limited to the sole purpose of responding to a defined procedural act.

See No. ICC-01/04-01/06-870, Pre-Trial Chamber I, 19 April 2007, pp. 3-4. See also No. ICC-01/04-01/06-881 (Registrar), 4 May 2007, pp. 3-4. See also ICC-01/04-01/07-75, Registrar, 13 November 2007.

5. Legal assistance paid by the Court

5.1 Indigence

A declaration of indigence shall normally be accompanied by a signed declaration certifying the correctness of the information provided and authorising the Registrar to take all necessary steps to decide on the eligibility for legal assistance paid by the Court. It shall also contain the engagement from the person to communicate to the Registry any change in his or her financial situation. Considering, however, that the legal representative of the person has certified, on behalf of his client, the correctness of the information provided as well as taken the engagement to communicate to the Registry any change in the client's financial situation, *exceptionally* the Registrar considers that this is *sufficient* for the purposes of starting the financial investigation necessary for deciding on the eligibility for legal assistance paid by the Court, and *pending* receipt of the declarations signed by the person concerned.

See No. ICC 01/04-490 (Registrar), 26 March 2008, pp. 3-4.

Pending the outcome of the financial investigation deciding on the eligibility for legal assistance paid by the Court, considering that the persons requesting legal assistance have been granted the status of victims in the situation, the status of the procedures pending at the appeals stage, and the issues affecting victims' interests, the Registrar provisionally considers the persons concerned totally indigent and grants payment of legal assistance in accordance with regulation 85(1) of the Regulations of the Court.

See No. ICC-01/04-490, Registrar, 26 March 2008, pp. 4-5. The same principles have also been applied by the Registrar when provisionally granting legal assistance paid by the Court to a suspect/accused: see No. ICC-01/04-01/06-63, Registrar, 31 March 2006; No. ICC-01/04-01/07-79, Registrar, 23 November 2007 and No. ICC-01/04-01/07-298, Registrar, 22 February 2008. See also No. ICC-01/04-01/07-562, Registrar, 9 June 2008 and No. ICC-01/04-01/07-563, Registrar, 9 June 2008.

5.2 Additional means

The considerable amount of material contained in different Prosecution's requests pursuant to rule 81 of the *Rules of Procedure and Evidence*, justifies the granting of additional means requested by the Counsel of the Defence in the form of an additional Legal Assistant at the P-2 Level.

See No. 01/04-01/06-460, Pre-Trial Chamber I, 22 September 2006, pp. 2-3.

5.3 Payment of fees

Having found that the *ad hoc* counsel acted beyond the scope of his mandate, the Chamber considers that he is in no position to request any payment of fees related to the activities following outside the said mandate.

See No. ICC-02/05-66, Pre-Trial Chamber I, 15 March 2007, p. 7. See also No. ICC-02/05-100, Pre-Trial Chamber I, 18 September 2007, p. 8.

In accordance with Regulation 135(1) of the *Regulations of the Registry*, disputes related to the payment of counsel fees shall be addressed to the Registrar.

See No. ICC-02/05-66, Pre-Trial Chamber I, 15 March 2007, p. 5.

Relevant decisions regarding legal representation

Decision on Prosecutor Request for Measures under Article 56 (Pre-Trial Chamber I), No. ICC-01/04-21, 26 April 2005

Registrar's Decision on Mr Thomas Lubanga Dyilo's Application for Legal Assistance Paid by the Court (Registrar), No. ICC-01/04-01/06-63, 31 March 2006

Decision Inviting Observations in Applications of Rule 103 of the *Rules of Procedure and Evidence* (Pre-Trial Chamber I), No. ICC-02/05-10, 24 July 2006

Decision on Defence Request pursuant to Regulation 83 (4) (Pre-Trial Chamber I), No. 01/04-01/06-460, 22 September 2006

Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-134, 1 February 2007

Decision on the *Ad hoc* Counsel for the Defence Request of 18 December 2006 (Pre-Trial Chamber I), No. 02/05-47, 2 February 2007

Decision on the Request for Review of the Registry's Decision of 13 February 2007 (Pre-Trial Chamber I), No. ICC-02/05-66, 15 March 2007

Appointment of Duty Counsel (Pre-Trial Chamber I), No. ICC-01/04-01/06-870, 19 April 2007

Désignation de Maître Emmanuel Altit comme conseil de permanence conformément à la Décision de la Chambre Préliminaire I du 19 avril 2007 (Registrar), No. ICC-01/04-01/06-881, 4 May 2007

Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-101, 10 August 2007

Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation (Pre-Trial Chamber I), No. ICC-01/04-374, 17 August 2007

Decision on legal representation of Victims a/0101/06 and a/0119/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-105, 28 August 2007

Decision on the Request for Review Pursuant to Regulation 135(2) of the Regulations of the Registry Submitted by the Former *Ad hoc* Counsel for the Defence on 27 July 2007 (Pre-Trial Chamber I), No. ICC-02/05-100 (Pre-Trial Chamber I), 18 September 2007

Decision on the appointment of a duty counsel (Pre-Trial Chamber I), No. ICC-01/04-01/07-52, 5 November 2007

Decision Appointing Mr Jean Pierre Fofé as Duty Counsel for Mr Germain Katanga (Registrar), No. ICC-01/04-01/07-75, 13 November 2007

Decision of the Registrar on the applications for legal assistance paid by the Court filed by Mr Germain Katanga (Registrar), No. ICC-01/04-01/07-79, 23 November 2007

Order on the Office of Public Counsel for Victims' request filed on 21 November 2007 (Trial Chamber I), No. ICC-01/04-01/06-1046, 27 November 2007

Corrigendum à la 'Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06' (Pre-Trial Chamber II), No. ICC-01/04-423-Corr, 31 January 2008

Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-267 and No. ICC-02/04-117, 15 February 2008

Décision du Greffier sur la demande d'aide judiciaire aux frais de la Cour déposée par M. Mathieu Ngudgolo Chui (Registrar), No. ICC01/04-01/07-298, 22 February 2008

Decision on the role of the Office of Public Counsel for Victims and its request for access to documents (Trial Chamber I), No. ICC-01/04-01/06-1211, 6 March 2008

Decision on victim's application for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0101/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-125 and No. ICC-02/04-01/05-282, 14 March 2008

Registrar's Decision on the Indigence of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 (Registrar), No. ICC 01/04-490, 26 March 2008

Decision on the OPCV's Requests for leave to file a response to the Defence's Application dated 25 March 2008 and to file observations on the Prosecution's Response to such Application (Pre-Trial Chamber II), No. ICC-02/04-132 and No.02/04-01/05-290, 4 April 2008

Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008

Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-537, 30 May 2008

Registrar's Decision on the Indigence of Victim a/0333/07 (Registrar), No. ICC-01/04-01/07-562, 9 June 2008

Registrar's Decision on the Indigence of Victims a/0327/07, a/0330/07 and a/0331/07 (Registrar), No. ICC-01/04-01/07-563, 9 June 2008

Decision on the provisional separation of Legal Representative of Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08 (Pre-Trial Chamber I), No. ICC-01/04-01/07-660, 3 July 2008

Decision on the Apparent Conflict of Interest in relation to the Legal Representative of Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08 (Pre-Trial Chamber I), No. ICC-01/04-01/07-683, 16 July 2008

Order on the organisation of common legal representation of victims (Trial Chamber II), No. ICC-01/04-01/07-1328, 22 July 2009

Decision on the defence observations regarding the right of the legal representatives of victims to question defence witnesses and on the notion of personal interest -and- Decision on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses (Trial Chamber I), No. ICC-01/04-01/06-2340, Trial Chamber I, 11 March 2010

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

**Regulations 80 and 81 of the *Regulations of the Court*
Regulations 114-117 of the *Regulations of the Registry***

1. Role of the Office in general

The mandate vested in the OPCV by the *Regulations of the Court* encompasses forms and methods of assistance to victims which fall short of legal representation and, therefore, it is appropriate for victims to benefit from any form of support and assistance which may be offered by the Office.

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

For the purpose of the tasks entrusted to the OPCV in the Decision [of 1st February 2007] it appears indeed necessary for the OPCV to have access to the unredacted version of the Warrants [of arrest], in particular with a view to it being apprised of the specific scope and the factual features of the charges brought against the persons whose arrest is sought by the Court.

See No. ICC-02/04-01/05-152, Pre-Trial Chamber II (Single Judge), 7 February 2007, p. 3.

It is the task of the OPCV, as the Office entrusted with providing victims applying to participate with any support and assistance which may be appropriate at the stage of the proceedings which precede a determination on their status, to inform victims having communicated with the Court of their rights and prerogatives in relation to article 53 of the *Rome Statute*.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 95, 101 and 103. See also No. ICC-02/04-125 Pre-Trial Chamber II (Single Judge), 14 March 2008, par. 194 as well as the operative part of the decision.

Consistent with the object and purpose of the application process, the OPCV's role is limited to providing support and assistance in few instances in which the Registry automatically requests additional information for any incomplete applications.

See No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, par. 10. See also ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, par. 34.

The Office's core role is to provide support and assistance to the legal representatives of victims and to victims who have applied to participate.

See No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, paras. 31-32.

Decisions on the role of the Office of necessity will be case-specific: although the range of options is extensive, a bespoke role should be established in each case.

See No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, par. 31.

2. The provision of support and assistance to the victims applying to participate

The Office shall provide support and assistance to victims applying to participate in the situation in Uganda and in the case of *The Prosecutor v. Joseph Kony and al.* when necessary and appropriate at the stage of the proceedings which precedes a decision by the Chamber on their status.

See No. ICC-02/04-01/05-134, Pre-Trial Chamber II (Single Judge), 1 February 2007, par. 13, as well as the operative part of the said Decision. See also No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, par. 164 as well as the operative part of the said Decision and No. ICC-02/04-125 Pre-Trial Chamber II (Single Judge), 14 March 2008, par. 194 as well as the operative part of the said Decision.

3. The legal representation of victims applying to participate

When an applicant has no legal representation or in the absence of any document signed by that person, the OPCV shall automatically be appointed by the Registrar as his or her legal representative to provide support and assistance to the applicant until such time as the applicant has been granted the status and a legal representative is chosen by him or her or appointed by the Court.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, paras. 41, 43, 44, 49 and 50 as well as the operative part of the said decision. See also ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, par. 34; No. ICC-01/04-395, Pre-Trial Chamber I (Single Judge), 17 September 2007, pp. 3-4. See also No. ICC-01/05-01/08-699, Trial Chamber III, 22 February 2010, par. 23.

Since applications for participation are complete, there is no need for the OPCV to be appointed to assist any of the applicants in providing additional information in relation to their applications.

See No. ICC-01/04-01/07-182, Pre-Trial Chamber I (Single Judge), 7 February 2008, p. 2.

Although a literal reading of regulation 81(4) of the *Regulations of the Court* would suggest that it concerns only persons who have been granted victim status within the meaning of rule 85 of the Rules, three Chambers of the Court have thus far deemed it necessary to request the Registry to appoint the Office of Public Counsel for Victims as the legal representative of the victims, pending a decision of the Chamber on their victim status, or until a legal representative is appointed.

The Chamber also adopts this position, while stressing that the appointment of the Office of Public Counsel for Victims is in this instance provisional, and that it does not prejudice any subsequent granting of victim status by the Chamber.

See No. ICC-01/04-01/07-933-tENG, Trial Chamber II, 26 February 2009, paras. 44-45. See also No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, paras. 43-44 and No. ICC-01/04-01/06-1308, Trial Chamber I, 6 May 2008, par. 18, No. ICC-01/05-01/08-103, Pre-Trial Chamber III, 12 September 2008, par. 10; No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, paras. 30-31 and 34 and No. ICC-01/05-01/08-651, Trial Chamber III, 9 December 2009 reclassified as public on 28 January 2010, paras. 9 and 18.

4. The legal representation of victims allowed to participate in the proceedings

Counsel from the Office may be appointed, pending the appointment of a common legal representative, to exercise the rights of victims allowed to participate in the proceedings.

See No. ICC-02/04-105, Pre-Trial Chamber II, 28 August 2007 (Single Judge), p. 5. See also No. ICC-01/04-423-Corr, Pre-Trial Chamber I, 31 January 2008, in the operative part of the said decision; No. ICC-02/04-01/05-267 and No. ICC-02/04-117, Pre-Trial Chamber II (Single Judge), 15 February 2008, pp. 4-6; No. ICC-02/04-125, Pre-Trial Chamber II, 14 March 2008 (Single Judge), par. 194 as well as the operative part of the said decision.

The Office of Public Counsel for Victims shall provide support and assistance to victims allowed to participate in the proceedings until such victims choose a legal representative or a legal representative is appointed by the Court.

See No. ICC-01/04-423-Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, p. 59.

In regards to an apparent conflict of interest of victims' legal counsel, the Pre-Trial Chamber directed the Registry to evaluate the existence and consequences of the apparent conflict of interest and pending the resolution of the issue the legal counsel was provisionally separated from his functions as legal representative of the victims and the victims were exceptionally and provisionally represented by the OPCV.

See No. ICC-01/04/01/07-660, Pre-Trial Chamber I, 3 July 2008, p. 9-10.

In case some of the victims participating in the present case object to being represented by the common legal representative appointed by the Registrar, or a conflict of interest is shown by the common legal representative, the Single Judge wishes to appoint the Office of Public Counsel for Victims (the «OPCV») as legal representative of those victims not represented by the common legal representative, if need be.

Concerning the role of OPCV, the Single Judge notes that this office is established for the main purpose of providing assistance and support to victims and their legal representatives in proceedings before this Court pursuant to regulation 81(4) of the *Regulations of the Court*, which includes (a) legal research and advice, and (b) appearing before a Chamber in respect of specific issues. In addition, counsel of this office may act as legal representative of victims pursuant to regulation 80(2) of the Regulations [of the Court].

In the present case the OPCV has been appointed by the Chamber as legal representative for those victims where no legal representative has been appointed by the victims. Thus, the Single Judge wishes to point out that the OPCV had been appointed by the Chamber only in case and for the time where victims could not

organise their timely legal representation. The Single Judge finds it appropriate that at this stage of proceedings, where victims have been recognised to participate in the present case, be represented by a counsel from their country, unless those victims object to such legal representation.

In case all victims participating in the present case agree to be represented by one common legal representative from the CAR, the OPCV will fulfil its mandate as provided in regulation 81 of the *Regulations of the Court*. In case, one or more victims object to being represented by a counsel from the CAR, the OPCV will continue to act as legal representative for those victims, in addition to its mandate pursuant to regulation 81 of the Regulations.

See No. ICC-01/05-01/08-322, Pre-Trial Chamber III (Single Judge), 16 December 2008, paras. 12-14.

5. The appearance before a Chamber in respect of specific issues

The opportunity for the Office to appear before the Chamber in respect of specific issues can be initiated by:

- the Chamber (this will usually relate to issues of general importance and applicability);
- a victim or his or her representative, who has asked for its support and assistance;
- the Office, if it is representing one or more victims; or
- the Office, following an application to address the Chamber on specific issues, notwithstanding the fact that it has not been requested to do so by the representatives of victims or any individual victims (this will usually relate to issues of general importance and applicability).

See No. ICC-01/04-01/06-1046, Trial Chamber I, 27 November 2007, paras. 3 and 5; see also No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, par. 35.

The OPCV had been requested to submit observations in accordance with Regulation 81(4)(b) of the Regulations [of the Court]. Although the OPCV was not acting as a legal representative for any of these applicants, it had been asked to submit observations in order to provide support and assistance to them on the specific issue of whether they come within the category of indirect victims.

The Chamber notes that neither the Statute nor the Rules provide for the participation of the OPCV in the proceedings. This office was established by the *Regulations of the Court* with a mandate to provide support and assistance to the legal representatives and the victims after the adoption of the Statute and the Rules. In the judgment of the court, the circumstances of the creation of the OPCV should not have the consequence of diminishing the rights of the defence.

In the circumstances, the Chamber determines that whenever the OPCV is performing the functions of, or is acting akin to, a legal representative of a victim - not least to protect the accused - the *Rome Statute* framework shall be applied as if it is an «ordinary» legal representative. It follows that these observations, in the view of the Chamber, are to be treated as if they were made by a legal representative under Rule 91(2) of the Rules.

See No. ICC-01/04-01/06-1813, Trial Chamber I, 8 April 2009, paras. 37-39

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

Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-134, 1 February 2007

Decision on «Request to access documents and material», and to hold a hearing in camera and ex parte (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-152, 7 February 2007

Decision on the OPCV's observations on victims' applications and on the Prosecution's objection thereto (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-243, 16 April 2007

Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-101, 10 August 2007

Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation (Pre-Trial Chamber I), No. ICC-01/04-374, 17 August 2007

Decision on legal representation of Victims a/0101/06 and a/0119/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-105, 28 August 2007

Order on the request by the OPCV for access to certain documents regarding applications a/0026/06, a/0145/06, a/0203/06 and a/0220/06 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-395, 17 September 2007

Order on the Office of Public Counsel for Victims' request filed on 21 November 2007 (Trial Chamber I), No. ICC-01/04-01/06-1046, 27 November 2007

Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06" (Pre-Trial Chamber I), No. ICC-01/04-423-Corr, 31 January 2008

Decision authorising the filing of observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-182, 7 February 2008

Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-267 and No. ICC-02/04-117, 15 February 2008

Decision on the role of the Office of Public Counsel for Victims and its request for access to documents (Trial Chamber I), No. ICC-01/04-01/06-1211, 6 March 2008

Decision on victims' application for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0101/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-125, 14 March 2008

Decision on the OPCV's Requests for leave to file a response to the Defence's Application dated 25 March 2008 and to file observations on the Prosecution's Response to such Application (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-132 and No.02/04-01/05-290, 4 April 2008

Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08 (Trial Chamber I), No. ICC-01/04-01/06-1308, 6 May 2008

Decision on the provisional separation of Legal Representative of Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08 (Pre-Trial Chamber I), No. ICC-01/04-01/07-660, 3 July 2008

Decision on Victim Participation (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-103-tENG-Corr, 12 September 2008

Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-322, 16 December 2008

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

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

Decision on the Observations on legal representation of unrepresented applicants (Trial Chamber III), No. ICC-01/05-01/08-651, 9 December 2009 (reclassified as public on 28 January 2010)



5. Procedural matters

1. Procedural matters in general

Pending the effective implementation of a secure system for the transmission of documents, it should be considered that, with respect to confidential documents:

- 1) a participant is deemed notified of a confidential document, decision or order on the day it is effectively received by post by the said participant;
- 2) the date of filing by a participant of a confidential document is understood to be the day the said document is sent, the postmark being authoritative.

See No. ICC-01/04-62, Pre-Trial Chamber I, 12 July 2005, p. 3.

Regulation 33(1)(b) of the *Regulations of the Court* clearly states that neither the day of notification of a document nor the day of filing of a response are taken into consideration for the calculation of the time period available to file a document.

See No. ICC-01/04-135, Pre-Trial Chamber I, 31 March 2006, par. 9.

The right set out in article 67(1)(a) of the Statute grants the accused the right to be informed in details of the nature, cause and content of the charges against him as opposed to granting him a general right to receive all documents from the Prosecution in a language he fully understands and speaks; that the Chamber is of the view that the detailed description of the charges together with a list of evidence («the Charging Document and List of Evidence») provided for in rule 121(3) of the Rules will adequately inform the accused of the nature, cause and content of the charges against him; and that the rights of the accused under article 67(1)(a) of the Statute would be duly guaranteed by the filing by the Prosecution in the record of the case against [the suspect] of a French version of the Charging Document and List of Evidence and, as the case may be, of the Amended Charging Document and List of Evidence within the time limits provided for in rule 121(3), (4) and (5) of the Rules. [...] Using the words “as are necessary to meet the requirements of fairness”, article 67(1)(f) of the Statute does not grant the accused the right to have all procedural documents and all evidentiary materials disclosed by the Prosecution translated into a language that the accused fully understands and speaks; and that this interpretation is fully consistent with the case law of the ECHR on this matter.

See No. ICC-01/04-01/06-268, Pre-Trial Chamber I (Single Judge), 4 August 2006, pp. 5-6. See also No. ICC-01/04-01/07-127, Pre-Trial Chamber I (Single Judge), 21 December 2007, paras. 40 and 41.

Review of decisions by the Court is only allowed either under specific circumstances explicitly provided in the Statute and in the Rules, or by way of interlocutory appeal against decisions other than final decisions, under article 82, paragraph 1 (d), of the Statute.

See No. ICC-02/04-01/05-209, Pre-Trial Chamber II (Single Judge), 20 February 2007, p. 4.

A document which is not signed by the counsel and which does not emanate from the counsel nor has been approved by the counsel cannot be accepted as a document emanating from the person through whom the Appellant acts, the only person who has authority to represent him in Court proceedings. Such a document must be therefore rejected as inadmissible.

See No. ICC-01/04-01/06-834, Appeals Chamber, 21 February 2007, par. 6.

Within the meaning of regulation 35(2) of the *Regulations of the Court*, a “good cause” entails the existence of valid reasons for non-compliance with the procedural obligations of a party to the proceedings. A cause is good, if found upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so, must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations. Therefore, inability of counsel to perform his/her duties owing to illness, medically certified, does provide a “good cause” for the extension of time envisaged by regulation 35(2) (first sentence) of the *Regulations of the Court*. If a party is allowed in the exceptional circumstances envisaged by regulation 35(2), to submit a document out of time, a similar right is imported to supplement a party’s submission, incomplete as it may be, for reasons outside his/her control.

See No. ICC-01/04-01/06-834, Appeals Chamber, 21 February 2007, paras. 7, 9 and 10.

A procedure for a motion for clarification is not provided for in the Statute of the Court, the Rules of Procedures and Evidence or the Regulations.

See No. ICC-02/04-01/05-18-US-Exp, Unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13.10.2005, Pre-Trial Chamber II, 18 July 2005, p. 2; No. 02/04-01/05-60, Pre-Trial Chamber II, 28 October 2005, paras. 16 and 18. See also No. ICC-01/04-403, Pre-Trial Chamber I (Single Judge), 3 October 2007, p. 3.

In deciding whether to grant the leave to an applicant to submit observations as *amicus curiae*, according to rule 103 of the Rules, the Chamber shall evaluate whether this is 'desirable for the proper determination of the case' and whether the observations relate to an issue that the Chamber deems appropriate. This determination shall necessarily be made by the Chamber on a case by case basis. The Chamber considers then that the *rationale* for admitting *amicus curiae* in the proceedings is to have the opportunity to get experts' information on relevant issues of legal interest for the proceedings in order to provide the Chamber with a contribution to the proper determination of the case.

See No. ICC-01/04-373, Pre-Trial Chamber I, 17 August 2007, paras. 3-4.

Pursuant to first sentence of the regulation 35(2) of the *Regulations of the Court* a Chamber may extend the time if good cause is shown. The Chamber notes that if the time limit for the document in support of the appeal were not extended, the Prosecutor would have to file his document in support of the appeal during the final week of the year. In this regard, the Chamber notes that this week is unusual in that, over and above the fact that it falls during the three week Court recess, it comprises two public holidays and special days of leave. On this basis the Chamber considers appropriate to extend the time limit for the filing of the document. The Chamber also notes that the three week Court recess does not generally constitute a suspension of the judicial activity.

See No. ICC-01/04-01/07-115, Appeals Chamber, 18 December 2007, paras. 6 and 9.

In principle, the statutory framework set out by the Statute and the Rules do not provide for a motion for reconsideration as a procedural remedy against any decision taken by the Pre-Trial Chamber or the Single Judge.

See No. ICC-01/04-456, Pre-Trial Chamber I, 18 February 2008, p. 4. See also No. ICC-01/04-01/06-123, Pre-Trial Chamber I (Single Judge), 23 May 2006, p. 3 and No. ICC-01/04-01/06-166, Pre-Trial Chamber I (Single Judge), 23 June 2006, par. 10.

Article 64(5) of the Statute establishes that «upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused», and rule 136 of the Rules provides that persons accused jointly shall be tried together unless the Trial Chamber, on its own motion or at the request of the Prosecution or the Defence, orders that separate trials are necessary, in order to avoid serious prejudice to the accused, to protect the interests of justice or because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with article 65, paragraph 2; [...] In the view of the Chamber, the ordinary meaning of article 64(5) of the Statute and rule 136 of the Rules provides that there shall be joint trials for persons accused jointly, and establishes a presumption for joint proceedings for persons prosecuted jointly. Considering that joint proceedings during the Pre-Trial phase is consistent with the object and purpose of the Statute and the Rules insofar as: (i) joinder enhances the fairness as well as the judicial economy of the proceedings because, in addition to affording to the arrested persons the same rights as if they were being prosecuted separately, joinder: a. avoids having witnesses testify more than once and reduce expenses related to those testimonies; b. avoids duplication of the evidence; and c. avoids inconsistency in the presentation of the evidence and would therefore afford equal treatment to both arrested persons; (ii) joinder minimises the potential impact on witnesses, and better facilitate the protection of the witnesses' physical and mental wellbeing; and (iii) concurrent presentation of evidence pertaining to different arrested persons does not per se constitute a conflict of interests.

See No. ICC-01/04-01/07-257, Pre-Trial Chamber I, 10 March 2008, pp. 7-8.

An accused's request for interpretation into a language other than the Court's language must be granted as long as he or she is not abusing his or her rights under article 67 of the Statute. If the Chamber believes that the accused fully understands and speaks the language of the Court, the Chamber must assess, on the facts on a case-by-case basis, whether this is so. An accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, non-technical conversation; it is not required that he or she has

an understanding as if he or she were trained as a lawyer or judicial officer. If there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated.

See No. ICC-01/04-01/07-522, Appeals Chamber, 27 May 2008, paras. 1-3.

Whether one speaks of article 67(1)(a) or (f) of the Statute, it seems that the starting point, as far as languages are concerned, will be a working language of the Court. That is, proceedings will in principle be offered in English or French¹⁰⁶. An accused may state, however, that he or she wishes to use another language - presumably on the basis that he or she does not fully understand and speak a working language of the Court. The subject of understanding is exclusively the accused. Thus, the Chamber must give credence to the accused's claim that he or she cannot fully understand and speak the language of the Court. This is because it is the accused who can most aptly determine his or her own understanding and it should be assumed that he or she will only ask for a language he or she fully understands and speaks.

The matter does not however, end there. What if the accused fully understands and speaks the language of the Court? The Chamber may have reasons as to why it does not find it appropriate to grant a request to have interpretation into another language. For example, an accused may fully understand and speak more than one language and it may be evident that he or she is asserting the right to use a different language to that being offered by the Court even though the latter is one of the languages that he or she also fully understands and speaks. The Chamber may consider that the accused is acting in bad faith, is malingering or is abusing his or her right to interpretation under article 67. If the Chamber believes that the accused fully understands and speaks the language of the Court, the Chamber must assess, on the facts on a case-by-case basis, whether this is so.

Given the addition of the word fully, and the drafting history, the standard must be high. Therefore, the language requested should be granted unless it is absolutely clear on the record that the person fully understands and speaks one of the working languages of the Court and is abusing his or her right under article 67 of the Statute. An accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, non technical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer. If there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated. Ultimately, the Chamber in question is responsible for ensuring the fair trial of the accused.

See No. ICC-01/04-01/07-522, Appeals Chamber, 27 May 2008, paras. 58-61.

Relevant decisions regarding procedural matters in general

Decision on the Request for an Extension of the Deadline (Pre-Trial Chamber I), No. ICC-01/04-62, 12 July 2005

Decision on the Prosecutor's Motion for Clarification and Urgent Request for Clarification of the Time-limit Enshrined in Rule 155 (Pre-Trial Chamber II), No. ICC-02/04-01/05-18-US-Exp, 18 July 2005

Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from Warrants of Arrest, Motion for Reconsideration and Motion for Clarification (Pre-Trial Chamber II), No. 02/04-01/05-60, 28 October 2005

Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Pre-Trial Chamber I), No. ICC-01/04-135, 31 March 2006

Decision on the Prosecution Motion for Reconsideration (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-123, 23 May 2006

Decision on the prosecution motion for reconsideration and, in the alternative, leave to appeal (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-166, 23 June 2006

Decision on the Requests of the Defence of 3 and 4 July 2006 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-268, 4 August 2006

Decision on Prosecutor's "Application to lift redactions from applications for Victims' Participation to be provided to the OTP" and on the Prosecution's further submissions supplementing such Application, and request for extension of time, (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-209, 20 February 2007

Reasons for the "Decision on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the *Regulations of the Court* of 7 February 2007" issued on 16 February 2007 (Appeals Chamber), No. ICC-01/04-01/06-834, 21 February 2007

Decision on the Requests of the Legal Representatives of Applicants on Application Process for Victims' Participation and Legal Representation (Pre-Trial Chamber I), No. ICC-01/04-373, 17 August 2007

Decision on the request for clarification by the OPCD (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-403, 3 October 2007

Decision on the «Prosecution's Urgent Application for Extension of Time to File Document in Support of Appeal» (Appeals Chamber), No. ICC-01/04-01/07-115, 18 December 2007

Decision on the Defence Request Concerning Languages (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-127, 21 December 2007

Decision on the «Demande du BPCV d'accéder au document confidentiel déposé par le Conseil des Fonds d'affectation spéciale au profit des victimes le 7 février 2008» (Pre-Trial Chamber I), No. ICC-01/04-456, 18 February 2008

Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI (Pre-Trial Chamber I), No. ICC-01/04-01/07-257, 10 March 2008,

Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled «Decision on the Defence Request Concerning Languages» (Appeals Chamber), No. ICC-01/04-01/07-522, 27 May 2008

2. *Ex parte* proceedings

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

In the framework of the Statute and the Rules, the notion of *ex parte* proceedings may involve the following two alternative meanings, as expressed in regulation 24(4) of the Regulations of the Registry:

- i. Proceedings where the Prosecution, the Defence, or any other participant (or a combination thereof), while aware that such proceedings exist, have no opportunity to voice their arguments [...]; or
- ii. Proceedings where the Prosecution, the Defence, or any other participant (or a combination thereof) are not notified and thus unaware of their existence.

See No. ICC-01/04-01/06-108-Corr, Pre-Trial Chamber I (Single Judge), 19 May 2006, par. 14. See also No ICC-01/04-01/06-119, Pre-Trial Chamber I (Single Judge), 22 May 2006, pp. 4-5; and No. ICC-01/04-01/06-1058, Trial Chamber I, 6 December 2007, par. 8.

Insofar as *ex parte* proceedings in the absence of the Defence constitute a restriction on the rights of the Defence, *ex parte* proceedings under rule 81 (4) of the Rules of Procedure and Evidence shall only be permitted subject to the prosecution showing in its application that:

- i. it serves a sufficiently important objective;
- ii. it is necessary in the sense that no lesser measure could suffice to achieve a similar result; and
- iii. the prejudice to the Defence interest in playing a more active role in the proceedings must be proportional to the benefit derived from such a measure.

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

The Defence must i. be informed of the existence and legal basis of any Prosecution *ex parte* application under rule 81 (2) or (4) of the Rules [of Procedure and Evidence]; ii. be allowed the opportunity to present submissions on (i) the general scope of the provisions that constitute the legal basis of the Prosecution's *ex parte* application; and (ii) any other general matter which in the view of the Defence could have an impact on the disposition of the Prosecution application; iii. be provided, at the very least, with a redacted version of any decision taken by the Chamber in any *ex parte* proceedings under rule 81(2) or (4) of the Rules held in the absence of the Defence.

See No. ICC-01/04-01/06-108-Corr, Pre-Trial Chamber I (Single Judge), 19 May 2006, par. 17.

The Pre-Trial Chamber's approach that the other participant has to be informed of the fact that an application for *ex parte* proceedings has been filed and of the legal basis for the application is, in principle, unobjectionable. Nevertheless, there may be cases where this approach would be inappropriate. Should it be submitted that such a case arises, any such application would need to be determined on its own specific facts and consistently with internationally recognised human rights standards, as required by article 21(3) of the Statute.

See No. ICC-01/04-01/06-568, Appeals Chamber, 13 October 2006, par. 67.

First, *ex parte* procedures are only to be used exceptionally when they are truly necessary and when no other, lesser, procedures are available, and the court must ensure that their use is proportionate given the potential prejudice to the accused. Second, even when an *ex parte* procedure is used, the other party should be notified of the procedure, and its legal basis should be explained, unless to do so is inappropriate. Accordingly, to this limited but important extent there should be a flexible approach. [...] The Chamber should always be provided with a full explanation of the legal basis and a factual justification for the *ex parte* procedure. If the applicant has not notified the other party of the fact of the application or its legal basis, then the reason for not doing so should also be set out for the Chamber's consideration.

See No. ICC-01/04-01/06-1058, Trial Chamber I, 6 December 2007, par. 12.

To the extent that victims have been granted the right to participate on particular issues or as regards particular areas of evidence, consideration should be given to including them in any relevant notification [of *ex parte* procedure], and if this is inappropriate, providing the bench with an explanation in writing as to why they have not been informed.

See No. ICC-01/04-01/06-1058, Trial Chamber I, 6 December 2007, par. 12.

Exceptional circumstances will need to exist in order to justify any party or participant providing information to the court on an *ex parte* basis when no relief is sought or subsequent application is made on the basis of the material, and when the Chamber has not invited that course of action. Not least, it could cause uncertainty at a later stage in the proceedings: if the bench is merely asked to 'receive' private information, judicial inactivity could later be interpreted as approval by the chamber either of any action provided proposed by the party or participant, or of any past events that are revealed.

See No. ICC-01/04-01/06-963-Anx1, Trial Chamber I, 26 September 2007, par. 32.



Relevant decisions regarding *ex parte* proceedings

Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the *Rules of Procedure and Evidence* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-108-Corr, 19 May 2006

Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled «Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the *Rules of Procedure and Evidence*» (Appeals Chamber), No. ICC-01/04-01/06-568, 13 October 2006

Decision on the Defence Motion concerning the *ex parte* hearing of 2 May 2006 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-119, 22 May 2006

Decision on Prosecutor's "Application to lift redactions from applications for Victims' Participation to be provided to the OTP" and on the Prosecution's further submissions supplementing such Application, and request for extension of time (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-209, 20 February 2007

Reasons for the "Decision on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the *Regulations of the Court* of 7 February 2007" issued on 16 February 2007 (Appeals Chamber), No. ICC-01/04-01/06-834, 21 February 2007

Decision on the Requests of the Legal Representatives of Applicants on Application Process for Victims' Participation and Legal Representation (Pre-Trial Chamber I), No. ICC-01/04-373, 17 August 2007

Redacted version of "decision on the prosecution's filing entitled "Prosecution's provision of information to the Trial Chamber" filed on 3 September 2007" (Trial Chamber I), See No. ICC-01/04-01/06-963-Anx1, 26 September 2007

Decision on the procedures to be adopted for *ex parte* proceedings (Trial Chamber I), No. ICC-01/04-01/06-1058, 6 December 2007

3. Jurisdiction and admissibility

Articles 5-20 of the Rome Statute Rules 44-62 of the Rules of Procedure and Evidence

The suspect was promptly brought before the Congolese national authority which, because he was being detained at that time in relation to national proceedings before the Congolese Military Courts, was competent under Congolese law to conduct the proceedings in the custodial State in accordance with article 59 (2) of the Statute[. In the view of the Chamber, no material breach of article 59(2) of the Statute can be found in the procedure followed by the competent Congolese national authorities during the execution of the Court's Cooperation Request.

[...]

The Defence is currently challenging the jurisdiction of the Court by stating that 'Article 21(3) [...] vests the Court with the obligation to consider whether its exercise of personal jurisdiction over the suspect is consistent with such general principles of human rights, or whether, given the serious violations of his human rights, it would be an abuse of process to exercise personal jurisdiction over him in such circumstances'. [...] Article 21 (3) of the Statute states that the 'application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights'; and that, according to those standards, any violations of the suspect's rights in relation to his arrest and detention prior to March 2006 will be examined by the Court only once it has been established that there has been concerted action between the Court and the [Democratic Republic of the Congo (DRC)] authorities. [...] Whenever there is no concerted action between the Court and the authorities of the custodial State, the abuse of process doctrine constitutes an additional guarantee of the rights of the accused; to date, the application of this doctrine, which would require that the Court decline to exercise its jurisdiction in a particular case, has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal.

[...]

In the course of the present proceedings under article 19 of the Statute, no issues have arisen to any alleged act of torture against or serious mistreatment of the suspect by the DRC national authorities prior to the transmission of the Court's Cooperation Request on 14 March 2006 to the said authorities; and that therefore the issue before the Chamber is to determine whether there was concerted action between the Court and the DRC authorities in connection with the arrest and detention of the suspect prior to 14 March 2006. [In this respect,] there is no evidence indicating that the arrest and detention of the suspect prior to the 14 March 2006 was the result of any concerted action between the Court and the DRC authorities; and that the Court will therefore not examine the lawfulness of the arrest and detention of the suspect by the DRC authorities prior to 14 March 2006.

See No. ICC-01/04-01/06-512, Pre-Trial Chamber I, 3 October 2006, pp. 8-11. See also No. ICC-01/04-01/06-803, Pre-Trial Chamber I, 29 January 2007, paras. 164-166.

Pursuant to article 19(2) of the Statute, the jurisdiction of the Court or the admissibility of a case may only be challenged by certain States or by an accused or a person for whom a warrant of arrest or summons to appear has been issued under article 58; that at this stage of the proceedings no warrant of arrest or summons to appear has been issued; and that the *Ad Hoc* Counsel for the Defence has no procedural standing to make a challenge under article 19(2)(a) of the Statute.

See No. ICC-02/05-34, Pre-Trial Chamber I, 22 November 2006, p. 3. See also No. ICC-01/04, Pre-Trial Chamber I, 9 November 2005, p. 4

The jurisdiction of the Court is defined by the Statute. The notion of jurisdiction has four different facets: subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction - *jurisdiction ratione loci* - and lastly jurisdiction *ratione temporis*. These facets find expression in the Statute. The jurisdiction of the Court is laid down in the Statute: Article 5 specifies the subject-matter of the jurisdiction of the Court, namely the crimes over which the Court has jurisdiction, sequentially defined in articles 6, 7, and 8. Jurisdiction over persons is dealt with in articles 12 and 26, while territorial jurisdiction is specified by articles 12 and 13 (b), depending on the origin of the proceedings. Lastly, jurisdiction *ratione temporis* is defined by article 11.

The Statute itself erects certain barriers to the exercise of the jurisdiction of the Court, those set up by article 17, referable in the first place to complementarity (article 17 (1) (a) to (b)) in the second to *ne bis in idem* (articles 17 (1) (c), 20) and thirdly to the gravity of the offence (article 17 (1) (d)). The presence of anyone of the aforesaid impediments enumerated in article 17 renders the case inadmissible and as such non-justiciable. Abuse of

process or gross violations of fundamental rights of the suspect or the accused are not identified as such as grounds for which the Court may refrain from embarking upon the exercise of its jurisdiction.

Article 19 of the Statute regulates the context within which challenges to jurisdiction and admissibility may be raised by a party having an interest in the matter, including a person in the position of the suspect against whom a warrant of arrest had been issued. Jurisdiction under article 19 of the Statute denotes competence to deal with a criminal cause or matter under the Statute. Notwithstanding the label attached to it, the application of the suspect does not challenge the jurisdiction of the Court. [...] [T]he conclusion to which the Appeals Chamber is driven is that the application of the suspect and the proceedings following do not raise a challenge to the jurisdiction of the Court within the compass of article 19(2) of the Statute. What the appellant sought was that the Court should refrain from exercising its jurisdiction in the matter in hand. Its true characterization may be identified as a *sui generis* application, an atypical motion, seeking the stay of the proceedings, acceptance of which would entail the release of the suspect. The term “*sui generis*” in this context conveys the notion of a procedural step not envisaged by the *Rules of Procedure and Evidence* or the *Regulations of the Court* invoking a power possessed by the Court to remedy breaches of the process in the interest of justice. The application could only survive, if the Court was vested with jurisdiction under the Statute or endowed with inherent power to stop judicial proceedings where it is just to do so.

See No. ICC-01/04-01/06-772, Appeals Chamber, 14 December 2006, paras. 21-24.

Article 19(1) of the Statute gives the Chamber discretion to make an initial determination of the admissibility of the case before the issuance of a warrant of arrest or a summons to appear. Such discretion should be exercised only if warranted by the circumstances of the case, bearing in mind the interest of the person concerned. The Chamber is of the view that for the case to be admissible, it is a condition *sine qua non* that national proceedings do not encompass both the person and the conduct which are the subject of the case before the Court. On the basis of the evidence and information provided [...], the Chamber finds that the case against Ahmad Harun and Ali Kushayab falls within the jurisdictions of the Court and appears to be admissible.

See No. ICC-02/05-01/07-1-Corr, Pre-Trial Chamber I, 27 April 2007, paras. 18, 24 and 25.

Article 19(1), second sentence of the Statute vests «the Court» (*i.e.*, its Chambers in the exercise of their judicial functions) with a broad power: it «[m]ay, on its own motion, determine the admissibility of a case in accordance with article 17». The broadness of such power, and the wide discretion which presides over its exercise, are made apparent by the use of the term “may”: the authority to decide whether the determination of admissibility should be made, and, in the affirmative, at what specific stage of the proceedings such determination should occur, resides exclusively with the relevant Chamber. The sole limit entailed by the lean wording of the provision appears to be that the proceedings must have reached the stage of a case (including “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects”, as opposed to the preceding stage of the situation following the Prosecutor’s decision to commence an investigation pursuant to article 53 of the Statute. Apart from this procedural boundary, the Statute and the other statutory texts are silent as to the criteria which may or should guide a Chamber in deciding whether and when to resort to the power vested in it by article 19(1), second sentence, of the Statute. Accordingly, it is for the Court, in the exercise of its judicial functions and when appropriate, to establish appropriate criteria for determining whether the actual exercise of this *proprio motu* power is warranted in a given case.

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

Article 17 is the statutory provision governing the assessment of the admissibility of a case. Pursuant to article 17(1), a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.

For the purposes of the Proceedings, the relevant provisions appear to be article 17(a) and (b), since there is no issue that the persons sought by the Court have already been tried at the national level, or that the relevant crimes attain the threshold of sufficient gravity, is at stake. Pursuant to article 17(a) and (b), the paramount criterion for determining the admissibility of a case is the existence of a genuine investigation and prosecution at the national level in respect of the case; the willingness and ability of a State to genuinely prosecute and

investigate crimes falling within the jurisdiction of the Court are the two fundamental concepts around which the notion of admissibility and the very principle of complementarity revolve.

See No. ICC-02/04-01/05-377, Pre-Trial Chamber II, 10 March 2009, paras. 35-36.

The question for the Chamber is whether the Motion was filed prior to or after the “*commencement of the trial*”, within the meaning of article 19(4) of the Statute. In order to respond to this question, it must define the meaning of this term. Indeed, it should be determined whether the trial commences as soon as the Trial Chamber is constituted pursuant to article 61(11) of the Statute, or only at a later stage in the proceedings, when the participants make their opening statements before the Chamber prior to the first witnesses testifying.

[...]

The actual wording of article 19(4) of the Statute does not enable the meaning of the term “*commencement of the trial*” to be determined. The Chamber cannot therefore base its consideration on a purely literal interpretation of paragraph 4 and to define this term and highlight the actual intentions of the States Parties on this point. It is thus necessary to refer to the context of this paragraph and to read it in the light of the other paragraphs of article 19 and all the provisions of the founding documents of the Court. On this point, the Permanent Court of International Justice clearly indicated that “[the] meaning [of a treaty] is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense”. This approach was in fact later confirmed by the Vienna Convention, which even widened it by inviting anyone interpreting a treaty to refer to all relevant instruments if required.

The Chamber must therefore first of all examine the ordinary meaning and use of the term “*trial*”, and, in particular, the expression “*commencement of the trial*” or the phrase “prior to the commencement of the trial” at each of their occurrences in the Statute, the Rules and the Regulations of the Court.

Firstly, article 19 of the Statute, read as a whole, does not allow this question to be answered, as the afore mentioned terms only appear in paragraph 4 thereof.

Secondly, the truth of the matter is that a certain number of the provisions of the Statute and the Rules are written in very general or ambiguous terms and that it is not possible to clearly answer the question, by simply reading them, in the French or English version, and referring to their ordinary meaning. Indeed, a purely literal reading of these provisions does not seem to allow either of the two solutions mentioned in paragraph 30 to be elevated over the other. This is the case, for example, for articles 31(3), 56(3)(a) and 56(4) and article 61(9) in that the latter provides the Prosecutor with the option of withdrawing the charges with the permission of the Trial Chamber after the commencement of the trial. The same goes for articles 62, 64(7), 65(3), 65(4)(b), 68(5) and 84(1)(a) of the Statute, rule 58(2) of the Rules, which sets out the procedure to be followed for the purposes of article 19 of the Statute, as well as for rules 80(1) and 122(4) of the Rules.

Thirdly, although a number of other provisions in the Statute and the Rules appear to favour the argument that the trial commences as soon as the Trial Chamber is constituted by the Presidency, others seem to support the idea that the trial commences with the opening statements.

Without prejudging a contrary interpretation arising from a more in depth analysis that could be given by the Chamber or any other chamber having to rule on one of these provisions, the following provisions seem to fall into the first category: the actual title of article 61 of the Statute (Confirmation of the charges before trial) read in conjunction with the title of Part VI of the Statute and of the Rules (“The trial”); articles 63, 64(2), 64(3)(a), 64(3)(b), 64(7), 67(d), the French version of the title of article 68, articles 74(1), 93(10)(b)(i)(a), the French version of rule 39,86 rule 137 and the title of rule 165 of the Rules. Lastly, the Chamber notes the wording of regulation 86(3) of the *Regulations of the Court*, which seems to draw a distinction of a procedural nature between the trial phase and the appeals phase.

It is permissible to conclude from a reading of the afore-mentioned provisions that the Statute divides the proceedings into three separate phases: the pre-trial phase (investigation and prosecution), which is within the jurisdiction of the Pre-Trial Chamber, the trial phase, which, in English, could be called the “trial proceedings”, which is assigned to the Trial Chamber, and the appeals phase, conducted before the Appeals Chamber. In any event, it appears to the Chamber that, for the purposes of these provisions, the trial is not confined to the evidentiary phase following opening statements.

Other provisions, however, seem to indicate that the trial only commences after the opening statements. This is the case in the Statute, for example, for articles 61(5) and 61(9), in that the latter suggests that there is an intermediate phase between the confirmation of charges and the commencement of the trial, which is confirmed by the wording of rule 128(1) of the Rules, article 64(3)(c) of the Statute, the chapeau of article 64(6), articles 64(8)(b) and 64(10), the French version of rule 64(2) of the Rules,⁸⁷ articles 74(2), 76(1), 83(2)(b), 84(1)(b) and rules 77, 78, 81(2), 81(4), 84, 94(2), 132(1), 134(1), 134(2), 135(4) and 138. Finally, the Chamber notes the wording of regulations 55(2) and 56 of the *Regulations of the Court*, which seems to offer a narrow definition of the term “trial”, limiting it to the presentation of evidence and argument during the hearing.

Thus, a contextual interpretation of the founding documents of the Court highlights the concurrency of two conceptions of the expression “*commencement of the trial*”: one, which seems to harken back to the inquisitorial system, has the trial commencing as soon as the matter is referred to the trial chamber following the investigations and/or preliminary investigation and is described as the case to be answered;⁸⁸ the other, which is closer to the common law system, sees the trial as the *momentum* of justice, described in fact as follows by *Black’s Law Dictionary*: “[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding”. The Chamber is of the view that the drafters of the Statute, who deliberately adopted a hybrid procedure which borrows from different legal cultures and systems, intended the “commencement of the trial” to mean both the start of the proceedings before the Trial Chamber (“trial proceedings” in English) and the commencement of hearings on the merits (“trial” or “hearing” in English), depending on the provision to be applied and the context in which it was to be applied.

As a result, it is impossible to generally and definitively choose either of the two conceptions that may define the expression “*commencement of the trial*” and apply it uniformly to all the provisions of the Statute. It is worth recalling that the founding documents of the Court were drafted by different working groups during diplomatic conferences. The co-existence of several meanings for the expression “*commencement of the trial*” which may be recognised in this case is thus simply the consequence of a laborious harmonisation process of all the work carried out, in several languages moreover, at these diplomatic conferences. As a result, the Chamber considers that the meaning of the expression “*commencement of the trial*” must be determined in light of the provision to be applied, based on a logical interpretation which gives full effect to the said provision and adheres to the intent of the States Parties when they adopted it. For example, in the decision setting the date of the trial, the Chamber held that the expression “*date of the trial*” in rule 132(1) of the Rules meant the date of the commencement of the hearing on the merits. Called upon to interpret article 61(9) of the Statute, Trial Chamber I, for its part, held, in a decision of 13 December 2007, that the expression “*before the trial has begun*” had the following meaning: “[a]lthough no definition is provided as to when the trial is considered to have begun, the Bench is persuaded that this expression means the true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses”.

Accordingly, it now falls to consider the specific case of article 19 of the Statute and to interpret the expression “*commencement of the trial*” used therein in the light of all the provisions of said article, in order to determine the exact intent of the States Parties when they adopted it.

In this regard, the Chamber notes that the provisions of paragraphs 5 to 8 of this article are clearly aimed at avoiding challenges to admissibility needlessly hindering or delaying the proceedings, which means that they must be brought as soon as possible, preferably during the pre-trial phase. Such is the case in paragraph 4 of article 19, as well as for paragraph 5 thereof, which requires States to make their challenges “*at the earliest opportunity*”. The same is also true of rule 58 of the Rules, which lays down the procedure to be followed for the purposes of article 19 and provides that a challenge may be considered in the context of a confirmation of charges hearing or a trial proceeding, “*as long as this does not cause undue delay*”, with the determination of the time limits for submitting observations being in the discretion of the Chamber. This same concern is indirectly expressed in rule 122(2) of the Rules, which requires the Pre-Trial Chamber, when called upon to rule on a challenge made during the confirmation hearing, to ensure adherence to the diligence expressly prescribed by rule 58 of the Rules. Furthermore, it should be recalled that rule 60 of the Rules, which supplements article 19(6) of the Statute, allows challenges to jurisdiction or admissibility made after a confirmation of the charges to be addressed to the Presidency. The very existence of this procedure illustrates how much the drafters of the Statute and of the Rules wanted challenges of this nature to be submitted at the earliest opportunity. In fact, with respect to all other applications or requests, the parties and participants must wait for the relevant chamber to be designated.

This emphasis, in article 19 of the Statute and rule 58 of the Rules, that challenges to admissibility be heard as early as possible and without undue delay, can be explained by the principle of complementarity. The drafters of the Statute clearly intended the Court to complement national courts, not to compete with them. Consequently, they endeavoured to avoid parallel and competing proceedings. In this regard, article 19(7) of the Statute specifically provides for the suspension of investigations by the Prosecutor when the admissibility of a case is challenged. Furthermore, given that investigations into crimes falling within the jurisdiction of the Court are very costly in terms of time and resources, it is in the interests of all, and primarily the suspects who have been deprived of their liberty, that the court with jurisdiction to try the case be determined as quickly as possible.

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

In sum, the Chamber considers that the Statute provides a three-phase approach in respect of challenges to admissibility. During the first phase, which runs until the decision on the confirmation of charges is filed with the Registry, all types of challenges to admissibility are permissible, subject to the requirement, for States, to make them at the "*earliest opportunity*". In the second phase, which is fairly short, running from the filing of the decision on the confirmation of charges to the constitution of the Trial Chamber, challenges may still be made if based on the *ne bis in idem* principle. In the third phase, in other words, as soon as the chamber is constituted, challenges to admissibility (based only on the *ne bis in idem* principle) are permissible only in exceptional circumstances and with leave of the Trial Chamber.

Consequently, after the decision on the confirmation of charges is filed with the Registry, a case must be considered admissible unless breach of the *ne bis in idem* principle is alleged.

See No. ICC-01/04-01/07-1213-tENG, Trial Chamber II, 15 July 2009, paras. 49-50.

Relevant decisions regarding jurisdiction and admissibility

Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005 (Pre-Trial Chamber II), No. ICC-02/04-01/05-53, 27 September 2005

Warrant of Arrest for Vincent Otti (Pre-Trial Chamber II), No. ICC-02/04-01/05-54, 8 July 2005

Warrant of Arrest for Okot Odhiambo (Pre-Trial Chamber II), No. ICC-02/04-01/05-56, 8 July 2005

Warrant of Arrest for Dominic Ongwen (Pre-Trial Chamber II), No. ICC-02/04-01/05-57, 8 July 2005

Decision following the consultation held on 11 October 2005 and the Prosecution's submission on Jurisdiction and admissibility filed on 31 October 2005 (Pre-Trial Chamber I), No. ICC-01/04-93, 9 November 2005

Warrant of Arrest [Bosco Ntaganda] (Pre-Trial Chamber I), No. ICC-01/04-02/06-2-tEN, 22 August 2006

Warrant of Arrest [Thomas Lubanga Dyilo] (Pre-Trial Chamber I), No. ICC-01/04-01/06-2-tEN, 10 February 2006

Decision on Thomas Lubanga Dyilo's Application for referral to the Pre-Trial Chamber / in the alternative, discontinuance of Appeal (Pre-Trial Chamber I), No. ICC-01/04-01/06-393, 6 September 2006

Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute (Pre-Trial Chamber I), No. ICC-01/04-01/06-512, 3 October 2006

Decision on the Submissions Challenging Jurisdiction and Admissibility (Pre-Trial Chamber I), No. ICC-02/05-34, 22 November 2006

Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006 (Appeals Chamber), No. ICC-01/04-01/06-772, 14 December 2006

Decision on the confirmation of the charges (Pre-Trial Chamber I), No. ICC-01/04-01/06-803, 29 January 2007

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

Decision on the Prosecution Application under Article 58(7) of the Statute (Pre-Trial Chamber I), No. ICC-02/05-01/07-1-Corr, 27 April 2007

Warrant of arrest for Ali Kushayb (Pre-Trial Chamber I), No. ICC-02/05-01/07-3, 27 April 2007

Warrant of arrest for Germain Katanga (Pre-Trial Chamber I), No. ICC-01/04-01/07-1, 2 July 2007

Warrant of Arrest for Mathieu Ngudjolo Chui (Pre-Trial Chamber I), No. ICC-01/04-01/07-260, 6 July 2007

Warrant of Arrest for Jean-Pierre Bemba Gombo (Pre-Trial Chamber III), No. ICC-01/05-01/08-1-tENG-Corr, 23 May 2008 and No. ICC-01/05-01/08-15-tENG, 10 June 2008

Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), No. ICC-02/05-01/09-1, 4 March 2009

Decision on the admissibility of the case under article 19(1) of the Statute (Pre-Trial Chamber II), No. ICC-02/04-01/05-377, 10 March 2009

Summons to appear for Bahr Idriss Abu Garda (Pre-Trial Chamber I), No. ICC-02/05-02/09-2, 7 May 2009

Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute) (Trial Chamber II), No. ICC-01/04-01/07-1213-tENG, 15 July 2009

Summons to appear for Saleh Mohammed Jerbo Jamus (Pre-Trial Chamber I), No. ICC-02/05-03/09-2, 27 August 2009

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

Judgement on the Appeal of the Defence against the “Decision on the Admissibility of the Case under Article 19(1) of the Statute” of 10 March 2010, (Appeals Chamber), No. ICC-02/04-01/05-408, 16 September 2009

Judgement on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, (Appeals Chamber), No. ICC-01/04-01/07-1482, 25 September 2009 27 August 2009



4. Evidence

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

4.1. Evidence in general

The Defence has the right to access un-redacted versions of (i) the evidence on which the Prosecution intends to rely at the confirmation hearing and (ii) the materials in the possession or control of the Prosecution which are potentially exculpatory, have been obtained or belonged to the suspect or are otherwise material to the Defence preparation for the confirmation hearing. [...] The Chamber is the ultimate guarantor of the Defence's timely access to the said evidence and materials.

See No. ICC-01/04-01/06-355, Pre-Trial Chamber I (Single Judge), 25 August 2006, pp. 3-4.

Summary of evidence shall be provided in a language that the suspect fully speaks and understands and shall contain the following information: (i) a brief introduction of the relevance and probative value of the summary evidence without identifying the witness; (ii) any information on which the Prosecution intends to rely at the confirmation hearing, in particular the information included in the paragraphs referred to in the Prosecution Charging Document and List of Evidence; and (iii) any information that could be potentially exculpatory or otherwise material for the Defence's preparation of the confirmation hearing.

See No. ICC-01/04-01/06-437, Pre-Trial Chamber I (Single Judge), 15 September 2006, p. 10

The probative value of the unredacted parts of the said documents, witness statements and transcripts of witness interviews [*i.e.* materials which redaction have been authorised] may be diminished as a result of the redactions proposed by the Prosecution and authorised by the Chamber.

See No. ICC-01/04-01/06-455, Pre-Trial Chamber I (Single Judge), 20 September 2006, p. 10

The Chamber may rely on any evidence admitted for the purpose of the confirmation hearing whether or not the party proposing such evidence presents it at the confirmation hearing as long as the other party had the opportunity to respond to it at the [confirmation] hearing.

See No. ICC-01/04-01/06-678, Pre-Trial Chamber I (Single Judge), 7 November 2006, p. 5.

In the opinion of the [Pre-Trial] Chamber, the purpose of the confirmation hearing is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought. Pursuant to article 61(7) of the Statute, the Pre-Trial Chamber shall determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. To define the concept of 'substantial grounds to believe', the Chamber relies on internationally recognised human rights jurisprudence. [...] Accordingly, the Chamber considers that for the Prosecution to meet its evidentiary burden, it must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations. Furthermore, the 'substantial grounds to believe' standard must enable all the evidence admitted for the purpose of the confirmation hearing to be assessed as a whole.

See No. ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, 29 January 2007, paras. 37-39.

The statutory and regulatory framework [of the texts governing the Court] undoubtedly establishes the unfettered authority of the Trial Chamber to rule on procedural matters and the admissibility and relevance of evidence, subject always to any contrary decision of the Appeals Chamber. [...] The Trial Chamber should only disturb the Pre-Trial Chamber's Decisions if it is necessary to do so and it should follow the Pre-Trial Chamber unless that would be an inappropriate approach.

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

In relation to the manner in which evidence shall be introduced, the Trial Chamber considers that evidence heard before the Pre-Trial Chamber cannot be introduced automatically into the trial process simply by virtue of having been included in the List of Evidence admitted by the Pre-Trial Chamber, but instead it must be introduced, if necessary, *de novo*. [...] The parties (and where relevant, the participants) can agree convenient mechanisms for the introduction of undisputed evidence.

See No. ICC-01/04-01/06-1084, Trial Chamber I, 13 December 2007, par. 8.

Article 69(2) of the *Rome Statute* establishes a presumption in favour of live in-court-testimony. However, if the Chamber will authorize their use whenever necessary, it will issue its decision on a case-by-case basis regarding especially the security situation or the vulnerability of the witness. So as to be able to arrange for a video-link the parties and participants are ordered to inform the Chamber and the Victims and Witnesses Unit not less than 35 days before the testimony is due do be heard that they seek to introduce evidence via audio or video-link from a remote location. In case the technology shall be used at the seat of the Court the parties and participants are advised to inform the Chamber and the VWU at the earliest opportunity of a corresponding request. However, no strict time-limit is imposed, given that unforeseen circumstances may arise.

See No. ICC-01/04-01/06-1140, Trial Chamber I, 29 January 2008, paras. 41-42.

For the purpose of the confirmation hearing, the E-Court Protocol for the presentation of evidence, material and witness information in electronic format shall contain the following [fields]: (i) Author (ii) Author Organization (iii) Recipient (iv) Parties (v) Related to Witness (vi) Charge (vii) Element of Alleged Crime (viii) Incident (ix) Element of Statement of Facts and (x) Mode of Participation; [and additional fields relating to witness information:] (i) Disclosure Date (ii) Charge (iii) Element of Alleged Crime (iv) Incident (v) Element of Statement of Facts (vi) Mode of Participation and (vii) Person/Witness from whom the Document Emanated.

See No. ICC-01/04-01/06-360, Pre-Trial Chamber I (Single Judge), 28 August 2006, p. 6.

E-court processes can greatly enhance courtroom and trial efficiency and as such should be embraced by the Court. [...] The exponential increase in the volume of information, together with real problems that have emerged over information management, has meant that standardised protocols are necessary to govern how information can be prepared and presented. Important experience has demonstrated that a protocol which is drawn to capture purely objective information about documents or records related to each case is the most useful approach: this enables the exchange, search, retrieval and presentation of information in the easiest, as well as most precise and consistent way, on multiple occasions. [...] These objectives cannot be met by the addition of subjective information: indeed, the inclusion of subjective fields works actively against them.

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

In order to maximise the utility and the coherency of the application of the E-Court Protocol, it should be applied to all exchanged materials, regardless of the particular stage in the proceedings at which they were disclosed. [...] Moreover, the Protocol should cover all case information filed with the Registry or exchanged between parties/participants. This, by definition, extends equally to the incriminatory and potentially exculpatory material exchanged between the parties. An exception to this approach applies to the semi or completely illegible materials, given that there are a large amount of documents that are either written by hand or otherwise cannot be searched electronically. The principle reason for permitting this exception is the imminence of the trial and the difficulties at this point in time for the prosecution of revisiting each of the relevant documents to apply the relevant objective coding or typing the record in full for electronic searching.

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

For the purposes of the E-Court protocol, a unique number shall be allocated to each victim participant.

See No. ICC-01/04-01/06-1127, Trial Chamber I, 24 January 2008, par. 27.

Under no circumstances may evidence not translated into one of the working languages of the Court at the time of commencement of the confirmation hearing be admitted into evidence insofar as the Chamber must be in a position to fully understand the evidence on which the parties intend to rely at the hearing; therefore, pursuant to article 69(4) of the Statute, video excerpts

(i) which are not translated into one of the working language of the Court by [the time-limit established by the Chamber] and (ii) whose translation is not made available to the Chamber and the Defence by that time must be declared inadmissible.

See No. ICC-01/04-01/06-676, Pre-Trial Chamber I (Single Judge), 7 November 2006, p. 3.

It seems clear that under the *Rome Statute* framework it is envisaged that an accused's right to a fair trial is not necessarily compromised by the imposition on him or her of an obligation to reveal in advance and in appropriate circumstances, details of the defences and the evidence to be presented, and the issues that are to arise.

See No. ICC-01/04-01/06-1235-Corr (Trial Chamber I), 20 March 2008, par. 31.

Those granted the procedural status of victim at the pre-trial stage of a case (i) must confine their participation to the discussion of the evidence on which the Prosecution and the Defences...intend to rely at the confirmation hearing; and (ii) do not have the right to introduce additional evidence.

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

The provision of information, *inter partes*, of a non-public nature is governed by the twin requirements of necessity and witness-security. When the distribution of information to the public has been limited - for whatever reason - it is appropriate that its use should be carefully regulated so as to ensure compliance with those requirements. Once information has been characterised as being non-public (whether it is characterised as "confidential", "*ex parte*" or under seal"), its use should be limited to the strict purposes of the disclosure and members of the public should only be shown those parts of it that are truly necessary for the preparation and presentation of the case of a party or participant.

See No. ICC-01/04-01/06-1372, Trial Chamber I, 3 June 2008, paras. 8-9.

Exculpatory material includes material, first, that shows or tends to show the innocence of the accused; second, which mitigates the guilt of the accused; and, third, which may affect the credibility of prosecution evidence.

See No. ICC-01/04-01/06-1401, Trial Chamber I, 13 June 2008, par. 59.

In order to ensure the expeditiousness of proceedings and proper case management, the parties shall submit the evidence in due time, in proper format and within the official filing hours as set out in regulation 33(2) of the *Regulations of the Court*. The Chamber draws particular attention of all concerned to the fact that all evidence is to be registered into the record of the case by the Registry and that, for the registration, they are to accord the Registry a reasonable time. [...] The parties are reminded to include in their submission of evidence the following documentation: (i) a list of evidence enlisting all pieces of evidence enclosed with their respective document ID as defined in the e-Court protocol (see Annex) and (ii) a list of recipients including the level of confidentiality applicable to each item vis-à-vis any party. In view of the principle of publicity of proceedings, the evidence submitted shall in principle be registered as public unless there is a need to classify it otherwise.

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

The Chamber observes that under article 61(5) of the Statute, the Prosecutor «[s]hall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged». Furthermore, pursuant to article 67(l)(a) and (b) of the Statute, not only must the accused «[b]e informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks» but must also «[h]ave adequate time and facilities for the preparation of the defence». Bearing in mind these objectives, the Chamber is of the view that the defence has to have all necessary tools to understand the reasons why the Prosecutor relies on any particular piece of evidence and that, consequently, the evidence exchanged between the parties and communicated to the Chamber must be the subject of a sufficiently detailed legal analysis relating the alleged facts with the constituent elements corresponding to each crime charged.

See No. ICC-01/05-01/08-55, Pre-Trial Chamber III, 31 July 2008, paras. 64-73.

The introduction of additional evidence on which neither the Prosecution nor the Defense intend to rely (and that therefore is not part of the record of the case kept by the Registry) by those granted the procedural status of victim would: (i) distort the limited scope, as well as the object and purpose, of the confirmation hearing as defined by article 61 of the Statute and rules 121 and 122 of the Rules,

and (ii) inevitably delay the commencement of a confirmation hearing that, pursuant to article 61 (1) of the Statute, must be held within a reasonable period of time after the suspect's surrender or voluntary appearance before the Court.

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

The introduction of additional evidence on which neither the Prosecution nor the Defense intend to rely at the confirmation hearing by those granted the procedural status of victim will infringe upon the Defense's rights not to rely on such material for the purpose of the confirmation hearing.

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

Article 69(3) of the Statute is not applicable during the pre-trial proceedings conducted before the Pre-Trial Chamber because: (i) the Pre-Trial Chamber is not a truth-finder; and (ii) according to the literal interpretation of article 69(3) of the Statute, its application is subject to consideration of the competent Chamber that evidence other than that introduced by the Prosecution and the Defense is 'necessary for the determination of the truth.'

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 110.

Because article 69(3) is not applicable during the Pre-Trial stage of the case, the Pre-Trial Chamber is prevented from authorizing victims to introduce additional evidence. Those granted the procedural status of victim cannot introduce additional evidence at the confirmation hearing on the ground that 'victim participation in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and in this sense the Court has 'requested' the evidence.

The statutory framework provided for by the Statute and the Rules for the pre-trial stage of a case leaves no room for the presentation of additional evidence by those granted the procedural status of victim. The approach adopted by the Trial Chamber is not applicable at the pre-trial stage of a case.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 112-113.

The right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence lies primarily with the parties, namely, the Prosecutor and the Defense. However, the Appeals Chamber does not consider these provisions to preclude the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings.

The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial. With these safeguards in place, the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is not inconsistent with the onus on the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial.

The Trial Chamber did not create an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation.

See No. ICC-01/04-01/06-1432, Appeals Chamber, 11 July 2008, paras. 3-4.

4.2 Issues related to the admissibility of evidence

In deciding on the admissibility of summary evidence in accordance with article 69(4) of the *Rome Statute*, the Single Judge must balance (i) the probative value that the Chamber could give to the summary evidence proposed by the Prosecution of [the] witnesses, against (ii) the grave risks to their security that are inherent to the disclosure of their identity to the Defence given the exceptional circumstances in the present case. In light of such criteria the adequate protection of the witnesses must prevail and therefore "in application of article 69 (4) of the Statute, the Single Judge considers (i) that, regardless of the format (unredacted versions, redacted versions or summary evidence), their statements, transcripts of their interviews and investigator's reports and notes of their

interviews must be declared inadmissible for the purpose of the confirmation hearing; and (ii) that consequently the Prosecution cannot rely on them at the confirmation hearing.

See No. ICC-01/04-01/06-517, Pre-Trial Chamber I (Single Judge), 4 October 2006, pp. 5-6.

Pursuant to article 69(4) of the Statute, the Chamber “[m]ay rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”; and that, pursuant to rules 63(1) and (2) of the Rules, a Chamber of the Court shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69 of the Statute.

See No. ICC-01/04-01/06-678, Pre-Trial Chamber I (Single Judge), 7 November 2006, p. 5.

Any evidence referred to in the Prosecution List of Evidence and in the Defence List of Evidence shall be admitted into evidence for the purpose of the confirmation hearing, unless it is expressly ruled inadmissible by the Chamber upon a challenge by the Prosecution or the Defence, as the case may be, at the [confirmation] hearing.

See No. ICC-01/04-01/06-678, Pre-Trial Chamber I (Single Judge), 7 November 2006, p. 5.

Under article 21(1)(c) of the Statute, where articles 21(1)(a) and (b) do not apply, the Chamber shall apply general principles of law derived by the Court from national laws. [...] The Chamber considers that the Court is not bound by the decisions of national courts on evidentiary matters. Therefore, the mere fact that a Congolese court has ruled on the unlawfulness of the search and seizure conducted by the national authorities cannot be considered binding on the Court. This is clear from article 69(8) of the Statute which states that “[w]hen deciding on the relevance or admissibility of evidence collected by a State, the Court shall rule on the application of the State’s national law”. As the Defence’s request is based on article 69(7) of the Statute, the Chamber must determine whether the evidence was obtained in violation of internationally recognized human rights. There is nothing in this case to indicate that the national authorities allegedly used force, threats or any other form of abuse to gain access to the home. As a result, the Chamber finds [...] that the unlawfulness of the search and seizure was a breach of a procedural rule, but cannot be considered so serious as to amount to a violation of internationally recognized human rights. However, the Chamber finds that in this case, in light of the ECHR jurisprudence, the search and seizure of hundreds of documents and items pertaining to the situation in the Democratic Republic of the Congo conducted in order to gather evidence for the purpose of domestic criminal proceedings infringed the principle of proportionality sanctioned by the ECHR, first, because the interference did not appear to be proportionate to the objective sought by the national authorities and secondly, because of the indiscriminate nature of the search and seizure involving hundreds of items. Accordingly, the Chamber finds that the infringement of the principle of proportionality can be characterized as a violation of internationally recognized human rights. The Chamber has to determine whether such a violation can justify the exclusion of the items seized. [...] Article 69(7) of the Statute rejects the notion that evidence procured in violation of internationally recognized human rights should be automatically excluded. Consequently, the Judges have the discretion to seek an appropriate balance between the Statute’s fundamental values in each concrete case. [...] The Chamber endorses the human rights and ICTY jurisprudence which focuses on the balance to be achieved between the seriousness of the violation and the fairness of the trial as a whole. As a consequence, the Chamber decides that for the purpose of the confirmation hearing the seized items are admitted, without prejudice to the Trial Chamber’s exercise of its functions and powers to make a final determination as the admissibility and probative value of such items.

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

Nothing in the Statute and in the *Rules of Procedure and Evidence* expressly states that the absence of information about the chain of custody and transmission affects the admissibility or probative value of Prosecution evidence. Therefore, it is assumed that the material included in the parties’ Lists of Evidence is authentic. Thus, unless a party provides information which can reasonably cast doubt on the authenticity of certain items presented by the opposing party, such items must be considered authentic in the context of the confirmation hearing. This is without prejudice to the probative value that could be attached to such evidence in the overall assessment of the evidence admitted for the purpose of the confirmation hearing.

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

The Chamber also notes that there is nothing in the Statute or the Rules which expressly provides that evidence which can be considered hearsay from anonymous sources is inadmissible per se. In addition, the Appeals Chamber has accepted that, for the purpose of the confirmation hearing, it is possible to use certain items of evidence which may contain anonymous hearsay, such as redacted versions of witness statements. In accordance to the ECHR jurisprudence, the Chamber considers that objections pertaining to the use of anonymous hearsay evidence do not go to the admissibility of the evidence, but only to its probative value. [...] However, mindful of the difficulties such evidence may present to the Defence in relation to the possibility of ascertaining its truthfulness and authenticity, the Chamber decides that, as a general rule, it will use such anonymous hearsay evidence only to corroborate other evidence.

See No. ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, 29 January 2007, paras. 101-103 and 106.

Relying on several grounds, the Defence challenged the credibility and reliability of the statements made by children on which the Prosecution relied to substantiate the charges against the suspect. However, the Chamber observes that a large number of these challenges actually proceed from matters of a peripheral nature which do not really go to the substance of the children's statements. In exercising its discretion in the light of article 69(4) and in accordance with the jurisprudence of the ICTR, the Chamber declares that it will attach a higher probative value to those parts of the children's evidence which have been corroborated, as is apparent from several sections of this decision.

See No. ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, 29 January 2007, paras. 118-121 and in the operative part, p. 155.

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.

Fourth, 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, summarising these four key factors, the drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited - at the outset - the ability of the Chamber to assess evidence «freely». Instead, the Chamber is authorised by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness. In ruling on admissibility the Chamber will frequently need to weigh the competing prejudicial and probative potential of the evidence in question. It is of particular note that Rule 63(5) mandates the Chamber not to «apply national laws governing evidence». For these reasons, the Chamber has concluded that it enjoys a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict, when those involved will have been killed or wounded, and the survivors or those affected may be untraceable or unwilling - for credible reasons - to give evidence.

If a challenge is made to the admissibility of evidence, it appears logical that the burden rests with the party seeking to introduce the evidence - in this case the prosecution. This has been the practice of the ICTY and there seems no reason to disturb this self-evidently sensible requirement.

Bearing in mind those key considerations, when the admissibility of evidence other than direct oral testimony is challenged the approach should be as follows.

First, the Chamber must ensure that the evidence is *prima facie* relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims. In this Decision, however, it is unnecessary to analyse further the meaning or the application of this expression, particularly since there has been no suggestion that this first test is not satisfied as regards the documents in question.

Second, the Chamber must assess whether the evidence has, on a *prima facie* basis, probative value. In this regard there are innumerable factors which may be relevant to this evaluation, some of which, as set out above, have been identified by the ICTY. The Appeals Chamber in *Aleksovski* stated that the indicia of reliability include whether the evidence is «voluntary, truthful and trustworthy, as appropriate; and for this purpose [the Trial Chamber] may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is «first-hand» or more removed, are also relevant...”

However, it is necessary to emphasise that there is no finite list of possible criteria that are to be applied, and a decision on a particular disputed piece of evidence will turn on the issues in the case, the context in which the material is to be introduced into the overall scheme of the evidence and a detailed examination of the circumstances of the disputed evidence. There should be no automatic reasons for either admitting or excluding a piece of evidence but instead the court should consider the position overall. Whilst the suggested test of the «indicia of reliability», as relied on by the prosecution and described by the ICTY, may be a helpful tool, the Chamber must be careful not to impose artificial limits on its ability to consider any piece of evidence freely, subject to the requirements of fairness.

It is necessary to observe that if, in the circumstances, it is impossible for the Chamber to conduct any independent evaluation of the evidence - if there are no adequate and available means of testing its reliability - then the court will need to consider carefully whether the party seeking to introduce it has met the test of demonstrating, *prima facie*, its probative value. Similarly, if evidence is demonstrably lacking any apparent reliability the Chamber must equally carefully decide whether to exclude the evidence at the outset or whether to leave that decision until the evidence overall is considered by the Chamber at the end of the case.

Third, the Chamber must, where relevant, weigh the probative value of the evidence against its prejudicial effect. Whilst it is trite to observe that all evidence that tends to incriminate the accused is also «prejudicial» to him, the Chamber must be careful to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber's fair assessment of the issues in the case.

It follows, that this will always be a fact-sensitive decision, and the court is free to assess any evidence that is relevant to, and probative of, the issues in the case, so long as it is fair for the evidence to be introduced.

See No. ICC-01/04-01/06-1399, Trial Chamber I, 13 June 2008, paras. 19-32.

Even though the Chamber is not bound by any evidentiary rulings made by the Pre-Trial Chamber, the Chamber will only depart from a previous ruling on a challenge to the admissibility of a particular item of evidence where there are compelling reasons to do so.

With regard to challenges pertaining to new items of evidence that were submitted by the Prosecution since the confirmation of charges, the Chamber wishes to emphasise that the evidentiary regime under the Statute and the Rules is neither one of complete freedom of proof, nor does it create any pre-defined categories of information that are systematically inadmissible as evidence. Rather, rule 63(2) of the Rules grants the Chamber full discretion to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69. This means that the Chamber must evaluate each challenge on its individual merits, taking into account the specific characteristics and provenance of the item of evidence that is being challenged. Only if the Chamber identifies serious problems with a particular item of evidence, which render it epistemologically unsound or prejudicial to the fairness or integrity of the proceedings, it may, under article 69(4) of the Statute, rule the item inadmissible. The Chamber stresses, in this respect, that it will not entertain general arguments based on the category to which a specific item of evidence allegedly belongs. Consequently, if a party wants to challenge the admissibility of a specific item of evidence, it must establish specific and substantial grounds that could reasonably lead the Chamber to find that the item of evidence in question is epistemologically unsound or that its admission would be prejudicial to the fairness or integrity of the proceedings in the sense of article 69(4) or (7).

The remaining question, therefore, is to determine the most appropriate moment for the Chamber to consider any questions relating to the admissibility of evidence. The Chamber notes, in this respect, that rule 64 determines that «[a]n issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to the Chamber». The term 'submitted to the Chamber' must be interpreted with respect to the Chamber's overall responsibility to ensure that the proceedings are fair and expeditious, in accordance with article 64(2). Therefore, in light of the large number of items of evidence in this case and in order to avoid the congestion of the trial proceedings, the Chamber considers that a reasonable and appropriate interpretation of rule 64(1) is that the inclusion of an item of evidence in the Table of Incriminating Evidence amounts to its being 'submitted' to the Chamber within the meaning of rule 64(1) of the Rules. It follows from this interpretation that any issue relating to the relevance or admissibility of an item of evidence contained in the Table must be raised within a reasonable delay after the Table has been notified.

The Chamber hereby invites the parties to submit their observations on the possibility, outlined in the previous paragraph, to examine all issues of relevance and admissibility, which are already known to the parties, before the start of the trial on the merits.

See No. ICC-01/04-01/07-956, Trial Chamber II, 13 March 2009, paras. 34-37. See also No. ICC-01/04-01/06-1084, trial Chamber I, 13 December 2007, par. 8.

The Statute and the Rules set out the principles to be applied to the admissibility of evidence, other than witness evidence, in various provisions. These provided the basis for the Chamber's general approach to the admissibility of documents, as described in its «Decision on the admissibility of four documents on 13 June 2008». The Chamber ruled that it will focus, *first*, on the *relevance* of the material (*viz.* does it relate to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims); *second*, on whether or not it has *probative value* (bearing in mind, for instance, "the indicia of reliability"); and, *third*, on the *probative value of the evidence as against its prejudicial effect*.

Both common law and Romano Germanic legal systems usually contain rules setting out specific principles that are to be applied when addressing illegally obtained evidence. Article 69(7) of the Statute expressly regulates the admissibility of evidence obtained by means of a violation of the Statute or internationally recognized human rights. This provision is *lex specialis*, when compared with the general admissibility provisions set out elsewhere in the Statute. Furthermore, Article 69(7) represents a clear exception to the general approach, set out above.

The Statute prescribes that evidence is inadmissible if it was obtained by means of a violation of the Statute or internationally recognized human rights, if particular criteria are met. Notably, the Statute does not “quantify” the violation of the Statute, or the internationally recognized human right, by reference to the degree of “seriousness”. Therefore, even a non-serious violation may lead to evidence being deemed inadmissible, provided that one of the two limbs of the test in Article 69(7) is satisfied (namely: (a) the violation creates doubts about the reliability of the evidence; or (b) the admission is antithetical to or would seriously damage the integrity of proceedings). It is only in the second limb of the test that a requirement of a degree of «seriousness» is introduced, although this is unconnected to the seriousness of the violation.

The Statute clearly stipulates that the violation has to impact on international, as opposed to national, standards on human rights. Furthermore, the Court «[s]hall not rule on the application of a State's national law» (Article 69(8) of the Statute), and the Court is not bound by the decisions of national courts on the admissibility of evidence. Instead, the Court shall apply the sources of law set out in Article 21 of the Statute. Although the Court must take into account, under Article 21(l)(c), «[t]he national laws of the States that would normally exercise jurisdiction over the crime», these take second (and third) place to «the statute, the Elements of Crimes and its Rules of Procedure and Evidence» and «[a]pplicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict». Therefore, evidence obtained in breach of national procedural laws, even though those rules may implement national standards protecting human rights, does not automatically trigger the application of Article 69(7) of the Statute.

The fact that a violation involved the right to privacy of a third party is not relevant when deciding whether the first step of the test for inadmissibility of evidence under Article 69(7) is satisfied. The Statute states that «[e]vidence obtained by means of a violation of [...] internationally recognized human rights shall not be admissible [...]». Accordingly, the identity of the person whose human rights were infringed is not a material consideration. In other words, evidence does not become admissible simply because the violation did not involve the human rights of the accused. The Statute establishes the benchmark that evidence obtained otherwise than in compliance with internationally recognized human rights standards (or in breach of the Statute) shall be excluded, if it is potentially unreliable or would undermine the proceedings.

Turning to the issue of the documents seized in the DRC, the Pre-Trial Chamber decided that the process of search and seizure infringed the right to privacy of the owner of the property and, as set out above, the national Court of Appeal ruled that the search and seizure was concluded in a manner that was contrary to national procedural law. Moreover, the Pre-Trial Chamber found that the conduct was disproportionate to the objective of the national authorities, as hundreds of documents were indiscriminately seized that were unrelated to the purpose of the search. There is no reason for this Chamber to reach a different conclusion on these issues, and in particular that an unjustified violation of the individual's right to privacy occurred.

This violation of the right to privacy may have rendered the evidence inadmissible had the drafting history of the Statute concluded in 1994. The 1994 International Law Commission Draft Statute contained a rule that evidence obtained by means of a violation of rules of this Statute or other rules international law shall be automatically deemed inadmissible. However, after the extensive negotiations at the March and April 1998 sessions of the Preparatory Committee, the Rome Conference adopted a different formulation of this rule. Consensus was reached that evidence obtained by means of a violation of the Statute or internationally recognized human rights shall be inadmissible only if the violation casts substantial doubt on the reliability of the evidence or its admission would be antithetical to and would seriously damage the integrity of the proceedings (the dual test).

As described above, Article 69(7)(a) relates to the impact of the violation on the reliability of the evidence. The Pre-Trial Chamber found that the violation did not affect the reliability of the evidence in this case. If the search and seizure had been conducted in full adherence to the principle of proportionality the content of the items seized would have been the same.

Some scholars have suggested that any violation of internationally recognized human rights will necessarily damage the integrity of proceedings before the ICC. This argument does not take into account the fact that the Statute provides for a “dual test”, which is to be applied following a finding that there has been a violation. Therefore, should the Chamber conclude that the evidence had been obtained in violation of the Statute or internationally recognized human rights, under Article 69(7) it is always necessary for it to consider the criteria in a) and b), because the evidence is not automatically inadmissible. It is important that artificial restrictions are not placed on the Chamber's ability to determine whether or not evidence should be admitted in accordance with this statutory provision.

When deciding whether there has been serious damage to the «integrity of proceedings» as provided in Article 69(7)(b), it has been stressed that «the respect for the integrity of proceedings is necessarily made up of respect for the core values which run through the *Rome Statute*». It has been suggested that applying this provision involves balancing a number of concerns and values found in the Statute, including “respect for the sovereignty of States, respect for the rights of the person, the protection of victims and witnesses and the effective punishment of those guilty of grave crimes”. In respect of the latter, the effective punishment of serious crimes has been said to render it «utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed».

The Chamber considers that the probative value of the evidence in question cannot inform its decision on admissibility, if it has been obtained in violation of internationally recognized human rights or the Statute. This conclusion results, in part, from the aforementioned *lex specialis* nature of Article 69(7) vis-à-vis the general admissibility provisions set out in the Statute. For instance, Article 69(4) enables the «probative value of the evidence» to be weighed along with other considerations, such as the fair evaluation of a witness’s testimony and, more broadly, any prejudice the evidence may cause to the fairness of the trial. However, when addressing the exclusionary criteria of Article 69(7), it is impermissible to introduce this further factor, namely adding the probative value of the evidence as a criterion of admissibility. Therefore, arguments directed at its probative value (even that it alone provides proof of an element of the charges) are irrelevant.

Similarly, the seriousness of the alleged crimes committed by the accused is not a factor relevant to the admissibility of evidence under Article 69(7). As set out in the Preamble and Article 1 of the Statute, the Court has jurisdiction over the most serious crimes of international concern. Article 17(l) (d) of the Statute renders cases inadmissible that do not possess sufficient gravity to justify further action by the Court. Therefore, the core crimes and the cases which justify «further action» by the Court will always be of high seriousness, but the public interest in their prosecution and punishment cannot influence a decision on admissibility under this statutory provision. Indeed, there is no basis within the *Rome Statute* framework generally for an approach that would allow the seriousness of the alleged crimes to inform decisions as to the admissibility of evidence.

Particular consideration needs to be given to the presence of a member of the prosecution during the search and seizure exercise conducted by the Congolese authorities. The defence stressed during the Pre-Trial stage (in its filing of 7 November 2006) the significance of the presence of an investigator of the prosecution: «the Prosecution was not merely the «fortunate recipient» of the «fruits of the poisoned tree: the Prosecution investigator was physically present at the scene». This submission highlights one possible purpose of exclusionary rules of evidence: they have the effect, *inter alia*, of disciplining or deterring irregular or unlawful conduct by law enforcement officials. It is to be observed that it may turn out to be the case that this kind of evidence-gathering exercise is not normally carried out by investigators of the prosecution, particularly since the Court is said to be «a giant without arms and legs». It has not been endowed with an enforcement apparatus enabling it readily to obtain evidence in this way, but instead it must rely on the assistance of sovereign States. Whatever the future may hold in this regard, it is of note that the ICTY has held that the exclusionary rules contained in the framework of the Tribunal were not intended to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence in international proceedings. The ICTY Trial Chamber stated:

Domestic exclusionary rules are based, in part, on the principle of discouraging and punishing over-reaching law enforcement. [...] The function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence.

In the current case, an investigator from the prosecution was in attendance during the search and seizure exercise, as opposed to performing a more active role, but it would seem that its mere presence at an event of this kind does not serve to engage this exclusionary rule. Deterrence and discipline, if they are to be given any sustainable meaning and purpose within the framework of exclusionary rules, should be directed at those in authority - the individuals who control the process or who have the power, at least, to prevent improper or illegal activity. In this case, the search was the sole responsibility of the Congolese authorities, and they carried it out; in contrast, the prosecution’s investigator was only «permitted to assist». There are no indicators that the investigator controlled or could have avoided the disproportionate gathering of evidence, or that he acted in bad faith. Therefore, even if the purpose of this exclusionary rule is, *inter alia*, to discourage or discipline irregular activity, it would not apply in this instance as regards the prosecution.

By Article 69(7) (b) of the Statute, it is for the Chamber to determine the seriousness of the damage (if any) to the integrity of the proceedings that would be caused by admitting the evidence. The

Chamber notes particularly the following points as regards these documents: (i) the violation was not of a particularly grave kind; (ii) the impact of the violation on the integrity of the proceedings is lessened because the rights violated related to someone other than the accused; and (iii) the illegal acts were committed by the Congolese authorities, albeit in the presence of an investigator from the prosecution.

In all the circumstances, the Chamber has concluded that the breach of privacy in this instance does not affect the reliability of the evidence; nor should the material be excluded because of an argument that the breach was antithetical to, or damaged the integrity of proceedings. Put otherwise, applying Article 69(7), the relevant documents obtained during the search and seizure exercise are admissible, notwithstanding the breach of the fundamental right to privacy.

Against that background, as regards the entirety of this material, the Chamber has applied a document-by-document approach. As outlined above, the probative value of the documents obtained during the search and seizure exercise carried out by the Office of the Prosecutor of the *Tribunal de Grande Instance* of Bunia is an irrelevant consideration for the reasons that have been extensively rehearsed. Otherwise, the Chamber has applied the test established in its Decision on the admissibility of four documents. In the Annex to the present Decision, the Chamber has addressed the admissibility of each of these documents, following the status conference on 7 May 2009, during which the prosecution supplied further information, at the Chamber's request, on a number of the individual annexes. The Chamber has particularly borne in mind the arguments of the defence, first, that the category (ii) documents (in relation to which it had previously reserved its position as regards their authenticity and evidential value) did not present sufficient guarantee of authenticity and reliability to be admitted into the proceedings; second, that the category (iii) documents are inadmissible, on the basis of suggested lack of relevance to the charges or because the prosecution has failed to provide the best means of proof, together with the argument that the documents do not all emanate from the UPC or the FPLC; and, third, that some of those referred to in Annex 1 to the prosecution's application do not correspond to the contents of the documents provided, as described above.

See No. ICC-01/04-01/06-1981, Trial Chamber I, 24 June 2009, paras. 33-49.

4.3 Witnesses

4.3.1 Witnesses in general

The Chamber may put questions to a witness before, during or after the witness is examined by the Defence or the Prosecutor, as the case may be.

See No. ICC-01/04-01/06-678, Pre-Trial Chamber I (Single Judge), 7 November 2006, p. 7.

If witnesses are housed or travel together, regardless of the extent to which their accounts overlap, they should be warned with appropriate regularity that they must not discuss their impending evidence with each other (or anyone else). If a party considers that witnesses with overlapping accounts should be kept apart, they have an obligation to inform the VWU as to which witnesses fall into this category. The presumption will be that the VWU is to implement this separation unless it can show the party or, in case of dispute, the Chamber good reason as to why it is either unnecessary or impractical.

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

It is likely that a number of the witnesses in this case will also participate as victims. In all probability this group will have the benefit of legal representation, and in most - if not all - instances it will be appropriate for their advisers to be supplied with copies of their witness statements and any related materials, which as a result will be available to the witnesses they represent. It would be unfair on those witnesses who are without representatives to deny them, as a matter of course, a similar opportunity of gaining access to this documentation. However, the argument is well-founded that some witnesses could be put significantly at risk if they retain their statements because if this material is seen by a third party, it clearly establishes a level of cooperation with the ICC generally, and with the prosecution in particular. Since there is no established «right» to be given or to keep copies of this documentation within the *Rome Statute* framework, once again fact sensitive decisions will need to be made, which take into account the circumstances of each

witness. If there are grounds for concluding, because of an individual's vulnerability (particularly if the witness is unrepresented), that supplying copies would place him or her in danger, they should be withheld.

In these circumstances, steps should be taken to allow the witness the opportunity to look at, but not retain copies of, the statement(s) and any relevant documents if a request is made. On the other hand, if their personal circumstances are such that no identifiable danger exists (e.g. with witnesses living in areas of stability within the DRC or abroad) then, on request, copies should be provided. In these circumstances, the witness should be given an explanation of the need to protect themselves by ensuring that the written materials remain private. Where a witness does not have legal representation, a copy of his or her statement should be provided by the relevant party by way of the VWU. The witnesses should not bring any of this material into court; if it becomes necessary for reference to be made to one or more of the statements or related material, then (subject to objection) copies can be made available during the witness's testimony.

See No. ICC-01/04-01/06-1351, Trial Chamber I, 23 May 2008, paras. 34-35.

The provision of information, *inter partes*, of a non-public nature is governed by the twin requirements of necessity and witness-security. When the distribution of information to the public has been limited - for whatever reason - it is appropriate that its use should be carefully regulated so as to ensure compliance with those requirements.

Once information has been characterised as being non-public (whether it is characterised as "confidential", "*ex parte*" or "under seal"), its use should be limited to the strict purposes of the disclosure and members of the public should only be shown those parts of it that are truly necessary for the preparation and presentation of the case of a party or participant. With regard to permitting contact between a party or a participant and the witnesses to be called by the other party or a participant, the overarching consideration is the consent of the witness. Once a witness consents, unless the Chamber rules otherwise, contact should be facilitated. If the party or participant who intends to call a witness objects to the meeting, it shall raise the matter with the Chamber by way of an application in advance of the interview. The party or participant calling the witness is entitled to have a representative present during the interview, unless - again, following an application - the Chamber rules otherwise.

The Chamber hereby orders that whenever information, which is characterised in manner more restrictive than "public", is provided to a party or participant by another party or participant, the party or participant receiving the material should make its content available to the public only to the extent that is truly necessary for the preparation of its case. Whenever information protected by this principle is made available to a member of the public, the party making the disclosure must keep a detailed record thereof. The information shall be made available to only identified members of the public, who shall give a written and signed undertaking not to reproduce or publicise its content, in whole or in part, or to show or disclose it to any other person. If written material covered by this principle is made available to a member of the public, it must be returned to the party or participant who disclosed it once that person no longer needs it for case-preparation. For the purposes of this order, the term «public» includes all persons, governments, organisations, entities, associations and groups. It does not include the judges of the Court, members of the Registry, the Prosecutor and his representatives, the Accused, the defence team, victims granted the right to participate in the proceedings and their legal representatives.

Any member of the legal teams of the prosecution, the defence or a participating victim shall, upon no longer being part of those teams, return all "non-public" material in their possession to the relevant person within the team.

A party or a participant wishing to interview a witness whom the other party or a participant intends to call, shall first inform the party or the participant of the proposal, setting out the suggested time and location of the interview. If the witness consents, the party or participant shall make such contact through the Victims and Witnesses Unit, which shall make the necessary arrangements for the interview. A representative of the Victims and

Witnesses Unit shall be present during the interview and the party or participant intending to call the witness may also attend the interview, unless the Chamber has, on an application, ruled otherwise.

See No. ICC-01/04-01/06-1372, Trial Chamber I, 3 June 2008, paras. 9- 14. See also No. ICC-01/04-01/06-2192-Red, Trial Chamber I, 20 January 2010, paras. 47-28.

Although there may be important practical differences that the Chamber must take into account between the positions of the prosecution and the defence in the implementation of this rule (as discussed below), there are no sustainable reasons in principle for distinguishing between prosecution and defence witnesses for these purposes: neither party «owns» the witnesses it intends to call, and there are many reasons why a discussion with some individuals in advance of their testimony may assist in the efficient management of the proceedings, and assist the Chamber in its determination of the truth. For instance, irrelevant lines of questioning may be identified and discarded; lines of further enquiry may become clear, enabling their timely investigation prior to the witness giving evidence; and the opposing party may decide that the witness's evidence is not in dispute and, in consequence, it may be possible to agree his or her statement, along with any relevant documents (thereby obviating the need to bring the witness to court). Important considerations of this kind apply whoever is calling the witness, such as to justify, in principle, discussions in advance of a witness's evidence, so long as the latter consents. Additionally, it is open to the party calling the witness to raise any discrete objections with the Chamber.

Although the position in principle is, therefore, relatively easy to explain, its application in practice will be infinitely various. Whenever a request of this kind is made, and if the witness consents to the meeting, the party calling him or her will have to consider the circumstances of the proposed meeting and whether there are any significant adverse security implications; it will have to ensure there are no identifiable issues of concern as regards the individual witness's mental or emotional stability; and it will need to assess the resource implications of the proposal. It follows there must be close liaison between the party calling the witness, the party seeking the meeting and the VWU, and, on occasion, it may be necessary to ask the Chamber to rule on specific requests, or aspects of them.

In the present circumstances, the prosecution must identify each of the witnesses it seeks to meet; it must suggest in writing dates, times and locations for the interviews; and for those witnesses who agree to participate, contact is to be established through the VWU. A representative of the VWU shall be present during each interview, and the defence may attend (unless the Chamber has ruled otherwise). Depending on the financial implications of any requests that are made, the Registry may have to consider providing additional funding to enable the defence to attend each of these interviews. It is conceivable that this exercise may involve unexpected and significant additional cost on the part of the defence, which is solely due to a request from the prosecution and which the defence is obliged to meet.

Particular difficulties that cannot be resolved through sensible discussions, along with any objections to proposed meetings with particular witnesses, are to be raised with the Chamber (save in situations of emergency) by way of written applications.

See No. ICC-01/04-01/06-2192-Red, Trial Chamber I, 20 January 2010, paras. 49-52.

The Appeals Chamber finds that the possibility for the Victims to testify on matters including the role of the accused in the crimes charged against them, grounded on the Trial Chamber's authority to request evidence necessary for the determination of the truth, is not per se inconsistent with the rights of the accused and the concept of a fair trial. However, and as the Appeals Chamber held previously in the Lubanga case, the Trial Chamber must ensure, on a case-by-case basis, that the right of the accused to a fair trial is respected. Therefore, whether a victim will be requested to testify on matters relating to the conduct of the accused will depend on the Trial Chamber's assessment of whether such testimony: (i) affects the victim's personal interests; (ii) is relevant to the issues of the case; (iii) contributes to the determination of the truth; and (iv) whether the testimony would be consistent with

the rights of the accused, and in particular the right to have adequate time and facilities to prepare his defence (article 67 (1) (b) of the Statute), and a fair and impartial trial.

See No. ICC-01/05-01/07-2288, Appeals Chamber, 16 July 2010, para. 114.

4.3.2 Familiarisation of witnesses

The familiarisation of witnesses is the process aiming at preparing the witness to give oral evidence before the Court in order to prevent being taken by surprise or being placed at a disadvantage due to ignorance of the Court's proceedings. This first component consists basically of a series of arrangements to familiarise the witnesses with the layout of the Court, the sequence of events that is likely to take place when the witness is giving testimony, and the different responsibilities of the various participants at the hearing.

See No. ICC-01/04-01/06-679, Pre-Trial Chamber I, 8 November 2006, paras. 15, 20 and 23.

Even though the expression "witness familiarisation" does not appear in the Statute nor in the Rules, there are several provisions in relation with the purpose of such practice: articles 43(6), 57(3)(c), 68(1), 87, 88 of the *Rome Statute* and rules 16(2) and 17(2)(b) of the *Rules of Procedure and Evidence*. Witness familiarisation is mandatory pursuant to these provisions.

See No. ICC-01/04-01/06-679, Pre-Trial Chamber I, 8 November 2006, paras. 21 and 23.

Pursuant to article 43(6) of the *Rome Statute* and rules 16-17 of the Rules of Procedure and Evidence, the Victims and Witnesses Unit is the competent section of the Court to carry out any witness familiarisation.

See No. ICC-01/04-01/06-679, Pre-Trial Chamber I, 8 November 2006, par. 24. See also No. ICC-01/04-01/06-1049, Trial Chamber I, 30 November 2007, par. 33 and No. ICC-01/04-01/07-1134, Trial Chamber II, 14 May 2009, par. 18.

The purpose of allowing a witness to reread his or her statements is to help to «refresh» potentially fallible memories. This is not an "evidence-checking" procedure, namely establishing whether or not the witness maintains the original account or whether he or she considers that changes to the written account need to be made. Any discrepancies of that kind should be ventilated in court rather than being discussed and recorded shortly before the witness gives evidence. The Chamber is more likely to identify the truth if the witness explains any reservations about the written account during their oral testimony, rather than by having his or her concerns interpreted and recorded by a representative of the VWU. Therefore, the submissions of the VWU are apposite to the extent that it suggests it should not be under any duty to monitor or record anything that is said by the witnesses during this familiarisation process, unless something exceptional occurs. Although representatives of the parties or participants may be present during the familiarisation process, including when the written records are read, they will be unable to speak with the witness about the evidence, and as a result they will only be permitted to watch the procedure. Similarly, if the witness is also a participating victim who is represented, with the witness's consent, the representative can be present during this process.

See No. ICC-01/04-01/06-1351, Trial Chamber I, 23 May 2008, paras. 38-39. See also No. ICC-01/04-01/07-1134, Trial Chamber II, 14 May 2009, par. 18.

4.3.3 Witness Proofing

No general principle of law could provide legal basis for the practice of witness proofing (*i.e.* the preparation of witnesses by parties for testimony). On the contrary, if any general principle of law were to be derived from the national laws of the legal systems of the world on this particular matter, it would be the duty of the Prosecution to refrain from undertaking the practice of witness proofing.

See No. ICC-01/04-01/06-679, Pre-Trial Chamber I, 8 November 2006, par. 42. See also No. ICC-01/04-01/06-1049, Trial Chamber I, 30 November 2007, par. 36.

A visit to the courtroom and a 'walk through' of the particular features the witness will encounter during their testimony is necessary, partly to provide as comfortable an environment as possible for the witness and partly to allow for the efficient presentation of their evidence. [...] Particular attention should be paid to any children who are called as witnesses to ensure that their psychological well-being is considered as a matter of paramount importance, pursuant to article 68 of the Statute and Rule 88 of the Rules.

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

Since the party which intends to call a particular witness is likely to have greater insight into the background and particular facets of the witness, which may assist the Victims and Witnesses Unit in discharging their role during the witness familiarisation process. The Victims and Witnesses Unit shall work in consultation with such a party in order to undertake the practice of witness familiarisation in the most appropriate way.

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

The Trial Chamber considers then that even though the practice of "witness proofing" is accepted to an extent in two legal systems [England and Wales], both of which are founded upon common law traditions, this does not provide a sufficient basis for any conclusion that a general principle based on established practice of national legal systems exists. The Chamber observes in particular that whilst the accepted practice allows the witness to read again his past statement prior to giving evidence, it permits neither substantive conversations between the prosecution or the defence and a witness nor any type of question and answer session to take place prior to the witness giving evidence.

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

In this respect, the Trial Chamber observes that the Statute moves away from the procedural regime of the *ad hoc* tribunals, introducing additional and novel elements to aid the process of establishing the truth and that, therefore, the procedure of preparation of witnesses before trial is not easily transferable into the system of law created by the ICC Statute and Rules. [...] While acknowledging the importance of considering the practice and jurisprudence at the *ad hoc* Tribunals, [the Chamber declares not to be] persuaded that the application of *ad hoc* procedures, in the context of preparation of witnesses for trial, is appropriate.

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

Allowing a witness to read his past statements will aid the efficient presentation of the evidence and help the Trial Chamber to establish the truth, since this process is likely to clarify for the witness events that occurred some time previously. At the same time, with regard to any discussion on the topics to be dealt with in court or any exhibits which may be shown to a witness in court, the Trial Chamber declares not to be convinced that either greater efficiency or the establishment of the truth will be achieved by providing past statements to a witness. Moreover, in the Chamber's view, this could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony, since a rehearsed witness may not provide the entirety or the true extent of his memory or knowledge of a subject, and the Trial Chamber would wish to hear the totality of an individual's recollection. The Trial Chamber further considers that the preparation of witness testimony by parties prior to trial may diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness, whilst the spontaneous nature of testimony can be of paramount importance to the Court's ability to find the truth". The Chamber finally states that [t]he pro-active role of judges under the Statute and Rules will help to ensure that witnesses are not 'revictimized' by their testimony, whilst also preventing any improper influence being applied to the witness.

See No. ICC-01/04-01/06-1049, Trial Chamber I, 30 November 2007, paras. 50-52.

4-3-4 Questioning of witnesses

A party may question a witness it has not called about matters which go beyond the scope of the witness's initial evidence. [...] Other relevant matters in terms of rule 140(2) (b) of the *Rules of Procedure and Evidence* may include trial issues, sentencing issues

and reparation issues. The parties are under an obligation to put such part of their case as is relevant to the testimony of a witness, *inter alia*, to avoid recalling witnesses unnecessarily. [Since witness questioning is a dynamic process], in principle, the parties are not under a legal obligation to disclose their lines of questions in advance. [Nevertheless], the Chamber appreciates that exceptions may be necessary, particularly in order to protect traumatised or vulnerable witnesses.

See No. ICC-01/04-01/06-1140, Trial Chamber I, 29 January 2008, paras. 32-33. See also oral decision of Trial Chamber I, No. ICC-01/04-01/06-T-107-ENG, 26 January 2009, pp. 72-73.

As a general instruction to all the parties appearing before it, the Chamber wishes to highlight the importance of asking succinct and precise questions, which are easily understandable by the person being questioned. Long and compounded questions are to be avoided.

A. *Examination-in-chief/Interrogatoire en chef*

1. **Scope of questioning**

As stated in rule 140(2)(a), a party submitting evidence by way of a witness, has the right to question that witness.

As a matter of principle, the Chamber will only allow questions that are clearly and directly relevant to contested issues. To the extent that a party has provided an indication of the themes it proposes to raise with a certain witness, and subject to any instructions by the Chamber regarding this matter, that party will be expected to confine its examination-in-chief to those themes.

Questions concerning the historical background and/or contextual elements of the case should as much as possible be focused on such matters as to which there is disagreement between the parties.

To the extent possible, both Defence teams should attempt to coordinate the calling of witnesses. As a matter of principle, the Chamber will not allow the same witness to be called more than once, unless there are overriding reasons for doing so.

When both accused wish to call the same witness, they shall coordinate with each other so as to avoid having to call the witness more than once. The Chamber therefore expects that in such a case the witness will be called by both Defence teams jointly. They shall agree among themselves how to organise the examination-in-chief and re-examination. In principle, all questions on behalf of both accused are to be put during examination-in-chief. The Defence teams may agree to partition the examination-in-chief of a witness or assign one Defence team to conduct the entire questioning. When one Defence team conducts the examination-in-chief on behalf of both accused, the other Defence team shall not have the right to cross-examine the witness.

2. **Mode of questioning**

As a general rule, during examination-in-chief only neutral questions are allowed. The party calling the witness is therefore not allowed to ask leading or closed questions, unless they pertain to an issue that is not in controversy.

However, if a party declares that the witness it has called has become adverse and the Chamber allows that party to continue questioning the witness, it may be appropriate for that party to cross-examine the witness. In such case, cross-examination must be limited to issues raised during the initial part of the interrogation or contained in the witness' previous statements.

B. Cross-examination/Contre-interrogatoire

1. Scope of questioning

It is a general rule and principle of fairness that the party opposing the party calling a witness, has the right to question that witness by way of cross-examination, in accordance with rule 140(2)(b).

Cross-examination shall be limited to matters raised during examination-in-chief and matters affecting the credibility of the witness. In addition, where the witness is able to give evidence relevant to the case for the cross-examining party, it may ask questions about such matters, even if they were not raised during examination-in-chief.

To the extent that the case of the cross-examining party is in contradiction with the evidence given by the witness during examination-in-chief, that party shall state this clearly to the witness before putting questions on that topic.

The Chamber stresses that cross-examination must also contribute to the ascertainment of the truth and is not to be used to obfuscate or delay the fact-finding process. As a general measure of good practice and subject to further specific instructions by the Chamber, parties are encouraged to adhere to the following guidelines when cross-examining:

- a) Questions must pertain to matters of fact that could reasonably be expected to be known to the witness. Unless the witness is called as an expert, parties may not ask witnesses to speculate or explain their opinion about facts not known to them.
- b) Before putting questions about contextual elements and/or the historical context of the case, counsel must state the purpose behind the question and explain how the evidence sought is relevant to the confirmed charges.
- c) Questions probing the credibility of the witness and the accuracy of his or her testimony are allowed, but must be limited to factors that could objectively influence reliability. When the witness has fully answered the question, the party cross-examining the witness will not be allowed to put further questions aimed at impeaching that answer without permission of the Chamber.
- d) If a witness did not provide all his or her testimony orally during examination-in-chief because the testimony was introduced by way of prior recorded testimony under rule 68(b), the cross-examining party must limit questioning to:
 - i. issues contained in the passages of the prior recorded testimony that were relied upon by the party calling the witness, or
 - ii. matters that are relevant to its own case.

The Chamber will not allow cross-examination on matters raised in the previously recorded testimony that have not been tendered into evidence by the party calling the witness.

The two Defence teams may agree among themselves if they wish to change the order in which they will cross-examine the witness. To the extent possible, the Chamber encourages them to coordinate so that only one of the Defence teams conducts the cross-examination. However, if the both Defence teams insist on conducting their own cross-examination, the Chamber will be strict in prohibiting repetitive questions and limit the second cross-examination to questions that pertain to matters directly relevant exclusively to its client. Challenges to credibility or accuracy of the witness should, in principle, only be asked by the first Defence team cross-examining the witness.

2. Obligation to put all questions relevant to the case of the cross-examining party

Cross-examination allows the party not calling the witness to elicit all further relevant evidence as may be useful for the case of that party or necessary for the determination of the truth. It is therefore incumbent upon the cross-examining party to put all questions it may have for the witness during this occasion. In principle, the Chamber will not allow a party to re-call a witness if it already had the opportunity to cross-examine him or her.

3. **Mode of questioning**

- a) Leading and closed questions allowed

The party cross-examining may ask leading and closed questions of a witness. The Chamber insists that cross-examination is conducted in a focused and professional manner. It will not allow unwarranted insinuations or questions that are concealed speeches.

- b) Challenging questions allowed

It is permissible to challenge the credibility of a witness by way of challenging questions, but cross-examination must at all times remain civil and respectful to the witness. The Chamber will not allow parties to assault the dignity or exploit the vulnerability of witnesses during cross-examination.

- c) Specific limitations for cross-examination by co-accused

As explained above, the Chamber expects that, as a general rule, parties who have not called a witness will put all questions pertaining to their case during cross-examination. This implies that when a witness called by one accused is subsequently cross-examined by the co-accused (who did not jointly call the witness), the latter Defence has the obligation to put all questions that are relevant to its case at that time. In principle, the cross-examining co-accused will not be allowed to put leading or closed questions in relation to matters that are being raised for the first time, unless the witness is clearly adverse to the co-accused.

C. ***Re-examination/Interrogatoire supplémentaire***

1. **Scope of questioning**

After cross-examination, the party who originally called the witness has the right to ask additional questions of the witness, but only in relation to matters that were raised for the first time during cross-examination, unless the Chamber exceptionally allows other questions.

2. **Mode of questioning**

The same rules that apply to examination-in-chief shall equally apply to re-examination.

D. ***Final questions by the Defence***

According to rule 140(2)(d), the Defence has the right to be the last to examine a witness. This means that if a witness was not called by an accused, the latter shall have the right to ask additional questions of the witness after he or she was re-examined by the party calling him or her.

1. **Scope of questioning**

Final questions are limited to matters raised since the Defence last had the opportunity to question the witness. If the Defence does not exercise its right to cross-examine a particular witness, it also waives its right to ask final questions of that witness, unless new matters are raised by additional questions of the Chamber or the participants after the examination-in-chief.

2. **Mode of questioning**

The same rules that apply to examination-in-chief shall equally apply to final questioning.

E. ***Questions by Victims' Legal Representatives***

As a matter of general principle, questioning by the Legal Representatives on behalf of victims who participate in the proceedings must have as its main aim the ascertainment of the truth. The victims are not parties to the trial and certainly have no role to support the case of the Prosecution. Nevertheless, their participation may be an important factor in helping the Chamber to better understand the contentious issues of the case in light of their local knowledge and socio-cultural background.

The following rules apply to questioning by Victims' Legal Representatives of witnesses called by other parties, participants or the Chamber.

See No. ICC-01/04-01/07-1665, Trial Chamber II, 20 November 2009, par. 60-83.

The questioning of witnesses by the victims' legal representatives pursuant to Rule 91(3) of the Rules is one example of the ways in which victims may participate in the proceedings. However, this rule only describes the procedure that the legal representatives are to follow in order to apply for leave to ask questions. In the absence of any relevant provisions in the *Rome Statute* framework, the manner of questioning falls to be determined by the Chamber.

The terms "examination-in-chief", "cross-examination" and "re-examination", which are used in common law and Romano Germanic legal systems, do not appear in the Statute. However, as set out in the procedural history above, these expressions have been used as terms of convenience by the parties and the participants when addressing the issue of how witnesses are to be questioned during their evidence before the Trial Chamber.

The purpose of the "examination-in-chief" is "to adduce by the putting of proper questions [...] relevant and admissible evidence which supports the contentions of the party who calls the witness". It follows from this purpose that the manner of such questioning is neutral and that leading questions (*i.e.* questions framed in a manner suggestive of the answers required) are not appropriate. However, it needs to be stressed that there are undoubted exceptions to this approach, for instance when leading questions are not opposed. In contrast, the purpose of "cross-examination" is to raise relevant or pertinent questions on the matter at issue or to attack the credibility of the witness. In this context, it is legitimate that the manner of questioning differs, and that counsel are permitted to ask closed, leading or challenging questions, where appropriate

The victims' legal representatives, however, fall into a category that is distinct and separate from the parties, and in this regard a description of the manner of questioning by the victims' legal representatives that uses the concepts of "examination in chief", "cross-examination" and "re-examination" is not necessarily helpful. This particular aspect of the proceedings at trial - the manner of questioning by the victims' legal representatives - is an example of the novel nature of the Statute, which is not the product of either the Romano Germanic or the common law legal systems. As participants in the proceedings, rather than parties, the victims' legal representatives have a unique and separate role which calls for a bespoke approach to the manner in which they ask questions.

By Article 66(2) of the Statute, one of the prosecution's primary functions is to prove the guilt of the accused: «[t]he onus is on the prosecutor to prove the guilt of the accused». However, the Appeals Chamber has held that this responsibility on the part of the prosecution does not "preclude the possibility for victims to lead evidence pertaining to the guilt of the accused". It follows that, depending on the circumstances, the alleged guilt of the accused may be a subject that substantively affects the personal interests of the victims, and the Appeals Chamber has determined that the Trial Chamber may authorise the victims' legal representatives to question witnesses on subjects that relate to this issue:

In addition the Trial Chamber finds support for this approach in the provision under rule 91 (3) of the Rules. Under this rule the Trial Chamber may authorise, upon request, the legal representatives of victims to question witnesses or to produce documents in the restricted manner ordered. The Appeals Chamber considers that it cannot be ruled out that such questions or documents may pertain to the guilt or innocence of the accused and may go towards challenging the admissibility or relevance of evidence in so far as it may affect their interests earlier identified and subject to the confines of their right to participate.

It follows that the victims' legal representatives may, for instance, question witnesses on areas relevant to the interests of the victims in order to clarify the details of their evidence and to elicit additional facts, notwithstanding its relevance to the guilt or innocence of the accused.

Under the scheme of the Statute, questioning by the victims' legal representatives has been linked in the jurisprudence of the Trial and the Appeals Chambers to a broader purpose, that of assisting the bench in its pursuit of the truth. The framework establishing the rights of victims as regards their participation during trial has been coupled expressly with the statutory powers of the Trial Chamber, pursuant to Article 69(3) of the Statute, «[t]o request the submission of all evidence that it considers necessary for the determination of the truth». The Appeals Chamber explained that:

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

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

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

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

See No. ICC-01/04-01/06-2127, Trial Chamber I, 16 September 2009, paras. 20-30.

4.3.5 Protection and well-being of witnesses

Applying article 64 of the *Rome Statute* [and with respect to rules 87 and 88 of the *Rules of Procedure and Evidence*], the Chamber will ensure that appropriate steps are taken to guarantee the protection of all victims and witnesses, and particularly those who have suffered trauma or who are in a vulnerable situation. The Chamber will rule on the merits of individual application [under rules 87 and 88] taking into account, inter alia, whether i) the testimony of a vulnerable witness is to be treated as confidential and access to it is to be limited to the parties and the participants in the proceedings; ii) evidence in appropriate circumstances can be given out of the direct sight of the accused or the public; iii) a witness should be able to control his or her testimony, and, if so, to what extent; iv) breaks in the evidence should be allowed as and when requested; a witness can require that a particular language is used.

See No. ICC-01/04-01/06-1140, Trial Chamber I, 29 January 2008, par. 35.

The obligation to identify, protect and respect the well-being and dignity of witnesses rests significantly with the party or participant calling the witness, but the other party and the participants, as well as the Court, have responsibilities in this regard. Thus, the Chamber calls on all the parties and participants, and in particular on the VWU, to inform the Chamber on the earliest opportunity on any specific concerns they may have regarding the integrity and well-being of a witness, and especially with those who may be traumatised or vulnerable.

See No. ICC-01/04-01/06-1140, Trial Chamber I, 29 January 2008, par. 36.

The Chamber’s Decision on witness’ familiarisation held that the practice known as the “proofing” of witnesses by a party calling a witness will not be allowed, and the Victims and Witnesses Unit is responsible for dealing with witnesses in advance of their testimony before the Court. In addition, Rule 87(1) of the Rules provides that the Victims and Witnesses Unit, as appropriate, may be consulted by the Chamber before protective measures are ordered. The Chamber remains of the view that the Victims and Witnesses

Unit is the only organ of the Court which should deal with witnesses upon their arrival in The Hague, including reviewing their security. However, there should be close cooperation between the Unit and the prosecution, particularly in light of Article 68(4) of the Statute which provides that the «[V]ictims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.»

Nonetheless, the Trial Chamber considers that, pursuant to Rule 87 of the Rules, the responsibility for filing applications for protective measures lies primarily with the party calling a witness. The prosecution is therefore directed to file applications for protective measures for witnesses it is to call, based on the information already in its possession and supplemented, as appropriate, by any relevant information provided by the Victims and Witnesses Unit at the time of the filing of the applications. Thereafter, the prosecution may raise orally, or by way of a filing, any new information, provided by the Victims and Witnesses Unit concerning the witnesses prior to, or following, their evidence at trial, which is relevant to their security.

See No. ICC-01/04-01/06-1547, Trial Chamber I, 9 December 2008, paras. 5-6.

The Chamber has also borne in mind that it has wide-ranging obligations as regards protective measures that require it to take all necessary steps to protect victims and witnesses, so long as these do not undermine the fairness of the proceedings or materially prejudice the defence. In light of the Appeals Chamber's decision referred to above, this obligation extends to persons who may be at risk on account of activities of the Court.

See No. ICC-01/04-01/06-1980-Anx2, Trial Chamber I, 24 June 2009, par. 48.

The Appeals Chamber emphasises that relocation is a serious measure that can, as argued by the Registrar, have a "dramatic impact" and «serious effect» upon the life of an individual, particularly in terms of removing a witness from their normal surroundings and family ties and re-settling that person into a new environment. It may well have long-term consequences for the individual who is relocated - including potentially placing an individual at increased risk by highlighting his or her involvement with the Court and making it more difficult for that individual to move back to the place from which he or she was relocated, even in circumstances where it was intended that the relocation should be only provisional. Where relocation occurs, it is likely to involve careful and possibly long-term planning for the safety and well-being of the witness concerned.

See No. ICC-01/04-01/07-776, Appeals Chamber, 26 November 2008, par. 66.

It is of note that article 43(6) is the sole provision of the Statute that deals with the setting up of a unit specifically to provide protective measures to victims and witnesses. The VWU is the responsibility of the Registrar and is situated within the Registry. There is no similar provision that establishes a unit for the provision of protective measures within the Office of the Prosecutor; nor is there therefore any provision which places the responsibility for such a unit under the authority of the Prosecutor.

The functions of, and responsibilities relating to, the VWU are expressly regulated by rules 16 to 19 of the *Rules of Procedure and Evidence*.

Those rules contain the only specific provision on relocation to appear in the statutory scheme of the Court. Rule 16(4) provides that agreements on relocation may be negotiated with States by the Registrar on behalf of the Court.

In addition, the specific provisions regulating the functions of the VWU are of note in this context. Rule 19(a) provides that the VWU may include, as appropriate, persons with expertise, inter alia, in witness protection and security. It was therefore foreseen that experts in witness protection and security would be located within the VWU. Given the serious consequences of relocation, as referred to above, it is appropriate that questions of relocation be considered by those with appropriate expertise.

Among the provisions regulating the functions of the VWU is rule 17(2)(a)(i), which refers to the VWU, in consultation with the Chamber, the Prosecutor and the defence, as appropriate, providing all witnesses, victims and others at risk on account of testimony given by such witnesses with adequate protective and security measures and formulating

long- and short-term plans for their protection. The responsibility for the formulation of plans for the adequate protection of witnesses falls within the mandate of the VWU. The formulation of such plans is likely to be of particular relevance in cases where questions of relocation arise, in light of the seriousness of the measure and its potentially long-term duration, as referred to above.

Also of note in the context of the rules outlining the responsibilities of the VWU is rule 18 (b), which specifically mandates the VWU to «[r]espect the interests of the witness» and to «[a]ct impartially when cooperating with all parties», while recognising the specific interests of the Office of the Prosecutor, the defence and the witnesses.

See No. ICC-01/04-01/07-776, Appeals Chamber, 26 November 2008, paras. 74-79. See also No. ICC-01/04-01/07-428-Corr, Pre-Trial Chamber I (Single Judge), 25 April 2008, par. 22-28.

In relation to emergency situations, the Impugned Decision recognised that there might be exceptional circumstances in which a witness is facing a serious threat of imminent harm that requires an immediate response. In such circumstances, the protection of the individual concerned is necessarily paramount. The Appeals Chamber approves generally the scheme set out by the Pre-Trial Chamber at paragraph 36 of the Impugned Decision in this regard, while recognising that, by the very nature of emergency situations, there may need to be some degree of flexibility in this regard. The Appeals Chamber envisages that, in an urgent situation in relation to a person for whom relocation is sought, the Prosecutor may request the VWU to take a temporary emergency measure to protect the safety of a witness while the overall application for relocation is under consideration. The Appeals Chamber notes, in this context, the reference to a witness being placed temporarily in a “safe house” while the VWU completes its assessment of whether a witness should be relocated.

The Appeals Chamber also cannot rule out that there may be situations in which temporary emergency measures may have to be taken by the Prosecutor in relation to a person for whom relocation is sought, in a situation of urgency. However, in the abstract and without a specific set of factual circumstances before it, the Appeals Chamber would not envisage such temporary measures to include the preventive relocation of a witness.

See No. ICC-01/04-01/07-776, Appeals Chamber, 26 November 2008, paras. 102-103. See also No. ICC-01/04-01/07-428-Corr, Pre-Trial Chamber I (Single Judge), 25 April 2008, paras. 35-36.

4.3.6 Dual status of victims and witnesses

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

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

However, when the Trial Chamber considers an application by victims who have this dual status, it will establish whether the participation by a victim who is also a witness may adversely affect the rights of the defence at a particular stage in the case. The Trial Chamber will take into consideration the modalities of participation by victims with dual status, the need for their participation and the rights of the accused to a fair and expeditious trial.

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

including providing information on any victims who have dual status. Although the cooperation of the defence is expected in this regard, the Chamber is not persuaded that this should be described as an obligation. The Trial Chamber notes that consultations have taken place between the Victims and Witnesses Unit, the Victims Participation and Reparations Section, the parties and the participants on possible practical arrangements for the exchange of information on persons with the dual status of victim and witness and that discussions are continuing.

On the issue of whether or not the Victims and Witnesses Unit has responsibility for victims who have applied to participate prior to the determination by the Court of their application, the starting point is Article 43(6) of the Statute which provides:

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

In the view of the Chamber, the process of “appearing before the Court” is not dependent on either an application to participate having been accepted or the victim physically attending as a recognised participant at a hearing. The critical moment is the point at which the application form is received by the Court, since this is a stage in a formal process all of which is part of «appearing before the Court», regardless of the outcome of the request. Therefore, once a completed application to participate is received by the Court, in the view of the Chamber, «an appearance» for the purposes of this provision has occurred. Whilst the Chamber readily understands that considerable demands are made on the Victims and Witnesses Unit and there are undoubted limitations on the extent of the protective measures that can be provided, nonetheless to the extent that protection can realistically be provided by the Court during the application process, the responsibility for this rests with the Victims and Witnesses Unit, pursuant to Article 43(6). It follows the Chamber rejects the submissions of the Prosecution and accepts the concession made at one stage by the Registrar that this responsibility lies with the Unit.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 132-137.

At the outset, the Single Judge notes that neither the Statute nor the Rules expressly prohibit the recognition of the procedural status of victim to an individual who is also a witness in the case. Indeed, the Single Judge observes that among the criteria provided for in rule 85 of the Rules for the granting of the procedural status of victim in any given case, there is no clause excluding those who are also witnesses in the same case.

Moreover, the Single Judge also notes that neither the Statute nor the Rules contain any specific prohibition against the admissibility of the evidence of individuals who have been granted the procedural status of victim in the same case. In this regard, the controlling provision is article 69 (4) of the Statute, which provides that:

The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the *Rules of Procedure and Evidence*.

[...]

In relation to the set of procedural rights to be granted to Witness 166 as a result of the Single Judge's recognition of his procedural status of victim at the pretrial stage of the present case, the Single Judge observes that neither the Statute nor the rules establish any specific limitation on the set of procedural rights to be granted to an applicant who is also a witness in the same case. Nevertheless, the Single Judge notes that article 68 (3) of the Statute makes clear that any such set of procedural rights must be defined «[i]n a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.»

Moreover, the Single Judge also notes that neither the Statute nor the rules contain any specific limitation on the probative value to be given to the evidence of a witness who also has the procedural status of victim in the same case.

In this regard, the Single Judge observes that, in its 18 January 2008 Decision, the Trial Chamber did not specify (i) the set of procedural rights granted to individuals who have the dual procedural status of victim and witness; and (ii) the consequences, if any, for the probative value of the evidence given by an individual with such a dual status.

See No. ICC-01/04-01/07-632, Pre-Trial Chamber I (Single Judge), 23 June 2008, paras. 18-19 and 23-25.

Introductory remarks

Prior to addressing the issues raised by the parties, the participants and the relevant sections of the Court on the subject of individuals with dual status, the Chamber identifies the following principles:

- a. Participation by an individual as a victim in the proceedings shall not compromise his or her security;
- b. The fact that an individual has dual status does not grant him or her rights in addition to those of someone who is only a victim or a witness; and
- c. Communication between the different sections of the Registry, as the Court's neutral body with principal responsibility for the protection of witnesses and victims, must be direct and continuous.

The role of the VWU and communicating information to the Registry

The Chamber endorses the following matters, as agreed by the parties and participants:

- a. As a general rule, the fact that an individual participates in the ICC protection programme shall remain confidential;
- b. The VWU shall facilitate all contact between a protected individual and the other organs of the Court, the parties and the participants;
- c. The VWU does not have an obligation to disclose to a party or the participants the details of contact with a protected individual; and
- d. The VWU should be aware of the dual status of a protected individual in order to reduce possible risks and to facilitate a proper risk-assessment.

As regards the practical solutions proposed by the VWU, the Trial Chamber:

- a. Recommends that the VWU assessment-procedure includes questions as to whether the applicant may have dual status;
- b. Orders that the VWU is:
 - afforded access (as necessary) to the VPRS records,
 - notified of all applications communicated to the Chamber, and
 - is provided with the accompanying reports, as well as any decision of the Chamber granting participating status to an applicant.
- c. Orders the party who refers a witness to the ICC protection programme to inform the VWU as soon as possible if they are aware of an individual's potential dual status.
- d. Orders the VWU to inform the VPRS of the dual status of an individual in order for the section to take this into account when notifying applicants and when submitting any confidential ex parte report to the Chamber.

- e. Orders the VWU to advise witnesses with potential dual status to seek legal advice when it is aware that the witness may also be a potential victim.

Communication between the legal representative of a victim and the prosecution

The Chamber endorses the following procedure which was agreed upon by the parties, participants and the relevant sections of the Registry:

- a. When the legal representatives of victims become aware that their client has dual status, they should provide the prosecution with the name of the individual, his or her date of birth and other identifying information, to the extent possible;
- b. Thereafter, the prosecution should check whether or not the witness has dual status, and if so, communicate this in writing to the legal representative (including when the witness is under the ICC protection programme);
- c. The prosecution should also verify whether it intends to make an application for protective or special measures under Rules 87 and 88 of the Rules and communicate this to the legal representative;
- d. The procedure under a., b. and c. above is subject to the following conditions:
 - there must be a solicitor-client relationship between the individual and the legal representative;
 - all communications must be confidential; and
 - legal representatives must have the victims' consent to disclose his or her identity to the prosecution.

In the event that the above *inter partes* mechanism fails, the Chamber orders that the following alternative procedure shall apply:

- a. The legal representative shall make an application to the Chamber in order to verify whether his or her client is in the ICC protection programme.
- b. Thereafter, the Chamber shall hold an ex parte, Registry-only hearing with the VWU and the VPRS in attendance (as the two sections of the Registry dealing with witnesses and victims).
- c. At that hearing, the Registry shall inform the Chamber as to whether the individual has dual status.
- d. If the person has dual status, it will be open to the Chamber to order the Registry to communicate with the individual, to seek his or her consent as regards the possible communication of this fact to the legal representative.

Communication between the legal representative of a victim and the defence

The Chamber endorses the following as agreed by the parties and participants:

- a. The legal representative shall communicate the name of his or her client to the defence, where the identity of that victim is already known by the defence; and
- b. The defence shall thereafter inform the legal representatives if the name provided is a potential witness for the defence.

When the defence is unaware of the identity of the individual, the legal representative should make an application in accordance with paragraph 56 above.

Modalities of contact with individuals enjoying dual status

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

- a. When a party wishes to contact an individual with dual status, it shall provide notice of this to the legal representative, when it is aware the person has legal representation;
- b. If a person with dual status requests to contact the parties or participants, the VWU will facilitate the contact, which will not be revealed to other parties and participants.

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

Contact between a witness with dual status and his or her legal representative

The Chamber endorses the agreement of the parties that, as a general rule, the legal representative may contact his or her client if they are a victim with dual status.

Providing the legal representatives with a copy of the signed statements and other materials, such as notes and documents, relating to a witness with dual status

The Chamber notes that as regards this particular issue there is no clear agreement between the parties and participants. Whilst the Chamber is sympathetic to the need for the parties to be able to control their own materials, it is persuaded that materials in the possession of the parties which not only relate to specific participating victims with dual status but were also produced with their direct involvement and assistance should, whenever possible, be provided to the legal representative of the relevant participating victim in order to enhance the role of both of them and to assist the Chamber.

Accordingly, the Chamber establishes the following procedure:

- a. If access is sought to materials in these circumstances, the legal representatives shall submit a detailed request outlining, inter alia, the reasons why access should be provided;
- b. Unless reasons exist for refusing access, the parties shall provide the legal representative of dual status victims, upon request, with a copy of these materials, under conditions of strict confidentiality;
- c. If a party considers that it should not provide particular materials or will only submit them in redacted or summary form, it shall inform the Chamber and the legal representative of the reasons; and
- d. The Chamber will then consider the matter, if an application is made by the legal representative.

Attendance by the legal representatives at the medical examination of witnesses with dual status and disclosure of any report to the legal representatives

The Chamber approves the agreement between the parties that as a general rule the legal representative may be present during a medical examination of a victim or victim-applicant with dual status, provided that there is consent from the individual concerned.

The presence of the legal representative must not in any way obstruct a proper medical examination

The same procedure as stated in paragraph 56 above applies where the legal representative is unable to obtain the consent of the individual.

The attendance of the legal representative at interviews of a witness with dual status

The Chamber endorses the agreement between the parties that as a general rule the legal representative may be present during an interview of an individual with dual status, provided there is consent from the individual concerned.

The legal representative has the right to receive a copy of the statement, transcript or recording made during the interview.

The presence of the legal representative must not obstruct a proper interview.

If the party considers that the presence of the legal representative is inappropriate, it shall, as soon as practicable, inform the legal representative of the interview and, unless a delay cannot be justified because of urgency, establish whether the party wishes to raise the matter with the Chamber and (when relevant) ensure that sufficient time is afforded to enable this to happen prior to the interview.

Where applicable, it shall provide the legal representative with any relevant material.

Providing information to the legal representative about the family or legal guardian of a child witness with dual status

The Chamber notes the defence position that the information it holds in this respect is subject to legal professional privilege. However, no restriction on its disclosure would arise if the individual concerned gives his or her consent to disclosure. Accordingly, weighing the submissions of the parties and participants, the Chamber hereby:

- a. Orders the parties to share this information with the legal representatives of victims with dual status, provided there is consent from the individual concerned; and
- b. Establishes that when the witness is in the ICC protection programme, the VWU is the competent entity to provide this information to the legal representative, provided there is consent from the individual concerned and the security of the individual or the operation of the protection programme is not put at risk.

Communication between the VPRS and the VWU

The proposal of the parties and participants is that whenever a victim or applicant is without legal representation, and the VPRS needs to contact the person, the VWU will inform the VPRS as to whether the person is in the ICC protection programme, having first consulted with the party or participant who referred the witness.

The Chamber considers that the issue of communication between the VWU and the VPRS is essentially an internal Registry issue, to be resolved by that organ of the Court. However, the Chamber is of the view that the prior consent of the party referring the victim to the protection programme is not a necessary precondition for this communication - indeed it is undesirable, particularly in those instances where the victim has indicated that he or she does not wish their identity to be revealed to one or both parties.

The Chamber therefore endorses the recommendations of the Registry in this regard and stipulates that the VWU shall indicate to the VPRS whether a victim applicant is in the protection programme in order to facilitate contact between the VPRS and the applicant.

The VWU shall take account of a victim's request that his or identity is not revealed to the parties, and instruct the VPRS not to reveal to any participant or party that the person is in the ICC protection programme and has dual status. Whether the party should inform the programme.

The Chamber endorses the agreement between the parties and participants that a party should inform the legal representative of victims and applicants of its intention to refer an individual to the ICC protection programme, where the party has knowledge of the individual's dual status.

However, the content of the referral shall remain at all times strictly confidential between the referring party and the VWU.

See No. ICC-01/04-01/06-1379, Trial Chamber I, 5 June 2008, paras. 52-78. See also No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 12 July 2010, paras. 50-54.

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

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

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

See No. ICC-01/04-01/06-1637, Trial Chamber I, 21 January 2009, paras. 11-13. See also No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 12 July 2010, paras. 58-60.

The Chamber considers that neither the Statute nor the Rules prohibit victim status from being granted to a person who already has the status of a prosecution or defence witness. Similarly, rule 85 of the Rules does not prohibit a person who has been granted the status of victim from subsequently giving evidence on behalf of one of the parties.

See No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, par. 110.

4.3.7 Expert witnesses

The work of the Court - and the interests of justice as reflected in Regulation 54(m) of the *Regulations of the Court* - would be significantly assisted if a single, impartial and suitably qualified expert is afforded the best possible opportunity to investigate areas of dispute, having been provided with the detail of the rival contentions.

[...]

The joint instruction of experts will potentially be of great assistance to the Court because through the exercise of identifying with precision the real areas of disagreement between the parties, the expert will be placed in the best possible position to achieve a balanced and comprehensive analysis. There are two particular dimensions to this procedure that deserve mention: first, given the single expert will not be in any sense influenced, however unconsciously, by the viewpoint of only one party, he or she will be particularly able to present a balanced view of the issues, informed by the particular concerns of both sides; second, this procedure avoids any later disagreement as to the qualifications and impartiality of an expert instructed by a single party, with all the potential for delay and disruption to the trial proceedings. Accordingly, the Chamber favours, where possible, the joint instruction of expert witnesses.

If the parties are unable to agree upon the joint instructions to be provided to the expert, they are to provide separate instructions on all the relevant issues. This approach will maintain the benefits of having agreement as to qualifications and expertise whilst also potentially keeping some of the advantages of limiting the areas of disagreement, following the discussions between the parties. The expert will then complete one report covering all the issues that have been raised in the competing instructions. The Chamber adds that, except for exceptional circumstances, it [is] impractical for the joint expert to provide separate, private reports because he or she would usually be faced with insuperable difficulties as regards confidentiality, both when discussing the issues with the parties individually and when giving evidence. [...] Unless exceptional circumstances exist, the parties may not provide confidential instructions to a joint expert and their letters of instruction to a joint expert may become a public document.

See No. ICC-01/04-01/06-1069, Trial Chamber I, 10 December 2007, paras. 14-16. See also No. ICC-01/05-01/08-695, Trial Chamber III, 12 February 2010, paras. 11-12 and the Oral decision of Trial Chamber III, No. ICC-01/05-01/08-T-21-ENG ET, 29 March 2010, pp. 13-24.

If a participant has been given leave to participate in the trial as regards a particular issue or area of evidence which is to be the subject of expert evidence, the parties, whenever appropriate, should notify the participant and thereby provide him with the opportunity of contributing to the joint instructions or filing separate instructions.

See No. ICC-01/04-01/06-1069, Trial Chamber I, 10 December 2007, par. 18.

If the parties or participants intend to appoint an expert jointly (whether instructed jointly or separately), the name of that expert is to be communicated in a public filing (unless there are good reasons for restricting the filing) in order to enable any question as to the expert's qualifications or professional standing to be raised at an early stage and before the expert has undertaken his or her work.

See No. ICC-01/04-01/06-1069, Trial Chamber I, 10 December 2007, par. 19.

Participants must make an application to the Chamber for leave if they seek to introduce expert evidence.

See No. ICC-01/04-01/06-1069, Trial Chamber I, 10 December 2007, par. 23.

Whenever an expert is to be appointed jointly, the instructions (whether joint or separate) are to be filed with the Chamber at an early stage to enable the Bench to provide additional instructions. Pursuant to Regulation 44 of the *Regulations of the Court*, the Chamber may separately instruct an expert witness if it believes there are relevant issues that are not under consideration by the parties.

See No. ICC-01/04-01/06-1069, Trial Chamber I, 10 December 2007, paras. 20 and 22.

The list of experts maintained by the Registry should provide a wide selection of experts, all of whom will have had their qualifications verified; moreover, they will have undertaken to uphold the interests of justice when admitted to the list. [...] In the establishment of the list of experts the Registrar should have regard to equitable geographical representation and a fair representation of female and male experts, as well as experts with expertise in trauma, including trauma related to crimes of sexual and gender violence, children, elderly, and persons with disabilities, among others.

See No. ICC-01/04-01/06-1069, Trial Chamber I, 10 December 2007, par. 24.

Relevant decisions regarding evidence

Decision on the Prosecution practice to provide to the defence redacted versions of evidence and materials without authorisation by the Chamber (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-355, 25 August 2006

Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information on Electronic Version for their Presentation during the Confirmation Hearing (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-360, 28 August 2006

First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-437, 15 September 2006

Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-455, 20 September 2006

Decision concerning the Prosecutor Proposed Summary Evidence (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-517, 4 October 2006

Decision on the Defence «Request to exclude video evidence which has not been disclosed in one of the working languages (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-676, 7 November 2006

Decision on the schedule and conduct of the confirmation hearing (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-678, 7 November 2006

Decision on the Practices of Witness Familiarisation and Witness Proofing (Pre-Trial Chamber I), No. ICC-01/04-01/06-679, 8 November 2006

Decision on the confirmation of charges (Pre-Trial Chamber I), No. ICC-01/04-01/06-803-tEN, 29 January 2007

Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (Trial Chamber I), No. ICC-01/04-01/06-1049, 30 November 2007

Decision on the procedures to be adopted for instructing expert witnesses (Trial Chamber I), No. ICC-01/04-01/06-1069, 10 December 2007

Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted (Trial Chamber I), No. ICC-01/04-01/06-1084, 13 December 2007

Decision on the E-Court Protocol (Trial Chamber I), No. ICC-01/04-01/06-1127, 24 January 2008

Decision on various issues related to witness' testimony during trial (Trial Chamber I), No. ICC-01/04-01/06-1140, 29 January 2008

Decision on disclosure by the defence (Trial Chamber I), No. ICC-01/04-01/06-1235-Corr, 20 March 2008

Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-412, 18 April 2008

Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-428-Corr, 25 April 2008,

Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008

Decision regarding the Protocol on the practices to be used to prepare witnesses for trial (Trial Chamber I), No. ICC-01/04-01/06-1351, 23 May 2008

Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses (Trial Chamber I), No. ICC-01/04-01/06-1372, 3 June 2008

- Decision on the admissibility of four documents (Trial Chamber I), No. ICC-01/04-01/06-1399, 13 June 2008
- Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (Trial Chamber I), No. ICC-01/04-01/06-1401, 13 June 2008
- Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (Appeals Chamber), No. ICC-01/04-01/06-1432, 11 July 2008
- Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties (Pre-Trial Chamber III), No. ICC-01/05-01/08-55, 31 July 2008
- Judgment on the appeal of the Prosecutor against the «Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules» of Pre-Trial Chamber I (Appeals Chamber), No. ICC-01/04-01/07-776, 26 November 2008
- Decision on the prosecution's oral request regarding applications for protective measures (Trial Chamber I), No. ICC-01/04-01/06-1547, 9 December 2008
- Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol (Trial Chamber II), No. ICC-01/04-01/07-956, 13 March 2009
- Decision on a number of procedural issues raised by the Registry (Trial Chamber II), No. ICC-01/04-01/07-1134, 14 May 2009
- Decision issuing confidential and public redacted versions of «Decision on the «Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information» of 5 December 2008 and «Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information» of 12 March 2009» (Trial Chamber I), No. ICC-01/04-01/06-1980 together with Annex 2, No. ICC-01/04-01/06-1980-Anx2, 24 June 2009
- Decision on the admission of material from the «bar table» (Trial Chamber I), No. ICC-01/04-01/06-1981, 24 June 2009
- Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims (Trial Chamber I), No. ICC-01/04-01/06-2127, 16 September 2009
- Directions for the conduct of the proceedings and testimony in accordance with rule 140 (Trial Chamber II), No. ICC-01/04-01/07-1665, 20 November 2009
- Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses (Trial Chamber I), No. ICC-01/04-01/06-2192-Red, 20 January 2010
- Decision on the Modalities of Victim Participation at Trial (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010
- Decision on the procedures to be adopted for instructing expert witnesses (Trial Chamber III), No. ICC-01/05-01/08-695, 12 February 2010
- Oral decision of Trial Chamber III, No. ICC-01/05-01/08-T-21-ENG ET, 29 March 2010
- Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 12 July 2010
- Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled «Decision on the Modalities of Victim Participation at Trial» (Appeals Chamber), No. ICC-01/04-01/07-2288, 16 July 2010

5. Issues related to the procedure of appeals

Articles 81-83 of the Rome Statute Rules 149-158 of the Rules of Procedure and Evidence Regulations 57-65 of the Regulations of the Court

[A]pplications by victims for participation in appeals must be filed as soon as possible and in any event before the date of filing of the response to the document in support of the appeal.

See. No. ICC-01/04-01/06-1335, The Appeals Chamber, 16 May 2008, par. 12.

5.1. Appealable decisions

In the system of the Statute, interlocutory appeals are meant to be admissible only under limited and very specific circumstances. This is apparent both from the wording and from the drafting history of the Statute. Interlocutory Appeals against other decisions are permitted only upon leave by the Chamber and on the basis of the criteria enumerated in paragraph 1 (d). Article 82, paragraph 1 thereby implies that the decisions by a Trial or Pre-Trial Chamber which do not fall under paragraph 1 (a)-(c), or which do not satisfy the requirements under paragraph 1 (d), are not subject to interlocutory appeals. Article 82, paragraph 1(d) specifies that only decisions [that involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial] are subject to leave to appeal. Moreover, even if those two criteria satisfied, leave shall be granted only if [an immediate solution by the Appeals Chamber may materially advance the proceedings]. This wording reflects the intention of the drafters of the Statute to limit the scope of interlocutory appeals to issues of crucial importance to the fairness and expeditiousness of the proceedings or to the outcome of the trial. This rationale is further reflected in the drafting history of the provision. [...] The aim of the discussion was to shape a provision that, whilst allowing interlocutory appeals when necessary to preserve fairness and expeditiousness in proceedings or when crucial for the outcome of the trial before the Court, would ensure that such appeals would not have paralysing effect. Accordingly, one could infer that the ultimate purpose was to limit interlocutory appeals to decisions involving issues with a bearing on the conduct of proceedings related to criminal responsibility for offences under the jurisdiction of the Court.

See No. ICC-02/04-01/05-90-US-Exp, Reclassified as public on 02.02.2007 pursuant to Decision ICC-02/04-01/05-135, Pre-Trial Chamber II, 10 July 2006, paras. 17-21.

The drafters of the Statute intentionally excluded decisions confirming charges against a suspect from the categories of decisions which may be appealed directly to the Appeals Chamber. [...] According to the provisions of the Statute and to general principles of criminal law, an interlocutory decision can only be appealed in exceptional circumstances and to avoid irreparable prejudice to the appellant; greater emphasis should be placed on this principle with regards to a decision confirming charges, as any appeal against such decision would significantly delay the start of the trial and thus the expeditious course of proceedings before the Court. [...] Attention should be paid to the status of the accused, since allowing the parties to appeal the decision confirming charges when the suspect is under detention would cause avoidable delay in the procedure, which has to be carefully counterbalanced with the interests of the suspect to a fair and expeditious trial.

See No. ICC-01/04-01/06-915, Pre-Trial Chamber I, 24 May 2007, paras. 19, 28, 29 and 30.

If the drafters of the Statute intended to make decisions confirming or refusing confirmation of charges the subject of a distinct right of appeal [...] they would have done so expressly, as they did with other decisions itemized as the subjects of appeal in articles 81 and 82 of the Statute.

See No. ICC-01/04-01/06-926, Appeals Chamber, 13 June 2007, par. 11.

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] Not every issue may constitute the subject of an appeal. It must be one apt to 'significantly affect', i.e. in a material way, either a) 'the fair and expeditious conduct of the proceedings' or b) 'the outcome of the trial'. The issue must be one likely to have repercussions on either of the above two elements of justice.

See No. ICC-01/04-168, Appeals Chamber, 13 July 2006, paras. 9-10. See also No. ICC-02/05-33, Pre-Trial Chamber I, 22 November 2006, p. 5; No. ICC-02/05-52, Pre-Trial Chamber I, 21 February 2007, pp. 4-5; No. ICC-02/05-70, Pre-Trial Chamber I, 27 March 2007, p. 3 and No. ICC-02/04-112, Pre-Trial Chamber II (Single Judge), 19 December 2007, paras. 19-21.

5.2 Interlocutory appeals lodged under article 82(1)(b) of the Rome Statute

Article 82(1)(b) of the [Rome] Statute defines succinctly the decisions subject to appeal, leaving no ambiguity as to the intentions of the [drafters] of the Statute. [...] The decision confirming the charges neither grants nor denies release. The wording of article 82(1)(b) of the Statute is explicit and as such it is the sole guide to the identification of decisions appealable under its provisions. There is no ambiguity as to its meaning, its ambit or range of application. It confers exclusively a right to appeal a decision that deals with the detention or release of a person subject to a warrant of arrest.

See No. ICC-01/04-01/06-926, Appeals Chamber, 13 June 2007, paras. 11, 15 and 16.

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

The Chamber believes that any determination of the Prosecutor's application for leave to appeal must be guided by three principles, namely: (i) the restrictive character of the remedy provided for in article 82, paragraph 1 (d), of the Statute; (ii) the need for the applicant to satisfy the Chamber as to the existence of the specific requirements stipulated by this provision; and (iii) the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal. Moreover, article 82, paragraph 1(d), of the Statute reflects a general trend to narrow the grounds for interlocutory appeals, and in particular to deviate from the concept that an issue is subject to interim appeal because of its general importance to proceedings or in international law generally, as a previous formulation of the relevant rule in the ICTY Rules of Procedure and Evidence had allowed.

See No. ICC-02/04-01/05-20, Pre-Trial Chamber II, 19 August 2005, paras. 15-16. See also No. ICC-01/04-135, Pre-Trial Chamber I, 31 March 2006, paras. 21-23; No. ICC-02/04-01/05-296, Pre-Trial Chamber II (Single Judge), 2 June 2008, pp. 7-8.

The only remedy of a general nature whereby participants can voice their concerns regarding a Chamber's decision is a request for leave to appeal under article 82(1)(d) of the *Rome Statute*.

See No. ICC-02/04-01/05-219, Pre-Trial Chamber II (Single Judge), 9 March 2007, p. 3.

For any leave to appeal pursuant to article 82(1)(d) of the Statute, the applicant must demonstrate that (i) the challenged decision involves an issue that would significantly affect (a) the fair and expeditious conduct of the proceedings or (b) the outcome of the trial and (ii) for which, in the opinion of the Pre-Trial Chamber or the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance proceedings. In the present case, the Chamber considers that the first requirement (i) having not been proved, there was no need to consider the second one. Any party wishing to appeal a decision under article 82(1)(d) of the Statute has imperatively five days running from the notification of that decision to make a written application setting out the reasons for the request for leave to appeal to the Chamber, considering the two requirements of that specific provision.

See No. ICC-01/04-14, Pre-Trial Chamber I, 14 March 2005, p. 3. See also No. ICC-01/04-168, Appeals Chamber, 13 July 2006, paras. 7-19; No. ICC-01/04-01/06-915, Pre-Trial Chamber I, 24 May 2007, paras. 21, 23 and 26; No. ICC-02/04-112, Pre-Trial Chamber II (Single Judge), 19 December 2007, par. 16, No. ICC-02/04-01/05-20, Pre-Trial Chamber II, 19 August 2005, par. 20 and No. ICC-01/04-135, Pre-Trial Chamber I, 31 March 2006, par. 26; No. ICC-02/04-01/05-90-US-Exp, Reclassified as public on 02.02.2007 pursuant to Decision ICC-02/04-01/05-135, Pre-Trial Chamber II, 10 July 2006, par. 40; See also No. ICC-01/04-01/07-149, Pre-Trial Chamber I (Single Judge), 18 January 2008, pp. 3-4; and No. ICC-02/05-118, Pre-Trial Chamber I (Single Judge), 23 January 2008, pp. 3-4; No. ICC-02/05-121, Pre-Trial Chamber I (Single Judge), 6 February 2008, pp. 3-4. See also No. ICC-01/04-01/06-1210, Trial Chamber I, 6 March 2008, paras. 6-7; and No. ICC 01/05-01/08-75, Pre-Trial Chamber III (Single Judge), 25 August 2008, paras. 5-12. See also No. ICC-01/04-01/06-1313, Trial Chamber I, 8 May 2008, par. 7.

The term 'fair' in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseparable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64 (2) and 67 (1) and article 21 (3)); making its interpretation and application subject to internationally recognized human rights. The expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial.

See No. ICC-01/04-168, Appeals Chamber, 13 July 2006, par. 11; No. ICC-02/04-01/05-90-US-Exp, Reclassified as public on 02.02.2007 pursuant to Decision ICC-02/04-01/05-135, Pre-Trial Chamber II, 10 July 2006, par. 24. See also No. ICC 01/05-01/08-75, Pre-Trial Chamber III (Single Judge), 25 August 2008, paras. 13-16.

The term 'proceedings' as encountered in the first part of article 82 (1) (d) is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto.

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

The outcome of the trial is postulated as a separate and distinct consideration warranting the statement of an issue for consideration by the Appeals Chamber, where the possibility of error in an interlocutory or intermediate decision may have a bearing thereupon.

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

A crucial word in the second leg of article 82 (1) (d) is 'advance' [...]. The word cannot be associated with the expeditiousness of the proceedings, one of the prerequisites for defining an appealable issue. The meaning conveyed by 'advance' in the latter part of sub-paragraph (d) is 'move forward'; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings.

See No. ICC-01/04-168, Appeals Chamber, 13 July 2006, par. 15.

The term 'immediate' underlines the importance of avoiding errors through the mechanism provided by sub-paragraph (d) by the prompt reference of the issue to the court of appeal. A corresponding duty is cast upon the Appeals Chamber to render its decision, the earliest possible.

See No. ICC-01/04-168, Appeals Chamber, 13 July 2006, par. 18. See also No. ICC 01/05-01/08-75, Pre-Trial Chamber III (Single Judge), 25 August 2008, paras. 19-20.

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

See. No. ICC-01/04-01/06-1335, The Appeals Chamber, 16 May 2008, par. 13.

The Single Judge is of the view that the procedure proposed at the Hearing would be consistent with article 82(l)(d) of the Statute, rule 155 of the Rules and regulation 65(1) and (2) of the *Regulations of the Court* as long as the relevant party files, within the five day time limit provided for in rule 155 of the Rules, a short (one or two pages) written application for leave to appeal in which: (i) the issues for which leave to appeal is requested are identified; and (ii) the legal and/or factual reasons supporting the request for each of the issues for which leave to appeal is requested are specified via their enumeration. According to the Single Judge's Proposal, once an application has been filed, the party filing it shall have until five days after the receipt of the notification of the Chamber's decision confirming or not the charges to file an additional document in support of the application in which the reasons enumerated in the original application may be elaborated upon. Due to the fact that the reasons will be subsequently developed in the additional document in support of the original application, the Single Judge considers that, whenever this procedure is resorted to, the three day time limit to file a response provided for in regulation 65(3) of the *Regulations of the Court* shall only start running (i) upon the notification of the filing of the additional document in support of the original application; or (ii) absent such filing, upon the expiration of the time limit provided for in the previous paragraph for the filing of such additional document.

See No. ICC-01/04-01/07-601, Pre-Trial Chamber I (Single Judge), 17 June 2008, paras. 13-15. See also paras. 20-22.

The procedures adopted in respect of interlocutory appeals pursuant to article 82(1)(b) of the Statute are equally applicable to the interlocutory appeals arising under article 82(1)(d) of the Statute.

See No. ICC-01/04-503, Appeals Chamber, 30 June 2008, par. 37.

5.4. Suspensive effect

The request of the Defence to stay all proceedings pending before another Chamber by the Appeals Chamber is not known to the law applicable to proceedings before the Court and therefore the request of the appellant shall be dismissed. The request to stay proceedings before another Chamber is a relief wholly separate and distinct from the one envisaged in article 82 (3) of the *Rome Statute*.

See No. ICC-01/04-01/06-838, Appeals Chamber, 9 March 2007, par. 4. See also No. ICC-02/04-01/05-92, 13 July 2006, Appeals Chamber, paras. 3-5 (Pursuant to Decision ICC-02/04-01/05-266, this document is reclassified as Public) and No. ICC-01/04-01/06-1347, Appeals Chamber, 22 May 2008, par. 1.

Article 82(3) of the Statute provides that an appeal shall not have suspensive effect «unless the Appeals Chamber so orders, upon request, in accordance with the *Rules of Procedure and Evidence*». Rule 156(5) of the *Rules of Procedure and Evidence* provides that «when filing an appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3». The decision on such a request is within the discretion of the Appeals Chamber. Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances.

See No. ICC-01/05-01/08-499, Appeals Chamber, 3 September 2009, par. 11. See also No. ICC-01/04-01/06-1290, Appeals Chamber, 22 April 2008, par. 6.

Article 82(3) of the *Rome Statute* provides that an appeal shall not have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the *Rules of Procedure and Evidence*. Rule 156(5) of the *Rules of Procedure and Evidence* provides that [w]hen filing an appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3 of the *Rome Statute*. As neither article 82(3) nor rule 156(5) stipulate in which circumstances suspensive effect should be ordered, this decision is left to the discretion of the Appeals Chamber.

Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances. In light of the submissions of the appellant, the Appeals Chamber has considered in the present case whether the implementation of the Impugned Decision would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant. The Appeals Chamber is not persuaded that it would be appropriate to order that the appeal shall have suspensive effect because it does not consider that the implementation of the impugned decision would create such an irreversible situation and because there are no other apparent reasons for granting the request. [...] Therefore, in the context of the present appeal, there is no need to protect the appellant from a potentially irreversible situation that could be caused by the disclosure of his lines of defence because the impugned decision did not oblige him to do so. Similarly, if the present appeal were successful and if this would lead to additional disclosure obligations of the Prosecutor prior to the commencement of the trial in respect of the identities of witnesses or the general use of child soldiers in the Democratic Republic of the Congo, the Trial Chamber could make any necessary adjustments at that time, in order to ensure the fairness of the proceedings. As the Appeals Chamber concludes that suspensive effect should not be ordered in the present case, it does not consider it necessary to address the question of whether the specific relief sought by the appellant, namely the suspension of all proceedings before the Trial Chamber pending the decision on appeal, would be appropriate.

See No. ICC-01/04-01/06-1290, Appeals Chamber, 22 April 2008, paras. 7-9.

Given the fact that the decision on release was under appeal and that leave to appeal the stay of proceedings had been granted and in light of previous findings of the Pre-Trial and Trial Chambers that his detention is necessary to secure his presence at trial, the Appeals Chamber found that the release of the accused at this point in time could potentially defeat the purpose of the present appeal as well as of the appeal that, in all likelihood, would be mounted against the Decision to Stay the Proceedings. In such circumstances, the interest of the accused to be released immediately did not outweigh the reasons in favour of granting the request for suspensive effect.

See No. ICC-01/04-01/06-1444, Appeals Chamber, 22 July 2008, par. 10.

Relevant decisions regarding issues related to the procedure of appeals

Decision on the Prosecutor's Application for Leave to Appeal (Pre-Trial Chamber I), No. ICC-01/04-14, 14 March 2005

Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58 (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005

Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 And VPRS 6 (Pre-Trial Chamber I), No. ICC-01/04-135, 31 March 2006

Decision on Prosecutor's applications for leave to appeal dated the 15th day of March 2006 and to suspend or stay consideration of leave to appeal dated the 11th day of May 2006 (Pre-Trial Chamber II), No. ICC-02/04-01/05-90-US-Exp, 10 July 2006

Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (Appeals Chamber), No. ICC-01/04-168, 13 July 2006

Decision on the Prosecutor "Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's Application for Extraordinary Review (Appeals Chamber), No. ICC-02/04-01/05-92, 13 July 2006

Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information on Electronic Version for their Presentation During the Confirmation Hearing (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-360, 28 August 2006

Décision relative à la requête sollicitant l'autorisation d'interjeter appel du conseil ad hoc pour la Défense (Pre-Trial Chamber I), No. ICC-02/05-33, 22 November 2006

Decision on the Ad hoc Counsel for the Defence's Request for leave to Appeal the Decision of 2 February 2007 (Pre-Trial Chamber I), No. ICC-02/05-52, 21 February 2007

Decision on the «Prosecution's Request for Leave to Appeal the Decision Denying the «Application to Lift Redactions From Applications for Victims' Participation to be Provided to the OTP»» (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-219, 9 March 2007

Reasons for «Decision of the Appeals Chamber on the Defence application 'Demande de suspension de toute action ou procédure afin on 20 February 2007» issued on 23 February 2007 (Appeals Chamber), No. ICC-01/04-01/06-844, 9 March 2007

Decision on the Request for Leave to Appeal to the Decision Issued on 15 March 2007 (Pre-Trial Chamber I), No. ICC-02/05-70, 27 March 2007

Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges (Pre-Trial Chamber I), No. ICC-01/04-01/06-915, 24 May 2007

Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled «Décision sur la confirmation des charges» of 29 January 2007» (Appeals Chamber), No. ICC-01/04-01/06-926, 13 June 2007

Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-112, 19 December 2007

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

Decision on the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-149, 18 January 2008

Decision on Request for leave to appeal the «Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor» (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-118, 23 January 2008

Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-121, 6 February 2008

Corrigendum to Decision on the defense request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008 (Trial Chamber I), No. ICC-01/04-01/06-1210, 6 March 2008

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

Decision on the Defence request for leave to appeal «Decision on disclosure by the defence» (Trial Chamber I), No. ICC-01/04-01/06-1313, 8 May 2008

Decision, in limine, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation" (Appeals Chamber), No. ICC-01/04-01/06-1335, 16 May 2008

Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I's Decision on Victim's Participation of 18 January 2008 (Appeals Chamber), No. ICC-01/04-01/06-1347, 22 May 2008

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

Decision on the Procedure for Leave to Appeal pursuant to article 82 (l)(d) of the Statute, rule 155 of the Rules and regulation 65 of the Regulations and on the Pending Requests for Leave to Appeal Concerning Witnesses 132 and 287 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-601, 17 June 2008

Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007 (Appeals Chamber), No. ICC-01/04-503, 30 June 2008

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

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

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

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

6. Issues related to disclosure

Articles 54(3)(e), 57(3)(c) and 67 of the Rome Statute Rules 76-84 of the Rules of Procedure and Evidence

Disclosure aims at providing the Defence with sufficient information on the Prosecution case and potentially exculpatory materials in order to place the Defence in a position to prepare adequately for the confirmation hearing. Communication to the Pre-Trial Chamber of certain evidence before the confirmation hearing aims at placing the Pre-Trial Chamber in a position to properly organise and conduct the confirmation hearing. In the view of the Single Judge, the relationship between disclosure and communication of certain evidence to the Pre-Trial Chamber in the Court's criminal procedure is such that a clear understanding of the extent of such communication is needed to properly address the main features of the disclosure system.

The Single Judge considers that interpreting the provisions on communication of certain evidence to the Pre-Trial Chamber must take into consideration a number of elements. First, the parties agree that the expression «[s]hall be communicated to the Pre-Trial» in rule 121(2)(c) of the Rules means filing certain evidence in the record of the case. In the view of the Single Judge, this approach is supported not only by a literal interpretation of the expression «[s]hall be communicated», but also by its contextual interpretation in light of rule 122(1) of the Rules. This last rule is drafted on the premise that the evidence to be presented at the confirmation hearing must previously have been filed in the record of the case, insofar as it establishes that, at the beginning of the confirmation hearing, the Presiding Judge «[s]hall determine how the hearing is to be conducted and, in particular, may establish the order and the condition under which he or she intends the evidence contained in the record of the proceedings to be presented». A teleological interpretation of rules 121(2)(c) and 122(1) of the Rules also supports this approach.

These rules aim at placing the Pre-Trial Chamber in a position to properly organise and conduct the confirmation hearing, which is best achieved by the Chamber having advance access to the evidence to be presented at the hearing. Filing the evidence to be presented at the confirmation hearing in the record of the case will fulfil two additional important functions. First, it puts the victims of the case in a position to adequately exercise their procedural rights during the confirmation hearing by giving them prior access to the evidence that is going to be presented. Second, it ensures that no matter what shortcomings may have occurred in the disclosure process, the parties will have access to the evidence to be presented at the confirmation hearing before it commences. Second, the Single Judge considers that access to all documents, materials and evidence filed in the record of the case is inherent to the jurisdictional functions of the Pre-Trial Chamber in the case against the suspect. Finally, the Single Judge agrees with the Defence and the Registry that the latter is the only organ of the Court which, under rules 15, 121(10), 131 and 137 of the Rules, can give full faith and credit to the proceedings before the Court, including those in the present case, and is responsible for keeping the record of such proceedings. Under these circumstances, the single judge considers that both parties are obliged, pursuant to rules 121(2)(c) and 122 (1) of the Rules, to file the original statements, books, documents, photographs and tangible objects in the record of the case. It will then be the responsibility of the Registry, as the record keeper of the Court, to maintain the evidence in its original format, so that the parties shall only have to address matters relating to the chain of custody arising from events prior to the filing of the relevant evidence.

See No. ICC-01/04-01/06-102, Pre-Trial Chamber I (Single Judge), 16 May 2006, paras. 29-37, pp. 26-28.

The Single Judge considers that, as a general rule, statements must be disclosed to the Defence in full. Any restriction on disclosure to the Defence of the names or portions, or both, of the statements of the witnesses on which the Prosecution intends to rely at the confirmation hearing must be authorised by the Single Judge under the procedure provided for in rule 81 of the Rules.

See No. ICC-01/04-01/06-102, Pre-Trial Chamber I (Single Judge), 16 May 2006, par. 101, p. 48.

Considering the recent deterioration of the security situation in some parts of the Democratic Republic of the Congo, non-disclosure of identity vis-à-vis the Defence for the purpose of the confirmation hearing is currently the only available and feasible measure for the necessary protection of many Prosecution witnesses.

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

Articles 61(5) and 68(5) of the Statute and rule 81(4) of the Rules allows the Prosecution to request the Chamber to authorise (i) the non-disclosure of the identity of certain witnesses on whom the Prosecution intends to rely

at the confirmation hearing and (ii) the reliance on the summary evidence of their statements, the transcripts of their interviews and/or the investigators' notes and reports of their interviews.

See No. ICC-01/04-01/06-437, Pre-Trial Chamber I (Single Judge), 15 September 2006, p. 9.

The notion of 'witness' in rule 81(4) of the Rules must be understood as including not only those witnesses on whom the Prosecution intends to rely at the confirmation of the charges hearing but also those on whom the Prosecution may decide to rely at trial if the charges against the person are confirmed.

See No. ICC-01/04-01/06-455, Pre-Trial Chamber I (Single Judge), 20 September 2006, p. 8.

Non-disclosure to the person in respect of whom a confirmation hearing is held of the identity of the witnesses on whom the Prosecutor intends to rely at the confirmation hearing or portions of prior statements made by these witnesses is an exception to the general rule that the identity of such witnesses and their prior statements are to be disclosed. A Pre-Trial Chamber, when considering a request by the Prosecutor for such non-disclosure pursuant to rule 81(4) of the *Rules of Procedure and Evidence*, will take into account all relevant factors and will carefully appraise the Prosecutor's request on a case-by-case basis. A mandatory application by the Prosecutor to the Victims and Witnesses Unit for protective measures prior to a request to the Pre-Trial Chamber for non-disclosure of the identity of witnesses on whom the Prosecutor intends to rely at the confirmation hearing is not prescribed by the Statute or the *Rules of Procedure and Evidence*.

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

It is not incorrect to state that non-disclosure of the identity of the witnesses on whom the Prosecutor intends to rely at the confirmation hearing is an exception. Pursuant to rule 76(1) of the *Rules of Procedure and Evidence*, "[t]he Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses". Rule 76 is part of Chapter 4 of the *Rules of Procedure and Evidence*, entitled "Provisions relating to various stages of the proceedings", which indicates that rule 76 is applicable to the confirmation hearing as well. This interpretation is consistent with article 61(3)(b) of the *Rome Statute*, which provides that the person in respect of whom a confirmation hearing is held "[b]e informed of the evidence on which the Prosecutor intends to rely at the hearing". That exceptions to the principle that the names of witnesses and prior witness statements are to be disclosed may occur follows from rule 76(4) of the *Rules of Procedure and Evidence*, which states that "[t]his rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82". Thus, reference is made to witness protection pursuant to rule 81(4) of the *Rules of Procedure and Evidence*.

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

The decision by the Pre-Trial Chamber that whenever an application pursuant to rule 81(2) and (4) of the *Rules of Procedure and Evidence* is filed *ex parte*, the other participant must be made aware in an *inter partes* filing of the fact that such an application was filed as well as of its legal basis and, with respect to an application under rule 81(4), of any request for *ex parte* proceedings that might be contained in such an application is erroneous to the extent that it does not provide for any exception.

See No. ICC-01/04-01/06-568, Appeals Chamber, 13 October 2006, par. 65.

A decision authorising the non-disclosure of the identities of witnesses of the Prosecutor to the defence has to state sufficiently the reasons upon which the Pre-Trial Chamber based its decision. The presentation by the Prosecutor of summaries of witness statements and other documents at the confirmation hearing is permissible even if the identities of the relevant witnesses have not been disclosed to the defence prior to the hearing, provided that such summaries are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

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

Authorisation of non-disclosure of the identity of a witness pursuant to rule 81(4) of the *Rules of Procedure and Evidence* shall take into account the following three considerations: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and why the Pre-Trial Chamber considered that the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

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

Pursuant to rule 81(4) of the *Rules of Procedure and Evidence*, a Chamber shall take *inter alia* necessary steps to protect witnesses and members of their families. The use of the word 'necessary' emphasises the importance of witness protection and the obligation of the Chamber in that respect; at the same time, it emphasises that protective measures should restrict the rights of the suspect or accused only as far as necessary. Thus, if less restrictive protective measures are sufficient and feasible, a Chamber must choose those measures over more restrictive measures.

See No. ICC-01/04-01/06-773, Appeals Chamber, 14 December 2006, par. 33.

Rule 81(5) of the *Rules of Procedure and Evidence* does not address the introduction into evidence of summaries at the confirmation hearing pursuant to articles 68(5) and 61(5) of the *Rome Statute*. The provision regulates under what conditions the material and information on the basis of which the summaries were compiled may subsequently be introduced into evidence.

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

The presentation of summaries at the confirmation hearing without disclosure of the identities of the relevant witnesses to the defence is not per se prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The use of summaries may affect the ability of the suspect pursuant to article 61(6)(b) of the *Rome Statute* to challenge the evidence presented by the Prosecutor at the confirmation hearing in two respects: first, the Prosecutor is authorised to rely on witnesses whose identities are unknown to the defence (anonymous witnesses); secondly, the ability of the defence to evaluate the correctness of the summaries is restricted because the defence does not receive prior to the confirmation hearing the witness statements and other documents that form the basis of the summaries. However, this does not mean that the use of such summaries at the confirmation hearing is necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The Appeals Chamber considers that the analysis of the European Court of Human Rights on anonymous witnesses is relevant for the present appeal. In fact, the use of such summaries is permissible where the Pre-Trial Chamber takes sufficient steps to ensure that summaries of evidence are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial. This will have to be determined on a case-by-case basis, also bearing in mind the character of the confirmation hearing. The Pre-Trial Chamber will have to take into account *inter alia* that the ability of the defence to challenge the evidence presented by the Prosecutor at the confirmation hearing is impaired not only by the use of anonymous witnesses but also by the use of summaries without disclosure to the defence of the underlying witness statements and other documents.

See No. ICC-01/04-01/06-773, Appeals Chamber, 14 December 2006, paras. 50-51.

A decision pursuant to rule 81(2) of the *Rules of Procedure and Evidence* authorising disclosure prior to the confirmation hearing of witness statements or other documents to the defence with redactions must state how the Pre-Trial Chamber came to such a conclusion; the reasoning should also state which of the facts before it led the Pre-Trial Chamber to reach its conclusion. At the confirmation hearing, the Prosecutor, in principle, may rely on the unredacted parts of witness statements and other documents even if they were disclosed to the defence prior to the hearing with redactions authorised pursuant to rule 81(2) of the *Rules of Procedure and Evidence*.

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

Pursuant to rule 81(2) of the *Rules of Procedure and Evidence*, the Prosecutor may not introduce material or information in the possession or control of the Prosecutor into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused. The Appeals Chamber considers that rule 81(2) of the *Rules of Procedure and Evidence* does not dictate that redactions and/or disclosure must be determined inflexibly by the unit of the entirety of a 'statement' or 'document', such that the statement or document must either be disclosed in its entirety or not considered at the confirmation hearing at all. As a consequence, if only parts of a witness statement or document are not disclosed to the defence prior to the confirmation hearing, the Prosecutor, in principle, may rely on those parts that have been disclosed at the confirmation hearing. To what extent redactions may be authorised or maintained if the Prosecutor seeks to introduce information that is disclosed to the defence only in part will need to be determined upon the facts of the individual case, taking into account the interests of the defence and the need for a fair and impartial trial.

See No. ICC-01/04-01/06-774, Appeals Chamber, 14 December 2006, paras. 44-46.

The test required in article 67(2) carries two main elements. The first element requires the prosecution to have evidence in its possession or control. Secondly, the Prosecutor must assess whether that evidence may affect the credibility of the prosecution evidence. If these two elements are met, it is the duty of the Prosecutor to disclose as soon as is practicable the information to the defence. [...] It is the prosecution's obligation to assess whether

[an information or evidence] may affect [the credibility of a Prosecution's witness.] If there is doubt on the issue, then the matter is to be referred to the court.

See No. ICC-01/04-01/06-963, Trial Chamber I, 26 September 2007, paras. 12 and 36.

In order for any redaction in any given statement to be authorised, the Single Judge must, first and foremost, have reached the conclusion that there is a risk that the disclosure to the Defence – at least at this stage of the proceedings – of the information sought to be redacted could (i) prejudice further or ongoing investigations by the Prosecution (rule 81(2) of the Rules); (ii) affect the confidential character of the information under articles 54, 72 and 93 of the *Rome Statute* (rule 81(4) of the Rules); or (iii) affect the safety of witnesses, victims or members of their families (rule 81(4) of the Rules). Moreover, after ascertaining the existence of such a risk, the Single Judge will analyse whether (i) requested redactions are adequate to eliminate, or at least, reduce such a risk; (ii) there is no less intrusive alternative measure that can be taken to achieve the same goal at this stage; and (iii) the requested redactions are not prejudicial to or inconsistent with the rights of the arrested person and a fair and impartial trial". The Single Judge states that "[o]nly when these three additional questions have been answered in the affirmative will the Single Judge authorise the redactions requested by the Prosecution.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, par. 4.

The risk of disclosing to the Defence the types of information for which authorisation for redactions have been requested must be assessed in light of several criteria, namely: (i) the current volatile situation in the Ituri and Kinshasa areas; (ii) the influence of the person in the custody of the Court [...] in the Ituri and Kinshasa areas today, [...] close connections to FNI and/or FRPI supporters currently living in these areas; (iii) the capabilities of the supporters of [the person in the custody of the Court] [...] to interfere with ongoing and further Prosecution investigations and/or Prosecution witnesses, victims and members of their families; and (iv) the several precedents of interference with Prosecution witnesses by FNI and/or FRPI members.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, par. 22. See also No. ICC-01/04-01/07-249, Pre-Trial Chamber I (Single Judge), 5 March 2008, par. 14.

The redaction of the information that could identify the current whereabouts of those Prosecution witnesses who have been accepted in the Victims and Witnesses Unit's protection program is not only an adequate measure, but also a necessary measure, to minimize the risk posed by the disclosure of their identities to the Defence. The redaction of this information is not prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial, insofar as (i) the Defence will have access to the identities of the relevant Prosecution witnesses; and (ii) any contact with such witnesses is always subject to the restrictions and procedures established by the Chamber.

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

For the purpose of Rule 81(4) of the *Rules of Procedure and Evidence*, the notion of 'members of the family' of witnesses should be considered as including guardians. In this regard, the Single Judge points out that "(i) guardians exercise parental powers and responsibilities over the minors under their guardianship and that consequently (ii) the risk to their safety and/or physical and psychological well-being as a result of disclosing to the Defence the identities of those Prosecution witnesses under guardianship is not less than the risk faced by close relatives of such witnesses.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, par. 30. See also No. ICC-01/04-01/07-249, Pre-Trial Chamber I (Single Judge), 5 March 2008, par. 13.

The Single Judge considers that the redactions of the information that could lead to the identification of the current whereabouts of Prosecution witnesses' family members, particularly those currently located in the Ituri district or in the Kinshasa area, independently of whether the identities of these individuals are known or are not known to the Defence, are adequate to minimise the risk and/or physical well-being. According to the Single Judge, the redaction of this information is not prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial insofar as (i) the Defence will have access to the identities of the witnesses who gave the statements; and (ii) the family members are not referred to as having any knowledge of the crime set out in the warrant of arrest.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, paras. 36-37. See also No. ICC-01/04-01/07-160, Pre-Trial Chamber I, 23 January 2008, paras. 46-47; and No. ICC-01/04-01/07-361, Pre-Trial Chamber I (Single Judge), 3 April 2008, paras. 18-20.

In the proceedings leading to the confirmation hearing, only those individuals on whose statements the Prosecution intends to rely at the confirmation hearing can be considered 'witnesses' within the meaning of

rule 81(4) of the *Rules of Procedure and Evidence*. Any other individual who has already been interviewed by the Prosecution, or whom the Prosecution intends to interview in the near future, in relation to the case at hand is more appropriately characterised as a 'Prosecution source' rather than as a 'Prosecution witness' and therefore any redaction relating to their identities must be justified by the need to ensure the confidentiality of information pursuant to rule 81(4) of the Rules or to avoid any prejudice to further or ongoing investigations pursuant to rule 81(2) of the Rules. As the individuals concerned by this category of redactions have been interviewed by the Prosecution, or are about to be interviewed by the latter, in relation to the case against the person or in relation to further Prosecution investigations, the Prosecution's further or ongoing investigations could be prejudiced if such individuals were to be threatened, intimidated or interfered with.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, paras. 41 and 43. See also No. ICC-01/04-01/07-249, Pre-Trial Chamber I (Single Judge), 5 March 2008, par. 26; and No. ICC-01/04-01/07-312, Pre-Trial Chamber I (Single Judge), 11 March 2008, p. 6.

When acting pursuant to article 54(3)(f) of the *Rome Statute*, the Prosecution is not entitled to redact *proprio motu*, but can only request authorisation to do so from the competent Chamber pursuant to rule 81 of the *Rules of Procedure and Evidence*.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, par. 52.

Rule 81(4) of the *Rules of Procedure and Evidence* does not empower the competent Chamber to authorise redactions whose sole purpose is to protect individuals other than Prosecution witnesses, victims or members of their families.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, par. 54.

Redactions concerning individuals other than Prosecution witnesses, victims or members of their families may only be authorised (i) if they are needed to ensure the confidentiality of information pursuant to rule 81(4) of the Rules; or (ii) in order not to prejudice further or ongoing Prosecution investigations because such individuals are Prosecution sources pursuant to rule 81(2) of the Rules and that otherwise, the use of redactions is not a measure that is available to ensure the protection of these individuals.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, par. 55. See also No. ICC-01/04-01/07-249, Pre-Trial Chamber I (Single Judge), 5 March 2008, par. 30; and No. ICC-01/04-01/07-312, Pre-Trial Chamber I (Single Judge), 11 March 2008, p. 8; and No. ICC-01/04-01/07-361, Pre-Trial Chamber I (Single Judge), 3 April 2008, par. 30; and No. ICC-01/04-01/07-425, Pre-Trial Chamber I (Single Judge), 21 April 2008, par. 19;

The redactions of the place where the interviews with the witnesses were conducted, and of the names, initials and signatures of current staff members of the Office of the Prosecutor and of the Victims and Witnesses Unit, as well as of those who were present when the interviews were conducted, could, in certain circumstances, contribute to minimising the existent risk of prejudice to the Prosecution's investigations. However, the Single Judge considers that there are less intrusive measures that can be taken in order to properly protect those staff members of the Office of the Prosecutor and the Victims and Witnesses Unit present when the witness statements were taken and to avoid any prejudice to the Prosecution's investigations, such as (i) avoiding to take statements in small villages or cities; (ii) making sure that such persons do not easily stand out from the local population; or (iii) rotating such persons once there are indications that their identification with the Court may endanger their security as well as the Prosecution investigation. While acknowledging that these measures are not applicable for the purpose of assisting in the process of interviewing witnesses and taking their statements, the Single Judge considers however that "the identification of, at least, the staff members of the Office of the Prosecutor and the Victims and Witnesses Unit present when the witness statements were taken is a key guarantee of procedure propriety in the taking of the statements, as well as a formal requirement for their admissibility, and redacting this information would be prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial.

See No. ICC-01/04-01/07-90, Pre-Trial Chamber I (Single Judge), 7 December 2007, paras. 59-62.

The notion of 'victim' is the same both in respect of protection and participation in the proceedings". The Single Judge, however, recalls that the victim status in the proceeding is granted only upon meeting certain conditions (reasonable grounds to believe that they have suffered harm e.g.) and thus these alleged victims unrelated to the charges cannot, in principle, be considered as victims for the purpose of rule 81(4) of the Rules. The Single Judge adds that authorization for redactions cannot also be granted for them under rule 81(2) of the Rules because they are neither OTP sources nor involved in the Prosecution's investigations. Nevertheless, authorization for redaction is granted considering that the drafters of the Statute and the Rules included a number of provisions specifically governing the protection of alleged victims of sexual offences as a result of

crimes within the jurisdiction of the Court and a systematic and teleological interpretation of rule 81(4) of the Rules - in light of the particular emphasis placed by the drafters of the Statute and the Rules on the protection of alleged victims of sexual offences resulting from crimes within the jurisdiction of the Court - leads to the conclusion that, on an exceptional basis and only for the purpose of their protection by means of the redaction of their names and identifying information, the notion of 'victim' under rule 81(4) of the Rules would also cover alleged victims of sexual offences which are unrelated to the charges in the case at hand.

See No. ICC-01/04-01/07-160, Pre-Trial Chamber I, 23 January 2008, paras. 13-19. See also No. ICC-01/04-01/07-361, Pre-Trial Chamber I (Single Judge), 3 April 2008, par. 35.

Even if any prejudice is caused by the authorised redactions, this will not be inconsistent with the rights of the Defence and a fair and impartial trial because the redactions are only granted for the purpose of the proceedings leading up to the confirmation hearing - which is an early stage of the proceedings in the case characterised by a limited scope.

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

The redactions requested by the Prosecution, which are limited to the current whereabouts of the aforesaid individuals, or to information that could lead to the identification of such whereabouts, are (i) sufficient to minimize this risk and that, at this stage of the proceedings, there is no less intrusive alternative measure that can be taken to achieve the same goal and (ii) necessary to guarantee that these individuals will not be identified". Furthermore, "the need for protection for these alleged victims of sexual offences [remaining in a serious situation] overrides any prejudice that might be caused to the Defence at this stage by the redaction of information that could lead to the identification of their current whereabouts; and that even if any prejudice is caused, this will not be inconsistent with the rights of the Defence and a fair and impartial trial as (i) the Defence will have access to the identity of [the witness whose statement is concerned by the redactions]; (ii) the alleged victims of sexual offences were not victimised [by the suspect] and (iii) the alleged victims of sexual offences are not referred to in the interview notes and statement of [the witness] as having any knowledge of the crimes included in the warrant of arrest.

See No. ICC-01/04-01/07-160, Pre-Trial Chamber I, 23 January 2008, paras. 34-36.

Authorisation for redaction are not granted since the Prosecution explicitly states [in its application] that none of the individuals referred to as 'innocent third parties' is a Prosecution source or is in any way involved in any ongoing or further Prosecution investigation, and that the relevant redactions have been requested solely for their protection since they could erroneously be perceived as Prosecution sources or witnesses.

See No. ICC-01/04-01/07-160, Pre-Trial Chamber I, 23 January 2008, par. 55.

Those granted the procedural status of victim cannot be part of the disclosure process at the pre-trial stage of a case, and thus they have neither disclosure rights nor disclosure obligations.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 114.

Rule 81(4) of the *Rules of Procedure and Evidence* should be read to include the words «persons at risk on account of the activities of the Court» so as to reflect the intention of the States that adopted the *Rome Statute* and the *Rules of Procedure and Evidence*, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons. While the non-disclosure of information for the protection of persons at risk on account of the activities of the Court is permissible in principle, pursuant to rule 81(4) of the *Rules of Procedure and Evidence*, whether any such non-disclosure should be authorised on the facts of an individual case will require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect. Non-disclosure of information that is required to be recorded pursuant to rule 111(1) of the *Rules of Procedure and Evidence* may be authorised by a Pre-Trial Chamber. Requests for non-disclosure of such information require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect.

See No. ICC-01/04-01/07-475, Appeals Chamber, 13 May 2008, paras. 1-3.

The Prosecutor may apply to the Pre-Trial Chamber, pursuant to rule 81(2) of the *Rules of Procedure and Evidence*, for a ruling as to whether the identities and identifying information of «potential prosecution witnesses» must be disclosed to the Defence. Whether any such application for non-disclosure should be authorised requires a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect. In this appeal «potential prosecution witnesses» are individuals to whom reference is made in the statements of actual witnesses upon whom the Prosecutor wishes to rely at the confirmation

hearing. They are individuals who have been interviewed by the Prosecutor or who the Prosecutor intends to interview in the near future, but in relation to whom the Prosecutor has not yet decided whether they will become prosecution witnesses.

See No. ICC-01/04-01/07-476, Appeals Chamber, 13 May 2008, paras. 1 and 2.

The Prosecutor may apply to the Pre-Trial Chamber, pursuant to rule 81(4) of the *Rules of Procedure and Evidence*, for a ruling as to whether the names, identifying information and whereabouts of alleged victims of sexual offences who are not connected to the charges in the relevant case and to whom reference is made in the statements of Prosecution witnesses must be disclosed to the Defence, so as to protect the safety of such alleged victims as «persons at risk on account of the activities of the Court». Whether any such application for non-disclosure should be authorised requires a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect.

See No. ICC-01/04-01/07-521, Appeals Chamber, 27 May 2008, paras. 1 and 2.

Inspection, as provided for in rules 77 and 78 of the *Rules of Procedure and Evidence*, relates only to the prosecution and the defense.

However, the Decision on victims participation does provide a mechanism whereby the victims who have been given the right to participate may be provided with 'any materials within the possession of the prosecution that are relevant to the personal interests of the victims.' The mechanism for the provision of this information shall operate, in the first instance, between the relevant victim's legal representative and the prosecution. The relevant victim's legal representative shall identify, first, the victim's personal interest and, second, the nature of the information that may be within the evidence in the possession of the prosecution which is material to the preparation of the victim's participation during a particular phase of the proceedings (e.g. material relating to involvement in particular events at a given time or location). This will enable the prosecution to identify whether material in its possession is relevant.

See No. ICC-01/04-01/06-1368, Trial Chamber I, 02 June 2008, para. 30-31.

This provision for provision of material should be dealt with by the prosecution and victims legal representatives inter se and that a filing before the Court should only be made in the event of disagreement.

See No. ICC-01/04-01/06-1368, Trial Chamber I, 02 June 2008, par. 34.

In order to exercise their right to receive relevant material, the legal representatives of victims are instructed to set out in a document provided to the prosecution how material in the latter's possession is relevant to an individual victim's personal interests (e.g. material relating to involvement in particular events at a given time or location).

The prosecution shall thereafter identify and provide any material in its possession which satisfies the above criteria.

In order to participate at the trial, and once victims have received the above documents, they are instructed to file discrete applications before the Chamber, in accordance with paragraphs 103-104 of the [Decision on victim participation, 16 January 2008], specifying how their personal interests are affected at a given phase of the trial.

See No. ICC-01/04-01/06-1368, Trial Chamber I, 02 June 2008, p. 15-16.

In highly restricted circumstances, the prosecution is given the opportunity to agree not to disclose material provided to it at any stage in the proceedings. The restrictions are that the prosecution should receive documents or information on a confidential basis solely for the purpose of generating new evidence—in other words, the only purpose of receiving this material should be that it is to lead to other evidence (which, by implication, can be utilized), unless Rule 82(1) applies.

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

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

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

In deciding whether non-disclosure is justified, human rights law suggests that it is the evidence and not summaries which should be provided to the court.

See No. ICC-01/04-01/06-1401, Trial Chamber I, 13 June 2008, par. 86.

The principle of analogous information is, for the purposes of the confirmation hearing, an adequate alternative measure to actual disclosure, pursuant to article 67(2) or rule 77, of article 54(3)(e) documents when requests for consent have been rejected or are still pending.

The transmission of summaries of article 54(3)(e) documents does not discharge the article 67(2) and rule 77 Prosecution's disclosure obligations for the purpose of the confirmation hearing.

See No. ICC-01/04-01/07-621, Pre-Trial Chamber I (Single Judge), 20 June 2008, p. 52.

The Chamber observes that in the Statute and the Rules reference is made to the process of disclosure between the parties, namely the Prosecutor and the defence. Regarding the modalities of disclosure, the Chamber notes the relevant provisions in articles 61(3) and 67(2) of the Statute and rules 76 to 83 and 121 of the Rules.

The Chamber further notes that the modalities of disclosure will be subject to any decision taken by the Chamber in respect of restrictions on disclosure pursuant to rules 81 and 82 of the Rules.

The Chamber observes that the provisions on disclosure, especially rule 121(2)(c) of the Rules, draw a clear distinction between "disclosure" which is *inter partes* and "communication" to the Chamber. Therefore, the Chamber is of the view that the concept of "disclosure" should not be confused with the concept of «communication» of evidence to the Chamber. The Chamber is not a party to the proceedings and does not take part in the disclosure process. Pursuant to rule 121(2)(b) of the Rules, the Chamber shall ensure that disclosure takes place under satisfactory conditions. Thus, for the Chamber to be in a position to ensure that proper disclosure takes place and to make an informed decision in accordance with its statutory mandate, as already set out in part I, the Chamber shall be informed by way of communication of all the evidence disclosed between the parties.

The Chamber notes that under rule 121(2)(c) of the Rules «[a]ll evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber». The reference to "all evidence" in rule 121(2)(c) of the Rules implies that communication to the Chamber comprises all the evidence disclosed between the parties and that it is not limited to the evidence which the parties intend to rely on or to present at the confirmation hearing. The travaux préparatoires of that rule indicate that it was first placed in the section of disclosure as draft rule 5.12, preceding rules concerning both disclosure *stricto sensu* and inspection which have now become rules 76 to 79 of the Rules. However, delegations decided that draft rule 5.12 would be better placed in the rule concerning the confirmation hearing. Without any modification, that draft rule was then transferred and incorporated into the present rule 121 of the Rules. In the Chamber's view, this is a further indication that the drafters intended rule 121(2)(c) of the Rules to cover all elements of disclosure referred to in what are now rules 76 to 79 of the Rules.

Furthermore, the Chamber notes that rule 121(2)(c) of the Rules is to be interpreted «in accordance with article 61 paragraph 3» of the Statute referring also to information which the Chamber may order to be disclosed pursuant to the second sentence of article 61(3) of the Statute. This allows the Chamber to have access to evidence other than that on which the parties intend to rely at the confirmation hearing.

The Chamber points out that Section II of Chapter IV of the Rules entitled «Disclosure» refers to two forms of disclosure according to the nature of the evidence, namely disclosure *stricto sensu* pursuant to rule 76 of the Rules, and disclosure by way of inspection either by the defence or by the Prosecutor pursuant to rules 77 and 78 of the Rules.

Furthermore, the Chamber notes that article 61(3) of the Statute does not follow this differentiation and encompasses both forms of disclosure as set out above.

Therefore, the Chamber considers that evidence previously inspected by the parties is to be communicated to the Chamber.

The Chamber observes that rule 77 of the Rules puts an obligation on the Prosecutor to disclose to the defence three types of evidence: any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, (i) which are material to the preparation of the defence or (ii) are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or (iii) were obtained from or belonged to the person charged.

The Chamber notes that rule 77 comprises material which may be of incriminatory, exculpatory or mixed nature. Therefore, in order to enable the Chamber to make its own assessment of the evidence inspected, all of it has to be communicated to the Chamber.

The above applies equally to the material in possession or control of the defence that is to be inspected by the Prosecutor in accordance with rule 78 of the Rules.

In light of the aforesaid, the Chamber will have access to the following disclosed evidence:

- a) evidence pursuant to article 67(2) of the Statute, namely all evidence in the Prosecutor's possession or control which the Prosecutor believes to show or tend to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of the prosecution evidence.
- b) evidence pursuant to rule 76 of the Rules, namely all names and statements of witnesses on whom the Prosecutor intends to rely at the confirmation hearing, regardless of whether the Prosecutor intends to call them to testify.
- c) evidence in the possession or control of the Prosecutor, which is material to the preparation of the defence or is intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or was obtained from or belonged to the person charged and which are subject to inspection pursuant to rule 77 of the Rules.
- d) evidence in the possession or control of the defence, which is intended for use by the defence as evidence for the purposes of the confirmation hearing and is subject to inspection pursuant to rule 78 of the Rules.
- e) evidence the defence may present, in case it intends, pursuant to rule 79 of the Rules, to raise the existence of an alibi or to raise a ground for excluding criminal responsibility.

See No 01/05-01/08-55, Pre-Trial Chamber III, 31 July 2008, paras. 40-51.

Three particular issues of principle are engaged in the determination of this application. First, the accused has the right to a fair hearing (Article 67(1) of the *Rome Statute*). Second, the Court has the various duties of protecting "the safety, physical and psychological well-being, dignity and privacy of victims and witnesses" (Article 68(1) of the Statute), providing "for the protection of the accused, victims and witnesses during the trial" (Article 64(6) (e) of the Statute), as well as taking "the necessary steps to ensure the confidentiality of information [...] to protect the safety of witnesses and victims and members of their families" (Rule 81(4) of the Rules). Third, the prosecution has the obligation to disclose to the defence copies of any statements made by those witnesses it intends to call, and to disclose to the defence evidence in its possession or control which the Prosecutor "believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence" (Article 67(2) of the Statute). Furthermore, the prosecution shall "permit the defence to inspect any books, documents photographs and other tangible objects in the possession or control of the prosecution, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence [...] or were obtained from or belonged to the person" (Rule 77 of the Rules). This latter principle has been referred to generally by the Chamber and the Appeals Chamber as the disclosure of exculpatory material.

The resolution of this application is mainly dependent on the interrelationship between those three principles, against the background of the facts of this case. By way of general observation, the accused has a right to a fair hearing and, by clear implication, to a fair trial, which the Chamber has a duty to protect. The entitlement of victims and witnesses to appropriate protection by the Court (including as regards their safety and privacy) is also a matter of substantial importance, although determining the right course in each instance is an essentially fact-sensitive decision. As regards the third principle, the disclosure regime established by the *Rome Statute* framework is imposed on the prosecution alone: in other words, no positive obligation is imposed on the other organs of the Court, the defence or the participants to disclose exculpatory material to the defence under Article 67(2) of the Statute, Rule 77 or Rule 76 of the Rules.

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

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

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

See No. ICC-01/04-01/06-1637, Trial Chamber I, 21 January 2009, paras. 9-13. See also Oral decision, Trial Chamber I, No. ICC-01/04-01/06-T-109-CONF-ENG ET, 27 January 2009, pp. 44-45.

The precise role of the intermediaries (together with the manner in which they discharged their functions) has become an issue of major importance in this trial. Contrary to the prosecution's argument, the defence submissions are not dependent on speculative assertions: they are, to an important extent, clearly evidence based. Given the extensive rehearsal of the relevant testimony and documents set out above, it is unnecessary to repeat in detail the particular facts on which defence counsel rely; instead, the Chamber needs to focus on the consequences of the material now before the Court.

The Chamber is alive to the potential risks to the intermediaries employed by the prosecution once their identities are revealed to the accused, as well as the possible adverse implications as regards their future usefulness, but there is now a real basis for concern as to the system employed by the prosecution for identifying potential witnesses. On the evidence, there was extensive opportunity for the intermediaries, if they wished, to influence the witnesses as regards the statements they provided to the prosecution, and, as just set out, there is evidence that this may have occurred. In the circumstances it would be unfair to deny the defence the opportunity to research this possibility with all of the intermediaries used by the prosecution for the relevant witnesses in this trial, where the evidence justifies that course.

On the basis of the history and the submissions set out extensively above, and applying the *Rome Statute* framework and the analysis just rehearsed, the Chamber has adopted the following approach:

- a. Given the markedly different considerations that apply to each intermediary (or others who assisted in a similar or linked manner), disclosure of their identities to the defence is to be decided on an individual-by-individual basis, rather than by way of a more general, undifferentiated approach.
- b. The threshold for disclosure is whether *prima facie* grounds have been identified for suspecting that the intermediary in question had been in contact with one or more witnesses whose incriminating evidence has been materially called into question, for instance by internal contradictions or by other evidence. In these circumstances, the intermediary's identity is disclosable under Rule 77 of the Rules. Given the evidence before the Chamber that some intermediaries may have attempted to persuade individuals to give false evidence, and that some of the intermediaries were in contact with each other, the Chamber considers that in these circumstances the defence should be provided with the opportunity to explore whether the intermediary in question may have attempted to persuade one or more individuals to give false evidence. However, in each instance the Chamber has investigated, and will investigate, the potential consequences of an order for disclosure for the intermediary and others associated with him, and whether lesser measures are available. Applications in this regard will be dealt with by the Chamber on an individual basis.
- c. The identities of intermediaries (or others who assisted in a similar or linked manner) who do not meet the test in b. are not to be disclosed.

- d. Disclosure of the identity of an intermediary (or others who assisted in a similar or linked manner) is not to be effected until there has been an assessment by the VWU, and any protective measures that are necessary have been put in place.
- e. The identities of intermediaries who did not deal with trial witnesses who gave incriminating evidence are not to be revealed, unless there are specific reasons for suspecting that the individual in question attempted to persuade one or more individuals to give false evidence or otherwise misused his or her position. Applications in this regard will be dealt with by the Chamber on an individual basis.
- f. The threshold for calling intermediaries prior to the defence abuse submissions is that there is evidence, as opposed to prima facie grounds to suspect, that the individual in question attempted to persuade one or more individuals to give false evidence.

See No. ICC-01/04-01/06-2434-Red2, Trial Chamber I, 31 May 2010, paras. 135, 138-140.

Relevant decisions regarding disclosure

Decision on the final system of disclosure and the establishment of a timetable (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-102, 16 May 2006

First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-437, 15 September 2006

Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-455, 20 September 2006

Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled «Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the *Rules of Procedure and Evidence*» (Appeals Chamber), No. ICC01/04-01/06-568, 13 October 2006

Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled «First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81» (Appeals Chamber), No. ICC-01/04-01/06-773, 14 December 2006

Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled «Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81» (Appeals Chamber), No. ICC-01/04-01/06-774, 14 December 2006

Decision issuing a redacted version of "Decision on the prosecution's filing entitled 'Prosecution's provision of information to the Trial Chamber' filed on 3 September 2007" and its annex entitled Redacted version of "Decision on the prosecution's filing entitled "Prosecution's provision of information to the Trial Chamber" filed on 3 September 2007" (Trial Chamber I), No. ICC-01/04-01/06-963, 26 September 2007

First Decision on the Prosecution Request for Authorisation to Redact Witness Statements (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-90, 7 December 2007

Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9 (Pre-Trial Chamber I), No. ICC-01/04-01/07-160, 23 January 2008 (Public Redacted Version of ICC-01/04-01/07-123-Conf-Exp)Corrigendum to the Third Decision on the Prosecution Request for Authorisation to Redact materials related to the statements of Witnesses 7,8, 9,12 and 14 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-249, 5 March 2008

Decision on the Prosecution requests for redactions pursuant to rule 81(2) and 81(4) of the Rules and for an Extension of Time pursuant to regulation 35 of the Regulations of the Court (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-312, 11 March 2008

Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witnesses 166 and 233 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-361, 3 April 2008

Sixth Decision on the Prosecution Request for Authorisation to Redact the Interviews Transcripts of Witness 238 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-425, 21 April 2008

Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008

Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled «First Decision on the Prosecution Request for Authorisation to Redact Witness Statements» (Appeals Chamber), No. ICC-01/04-01/07-475, 13 May 2008

Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled «First Decision on the Prosecution Request for Authorisation to Redact Witness Statements» (Appeals Chamber), No. ICC-01/04-01/07-476, 13 May 2008

Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled «Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9» (Appeals Chamber), No. ICC-01/04-01/07-521, 27 May 2008

Decision on the legal representative's request for clarification of the Trial Chamber's 18 January 2008 "Decision on victims' participation" (Trial Chamber I), No. ICC-01/04-01/06-1368, 2 June 2008

Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (Trial Chamber I), No. ICC-01/04-01/06-1401, 13 June 2008

Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-621, 20 June 2008

Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties (Pre-Trial Chamber III), No 01/05-01/08-55, 31 July 2008

Decision on the defence application for disclosure of victims applications (Trial Chamber I), No. ICC-01/04-01/06-1637, 21 January 2009

Oral decision, Trial Chamber I, No. ICC-01/04-01/06-T-109-CONF-ENG ET, 27 January 2009

Redacted Decision on Intermediaries (Trial Chamber I), No. ICC-01/04-01/06-2434-Red2, 31 May 2010



Part 3

Practical issues

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1. How to file a document in the proceedings before the Court?

All documents and material pertaining to the proceedings in a situation and/or case have to be filed through the Court Management Section (CMS) in order to be registered in the relevant situation and/or case record.

In accordance with regulation 24(1) of the *Regulations of the Registry*, “documents [and] material [...] may be filed with the Registry by hand, by post or by electronic means”. If filed electronically, documents and materials shall be sent to the following email address: judoc@icc-cpi.int.

The *Regulations of the Court* and the *Regulations of the Registry* provide for specificities regarding the format of the documents to be filed, their level of confidentiality, and time limits.

1. Format of documents filed with the Court

Regulation 36 of the Regulations of the Court:

Format of documents and calculation of page limits

“4. All documents shall be submitted on A4 format. Margins shall be at least 2.5 centimetres on all four sides. All documents that are filed shall be paginated, including the cover sheet. The typeface of all documents shall be 12 point with 1.5 line spacing for the text and 10 point with single spacing for footnotes. An average page shall not exceed 300 words”.

Participants in the proceedings shall use a specific template to file written submissions before the Court. Please refer to the Annex for the template and the explanations for its use.

2. Time limits for documents filed with the Court

Regulation 33 of the Regulations of the Court:

Calculation of time limits

“1. For the purposes of any proceedings before the Court, time shall be calculated as follows:

- (a) Days shall be understood as calendar days;
- (b) The day of notification of a document, decision or order shall not be counted as part of the time limit;
- (c) Where the day of notification is a Friday, or the day before an official holiday of the Court, the time limit shall not begin to run until the next working day of the Court;
- (d) Documents shall be filed with the Registry, at the latest, on the first working day of the Court following expiry of the time limit.

2. Documents shall be filed with the Registry between 9am and 4pm The Hague time or the time of such other place as designated by the Presidency, a Chamber or the Registrar, except where the urgent procedure foreseen in regulation 24, sub-regulation 3 of the *Regulations of the Registry* applies.

3. Unless otherwise ordered by the Presidency or a Chamber, documents, decisions or orders received or filed after the filing time prescribed in sub-regulation 2 shall be notified on the next working day of the Court”.

Regulation 34 of the Regulations of the Court:

Time limits for documents filed with the Court

“Unless otherwise provided in the Statute, Rules or these Regulations, or unless otherwise ordered:

- (a) A Chamber may fix time limits for the submission of the initial document to be filed by a participant;
- (b) A response referred to in regulation 24 shall be filed within 21 days of notification in accordance with regulation 31 of the document to which the participant is responding;
- (c) Subject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days of notification in accordance with regulation 31 of the response”.

Regulation 35 of the Regulations of the Court:

Variation of time limits

“1. Applications to extend or reduce any time limit as prescribed in these Regulations or as ordered by the Chamber shall be made in writing or orally to the Chamber seized of the matter setting out the grounds on which the variation is sought.

2. The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.

Regulation 24 of the Regulations of the Registry:

Responses and replies

"3. The Presidency, a Chamber or a participant filing a document or material which requires urgent measures to be taken shall insert the word "URGENT" on the cover page in capital letters. Outside the filing hours described in regulation 33, sub-regulation 2, of the Regulations of the Court, the Presidency, a Chamber or the participant requesting urgent measures shall contact the duty officer provided for in regulation 44".

Examples:

- If a decision giving the right to respond within 3 days is issued on a Monday, the time limit begins to run on the Tuesday of the same week, for 3 days, and the response shall thus be filed at the latest on the Friday of the same week, between 9am and 4pm The Hague time.
- If a decision giving the right to respond within 3 days is issued on a Friday (or on the day before an official holiday of the Court), the time limit will begin to run from the next working day of the Court, so on next Monday, for 3 days, and the response shall thus be filed at the latest on the next Thursday, between 9am and 4pm The Hague time.
- If a decision giving the right to respond within 3 days is issued on a Tuesday, the time limit will begin to run on the Wednesday of the same week, for 3 days, and the response shall thus be filed at the latest on the next Monday, between 9am and 4pm The Hague time.
- If a decision giving the right to respond within 3 days is issued on a Wednesday, the time limit will begin to run on the Thursday of the same week, for 3 days, and the response shall thus be filed at the latest on the next Monday (the next working day), between 9am and 4pm The Hague time, since Saturdays and Sundays are considered as calendar days and as such shall be counted in the calculation.

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

Table I – general time limits

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

Table II – Time limits related to appeals

An appeal shall of itself not have suspensive effect – except the ones against convictions, acquittals, sentences (see art. 81(3)(a), (b) and (4))

Type of documents	Time limits	Person(s) or organ(s) submitting the documents	Relevant Provision(s) of the Regulations of the Court or the Rules of Procedure and Evidence	Specificities of the procedure
Appeals under rule 150	30 days from the date on which the party filing the appeal is notified of the relevant document	Not specified	Rule 150(1) Rule 150(2) Rule 152(1)	<ul style="list-style-type: none"> • Appeals under rule 150 are against convictions, acquittals, sentences and reparation orders • The Appeals Chamber may extend the time limit “for good cause”, following an application to this effect • The Appellant can discontinue its appeal any time before judgment
Document in support of an appeal	Within 90 days of notification date	Not specified	Regulation 58(1)	
Response to the document In support of the appeal	Within 60 days of notification of the document in support of the appeal	Participant	Regulation 59(1)	
Reply to a response to the document in support of the appeal	Within such time as the Appeals Chamber may specify in its order	Appellant	Regulation 60(1)	Whenever the Appeals Chamber considers it necessary in the interests of justice
Appeals against other decisions, that do not require the leave of the court	Not later than 5 days from the “notification date” No later than 2 days from the “notification date”	The party filing the appeal The party filing the appeal	Rule 154(1) Rule 154(2)	<ul style="list-style-type: none"> • For appeals filed under article 81(3)(c)(ii) [detention maintained in case of an acquittal] or 82(1)(a) or (b) [decision/jurisdiction, admissibility; granting, denying release of person investigated or prosecuted] • For appeals filed under article 82(1)(c) [PTC decision to act on its own initiative under art. 56(3) / unique investigative opportunity] • The Appellant can discontinue its appeal any time before judgment

Type of documents	Time limits	Person(s) or organ(s) submitting the documents	Relevant Provision(s) of the Regulations of the Court or the Rules of Procedure and Evidence	Specificities of the procedure
Document in support of appeals under rule 154	Within 21 days of notification of the relevant decision	Appellant	Regulation 64(2)	
Response to a document in support of appeals under rule 154	Within 21 days of the notification date	Participant	Regulation 64(4)	
Appeals against other decisions, that do require the leave of the court	Within 5 days of the notification date	"A party" State concerned or prosecutor	Rule 155(1)	<ul style="list-style-type: none"> For appeals against decision under article 82(1)(d) [that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings] For appeals against decision under article 82(2) [PTC decision under art. 57(3)(d)] The Appellant can discontinue its appeal any time before the judgment
Response to appeals under rule 155	Within 3 days of notification of the application	Participants	Regulation 65(3)	
Document in support of appeals under rule 155	Within 10 days of notification of the decision granting leave to appeal	Appellant	Regulation 65(4)	
Application for revision	NOT SPECIFIED	Accused	Regulation 66	
Response to the application for revision	Within 40 days of notification date	Participants & any other person having a direct interest in the revision proceedings	Regulation 66(2)	
REPLY (to the response to the application for revision)	Within such time as specified in the Appeals Chamber's order	Appellant	Regulation 66(4)	May be ordered by the Appeals Chamber if the latter considers it necessary in the interests of justice

3. Level of confidentiality of documents filed with the Court

Pursuant to regulation 14 of the *Regulations of the Registry*, documents and material may be classified as public (available to the public and to all participants), confidential (not disclosed to the public, but available to all participants), under seal or *ex parte* (confidential and only available to a limited number of persons).

Regulation 23 bis of the Regulations of the Court:

Filing of documents marked *ex parte*, under seal or confidential

"1. Any document filed by the Registrar or a participant and marked "*ex parte*", "*under seal*" or "*confidential*", shall state the factual and legal basis for the chosen classification and, unless otherwise ordered by a Chamber, shall be treated according to that classification throughout the proceedings.

2. Unless otherwise ordered by a Chamber, any response, reply or other document referring to a document, decision or order marked "*ex parte*", "*under seal*" or "*confidential*" shall be filed with the same classification. If there are additional reasons why a response, reply or any other document filed by the Registrar or a participant should be classified "*ex parte*", "*under seal*", or "*confidential*", or reasons why the original document or other related documents should not be so classified, they shall be provided in the same document.

3. Where the basis for the classification no longer exists, whosoever instigated the classification, be it the Registrar or a participant, shall apply to the Chamber to reclassify the document. A Chamber may also re-classify a document upon request by any other participant or on its own motion. In the case of an application to vary a protective measure, regulation 42 shall apply.

4. This regulation shall apply *mutatis mutandis* to proceedings before the Presidency".

Regulation 24 of the Regulations of the Registry:

Responses and replies

"4. Where proceedings are held without notification of one or more of the participants, or where they do not have an opportunity to voice their arguments, documents, material and orders shall be filed *ex parte*. The words 'EX PARTE' shall be inserted on the cover page in capital letters and the recipients other than the Chamber shall be specified after the phrase 'only available to'".

Pursuant to regulation 23 *bis* of the *Regulations of the Court*, the legal and factual basis of the document filed shall be stated in the latter itself by the participant filing a document *ex parte*, under seal or confidential.

4. Page limits of documents filed with the Court

Regulation 37 of the Regulations of the Court:

Page limits for documents filed with the Registry

"1. A document filed with the Registry shall not exceed 20 pages, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.

2. The Chamber may, at the request of a participant, extend the page limit in exceptional circumstances".

Regulation 38 of the Regulations of the Court:

Specific page limits

"1. Unless otherwise ordered by the Chamber, the page limit shall not exceed 100 pages for the following documents and responses thereto, if any:

[...]

(f) Representations under article 75.

2. Unless otherwise ordered by the Chamber, the page limit shall not exceed 50 pages for the following documents and responses thereto, if any:

(a) Representations made by victims to the Pre-Trial Chamber under article 15, paragraph 3, and rule 50, sub-rule 3;

[...]

(e) A request by any participant to the Pre-Trial Chamber to take specific measures or to issue orders and warrants or to seek State cooperation;

[...]".

Documents filed shall usually not exceed 20 pages in accordance with regulation 37 of the *Regulations of the Court*. However, pursuant to regulation 38 of the *Regulations of the Court*, some submissions can exceed such page limit.

2. How to file an application for participation or for reparations in the proceedings before the Court?

1. Use of the standards forms created by the Court

Applications for participation and/or for reparations shall be submitted in writing to the Victims Participation and Reparations Section within the Registry. Pursuant to regulation 86 of the *Regulations of the Court*, standard forms have been developed to this effect and are available on the Website of the Court at the following addresses:

Participation:

<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Participation/Application+Form/Individuals/Individuals+and+Persons+acting+on+their+behalf.htm>

Reparations:

<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Reparation/Standard+application+form+for+reparations+before+the+International+Criminal+Court+for+individual+vic.htm>

2. Use of the Booklet accompanying the forms

In order to help victims and/or intermediaries and/or legal representatives, the Victims Participation and Reparations Section (VPRS) prepared a booklet explaining how to fill out the standard form for participation and/or for reparations. The booklet is available on the Website of the Court at the following address:

<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Participation/A+guide+for+the+Participation+of+Victims+in+the+proceedings+of+the+court.htm>

3. Appropriate moment to file the applications

Pursuant to regulation 86(3) of the *Regulations of the Court*, the application for participation should be filed “before the start of the stage of the proceedings in which [victims] want to participate”.

4. Address where to send the applications

Once completed, the standards forms should be sent to:

Victims Participation and Reparations Section (VPRS)

P.O. Box 19519, 2500 CM The Hague

The Netherlands

Fax: + 31 (0)70 515 9100

Email: vprsapplications@icc-cpi.int

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

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

Rule 90 of the Rules of Procedure and Evidence:

Legal representative of victims

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

Regulation 113 of the Regulations of the Registry:

Legal assistance paid by the Court

"1. For the purpose of participation in the proceedings, the Registry shall inform victims that they may apply for legal assistance paid by the Court, and shall supply them with the relevant form(s).

2. In determining whether to grant such assistance, the Registrar shall take into account, inter alia, the factors mentioned in article 68, paragraph 1, any special needs of the victims, the complexity of the case, the possibility of asking the Office of Public Counsel for Victims to act, and the availability of pro bono legal advice and assistance.

3. Regulations 130 - 139 shall apply mutatis mutandis".

1. Applications for legal assistance paid by the Court

Pursuant to rule 90(5) of the *Rules of Procedure and Evidence* and regulation 113(1) of the *Regulations of the Registry*, when victims have no financial means to pay a counsel they may apply for legal assistance to be paid for by the Court. A standard form is available upon request. Please note that the declaration of indigence attached to the form ought to be signed by the victim himself or herself and that the legal representative of the said victim cannot sign for his or her client.

A specific section within the Registry – the Counsel Support Section (CSS) – deals with any matters related to the legal assistance paid by the Court, as well as with matters dealing with administrative support to counsel.

By mail

css@icc-cpi.int

By postal mail

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

By phone:

+31-(0)705158787

2. Criteria used for the evaluation of such applications

Pursuant to regulation 113(2) of the *Regulations of the Registry*, "[i]n determining whether to grant such assistance, the Registrar shall take into account, inter alia, the factors mentioned in article 68, paragraph 1, any special needs of the victims, the complexity of the case, the possibility of asking the Office of Public Counsel for Victims to act, and the availability of pro bono legal advice and assistance".

Moreover, pursuant to regulation 84(1) of the *Regulations of the Court*, it is for the Registrar to determine whether or not a person applying for legal assistance has the means and whether or not full or partial payment should be made.

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

4. How to constitute a team?

Proceedings before the Court require constant attention. It is therefore essential to constitute a team in order to be able to fully follow the entire proceedings before the Court and to react in a timely manner. In order to help the legal representatives to constitute their teams, the Registry has created and maintains, on the one hand, a list of assistants to Counsel and, on the other hand, a list of professional investigators. These lists are available upon request.

1. Lists of assistants and professional investigators

Assistants are persons who assist counsel in the proceedings before the Court. They have either five years of relevant experience in criminal proceedings or specific competence in international or criminal law and procedure.

Professional investigators are persons with established competence in international or criminal law procedure and at least ten years of relevant experience in investigative work in criminal proceedings at the national or international level. Legal representatives should consider to be assisted by professional investigators if investigative actions are needed for the representation of the interests of their clients. Appeal to an investigator may be useful, for instance, during the reparations proceedings when victims will need to present evidence of the harm suffered in support of their claims to the relevant Chamber.

Regulation 127 of the Regulations of the Registry:

Appointment of assistants to counsel

"Persons who assist counsel in the presentation of the case before a Chamber shall be appointed by counsel and selected from the list maintained by the Registrar".

Regulation 139 of the Regulations of the Registry:

Selection of professional investigators

"1. Where legal assistance is paid by the Court and includes the fee of a professional investigator, counsel shall select the professional investigator from the list referred to in regulation 137.

2. A person not included in the list of investigators but who has relevant experience with regard to investigations in criminal proceedings, is fluent in at least one of the working languages of the Court and speaks at least one of the languages of the country in which the investigation is being conducted, exceptionally and after confirmation by the Registrar that the above criteria have been met, can be selected by counsel as a resource person in a given case. That resource person shall not be related to the person entitled to legal assistance, to the counsel or any person assisting him or her".

2. The issue of the language used in the proceedings

Considering that the proceedings before the Court are conducted in English and French, it is essential that legal representatives constitute teams including people speaking both working languages. Despite the fact that decisions and orders are translated into both languages, such translations are not available at the same time the original decision is issued. Moreover, filings of the participants to the proceedings are normally not translated.

Legal representatives should also consider to be assisted by an interpreter, if they do not speak the language of the victim(s) they represent.

3. Examples for the constitution of a team

The needs of the legal representatives with regard to their teams will necessarily vary according to the different stages of the proceedings and the modalities of participation granted by Chambers.

Different factors need to be taken into account:

- The fact that legal representatives are usually present in the courtroom during hearings, but they also need to be able to respond to any written submissions in the proceedings at the same time;
- The need for maintaining a constant contact with their clients – who are usually located outside The Netherlands and in remote areas of the country of their residence – in order to be able to collect their views and concerns and to keep them updated of the proceedings;

- The need to collect evidence for the purposes of the proceedings.
- During the reparations stage, the prerogatives of the legal representatives are much wider than during the pre-trial and the trial stages. The possibility for legal representatives to question witnesses, experts and the accused, to submit evidence as well as a list of witnesses and experts gives rise to additional needs with regard to the composition of their teams.

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

In order to be able to fulfil its mandate with regards to the provision of support and assistance to external legal representatives, the Office of Public Counsel for Victims (OPCV) has developed several tools with the aim of enhancing effectiveness and promptness of answers.

The Office has created a Library for the use of its staff and for the use of external legal representatives' teams. The sections of the library are divided per subject and include, *inter alia*, a section on gender issues, one on children issue, one on reparations issues, one on victims in general, and section per country where a situation or a case is ongoing, including national jurisprudence on crimes under the jurisdiction of the Court.

In order to assist external legal representatives in the proceedings before the Court, the Office has also drafted researches on several topics concerning victims' rights, as well as on the crimes under the jurisdiction of the Court. Special attention has been given to the analysis of the preparatory works for the draft of the *Rome Statute*, the *Rules of Procedure and Evidence*, the *Regulations of the Court* and the *Regulations of the Registry*.

In order to answer to the needs of each external legal representatives' team, the modalities and extent of the support and assistance provided by the Office are agreed upon on a case-by-case basis.

The Office can be contacted at:

OPCV@icc-cpi.int

6. Some information on research methodology

1. ICC Legal Tools Project

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

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

The Project comprises:

1. The **Elements Digest**: This is a doctrinal commentary on each element of the crimes and legal requirements of the modes of liability in the *Rome Statute*. It describes all main sources of international criminal law and seeks to give users access to the text of relevant sources for a proper understanding of the substantive law of the *Rome Statute*. The text in this tool does not necessarily represent the views of the ICC, any of its Organs or any participant in proceedings before the ICC. This tool is only available through the Case Matrix (see below).
2. The **Proceedings Commentary**: This is a detailed commentary on criminal procedural and evidentiary questions as contained in the *Rome Statute*, the *Rules of Procedure and Evidence*, and the *Regulations of the Court*. It provides an analysis of key legal issues that are relevant for proceedings before the ICC. This tool may be made publicly available in the future.
3. The **Means of Proof Digest**: This tool provides practical examples of the types or categories of evidence used in national and international criminal jurisdictions to satisfy the legal requirements of the crimes and modes of liability contained in the *Rome Statute*. It is a comprehensive document

amounting to more than 6,000 A4 pages of text. The text in this tool does not necessarily represent the views of the ICC, any of its Organs or any participant in proceedings before the ICC. This tool is only available through the Case Matrix (see below).

4. The **Case Matrix**: a unique, law-driven case management application that provides an explanation of the elements of crimes and legal requirements of modes of liability for all crimes in the *Rome Statute*, serves as a user's guide to how one could prove international crimes and modes of liability, and provides a database service to organise and present the potential evidence in a case; the Case Matrix is only available to users who are working on core international crime cases, on the basis of an agreement with the ICC; and
5. The **Legal Tools Database**, available through the ICC website, containing more than 40,000 documents. It is the most comprehensive and complete database within the field of international criminal law. The tools in the Database are the following:
 - **ICC Documents**: This is a repository of basic ICC documents (such as founding instruments) and case documents. It provides a one-stop location for finding materials used by the Court in its daily practice;
 - **ICC "Preparatory Works"**, containing more than 16,000 documents related to the negotiation and drafting of the *Rome Statute*, the *Rules of Procedure and Evidence* and the Elements of Crimes, issued by States, Non-Governmental Organisations (NGOs), academic institutions, the United Nations and other international organisations between December 1989 and September 2002;
 - **International Legal Instruments**: This tool provides the full text of key international treaties in four areas relevant to work on core international crimes: public international law, international human rights, international humanitarian law, and international criminal law;
 - **International(ised) Criminal Jurisdictions**: This tool contains the basic legal texts and background information of the International Military Tribunals of Nuremberg and Tokyo, the ICTY, the ICTR, UNMIK courts and tribunals, the Special Court for Sierra Leone, the East Timor Panels for Serious Crimes, the Iraqi High Tribunal, and the Extraordinary Chambers in the Courts of Cambodia;
 - **International(ised) Criminal Judgments**: This tool contains the full text of indictments and judgments and other selected decisions issued by the International Military Tribunals of Nuremberg and Tokyo, the ICTY, the ICTR, UNMIK courts and tribunals, the Special Court for Sierra Leone, and the East Timor Panels for Serious Crimes. It also includes selected judgments of allied tribunals in trials for international crimes held immediately after World War II. Judgments of the Iraqi High Tribunal and the Extraordinary Chambers in the Courts of Cambodia will also be made available in the future;
 - **National Jurisdictions**: This tool provides an overview of national legal systems. It contains information helpful for conducting comparative research on criminal law and procedure and on the legal status of core international crimes in the systems;
 - **National Implementing Legislation**: This tool collects national legislation implementing the Rome Statute;
 - **National Cases Involving Core International Crimes**: This tool compiles the most relevant decisions issued by domestic courts and tribunals concerning genocide, crimes against humanity and war crimes, both in civil and criminal matters;
 - **Publicists**: This tool contains articles and opinions by prominent scholars on international criminal law. This tool will be made publicly available in the future;
 - **Internet Legal Resources**: This tool provides a structured list of other Internet websites of relevance to research on international criminal law and related fields;
 - **Human Rights Decisions**: This tool contains human rights decisions from United Nations and regional human rights mechanisms particularly relevant to criminal justice processes linked to core international crimes. This tool is under development and will only be made publicly available in the future;

- **Other International Legal Decisions:** This tool contains decisions by international courts that are not criminal jurisdictions on matters which may be relevant to criminal justice for core international crimes. This tool is under development and is only partially available to the public;
- **Legal Kit:** This is a mobile mini-library of international criminal law sources which fits on portable digital media and can be kept with the user at all times. This tool may be made publicly available in the future.

How are the Legal Tools being maintained?

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

The Legal Tools are available at:

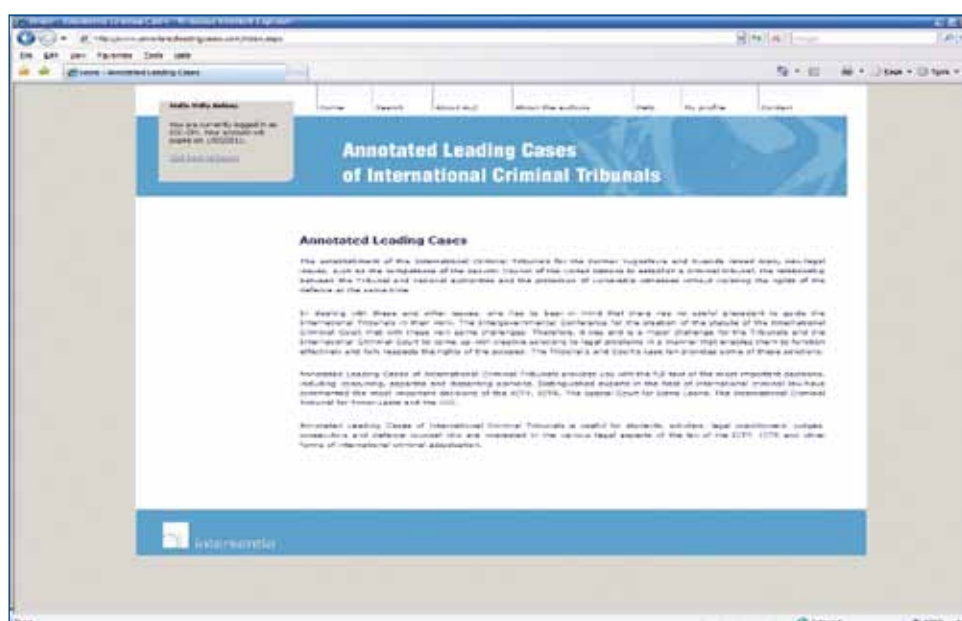
www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/

2. Databases on the Law of the International Criminal Court

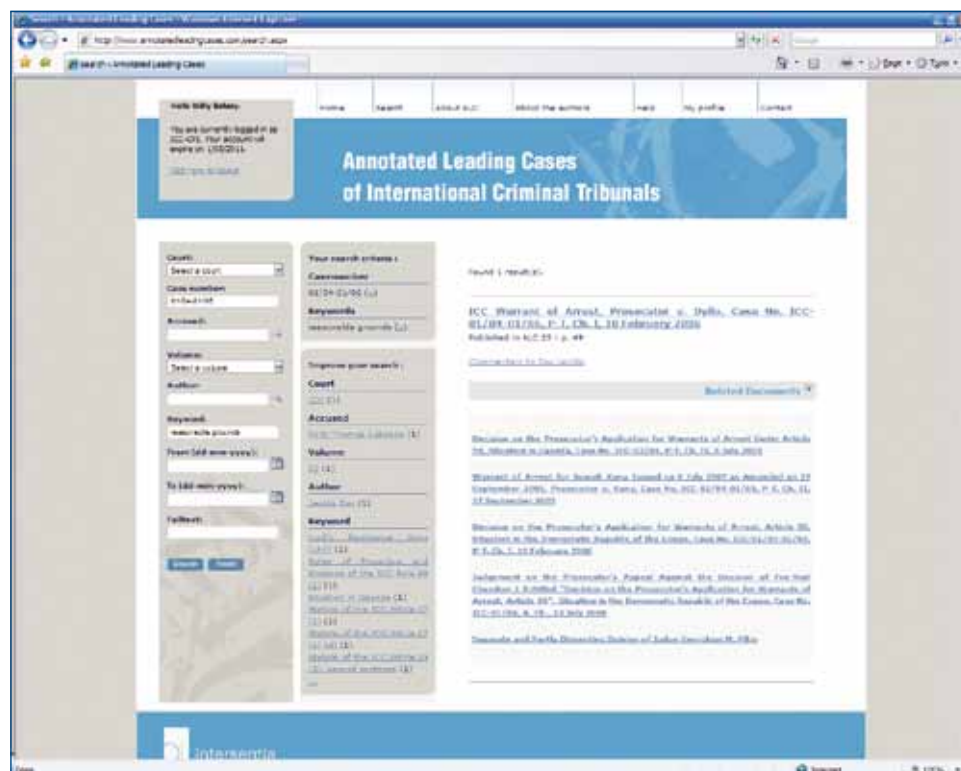
2.1. Annotated Leading Cases

This database is published under the editorial supervision of Prof. André Klip (Maastricht University, the Netherlands) and Prof. Göran Sluiter (University of Amsterdam, the Netherlands). It provides the full text of the most important decisions of the ICC, ICTY, ICTR, and other international courts. It is very useful for counsel practising at the ICC and is available through the ICC Library. However, the database is offered with charge for private users. The web address is:

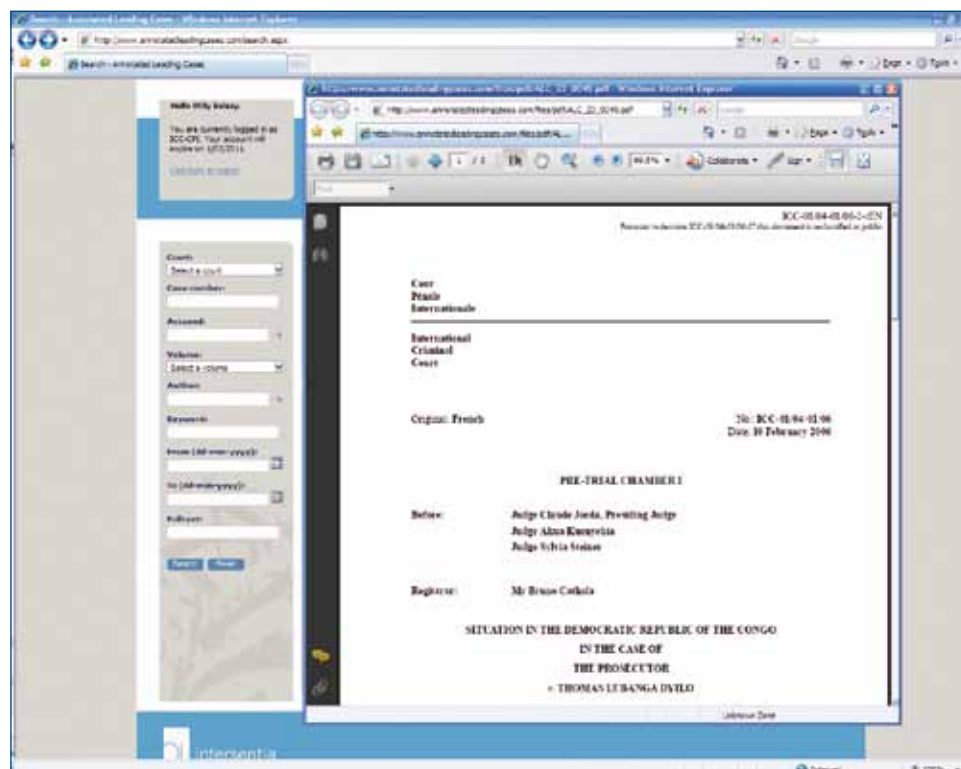
<http://www.annotatedleadingcases.com/index.aspx>



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



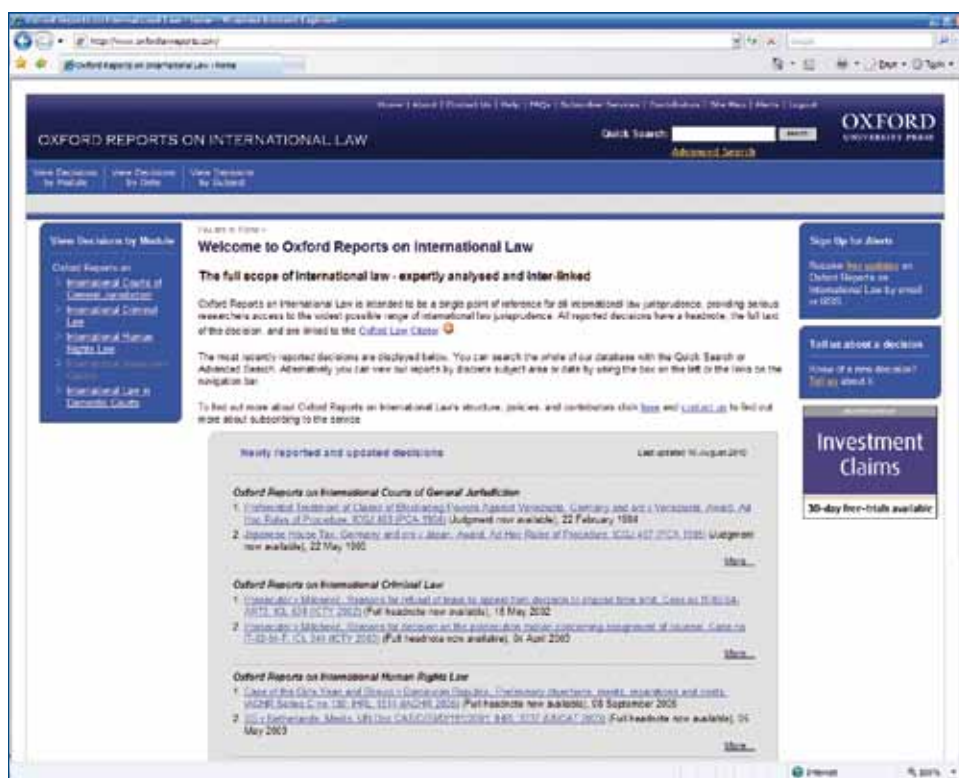
The most valuable service offered by this database is the provision of commentaries of decisions by experts in the international criminal law. These commentaries provide lots of useful information about the case law, including general remarks on the decision, the main legal issues at stake, and the relevant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



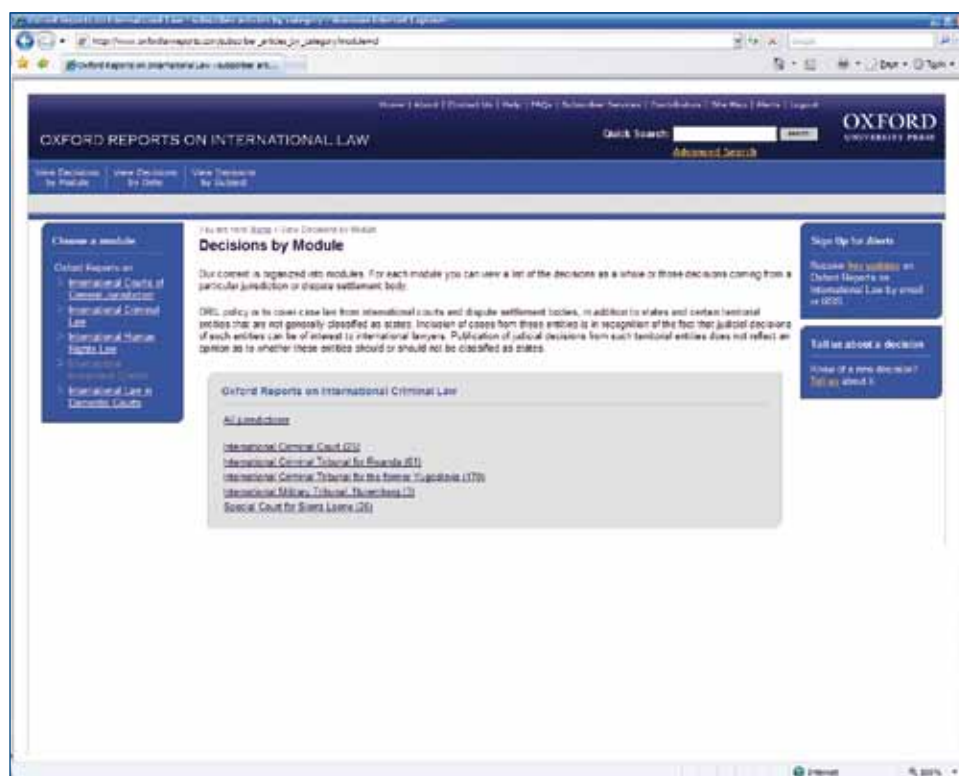
2.2. Oxford Reports on International Law

This database is intended to constitute a single point of reference for all international law jurisprudence, providing researchers access to the widest possible range of international law jurisprudence. This

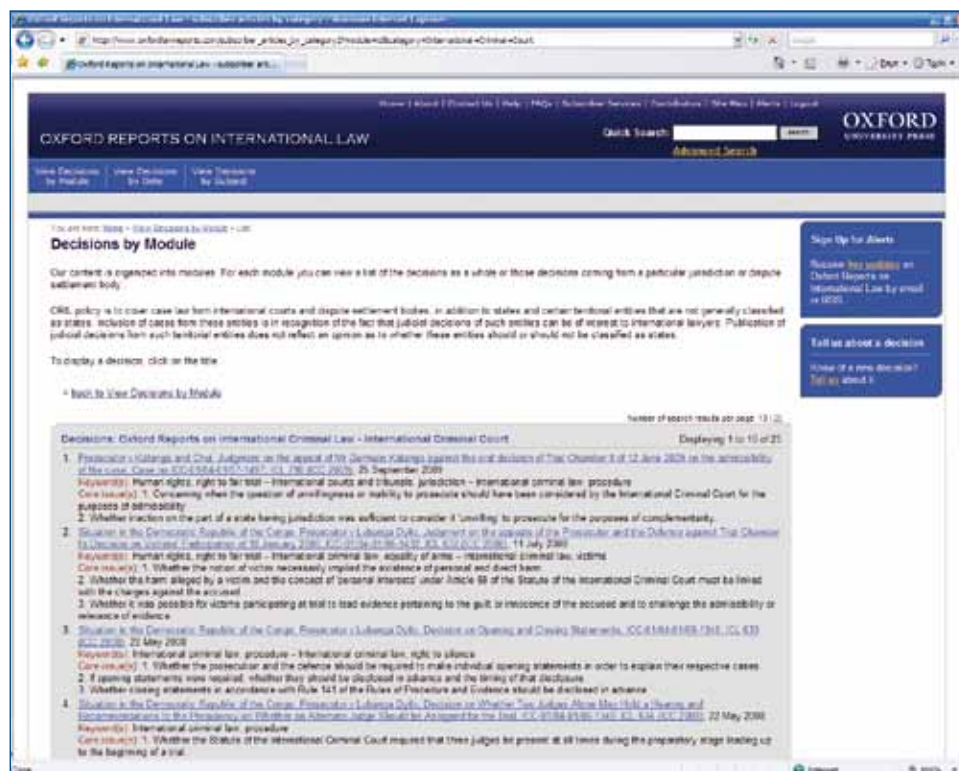
service is available through the ICC Library. However, it is offered on a subscription basis for private users. <http://www.oxfordlawreports.com/>



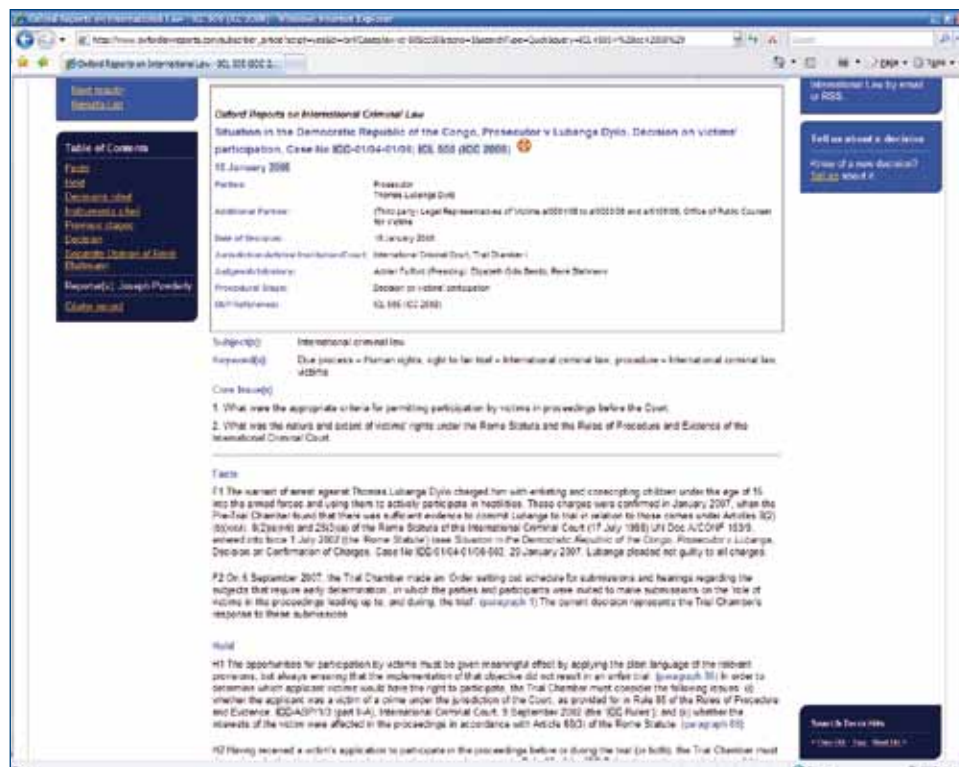
One of the modules is the Oxford Reports on International Criminal Law, which focuses on decisions from of the international criminal courts including the ICC.



This module covers all decisions containing anything of jurisprudential importance, excluding decisions which do not contain any point of law.



The full case report contains a summary of the core facts discussed in the decision and holdings as well as an analysis of the legal issues at stake. The case report also contains citations of other relevant decisions.

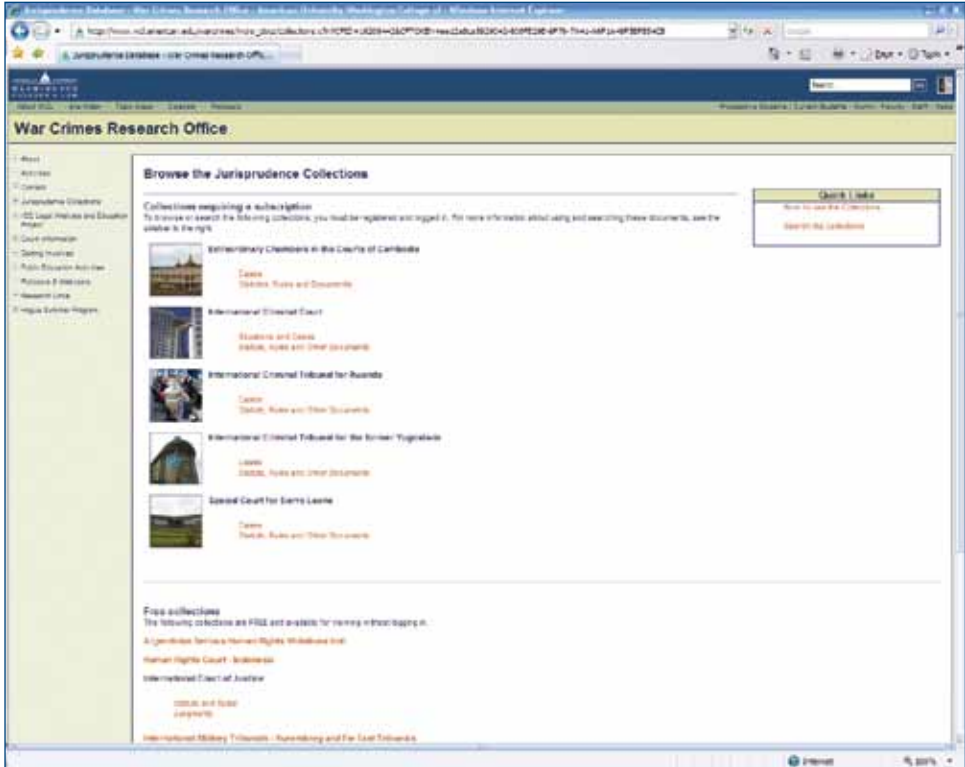


2.3. Jurisprudence Collections by the War Crimes Research Office

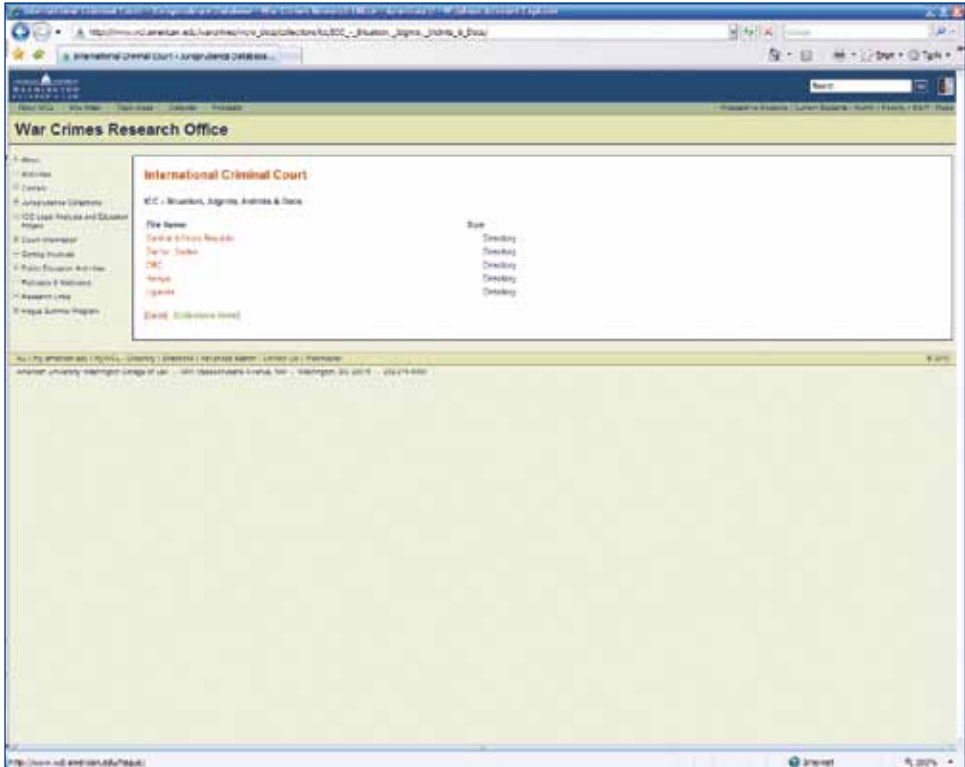
This database, which is maintained by the War Crimes Research Office of the American University Washington College of Law, provides a regularly updated, searchable database of jurisprudence

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

https://www.wcl.american.edu/warcrimes/wcro_docs/collections.cfm.



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



Moreover, one of the most useful works done by the War Crimes Research Office is the series of "Reports on Early Issues before the International Criminal Court". According to its website, this

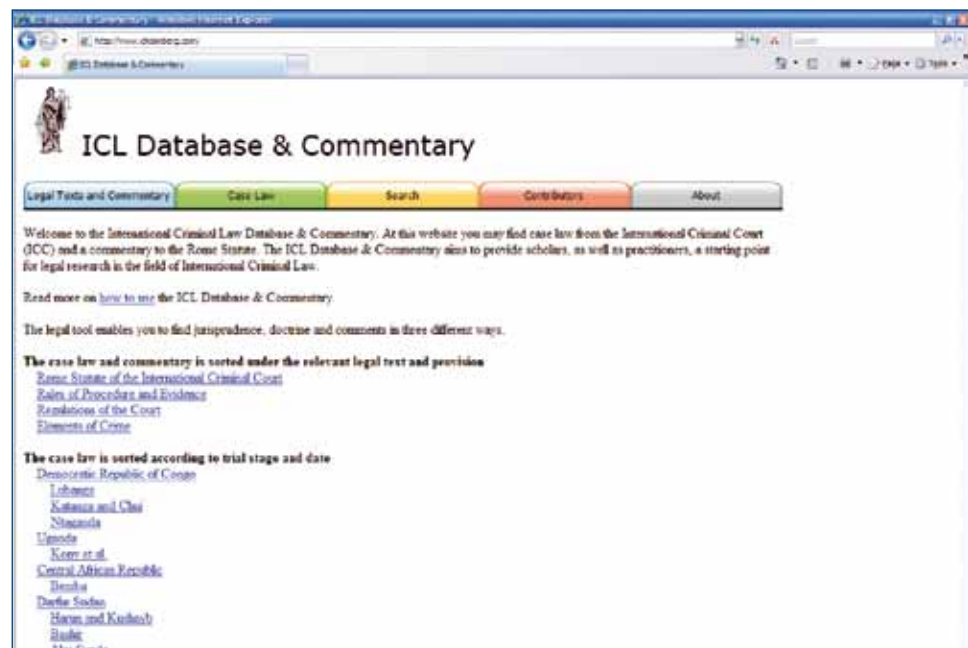
series aims at producing public, impartial, and legal analyses of critical issues raised by the ICC's early decisions. These reports are available free of charge.



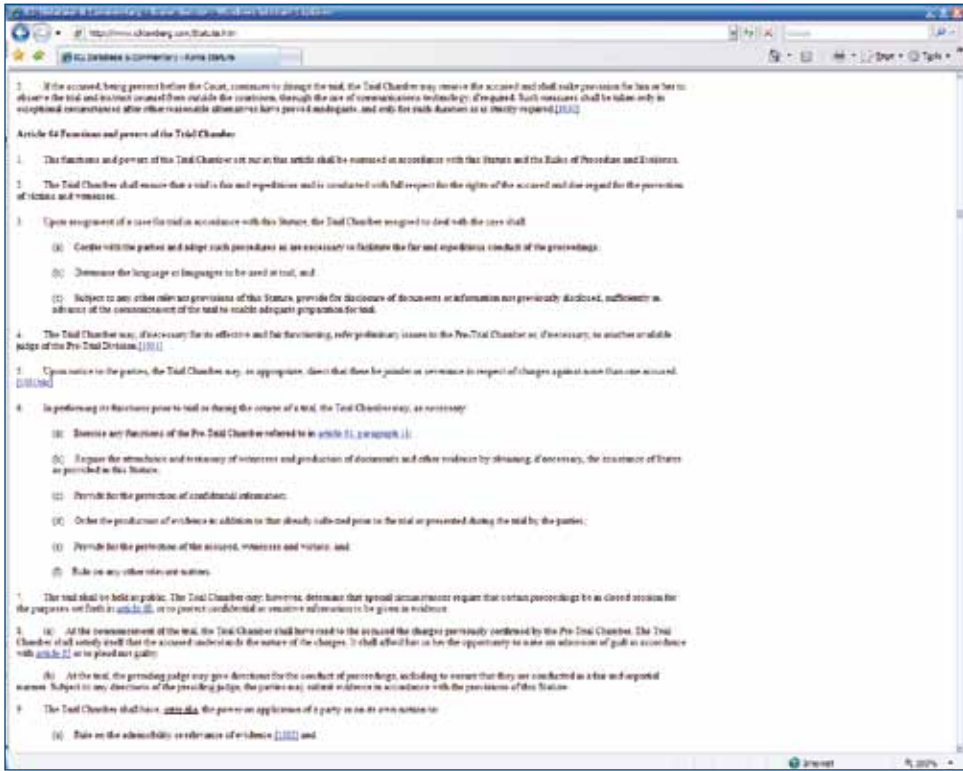
The series now include “Victim Participation Before the International Criminal Court”, “Interlocutory Appellate Review of Early Decisions by the International Criminal Court”, “The Gravity Threshold of the International Criminal Court”, “Protecting the Rights of Future Accused During the Investigation Stage of International Criminal Court Operations”, “The Confirmation of Charges Process at the International Criminal Court”, “Victim Participation at the Case Stage of Proceedings”, “Witness Proofing at the International Criminal Court”.

2.4. ICL Database & Commentary

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



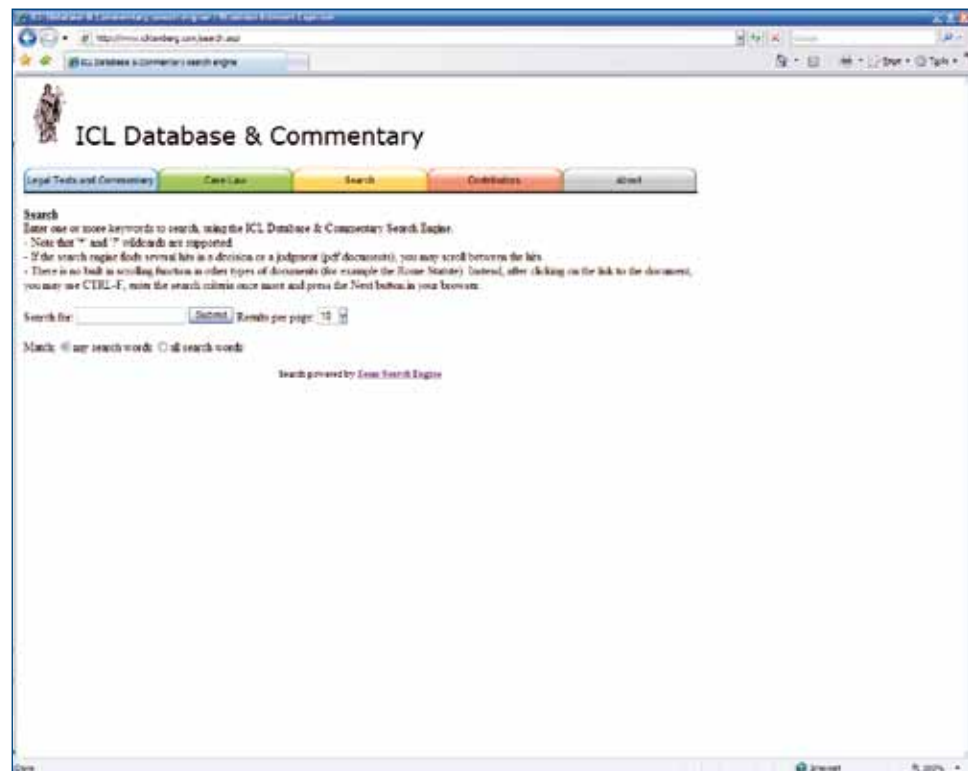
The commentaries are sorted under the relevant provisions of the *Rome Statute* and other statutory instruments. The commentaries also mention the relevant doctrines by quoting specific citations of the literature on the subject, and refer to relevant official documents of the Court on the provisions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



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

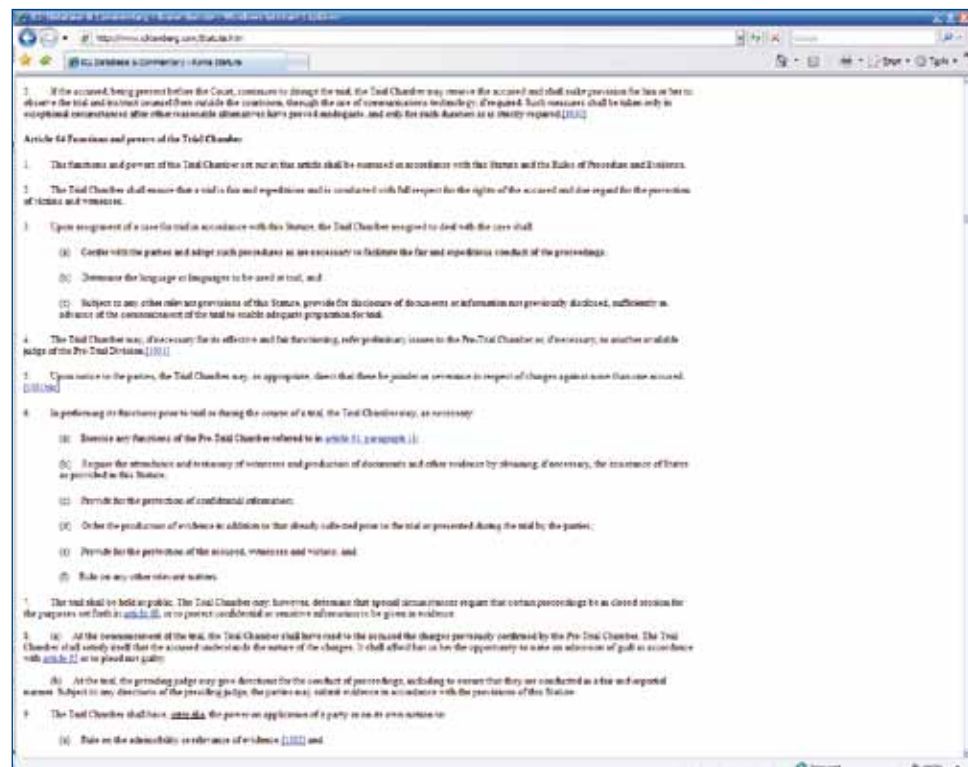


Secondly, the database offers the collection of the ICC case law. Lastly, the database also offers a Search Engine which allows the users to search by using key words in both the commentary and the case law sections at once.

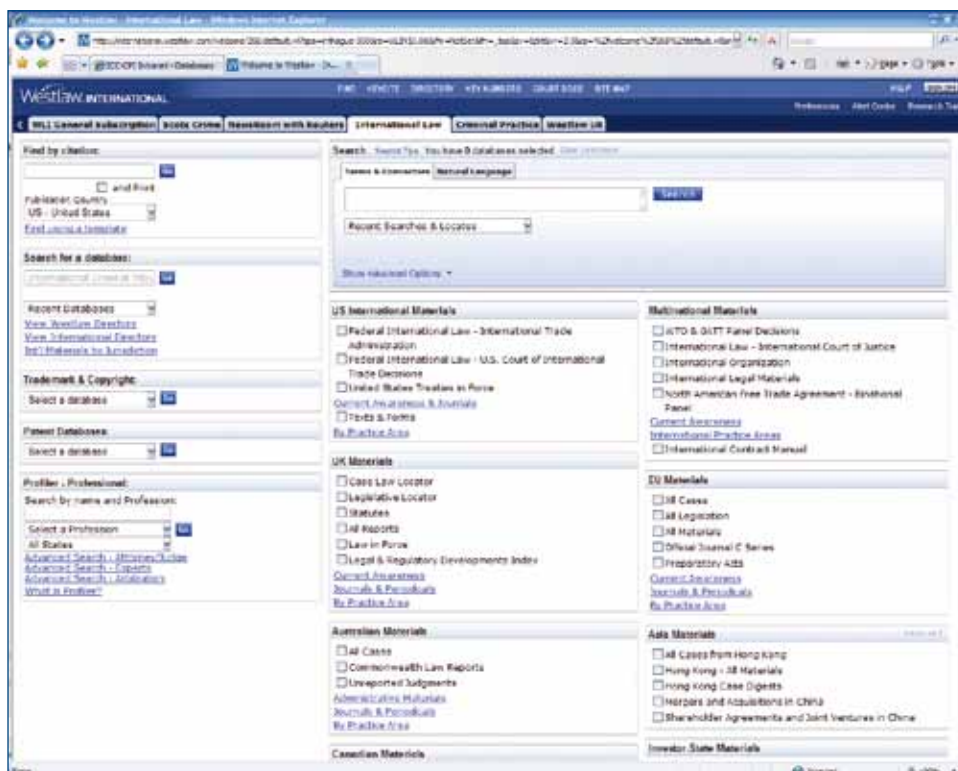


2.5. Westlaw International

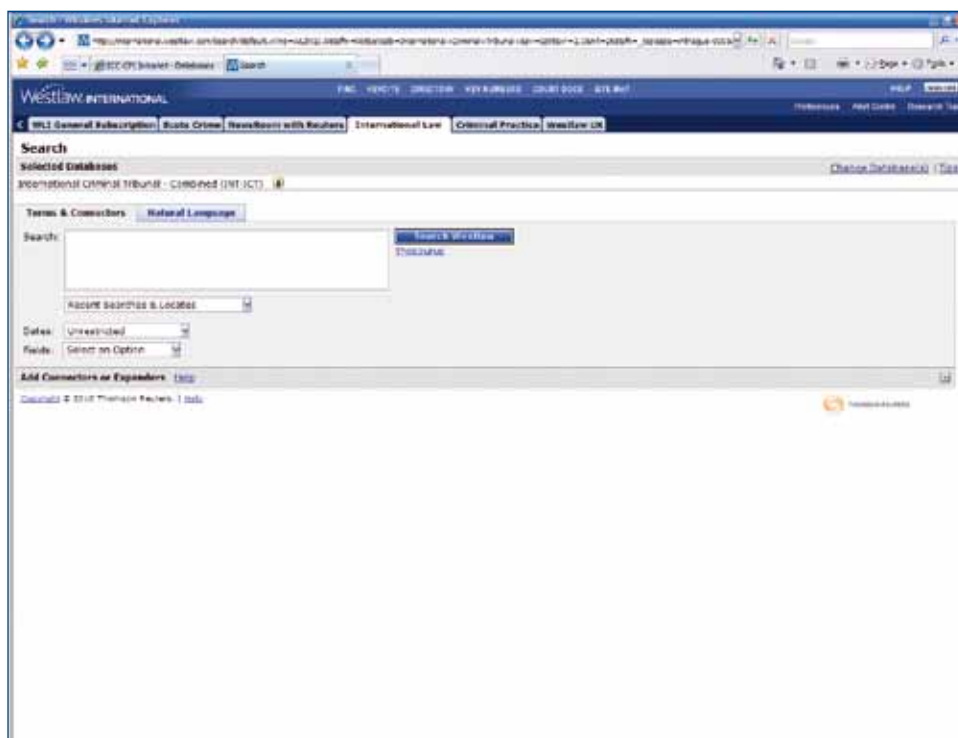
Westlaw International is one of the primary online legal research services for legal professionals, otherwise available on subscription. *Westlaw International* offers a range of legal materials including US, Canadian and European legislations, case law, and law journals/reviews etc.



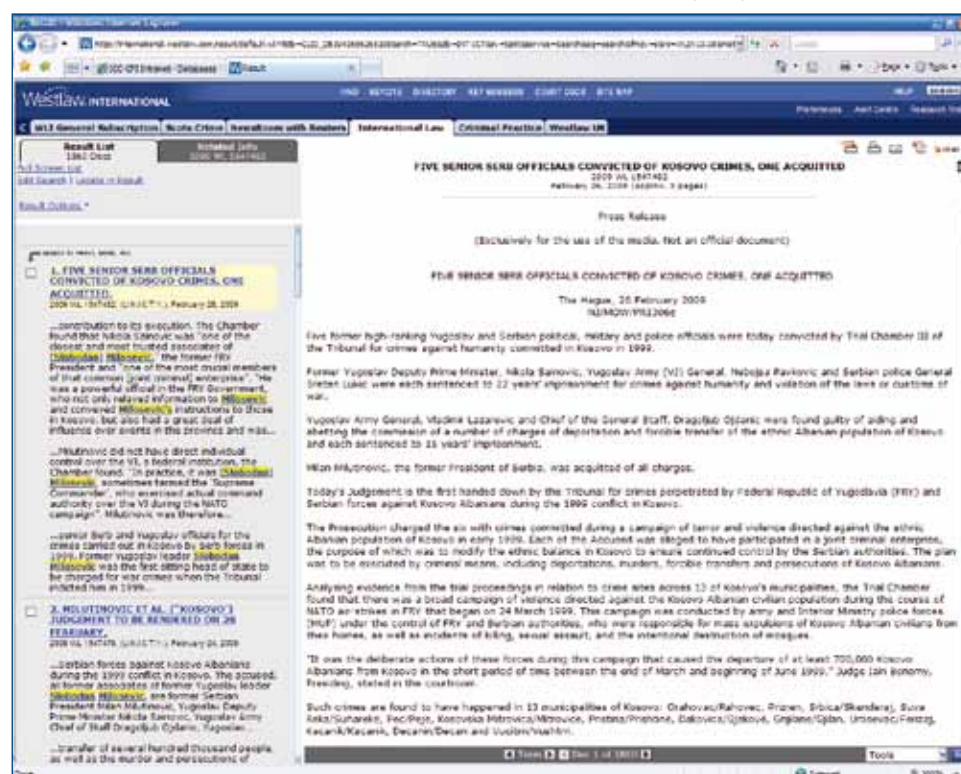
However, to this day, the Westlaw does not have a specific database for the ICC. Nonetheless, the most important feature of Westlaw for lawyers practising before the ICC is the database on the case law of the *ad hoc* Tribunals - “International Criminal Tribunal - Combined (INT-ICT)”



The advantage of this database is the fact that users may not only search documents by using key words (Terms and Connectors) but also by using Natural Language Method. According to the website, “this method allows the user to use plain English by entering the description of the subject as Westlaw will then display the documents that best match the concepts in the user’s description.” In other words, if the user does not know the exact legal terminology used within the subject of the research, he/she may still be able to conduct researches by typing the phrases or sentences containing such general descriptions commonly used in the subject area, which, in turn, will allow the search engine to retrieve the documents by following the natural usage of the English language.



This search method is particularly useful since the search results will be displayed in order of statistical relevancy. In other words, the document that most closely matches the search will be displayed first and, as the user moves down the list of retrieved documents, statistically they become weaker.



3. ICC Court Records Database

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

In order to make a research of the jurisprudence of the Court itself, the use of the Court Records Database is very useful. It allows for a greater focus on the research by giving either the source of the document to be found (for instance Trial Chamber I or Legal Representatives of victims, etc.), the case or situation concerned, key words in the title or in the content of the documents themselves, the document number, if known, the date of its notification, etc.

This tool is very useful to find filings pertaining to a topic through various cases or situations and filings or decisions regarding a specific issue or in a specific case, even at a specific stage of the proceedings. It is also possible to isolate the type of document, the language of the document or its confidentiality level.

It is important to note that when using the Court Records Database for a research, only the documents to which a participant in a proceeding has access will be identified - and consequently accessible; in other words, even though there would be other documents filed in the records of the proceedings that could correspond to the criteria of the research, these documents will not appear in the result of the research if their confidentiality level do not allow the person making the research to have access to them.

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

Within the remit of the Registry, the Office is not the only section dealing with victims. The Victims Participation and Reparation Section and the Victims and Witnesses Unit are also in charge of specific aspects concerning victims.

The Victims Participation and Reparation Section (VPRS) is a section within the Registry dealing with victims' participation and reparations, with the responsibility for assisting victims and groups of victims to understand how victims can exercise their rights under the Rome Statute and for assisting them in obtaining legal assistance and representation, including, where appropriate, from the Office of Public Counsel for Victims. The VPRS can be seen as the first point of contact of victims with the Court, since the Section is in charge of assisting victims in filling in their application forms for participation and/or reparations, as well as of providing them with all information necessary to be able to exercise their rights under the *Rome Statute*.

The Victims and Witnesses Unit (VWU) assists victims and witnesses testifying and/or participating in the proceedings and limits possible adverse effects due to their status by providing protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony. The VWU also takes appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims, witnesses and other persons at risk, and advise the participants in the proceedings and other organs and sections of the Court on appropriate protective measures, security arrangements, counselling and assistance, in accordance with article 68 of the *Rome Statute*.

8. Useful websites

1. International Courts

- International Court of Justice (www.icj-cij.org) [See also: World Court Digest provided by the Max Planck Institute for Comparative Public Law and International Law www.mpil.de/ww/en/pub/research/details/publications/institute/wcd.cfm?100000000000.cfm]
- Permanent Court of Arbitration (www.pca-cpa.org)
- European Court of Human Rights (www.echr.coe.int)
- African Commission on Human and Peoples' Rights (www.achpr.org) [An African Court on Human and Peoples' Rights has been established but it does not have any website yet]
- Inter-American Court of Human Rights (www.corteidh.or.cr/)
- There are many regional courts which jurisprudence may be relevant to counsel work on legal analysis and doctrine [Caribbean Court of Justice (www.caribbeancourtsofjustice.org/); Eastern Caribbean Supreme Court (www.eccourts.org/); etc.]

2. International Criminal Tribunals

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

3. Mixed Courts

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

4. Other Websites

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

9. Basic book references


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- LEE (R.S.) (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, N.Y., Transnational Publishers, 2001, 857 pp.
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- SCHABAS (W. A.), *Genocide in International Law: The Crime of Crimes* (Second Edition), Cambridge, 2009, 760 pp.
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- TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Second Edition), Hart Publishing, Oxford, 2008, 1954 pp.

Annex

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

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Subject to the language you will use in your document, choose: français/english

Original: Choose language

Indicate the reference of the situation/case. Example: 01/04-01/06 (for the *Lubanga* Case)

**No.: ICC-
Date:**

Indicate the date of the filing of your document

Before:

Fill in the 1, 3 or 5 lines, indicating the name(s) of the Judge(s) seating on the Chamber to which you file your document (Single Judge, names of 3 or 5 Judges) Choose the blank line in the dropdown list if you do not need all the 5 lines offered. Verify the name of the Presiding Judge when a Chamber is composed of 3 or 5 Judges and specify "Single Judge" when the Chamber is composed of one Judge.

CHOOSE BODY

Depending on the Chamber to which the document is submitted, choose between:
PRE-TRIAL CHAMBER I (II or III)
TRIAL CHAMBER I (II or III)
APPEALS CHAMBER

Choose ICC JudgeTitle
Choose ICC JudgeTitle
Choose ICC JudgeTitle
Choose ICC JudgeTitle
Choose ICC JudgeTitle

Indicate the name of the situation, followed by the name of the case, if need be.
Example: SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

**SITUATION
IN THE CASE OF
THE PROSECUTOR
v.**

Indicate the title of your filing. Example: "Request for extension of page limit"

Specify whether the document you are filing is Public, Confidential or Ex Parte

Level of Confidentiality

Title

Source:

[Enter name of entity filing the document]

Specify your name, title and the victims you are representing. Example: Raymond Durand, Legal Representative of victims a/xxxx/yy and a/xxxx/zz

Verify that the number of the situation/case and the date are automatically inserted.

No. ICC-NUMBER

p./p.

DATE

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

The Office of the Prosecutor
[2 names maximum]

Counsel for the Defence
[2 names per team maximum]

Erase the grey
line if non
applicable

Legal Representatives of Victims
[1 name per team maximum]

Legal Representatives of Applicants
[1 name per team maximum]

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**
[2 names maximum]

**The Office of Public Counsel for the
Defence**
[2 names maximum]

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

No. ICC-NUMBER

p./p.

DATE

I. PROCEDURAL HISTORY

Indicate in individual paragraphs each procedural document relevant for your filing. End this part with a paragraph introducing the submissions you want to address.

Example:

1. On 5 May 2006, Pre-Trial Chamber I issued the "Decision on..."⁴
2. On 16 June 2006, the Prosecution filed...
3. The Legal Representative submits that....

II. LEGAL BASIS OF THE FILING (IF NEED BE)

Specify the legal basis of your request, indicating when need be the reference to the relevant provision(s) of the texts of the Court and the criteria set by a Chamber that are related to it.

CONTINUE, in each section of your filing, to develop your arguments in the numerical order as began in your procedural history (example: if you end your procedural history with paragraph 3, your first paragraph under your part II will be number 4).

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

⁴ "Footnotes": Word templates do not allow adding footnotes to the text. The document will need to be unprotected to allow footnotes.

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II Bis. LEGAL AND FACTUAL BASIS FOR CONFIDENTIAL AND EX PARTE FILING (IF NEED BE)

Specify the legal and factual basis if your document is *ex parte* or confidential in accordance with regulation 23 *bis* of the Regulations of the Court.

III. CORE OF YOUR ARGUMENTS

The title should reflect your intention and objective with the filing. Example, if your filing concerns observations with regard to parties' submissions, the title of this part could be: **OBSERVATIONS IN RESPONSE TO THE PROSECUTIONS ARGUMENTS.**

IV. CONCLUSION

Repeat your request to the Chamber. This paragraph won't usually bear any number and thus falls out the numerical order followed for the others paragraphs. For instance:

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

Erase the grey lines if not necessary

[Enter name and title of person signing]
on behalf of
[Enter name and title of person on behalf of whom the document is signed, if applicable]

Dated this

At [place, country]

No. ICC-NUMBER

Indicate the date of the filing of your document

Indicate the city and the country from which you are filing your document

p./p.

DATE



