

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/07

Date: 13 May 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. Germain Katanga and Mathieu Ngudjolo Chui***

Public

URGENT

**Decision on the Set of Procedural Rights Attached to Procedural Status of Victim
at the Pre-Trial Stage of the Case**

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

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I, Judge Sylvia Steiner, judge at the International Criminal Court (“the Court”);

NOTING the “Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08” (“the Decision on the Applications”)¹ issued by the Single Judge on 2 April 2008, in which the Single Judge *inter alia*:

- (i) granted the procedural status of victim at the pre-trial stage of the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* to Applicants a/0327/07, a/0329/07, a/0330/07 a/0331/07 and a/0333/07;
- (ii) decided that Applicants a/0327/07, a/0329/07, a/0330/07, a/0331/07 and a/0333/07 would have until Wednesday 9 April 2008 at 16h00 to (a) make a request, if they so wished, for the non-disclosure of their identities to the Defences for Germain Katanga and Mathieu Ngudjolo Chui during the pre-trial stage of the present case; and (b) make their observations on the set of procedural rights that should be attached to the procedural status of victim at the pre-trial stage of the present case; and
- (iii) decided that the Prosecution would have until Monday 14 April 2008, and the Defences for Germain Katanga and Mathieu Ngudjolo Chui until Friday 18 April 2008 to make their respective observations (“the Observations of the Parties”) on (a) any request for non-disclosure of identity made by Applicants a/0327/07, a/0329/07, a/0330/07, a/0331/07 and a/0333/07 and (b) the set of procedural rights that should be attached to the procedural status of victim at the pre-trial stage of the present case;

NOTING the “*Observations des Représentants légaux de la victime a/0333/07 relatives au maintien de l’anonymat et aux modalités de participation des victimes au stade préliminaire de l’affaire*”² filed by the Legal Representatives of Victim a/0333/07 on 9 April 2008, in which the Legal Representatives of Victim a/0333/07 informed the

¹ ICC-01/04-01/07-357

² ICC-01/04-01/07-383

Chamber that Victim a/0333/07 does wish to remain anonymous and requests that his identity not to be disclosed to the two Defence Teams;

NOTING the “*Soumission du représentant légal des victimes a/0327/07, a/0329/07, a/0330/07 et a/0331/07 sur le mode de participation des victimes à l’audience des confirmations des charges*”³ submitted by the Legal Representative of Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 on 9 April 2008, in which *inter alia* the Legal Representative informed the Chamber that Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 do not wish to remain anonymous and request that their identity be disclosed to the two Defence Teams, but not to the public;

NOTING “Prosecution’s Observations on the Anonymity and the Modalities of Participation in the Proceedings of Applicants a/0327/07 to a/0337/07”⁴ (“the Prosecution’s Observations”) filed by the Prosecution on 14 April 2008 and in which the Prosecution:

- (i) did not oppose the anonymity of Victim a/0333/07 who should be afforded the same set of procedural rights as granted to the anonymous victims at the pre-trial phase of the case of *The Prosecutor v. Thomas Lubanga Dyilo*; and
- (ii) submitted that a casuistic approach should be adopted in relation to the victims who did not wish to be anonymous, according to which, any time victims wish to conduct a specific procedural activity, they must show that it relates to issues specific to their interests;

NOTING “*Requête sollicitant la prorogation des délais conformément à la Norme 35 du Règlement de la Cour pour permettre à la Défense de répondre aux observations des Représentants légaux des victimes a/0333/07 a/0327/07, a/0329/07, a/0330/07 et a/0331/07 relatives au maintien de l’anonymat et aux modalités de participation des victimes au stade*

³ ICC-01/04-01/07-385

⁴ ICC-01/04-01/07-392

préliminaire de l'affaire"⁵ filed by the Defence for Mathieu Ngudjolo Chui on 15 April 2008;

NOTING the "Decision on the Defence Request for extension of Time"⁶ issued by the Single Judge on 16 April 2008 and by which the Single Judge granted the request of the Defence for Mathieu Ngudjolo Chui and decided that both Defences for Mathieu Ngudjolo Chui and Germain Katanga would have until Wednesday 23 April 2008 to file their observations pursuant to the Decision on the Applications;

NOTING the "Defence's Observations on the Modalities of Participation of Victims"⁷ filed by the Defence for Germain Katanga on 16 April 2008 and in which the Defence for Germain Katanga agreed with the Prosecution's Observations and further submitted that there was no need for the Legal Representatives to attend all hearings because (i) some hearings are not directly relevant to the interests of the victims and (ii) their interests can be equally, and more economically, protected by access to transcripts and by invitation to contribute in respect of particular issues by providing an agenda in advance of hearings;

NOTING the "Decision on Evidentiary Scope of the Confirmation Hearing"⁸ issued by the Single Judge on 17 April 2007;

NOTING the "*Observations de la Défense de Mathieu Ngudjolo sur le mode de participation des victimes durant la phase préliminaire du procès pénal*"⁹ filed by the Defence for Mathieu Ngudjolo Chui on 23 April 2008 and in which the Defence for Mathieu Ngudjolo Chui:

- (i) opposes anonymous participation;

⁵ ICC-01/04-01/07-396

⁶ ICC-01/04-01/07-399

⁷ ICC-01/04-01/07-400

⁸ ICC-01/04-01/07-411-Conf-Exp, ICC-01/04-01/07-423-Conf, ICC-01/04-01/07-428-Corr

⁹ ICC-01/04-01/07-433

- (ii) highlights that if the victims can have access to evidence submitted by the Prosecution or collaborate with the other victims, they cannot be called at a later stage in the proceedings as a witness by the Prosecution; and
- (iii) underlines the fact that since the Legal Representatives of Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07 and a/0333/07 are also Legal Representatives of Victims and Applicants in the case of *The Prosecutor v. Thomas Lubanga Dyilo* it could lead to situations where witnesses in the case of *The Prosecutor v. Thomas Lubanga Dyilo* could also be alleged victims in the case against Mathieu Ngudjolo Chui and be granted access to confidential material;

NOTING the “*Observation du représentant legal des victimes a/0327/07, a/0329/07, a/0330/07 et a/0330/07 aux répliques des équipes des defenses et de l'accusation sur les modalités de participation des victimes devant la chambre préliminaire*”¹⁰ filed by the Legal Representative of Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 on 25 April 2008.

NOTING the “*Réplique des représentants légaux de la victime 0333/07 relatives au maintien de l'anonymat et aux modalités de participation des victimes au stade préliminaire de l'affaire*”¹¹ filed by the Legal Representatives of Victim a/0333/07 on 25 April 2008;

NOTING the “*Decision on the Defence Request for Postponement of the Confirmation Hearing*”¹² issued by the Chamber on 25 April 2008, by which the Chamber decided to postpone the commencement date of the confirmation hearing in the present case to Friday 27 June 2008;

NOTING the “*Decision Establishing a Calendar according to the date of the Confirmation hearing: 27 June 2008*”¹³ issued by the Single Judge on 29 April 2008;

¹⁰ ICC-01/04-01/07-440

¹¹ ICC-01/04-01/07-445

¹² ICC-01/04-01/07-446

¹³ ICC-01/04-01/07-459

NOTING articles 54, 57, 61, 67 and 68 of the *Rome Statute* ("the Statute"); rules 87 to 92, 121 and 122 of the *Rules of Procedure and Evidence* ("the Rules"); and regulations 24 and 86 of the *Regulations of the Court* ("the Regulations");

I. Introductory Remarks

1. At the outset, the Single Judge notes that whereas Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 do not wish to remain anonymous and request that their identity be disclosed to the two Defences, but not to the public, Victim a/0333/07 requests anonymity during the proceedings leading to and at the confirmation hearing.

2. As a result, the Single Judge shall first discuss the set of procedural rights attached to the procedural status of victim at the pre-trial stage of the case for Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07. Subsequently, the Single Judge will analyse the request for anonymity made by Victim a/0333/07 and, if granted, the limitations, if any, to the above-mentioned set of procedural rights as a result of the granting of anonymity for the purpose of the confirmation hearing.

3. Nevertheless, before entering into such analysis, the Single Judge will address the issue raised by the Defence for Mathieu Ngudjolo Chui in relation to the alleged conflicts of interest that may arise for the Legal Representatives of Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07 and a/0333/07, as they also represent applicants and/or individuals granted the procedural status of victim in the situation in Democratic Republic of the Congo ("the DRC situation") or in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("the Lubanga Case").

4. In this regard, the Defence for Mathieu Ngudjolo Chui underlines that such legal representation could prejudice the rights of the Defence because of the overlapping temporal and geographical scope of the cases against Mathieu Ngudjolo Chui and Thomas Lubanga Dyilo. In addition, the Defence for Mathieu Ngudjolo Chui expresses its concerns that some witnesses in the *Lubanga Case* might also be

alleged victims in the proceedings against Mathieu Ngudjolo Chui, and *vice versa*, and that such concerns will be even greater if such victims are to be given access to confidential documents and incriminating material.¹⁴

5. The Legal Representative of Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 asserts that no conflict of interest arises as a result of representing victims in the *Lubanga* Case because, according to her, the victim she is representing in the *Lubanga* Case did not operate in the geographical zone where victims of the present case were located during the relevant periods. In addition, the Legal Representative refers to article 16 of the Code of Professional Conduct,¹⁵ which provides guidelines to legal representatives in situations in which a conflict of interest may arise. Finally, she recalls article 8 of the Code of Professional Conduct in relation to the respect for professional secrecy and confidentiality.

6. The Legal Representative of Victim a/0333/07 asserts that no provision in the Statute or in the Rules prohibits counsel from acting as a legal representative in distinct cases. The Legal Representative also recalls the need to avoid any conflict of interest and in this regard, the Legal Representative is also bound by the Code of Professional Conduct. The Legal Representative of Victim a/0333/07 asserts that, in the present case, there is no conflict of interest since the facts and the geographical scope of the cases do not overlap.

7. At the outset, the Single Judge underlines that, pursuant to rule 90(1) of the Rules, a victim shall be free to choose his or her legal representation 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.

8. In relation to the specific issue raised by the Defence for Mathieu Ngudjolo Chui, the Single Judge notes that the *Lubanga* Case is confined to the enlistment and conscription into the *Forces Patriotiques pour la Libération du Congo* ("FPLC") and the active use in hostilities of children under the age of 15 in a handful of training camps

¹⁴ ICC-01/04-01/07-433, para 41

¹⁵ Resolution ICC-ASP/4/Res.1, Adopted at the 3rd plenary meeting on 2 December 2005, by consensus

and military operations, whereas the case at hand is limited to crimes allegedly committed during one attack on one village on one day (the alleged joint FNI/FRPI attack against the village of Bogoro on or about 24 February 2003).¹⁶

9. The Single Judge observes that Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 are represented by Ms Carine Bapita Buyagandu, who is also the Legal Representative of Victim a/0105/06, who has been granted the procedural status of victim in the *Lubanga* Case.¹⁷ The Single Judge also observes that Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 are all from the same ethnic group (Hema)¹⁸ and all have allegedly been victimised as a result of the alleged 24 February 2003 joint FRPI/FNI attack on the village of Bogoro, whereas Victim a/0105/06 is of another ethnicity and has allegedly suffered harm as a result of his alleged enlistment into the FPLC.¹⁹

10. Hence, Victim a/0105/06 was neither a member of the FRPI or the FNI, the groups that allegedly attacked the village of Bogoro on 24 February 2003, nor was he of Lendu or Ngiti ethnicity -the ethnicity to which, according to the Prosecution, most members of the FRPI and the FNI allegedly belong. Quite the contrary, Victim a/0105/06 was a member of the FPLC, the military branch of the *Union des Patriotes Congolais* ("UPC"), which is a movement of a predominantly Hema ethnicity as found by Pre-Trial Chamber I ("the Chamber") in the Decision on the Confirmation of the Charges in the *Lubanga* Case.²⁰

11. Moreover, the Single Judge further notes that according to the information at her disposal, Victim a/0105/06, although enlisted into the FPLC, was not based in Bogoro and did not take any active part in the hostilities that took place in the village of Bogoro during the alleged 24 February 2003 joint FRPI/FNI attack, neither did he suffer any harm as a result of the Bogoro attack.

¹⁶ ICC-01/04-01/07-428-Corr, paras. 58 and 59.

¹⁷ ICC-01/04-01/06-601

¹⁸ ICC-01/04-01/07-171-Conf-Exp-Anx1, p 1; Anx3, p 1; Anx4, p 1; and Anx5, p 1

¹⁹ ICC-01/04-01/06-601-tEN, p 12

²⁰ ICC-01/04-01/06-796-Conf, ICC-01/04-01/06-803 (public redacted version), paras 222, 252, 378(a), 379(III), 392 and 399

12. The Single Judge is therefore of the view that the conflict of interest issue raised by the Defence for Mathieu Ngudjolo Chui in relation to the fact that Ms Carine Bapita Buyagandu is representing Victim a/0105/06 in the *Lubanga* Case, as well as Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 in the present case, is without merit.

13. Concerning Victim a/0333/07, the Single Judge observes that his legal representative, Mr Joseph Keta, is currently also representing individuals for whom the procedural status of victim has been granted at the stage of investigation of the DRC situation.²¹ Nevertheless, the Single Judge notes that Mr Joseph Keta has not represented, to date, any individual to whom the procedural status of victim has been granted in the *Lubanga* Case.

14. Moreover, the Single Judge notes that Victim a/0333/07 is an alleged child soldier of Ngiti/Lendu ethnicity who allegedly participated, as a member of the FRPI, in the alleged 24 February 2003 joint FNI/FRPI attack on the village of Bogoro, whereas the other victims of the investigation into the DRC situation represented by Mr Joseph Keta have been allegedly victimised by UPC members – the only exception being Victim a/0044/06, “who allegedly suffered moral harm as a result, *inter alia*, of the death of her husband who was allegedly killed by FNI members during the 6 March 2003 confrontation in the city of Bunia.”²²

15. The Single Judge is therefore of the view that the conflict of interest issue raised by the Defence for Mathieu Ngudjolo Chui in relation to the fact that Mr Joseph Keta is representing certain victims of the DRC situation, as well as Victim a/0333/07 in the present case, is without merit.

16. The Single Judge would also like to emphasise that Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07, who are all of Hema ethnicity and have allegedly been harmed as a result of the alleged 24 February 2003 joint FRPI/FNI attack on the

²¹ ICC-01/04-423-Corr

²² The Single Judge notes that the procedural status of victim authorised to participate at the investigative stage in the situation in the DRC has been granted to the wife of the man allegedly killed by FNI members (ICC-01/04-423-Corr, para 79)

village of Bogoro and are represented by a different legal representative (Ms Carine Bapita Buyagandu) than Victim a/0333/07 (represented by Mr Joseph Keta) – who has acknowledged having actively participated in the alleged 24 February 2003 joint FNI/FRPI attack on the village of Bogoro.²³

17. With regard to the Defence for Mathieu Ngudjolo Chui's concerns in relation to access to confidential documents and/or to incriminating material in the Prosecution's possession, the Single Judge is of the view that these are without merit because, as provided for in the present decision, 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 for Germain Katanga and Mathieu Ngudjolo Chui intend to rely at the confirmation hearing; and (ii) do not have the right to introduce additional evidence.

18. Furthermore, the Single Judge recalls that Legal Representatives of victims are bound by article 8 of the Code of Professional Conduct, according to which:

1. Counsel shall respect and actively exercise all care to ensure respect for professional secrecy and the confidentiality of information in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court.
2. The relevant provisions referred to in paragraph 1 of this article include, *inter alia*, article 64, paragraph 6 (c), article 64, paragraph 7, article 67, paragraph 1 (b), article 68, and article 72 of the Statute, rules 72, 73, and 81 of the Rules of Procedure and Evidence and regulation 97 of the Regulations of the Court. Counsel shall also comply with the relevant provisions of this Code and any order of the Court.
3. Counsel may only reveal the information protected under paragraphs 1 and 2 of this article to co-counsel, assistants and other staff working on the particular case to which the information relates and solely to enable the exercise of his or her functions in relation to that case.
4. Subject to paragraph 3 of this article, counsel may only disclose the information protected under paragraphs 1 and 2 of this article, where such disclosure is provided for by a particular provision of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court or this Code or where such disclosure is ordered by the Court. In particular, Counsel shall not reveal the identity of protected victims and witnesses, or any confidential information that may reveal their identity and whereabouts, unless he or she has been authorized to do so by an order of the Court.

II. Request for Non disclosure of the Identities of Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 to the Public and the Media

²³ ICC-01/04-01/07-171-Conf-Exp-Anx7, p 19, ICC-01/04-01/07-212-Conf-Anx7, p 19 See also ICC-01/04-01/07-357, p 10

19. The Single Judge notes that the Legal Representative of Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 has informed the Single Judge that the said victims do not wish to request anonymity *vis-à-vis* the Defences for Germain Katanga and Mathieu Ngudjolo Chui, but that they do request that their identity not be disclosed to the public.

20. In this regard, the Single Judge would first like to highlight that, given the security situation in the areas where Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 currently live, they are taking an inherent risk by appearing before the Court to exercise the rights attached to the procedural status of victim in the present case without requesting that their identities not be disclosed to both Defences.

21. In the view of the Single Judge, regardless of the reasons for Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07's choice, it is the duty of the Single Judge, pursuant to articles 57(3)(c) and 68(1) of the Statute, to minimise this risk.

22. The Single Judge considers that the risk assumed by Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 can be minimised by granting their requests not to disclose their identities to the public or the media. In the view of the Single Judge, this entails keeping their names confidential and ordering the Prosecution, the Defences for Germain Katanga and Mathieu Ngudjolo Chui and any other participant in the proceedings to refer to them by the numbers that they have currently been assigned by the Registry, and not by their names.

III. Preliminary Issues Concerning the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of a Case

III.1. Submissions of the Prosecution, Defences and Legal Representative of Victims

23. The Single Judge notes that the Legal Representative of Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 submits that the set of procedural rights to be

attached to the procedural status of victim at the pre-trial stage of a case should include, at the very least, the following rights:

- (i) the right to be notified of the full record of the case or, at least, the complete index of the record of the case;
- (ii) the right to participate in all status conferences, whether public or in closed session;
- (iii) the right to participate in the entire confirmation hearing, including the closed sessions;
- (iv) the right to present observations at the beginning and at the end of the confirmation hearing;
- (v) the right to request intervention during the confirmation hearing on issues that have an impact on the interests of the victims; and
- (vi) the right to interrogate witnesses according to rule 91(3) of the Rules.

24. According to the Prosecution, those granted the procedural status of victim ought to be entitled to participate in various forms which relate to issues specific to their interests as long as such participation is performed in a manner that respects the rights of the suspects.²⁴

25. Nevertheless, in its submissions, the Prosecution does not identify any specific procedural rights that should be accorded to victims. On the contrary, the Prosecution's submissions focus on those procedural rights that should not be part of the procedural status of victim.²⁵ In this regard, the Prosecution submits that, as those accorded the procedural status of victims are "non-party participants", they cannot be entitled to lead evidence pertaining to the guilt or innocence of the suspect, or advance legal positions that are probative to the issue to be litigated between the parties – with the exception of those functions exercised pursuant to rule 91(3) of the Rules.²⁶

²⁴ ICC-01/04-01/07-392, para 7

²⁵ ICC-01/04-01/07-392, paras 15-23

²⁶ ICC-01/04-01/07-392, paras. 5-6.

26. Concerning the determination of the set of procedural rights attached to the procedural status of victim, the Prosecution favours a casuistic approach. Accordingly, each time victims wish to conduct a specific procedural activity, they must show that it relates to issues specific to their interests. As a result:

- (i) access to confidential materials in the record of the case, including the index, should only be granted on a case-by-case basis upon a showing that the relevant materials relate to the victims' specific interests;²⁷
- (ii) attendance and participation in the proceedings leading up to the confirmation hearing and during the confirmation hearing should only be allowed in relation to issues relating to their interests unless there is a justifiable reason for their exclusion;²⁸
- (iii) presentation of observations on issues related to the conduct of the confirmation hearing should be decided on an issue-by-issue basis upon the request of the victims, and should be limited to matters directly impacting the victims' respective interests which are not restricted to the parties;²⁹
- (iv) questioning of witnesses should be decided on a witness-per-witness basis and should be limited to issues directly relevant to the interests of the victims and should not address the question of guilt or innocence;³⁰ and
- (v) responses to requests, submissions or observations of the parties should only be allowed on a case-by-case basis and only in relation to those documents that impact on the victims' interests.³¹

27. The Defence for Germain Katanga agrees for the most part with the observations of the Prosecution.³² Furthermore, it proposes that, in relation to those hearings which are not directly relevant to the interests of the victims, their "interests

²⁷ ICC-01/04-01/07-392, para 17

²⁸ ICC-01/04-01/07-392, para. 18

²⁹ ICC-01/04-01/07-392, paras 19-20

³⁰ ICC-01/04-01/07-392, paras. 21-22

³¹ ICC-01/04-01/07-392, para 23

³² ICC-01/04-01/07-400, para. 3

can be equally, and more economically, protected by access to transcripts, by invitations to contribute in respect of particular issues and by providing an agenda in advance of hearings.”³³

28. The Defence for Mathieu Ngudjolo Chui requests that the Chamber follow the criteria set out by the Appeals Chamber. In other words, it proposes that victims only be allowed to request authorisation to participate in those specific procedural activities that have a direct impact on their personal interests. In the view of the Defence for Mathieu Ngudjolo Chui, the Chamber should identify the specific procedural activities that could impact on the personal interests of the victims, which would prevent the submission of numerous requests and the duplication of the role of the Prosecution.³⁴

29. Concerning the determination of the set of procedural rights attached to the procedural status of victim, the Defence for Mathieu Ngudjolo Chui is of the view that victims should neither submit any legal documents regarding the elements of crime, modes of liability, admissibility of evidence, nor should they be allowed to present evidence or documents during the confirmation hearing and that allowing such activities would duplicate and usurp the role of the Prosecution. In addition, the Defence also asserts that if the victims can have access to evidence submitted by the Prosecution or collaborate with other victims, they cannot be called at a later stage of the proceedings to testify as witnesses for the Prosecution.

III.2. The Issue of the Guilt or Innocence of the Suspects and the Core Interests of Victims

30. The Single Judge notes that the Prosecution, as well as the Defences for Germain Katanga³⁵ and Mathieu Ngudjolo Chui,³⁶ have pointed out that those granted the procedural status of victim at the pre-trial stage of the present case should not be

³³ ICC-01/04-01/07-400, para 5

³⁴ ICC-01/04-01/07-433, paras 19-21

³⁵ ICC-01/04-01/07-400, para 3

³⁶ ICC-01/04-01/07-433, para 34.

permitted to discuss evidence or to question a witness in relation to matters that pertain to the guilt or innocence of the suspects because, according to the Prosecution and both Defences, these matters are not directly relevant to the interests of the victims.³⁷

III.2.1. Victims' Right to the Truth

31. 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.³⁸

32. 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.³⁹

³⁷ ICC-01/04-01/07-392, paras 7 and 19, ICC-01/04-01/07-400, para 4, ICC-01/04-01/07-433, para 20.

³⁸ Ambos, K., "El Marco Jurídico de la Justicia de Transición", Temis, Bogotá, 2008, p. 21, where reference is made to the study of Kiza, E. / Rathgeber, C. / Rohne, H., "Victims of War: An Empirical Study on War-Victimization and Victims Attitudes towards Addressing Atrocities", Hamburg 2006, pp. 123 and 126.

³⁹ The victims' right to the truth, understood as the determination of the facts, the identification of the responsible persons and the declaration of their responsibility, can be traced back to articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions, and has subsequently been developed by national and international case law, especially in cases of forced disappearances.

In this regard, particularly relevant has been the role played by the case law of the Inter-American Court of Human Rights. See, *inter alia*, the cases of *Bámaca-Velásquez vs. Guatemala*, Judgement of 25 November 2000, Series C, No. 70, para. 201, *Barrios Altos vs. Perú*, Judgement of 14 March 2001, Series C, No. 75, para. 48, *Masacre de Mapiripán vs. Colombia*, Judgement of 15 September 2005, Series C, No. 134, para. 297; *Almohacid-Arellano et al. vs. Chile*, Judgement of 26 September 2006, Series C, No. 154, paras 148 *et seq.*

The case law of the European Court of Human Rights has also developed the victim's right to the truth. See in this regard, the case of *Hugh Jordan vs. UK*, Judgement of 4 May 2001, Application No. 24746/1994, [2001] ECHR 327, para. 93.

At the national level, the Single Judge would like to highlight the Judgement of the Colombian Constitutional Court in the case of *Gustavo Gallón et al.*, Judgement C-370 of 28 May 2006, File D-6032, and the Judgement of the Peruvian Constitutional Court of 9 December 2004 in the case of *Villegas Namuche*, 2488-2002-HC/TC.

As a result of its recognition by international human rights instruments, and by the jurisprudence of the bodies applying such instruments, as well as by the legislative and jurisprudential practice of States, a number of authors have stated that the victims' right to the truth, understood as the determination of the facts, the identification of the responsible persons and the declaration of their responsibility, is today an emerging customary norm, as well as a general principle of law. See, in this regard, Naqvi, Y., "The Right to the Truth in International Law: Fact or Fiction?", in (2006) 88 ICRC Int. Rev. 245, pp. 267 and 268; Méndez, J., "The Right to Truth", in Joyner, Ch. (Ed.), "Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Syracuse Conference", 17-21 September 1998, Eres, Toulouse, 1998, pp. 257 *et seq.*; and Ambos, K., "El Marco Jurídico de la Justicia de Transición", Temis, Bogotá, 2008, pp. 42 to 44.

33. 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.

34. 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.

35. 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.

36. 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.

III.2.2. Victims' Right to Justice

37. 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.⁴⁰

⁴⁰ Ambos, K, "El Marco Jurídico de la Justicia de Transición", Temis, Bogotá, 2008, p. 21, where reference is made to the findings of (i) Kiza, E. / Rathgeber, C. / Rohne, H, "Victims of War An Empirical Study on War-Victimization and Victims Attitudes towards Addressing Atrocities", Hamburg 2006, and (ii) ICRC Report, *The People on War Report* - worldwide consultation on the rules of war (1999-2000), Report by Greenberg Research Inc., which reflects a survey of public opinion

38. 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.

39. These interests - namely the identification, prosecution and punishment of those who have victimised them by preventing their impunity⁴¹ - are at the root of the well-established right to justice for victims of serious violations of human rights,⁴² which international human rights bodies have differentiated from the victims' right to reparations.⁴³

on war crimes and punishment, conducted in 16 countries (Afghanistan, Bosnia-Herzegovina, Cambodia, Colombia, El Salvador, Georgia/Abkhazia, Israel, the occupied territories and the autonomous territories, Lebanon, Nigeria, Philippines, Somalia, South Africa, Switzerland and the four permanent Security Council members France, Russian Federation, United Kingdom and United States), pp. 17, 66, 67, 94 and 106

According to the study by Kiza / Rathgeber/ Rohne, 79% of the victims interviewed in Afghanistan, Bosnia and Herzegovina, Cambodia, Croatia, Democratic Republic of the Congo, Israel, Kosovo, Republic of Macedonia, Palestine, Philippines and Sudan wished to have their alleged perpetrators prosecuted before a criminal court. Moreover, 68 % of those interviewed also wished to have them convicted, be it to the death penalty (4%), imprisonment (36%) or a pecuniary sanction (45%)

According to the ICRC Report "[a]n overwhelming proportion of the population in the countries surveyed by the ICRC believe there are war crimes so serious that wrongdoers should be tried and punished", and "[t]he culture of war – and the constant assault on the norms and conventions of war – have produced a demand for justice among both combatants and non-combatants. [...] Fifty-nine per cent of those surveyed agree with the statement that there are rules in war that are so important that people who break them should be punished"; further "[t]he publics in the four [permanent] Security Council countries surveyed are more likely than those in war-torn countries to believe that wrongdoers should be punished for breaking laws during wartime, that people who break the rules of war should be put on trial and that international institutions should be responsible for punishing them. In essence, these countries – all of which are global powers in one way or another – are in favour of more uniform and more international punishment for war criminals."

⁴¹ Judgement of the Colombian Constitutional Court in the case of *Gustavo Gallón et al.*, Judgement C-370 of 28 May 2006, File D-6032

⁴² This right has been dealt with along with the duty of the states to investigate, prosecute and punish those responsible for serious violations of human rights. See in this regard, General Comment 31 of the Human Rights Committee. See also the judgements of the Inter-American Court of Human Rights in, *inter alia*, the cases of *Velásquez-Rodríguez v. Honduras*, Judgement of 29 July 1988, Series C, No. 7, paras 162-166 and 174; *Comunidad Morwana v. Suriname*, Judgement of 15 June 2005, Series C, No. 124, paras 204, *Masacre de Mapiripán v. Colombia*, Judgement of 15 September 2005, *Almohacid-Arellano et al vs Chile*, Judgement of 26 September 2006, Series C, No. 154, para 148; *Vargas-Areco v. Paraguay*, Judgement of 26 September 2006, Series C, No. 155, paras 153 *et seq*, and *La Cantuta v. Perú*, Judgement of 29 November 2006, Series C, No. 162, para 222

See also the Judgements of the European Court of Human Rights in, *inter alia*, the cases of *Aksoy v. Turkey*, Judgement of 18 December 1996, Application No. 21987/93, 1996 ECHR 68, para 98, *Aydın v. Turkey*, Judgement of 25 September 1997, Application No. 21178/94, 1997 ECHR 75, para. 103, *Selcuk and Asker v. Turkey*, Judgement of 24 April 1998, Application No. 23184/94, 1998 ECHR 36, para 96, *Kurt v. Turkey*, Judgement of 25 May 1998, Application No. 24276/1994, 1998 ECHR 44, para 140, *Selmouni v. France*, Judgement of 28 July 1999, Application No. 25803/94, 1999 ECHR 66, para 79 and *Hugh Jordan vs UK*, Judgement of 4 May 2001, Application No. 24746/1994, 2001 ECHR 327, paras 16, 23, 157 and 160

See also Question of the impunity of perpetrators of human rights violations (civil and political), Final Report prepared by Mr. Jomiet pursuant to Sub-Commission decision 1996/119, Annex II Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Jomiet Principles), U N Doc E/CN.4/Sub.2/1997/20 (1997) and E/CN.4/Sub.2/1997/20/Rev.1 (1997) ("the UN Principles Combating Impunity"), principle 8, updated in 2005 by UN expert D. Orentlicher, "Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity" U N Doc E/CN.4/2005/102/Add.1

⁴³ According to the abundant case law of the Inter-American Court of Human Rights on this matter, the right to reparations of victims of serious violations of human rights include *restitutio in integrum*, compensation, rehabilitation, and the satisfaction and guarantees of no repetition. See the detail references to the case law of the Inter-American Court of Human Rights in this matter included in Ambos, K., *El Marco Jurídico de la Justicia de Transición*, Temis, Bogotá, 2008, notes 107-112. See also the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations

40. 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,"⁴⁴ a duty that has been upheld by the Human Rights Committee,⁴⁵ as well as by the case law of the Inter-American and European Courts of Human Rights.⁴⁶

41. 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.

42. 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.

43. 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

of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly, latest on 21 March 2006 (A/60/509/Add 1), para 21

⁴⁴ Preamble of the Statute, paragraph 4

⁴⁵ See in particular, General Comment 31 of the Human Rights Committee (Nature of the General Legal Obligation on States parties to the Covenant), adopted on 29 March 2004, *CCPR/C/21/Rev 1/Add.1* (26 May 2004), reprinted in UN Doc HRI/GEN/1/Rev 8 (2006)

⁴⁶ See the case law of the Inter-American Court of Human Rights and the European Court of Human Rights referred to in *supra* note 42

suspects are responsible for the crimes with which they have been charged by the Prosecution.⁴⁷

44. 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.⁴⁸

III.3. Systematic versus Casuistic Approach

45. 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;"⁴⁹
- (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;⁵⁰
- (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,⁵¹ and consequently:

⁴⁷ ICC-02/05-110, ICC-01/04-417. See also ICC-01/04-01/06-462-tEN, p. 5

⁴⁸ ICC-02/04-01/05-252, paras. 9-11

⁴⁹ ICC-02/05-121, p. 6

⁵⁰ ICC-02/05-121, p. 6

⁵¹ ICC-02/05-110, ICC-01/04-417. See also ICC-01/04-01/06-462-tEN, p. 5

1. this is an appropriate stage of the proceedings for victim participation in all cases before the Court;⁵²
 2. there is no need to review this finding each time a new case is initiated before the Court;⁵³ and
 3. a procedural status of victim exists at the pre-trial stage of any case before the Court;⁵⁴
- (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;⁵⁵
- (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";⁵⁶ 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.⁵⁷

46. The Single Judge also underlines, in relation to the request of the Defence for Mathieu Ngudjolo Chui that the Chamber follows the criteria set out by the Appeals Chamber, that the Chamber has already found that its approach is consistent with the Decision of the Appeals Chamber of 13 June 2007 because:

⁵² ICC-02/05-121, p 8 See also ICC-01/04-438, p 5

⁵³ ICC-02/05-121, p 8

⁵⁴ ICC-02/05-121, p 8

⁵⁵ ICC-02/05-118, p 5, ICC-02/05-121, p 9 See also ICC-01/04-438, p 5

⁵⁶ ICC-02/05-121, p. 9

⁵⁷ ICC-02/05-121, p 9

[...] in that decision, (i) the Appeals Chamber does not require victims to show that their personal interests are affected by each procedural activity or piece of evidence which is part of an interlocutory appeal; and that (ii) on the contrary, the Appeals Chamber focused its assessment on whether the personal interests of the victims were affected by the overall interlocutory appeal, it being understood that each interlocutory appeal gives rise to a distinct and separate procedure before the Appeals Chamber.⁵⁸

47. Furthermore, the Single Judge also recalls that, in relation to the casuistic approach proposed by the Prosecution and by the Defence for Germain Katanga, the Chamber has stated on several occasions that:

[...] if, as submitted by the Prosecution and the OPCD, the analysis under article 68(3) of the Statute and the procedure pursuant to rule 89 of the Rules and regulation 86 of the Regulations were to be conducted in relation to each specific procedural activity or piece of evidence, a situation may arise in which:

- (i) the efficient and effective operation of the Court as a whole could be hampered because every time a natural or legal person intended to participate in relation to any procedural activity or piece of evidence, (a) that person would have to make an application for participation; (b) the Victims Participation and Reparations Section of the Registry would have to file a report on the application; (c) the parties would have to be given the opportunity to submit their observations on the application; and (d) the Chamber would have to decide on such application prior to conducting the relevant specific procedural activity or discussing the relevant piece of evidence;
- (ii) victims would be deprived of any procedural status at any of the stages of the criminal proceedings before the Court because their right to participate would be confined to specific procedural activities or pieces of evidence; and
- (iii) the role of victims in criminal proceedings before this Court, which, in the view of the Single Judge constitutes one of the core features of the Statute, would be significantly limited due to the difficulties in proving that the personal interests of victims were affected by a specific procedural activity or piece of evidence (as opposed to an overall stage of the proceedings, such as the investigation stage of a situation or the pre-trial phase of a case).⁵⁹

48. In this regard, the Single Judge considers regrettably that, despite previous rulings of the Chamber and the need for clear guidance in relation to the role of victims in criminal proceedings before this Court,⁶⁰ the Prosecution continues to insist on a casuistic approach to victim participation at the pre-trial stage of the case, which will:

- (i) result in a system in which every decision is taken upon request by the victims' representatives on a case-by-case basis and in light of certain

⁵⁸ ICC-02/05-121, p 6

⁵⁹ ICC-02/05-121, pp 6 and 7.

⁶⁰ Needless to say that clear guidance would also be beneficial for the outreach program of the Court which could provide precise information and dissipate doubts as to the extent of the role of victims before the Court

specific victims' interests that the Prosecution has been unable to identify in its submissions;

- (ii) cause significant delays in the proceedings and greatly limit the role of victims in criminal proceedings before the Court; and
- (iii) result in greater uncertainty in relation to what exactly victims are entitled to do before this Court.

49. For these reasons, the Single Judge rejects, once again, a casuistic approach to the determination of the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case. By doing so, 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 present case may exercise.

50. This approach has already been followed by the Chamber in the *Lubanga* Case, and, in the view of the Single Judge, is the only approach that may provide the necessary legal certainty as to the specific content of the role of victims in criminal proceedings before this Court. Moreover, it is also the approach followed by those national jurisdictions in which victims are granted a procedural status at the pre-trial stage of a case.⁶¹

51. By adopting this approach, the Single Judge not only intends to provide legal certainty to all parties and participants in the proceedings in the present case, but she also aims to ensure that the role attributed to those granted the procedural status of victim at the pre-trial stage of a case before the Court is:

- (i) not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial;

⁶¹ As seen below in further detail, the codes of criminal procedure of these national jurisdictions clearly pre-establish the set of procedural rights that those granted the procedural status of victims can exercise at the pre-trial stage of a case

- (ii) judicially consistent as the set of procedural rights is decided upon once and for the duration of the proceedings, as opposed to being decided in numerous decisions taken at various times of the proceedings;
- (iii) systematically consistent with the main features of the pre-trial proceedings of a case as defined by the Statute and the Rules; and
- (iv) meaningful - and not purely symbolic - as would be the case if victims were to be required to ask for the leave of the competent Chamber to perform the most simple procedural activity, such as responding to the submission of a party.

IV. Victims' Role at the Pre-Trial Proceedings of a Case and Internationally Recognised Human Rights Standards

52. According to article 68(3) of the Statute:

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.

53. As already stated by the Chamber, this provision does not pre-establish the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case, but rather leaves its determination to the discretion of the Chamber.⁶²

54. The Single Judge notes that rules 91 and 92 of the Rules complement article 68(3) of the Statute in certain areas, such as notification, attendance at hearings and questioning of witnesses by those granted the procedural status of victim at the pre-trial stage of a case.

55. Nevertheless, the Single Judge also observes that the scope of notifications pursuant to rules 92(5), (6) and (7) of the Rules, attendance at hearings pursuant to rule 91(2) of the Rules and questioning of witnesses pursuant to rule 92(3) of the Rules are all subject to a ruling of the Chamber in that regard.

⁶² ICC-02/05-118, p. 5, ICC-02/05-121, p. 9 See also ICC-01/04-438, p. 5

56. As a result, the Single Judge considers that, although the Statute and the 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.

57. As provided for in article 68(3) of the Statute, the first and foremost concern of the Single Judge in determining the set of procedural rights that should be attached to the procedural status of victim at the pre-trial stage of a case must be that it "is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." This, in the view of the Single Judge, is consistent with the general principle of interpretation set out in article 21(3) of the Statute.

58. The Single Judge is aware of the unprecedented nature in international criminal law of the role granted to victims at the pre-trial stage of a case by article 68(3) of the Statute and rules 91 and 92 of the Rules.⁶³

59. The Single Judge is also aware of the long-standing practices in this area in a number of national systems of criminal justice belonging to the Romano-Germanic tradition.⁶⁴

60. As a result, in the view of the Single Judge, the best point of departure to analyse whether a given set of procedural rights could be consistent with the rights of Germain Katanga and Mathieu Ngudjolo Chui and with a fair and impartial trial is the study of those sets of procedural rights that:

⁶³ See *inter alia* W A Schabas, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2nd ed., 2004, p. 172, C Jorda and J Hemptinne, *The Status and Role of the Victim*, in Cassese / Gaeta / Jones (ed.), *The Rome Statute of the International Criminal Court A Commentary*, Oxford University Press, pp 1387-1419. See also ICC-01/04-01/06-1119, para. 85; and G Bitti and H Friman, *Participation of Victims In the Proceedings*, in Roy S Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers Inc., pp. 456-474

⁶⁴ See for instance the Brazilian, the Spanish, the French, the Belgium, the German and the Italian Systems referred to below in this section.

- (i) for a long time have been attached to the procedural status of victim in the pre-trial stage of a case in national systems of criminal justice of the Romano-Germanic tradition; and
- (ii) have never been found to constitute a violation of internationally recognised human rights standards concerning the rights of the accused and a fair and impartial trial.

61. At the outset, the Single Judge observes that those systems which provide for a procedural status for victims at the pre-trial stage of a case – and more particularly at the “intermediate stage” which (i) is comprised of those proceedings that take place after the conclusion of the investigation of the case; and (ii) aim at determining whether the evidence gathered during such investigation is sufficient to proceed to trial – are based on only one comprehensive investigation that is carried out by the organ of State vested with investigative powers (an investigating magistrate in France,⁶⁵ Belgium⁶⁶ and Spain⁶⁷, or the Prosecution in Brazil,⁶⁸ Germany⁶⁹ and Italy⁷⁰).

62. During the investigation of the case, the competent public organ, which acts, generally, pursuant to the principle of legality,⁷¹ and is obliged to equally investigate incriminating and exonerating circumstances,⁷² takes those investigative steps that it considers necessary to fulfil its duty to conduct a comprehensive investigation. In principle, those granted the procedural status of victim, as well as the Defence, do not have investigative powers.⁷³ Nevertheless, they can request from the public organ

⁶⁵ *Code de procédure pénale*, Title III, Chapter I, see in particular article 49

⁶⁶ *Code d'instruction criminelle*, First Book, Chapter VI, Sections I and II, see in particular article 55

⁶⁷ Article 303 of the *Ley de Enjuiciamiento Criminal*

⁶⁸ Article 129(1) and (8) of the Constitution, and articles 24 and 257 of the *Código de proceso penal*.

⁶⁹ Sections 141-151 of the Courts' Constitution Act, *Strafprozessordnung*, Chapter III, in particular, articles 33-36

⁷⁰ Article 112 of the Constitution of the Republic of Italy *Codice di procedura penale*, First book, Chapter I, Title II, articles 50-54, Fifth Book, Chapter II, Title I, articles 327 and 328, and Fifth Book, Chapter II, Title V, article 358

⁷¹ France, articles 51, 79, 80 and 86 of the *Code de procédure pénale*, Italy, article 112 of the Constitution and article 50 of the *Codice di procedura penale*, Germany, article 34(1) of the *Strafprozessordnung*, and sections 1 and 2 of the *Strafgesetzbuch* Spain, *Ley de Enjuiciamiento Criminal*, articles 105 and 308

⁷² France, article 81 of the *Code de procédure pénale*, Belgium, article 56 of the *Code d'instruction criminelle*, Italy, article 358 of the *Codice di procedura penale*, Germany, article 34(3) of the *Strafprozessordnung* Spain, *Ley de Enjuiciamiento Criminal*, article 299.

⁷³ France, article 81 of the *Code de procédure pénale*, Germany, articles 45, 46(2) and 47(2) of the *Strafprozessordnung*, subject to conditions, the private plaintiff is entitled, pursuant to article 48 of the *Strafprozessordnung*, to act as a private accuser and to overtake the prosecution of certain crimes Spain, *Ley de Enjuiciamiento Criminal*, articles 302, 311 and 315

in charge of the investigation the carrying out of those investigative steps that they consider necessary to complete the investigation.⁷⁴

63. Once the investigation is completed, the case file created by the public organ in charge of the investigation, which contains all materials and information collected during the investigation, is sent to the Registry, where it is placed at the disposal of the Defence and of those granted the procedural status of victim.⁷⁵

64. Hence, those granted the procedural status of victim have, in principle, access to all materials and information contained in the case file, including those that may not be accessible to the general public or to the media, and may rely on such materials to prepare their intervention at those hearings in which the suspect's committal for trial is discussed.⁷⁶

65. Moreover, those granted the procedural status of victims are normally allowed to (i) propose evidence, including calling witnesses, as long as it is contained in the case file kept by the Registry; and (ii) to discuss the evidence proposed by the Prosecution and the Defence (which is also part of the case file kept by the Registry), including examining witnesses.⁷⁷

66. These national criminal justice systems have been for decades subject to the scrutiny of the Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights. Nevertheless, the Single Judge notes that these human rights bodies have never found that the above-mentioned procedural

⁷⁴ France, article 82-1 and 82-2 of the *Code de procédure pénale*, Belgium, article 61 quinquies of the *Code d'instruction criminelle*, Italy, articles 50 and 342 of the *Codice di procedura penale*, Germany, article 46(4) of the *Strafprozessordnung* Spain, *Ley de Enjuiciamiento Criminal*, articles 302, 311 and 315

⁷⁵ In those systems in which the investigation is conducted by an investigating magistrate, such as France, Belgium or Spain, the case file always remains in the Registry. See for France, articles 81 and 114 of the *Code de procédure pénale*, for Belgium, article 61-ter of the *Code d'instruction criminelle*, for Spain, *Ley de Enjuiciamiento Criminal*, articles 302, 627 and 629.

⁷⁶ France, article 114 of the *Code de procédure pénale*, Italy, article 90 of the *Codice di procedura penale*, Germany, articles 46(2) and 47(2) of the *Strafprozessordnung*, Spain, *Ley de Enjuiciamiento Criminal*, articles 622 to 633 and 645, and in particular articles 627 and 629, Brazil, articles 268-271, Belgium, article 223 of the *Code d'instruction criminelle*

⁷⁷ France, article 120 of the *Code de procédure pénale*, Germany, articles 46(2) and 47(3) of the *Strafprozessordnung* Spain, *Ley de Enjuiciamiento Criminal*, articles 302, 448-449, 627-632 and 645. See also article 701 of the *Ley de Enjuiciamiento Criminal* in relation to the calling of witnesses and the examination of witnesses at trial by those granted the procedural position of victim. Brazil, articles 268 to 271 of the *Código de processo penal*, which allow victims of crimes to participate in the proceedings as "assistants to the Prosecution", and have a legitimate entitlement to pursue the very aim of any criminal procedure - the punishment of the perpetrators of crimes. The victims can, *inter alia*, file evidence, or request the Chamber to provide the gathering of evidence - such as documents, search and seizure, and expertise, call witnesses to testify, examine Prosecution or Defence witnesses, and file appeals, or add reasoning to the appeals filed by the Prosecution

rights granted to victims constitute *per se* a violation of those internationally recognised standards concerning the rights of the accused and a fair and impartial trial embraced by article 14 of the International Covenant on Civil and Political Rights ("ICCPR"), article 6 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR") and article 8 of the Inter-American Convention on Human Rights ("IACHR").

67. The Single Judge also observes that no violation has been found even in relation to those systems in which victims, although lacking investigative powers, have full prosecutorial rights so that they:

- (i) have full access to the case-file;
- (ii) have equal standing as the Prosecution to propose evidence and discuss at pre-trial proceedings, and eventually at trial, the materials and information contained in the case file; and
- (iii) can exercise the penal action, and request the investigating magistrate or the competent Chamber to authorise that the case goes to trial even if the Prosecution opposes it.⁷⁸

68. Furthermore, the Single Judge considers that granting victims a procedural status at the pre-trial stage of a case has been proven particularly effective in some States to fight against impunity and bring to justice those who are responsible for "the most serious crimes of concern to the international community." Hence, the procedural role given to victims in these national systems of criminal justice have not only not been found to be in violation of internationally recognised standards concerning the rights of the accused and a fair and impartial trial, but are also an effective mechanism to comply with "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."⁷⁹

⁷⁸ Spain, *Ley de Enjuiciamiento Criminal*, articles 110, 602, 627 to 632, and 642 to 645

⁷⁹ As seen above this duty 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. See *supra* notes 42, 45 and 46. See also Preamble of the Statute, paragraph 4

69. The Single Judge would like to emphasise that the procedural status granted to victims at the pre-trial stage of a case in a number of national systems from the Romano-Germanic tradition may not be necessarily consistent with the “wholly adversarial approach” to criminal proceedings embraced in a number of national jurisdictions belonging to the common law tradition, as well as with the manner in which these national jurisdictions have elaborated on the right to a fair trial.

70. Nevertheless, the Single Judge considers that internationally recognised standards concerning the rights of the accused and a fair and impartial trial have not adopted this “wholly adversarial approach” which has led in a number of national jurisdictions to a limitation of the role of victims in criminal proceedings to filing criminal complaints, giving testimony as witnesses if they are called by the Prosecution,⁸⁰ and/or giving an impact statement at the sentencing stage at a maximum.⁸¹

71. At the same time, the Single Judge also observes that those national jurisdictions that have adopted a “wholly adversarial approach” to criminal proceedings and to the right to a fair trial have not been found in violation of their obligations, pursuant to articles 14 of the ICCPR, 6 of the ECHR and 8 of the IACHR, for limiting to such an important extent the role of victims in their criminal proceedings.

72. As a result, the Single Judge is of the view that granting victims a procedural status at the pre-trial stage of a case is neither mandatory nor prohibited by internationally recognised standards concerning the rights of the accused and a fair and impartial trial. Therefore, those national systems which provide for a procedural status of victim throughout a criminal case (including at the pre-trial stage), and

⁸⁰ This is the case, for instance, in England and Wales (section 9 of the Criminal Justice Act 1967 and section 5A of the Magistrates' Courts Act 1980), South Africa (section 161 of the Criminal Procedure Act, 1977) See generally United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims: On the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (New York, 1999), 39.

⁸¹ This is the case, for instance, of the United States of America (42 U.S.C. § 10606 Sec 502, The Federal Victims Rights and Restitution Act of 1990), New South Wales (Crimes (sentencing procedure) Act, 1999); Canada (Section 722 of the Canadian Criminal Code) and South Australia (Criminal Law (sentencing) Act 1989) See generally United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims: On the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (New York, 1999), 39

those which confine the role of victims in criminal proceedings to filing criminal complaints and giving evidence as witnesses, equally comply with such standards.

73. Likewise, the Single Judge also notes that granting victims a procedural status at the pre-trial stage of a case is neither mandatory nor prohibited by internationally recognised standards concerning the rights of victims of serious violations of human rights to truth and justice.

74. Indeed, those national jurisdictions which have adopted a “wholly adversarial approach” to criminal proceedings have not been found by Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights in violation of their obligations under the ICCPR, the ECHR and the IACHR in relation to the rights to the truth and justice of victims of serious violations of human rights.

75. Therefore, satisfaction of such rights is not dependant on the adoption at a national level of a specific model of victims’ participation in criminal proceedings, but on the existence of sufficient safeguards so as to ensure that the interests of victims underlying their rights to the truth and justice can be satisfied through the relevant national criminal proceedings.

V. Interpretation of Article 68(3) of the Statute and Rules 91 and 92 according to the Interpretative Criteria of the Vienna Convention on the Law of Treaties

76. The Single Judge has already found that the literal interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules does not suffice to clearly determine the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case before the Court because the only explicit guidance is the obligation to shape this set of procedural rights “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

77. Furthermore, as seen in the previous section, the Single Judge has also found that those national systems which provide for a substantial role for victims throughout a criminal case (including at the pre-trial stage), and those which confine the role of victims in criminal proceedings to filing criminal complaints and giving evidence as witnesses, equally comply with internationally recognised standards concerning the rights of the accused and a fair and impartial trial.

78. Under these circumstances, the Single Judge is of the view that, the discretion granted to the Chamber in the determination of the role of victims in the pre-trial stage of a case before the Court must be exercised by applying, in addition to the general principle of interpretation set out in article 21(3) of the Statute, the interpretative criteria provided for in article 31(1) of the Vienna Convention on the Law 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."⁸²

79. It is thus necessary to turn to the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules in light of the main features of the pre-trial proceedings of a case as defined by the Statute and the Rules, as well as to the interpretation of such provisions in light of their object and purpose, to determine the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case.

V. 1. Contextual Interpretation in light of the Statutory Framework of the Pre-Trial Stage of a Case before the Court

V.1.1. Lack of Independent Investigative Powers

80. As the Single Judge has recently stated in the Decision on the Evidentiary Scope of the Confirmation Hearing, the criminal procedure endorsed by the Statute is:

⁸² ICC-01/04-01/07-307, p 7.

[...] an accusatorial system of criminal procedure -in the sense that it is the Prosecution who exercises the penal action – which is not a purely adversarial system because it includes a mixture of procedural features from the Romano-Germanic and common law traditions.⁸³

81. In the view of the Single Judge, the first element of the mixed system embraced by the Statute and the Rules is article 54(1)(a) of the Statute, according to which the Prosecution shall “in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.” In order to conduct its investigation, the Prosecution can, *inter alia*, “collect and examine evidence”,⁸⁴ “request the presence of and question persons being investigated, victims and witnesses”,⁸⁵ and “take necessary measures, or request that necessary measures be taken, to ensure [...] the preservation of evidence.”⁸⁶

82. Hence, the Statute makes the Prosecution the organ primarily in charge of conducting the investigation of the situations with which the Court is seized, and of every case arising out of the situations under investigation.⁸⁷ Moreover, the Prosecution, in conducting its investigation, is bound pursuant to article 54 (1)(a) of the Statute by the principle of legality, and therefore its investigation must be comprehensive.

83. As a result, the Single Judge considers that granting investigative powers, independent from those of the Prosecution, to those granted the procedural status of victim would not be consistent with the procedural system embraced by the Statute

⁸³ ICC-01/04-01/07-428, para 29

⁸⁴ Article 54 (3) (a) of the Statute

⁸⁵ Article 54 (3) (b) of the Statute

⁸⁶ Article 54(3) (f) of the Statute

⁸⁷ The Single Judge notes that articles 56 and 57 of the Statute grant the Chamber certain functions during the investigation of situations, and of cases arising out of such situations, and in particular when the evidence must be gathered (i) with the safeguards required by the *principe contradictoire* because there is a risk that the evidence could not be reproduced at the confirmation hearing or at trial (article 56 of the Statute), (ii) upon authorisation of the Pre-Trial Chamber because (a) the relevant investigative steps will affect the fundamental rights of those individuals subject to them (article 57(3)(c) of the Statute), and (b) the Prosecution has been unable to secure the cooperation of the territorial State due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under part 9 of the Statute (article 57 (3) (d) of the Statute) Moreover, as the Chamber has already stated, article 53(2) of the Statute and rules 107 to 109 of the Rules, give the Chamber a certain review power when the Prosecution decides to put an end to the investigation of a situation. See Decision on the Requests of the Legal Representative for Victims VPRS 1 to VPRS 6 regarding "Prosecutor's Information on further Investigation", ICC-01/04-399, p 5, issued by Pre-Trial Chamber I on 26 September 2007

and the Rules.⁸⁸ Therefore, if those granted the procedural status of victim find it necessary to undertake certain investigative steps, they must request the Prosecution to undertake such steps.⁸⁹

84. In the view of the Single Judge, this is not only consistent with the procedural framework of the Statute and the Rules, but also corresponds with the manner in which those national systems from the Romano-Germanic tradition which provide for a procedural status of victim at the pre-trial stage of a case operate.⁹⁰

V.1.2. Lack of Access to the Prosecution Situation and Case Files

85. As seen above, those national systems that provide for a procedural status of victim at the pre-trial stage of a case are systems of criminal justice (i) based on one comprehensive investigation; and (ii) in which the case file created by the investigative body is sent after the completion of the investigation to the Registry,⁹¹ where it is placed at the disposal of the Defence and of those granted the procedural status of victim.

86. The Single Judge notes that the Statute and the Rules differ from the above-mentioned national systems in that they embrace a procedural system in which (i) there are two parallel investigations: one by the Prosecution and one by the Defence; and (ii) neither the Prosecution's situation file nor the Prosecution's case file must be

⁸⁸ This is also the reason why neither the Rules nor the Regulations of the Court confer any investigative power upon the Office of Public Counsel for Victims, see regulations 80(2) and 81 of the Regulations of the Court, regulations 113(2), and 114 to 117 of the Regulations of the Registry

⁸⁹ It is for this reason that the Chamber, when asked by those granted the procedural status of victim at the stage of investigation of the DRC situation to request the Prosecution to provide information and specific documents in order for the Chamber to take the necessary measures to preserve evidence related to them, has explained as follows

[.] under article 57(3)(c) of the Statute, the Chamber may exercise this authority "where necessary" and that at the present time there is no indication that the Prosecution, in conducting its investigation in the Situation in the DRC, has not taken the necessary measures to ensure the preservation of evidence, pursuant to article 54(3)(f) of the Statute (Decision on the Requests of the Legal Representative for Victims VPRS 1 to VPRS 6 regarding "Prosecutor's Information on further Investigation", ICC-01/04-399, p. 6, issued by Pre-Trial Chamber I on 26 September 2007)

⁹⁰ As seen above, in these systems those granted the procedural status of victim at the pre-trial stage of a case must request from the public organ in charge of the investigation – be it an investigating magistrate, be it the Prosecution – the carrying out of those investigative steps that they consider necessary. See for France, articles 82-1 and 82-2 of the *Code de procédure pénale* for Belgium, article 61 quinquies of the *Code d'instruction criminelle*, for Italy, Articles 74-108 of the *Codice di procedura penale*, for Germany, Article 46(4) of the *Strafprozessordnung* Spain, *Ley de Enjuiciamiento Criminal*, arts. 302, 311 and 315

⁹¹ If the investigation is conducted by an investigating magistrate, the case file always remains at the Registry

provided to the Registry. In the view of the Single Judge, this is the result of the adoption by the Statute and the Rules in particular articles 61(3), 67(1)(a) and (b) and 67(2) of the Statute and rules 76 to 83 of the Rules of a system of disclosure, which can be traced back to the common law tradition.

87. In this regard, the Single Judge recalls that in the *Lubanga* Case, the Chamber rejected the Defence request to have full access to the Prosecution situation and case files⁹² because:

[...] the provisions on the Prosecution's disclosure obligations regulate the extent, time, and manner in which the Defence can access some of the materials contained in the Prosecution file. They are based on the premise that the criminal procedure before the International Criminal Court does not provide for full access by the Defence to the entire Prosecution file. In the single judge's opinion, to say otherwise would make those provisions meaningless.⁹³

88. In light of the above-mentioned, the Single Judge considers that, if the Prosecution has no obligation to provide the Defence 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 Defence.

89. Hence, the Single Judge considers that the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules in light of the regulation of the pre-trial stage of a case by the Statute and the Rules (in particular those provisions relating to the disclosure process) leads to the conclusion that 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.

⁹² In support of its request, the Defence submitted that "if it wishes to challenge the charges and present evidence at the confirmation hearing, then "considerable investigative work" must be done. This would require having access "immediately" to the entire Prosecution file to study all its aspects, including exculpatory materials." Moreover, according to the Defence, "preparation of the Defence is clearly an independent exercise, and the obligation bearing upon the Prosecutor to permit inspection is, in fact, the possibility for the Defence to take knowledge of all of the case compiled by the Prosecutor to establish whether there is information which is material in any way to the Defence " (Decision on the Final System of Disclosure and the Establishment of a Final Timetable, ICC-01/04-01/06-102, paras 8 and 9)

⁹³ Decision on the Final System of Disclosure and the Establishment of a Final Timetable, ICC-01/04-01/06-102, para 12. See also the "Decision on the Defence Request for Unrestricted Access to the Entire File of the Situation in the Democratic Republic of the Congo", ICC-01/04-01/06-103

V.1.3. Exclusion from the Disclosure Process and Lack of a Right to Propose the Introduction of Additional Evidence

90. The question also arises as to the consistency between the main procedural features of the pre-trial stage of a case embraced by the Statute and the Rules, and the possibility of involving those granted the procedural status of victim in the disclosure process.

91. At the outset, the Single Judge observes how the provisions on disclosure, provided for in articles 61(3), 67(1)(a) and (b) and 67(2) of the Statute and rules 76 to 83 of the Rules, only expressly grant rights to, and impose obligations on, the Prosecution and the Defence.

92. In this regard, the Single Judge notes that while these provisions contain several references to direct exchanges between the Prosecution and the Defence,⁹⁴ there is no single reference in such provisions to those granted the procedural status of victim or their legal representatives.

93. The Single Judge notes that the Chamber has stated in the *Lubanga* Case that a contextual interpretation of the relevant provisions on disclosure “also leads to the conclusion that the disclosure process can only be *inter partes* and prior to any communication of evidence to the Pre-Trial Chamber through its filing in the record of the case.”⁹⁵ As the Chamber has highlighted:

[...] the consistency of the disclosure process and the need to safeguard the Court's unique criminal procedure require that disclosure be carried out *inter partes* with regard to (i) the evidence that subsequently must be communicated to the Pre-Trial Chamber by filing it in the record of the case, that is the evidence on which the parties intend to rely at the confirmation hearing; and (ii) the other materials that the Prosecution must disclose to the Defence before the confirmation hearing but that neither party intends to present at that hearing.⁹⁶

94. The Single Judge also observes that the Chamber has already concluded in the *Lubanga* Case that the interpretation of the aforementioned provisions on disclosure

⁹⁴ ICC-01/04-01/06-102, para 62

⁹⁵ ICC-01/04-01/06-102, para 63

⁹⁶ ICC-01/04-01/06-102, para. 65

in light of their object and purpose also support the conclusion that, in the system of the Statute and the Rules, disclosure is an *inter partes* process which takes place only between the Prosecution and the Defence. As the Chamber has underlined:

From a teleological perspective, the rules on disclosure seek to guarantee Thomas Lubanga Dyilo's right to a fair trial by ensuring that the Defence can properly prepare for the confirmation hearing. The single judge concurs with both the Prosecution and the Defence that this overriding goal will be best achieved if the disclosure process takes place directly between the parties in order to ensure that it is expeditious and effective. Doing this will permit the Defence, as soon as possible before the confirmation hearing, to be in a position to decide on the scope of defence and to select the evidence on which it intends to rely at the hearing.⁹⁷

95. As a result, the Single Judge, following the case law of this Chamber in the *Lubanga Case*⁹⁸, as well as in the present case,⁹⁹ considers that, as it occurs in those national systems belonging to the common law tradition,¹⁰⁰ the disclosure process is an *inter partes* process which only (i) grants rights to, and impose obligations on, the Prosecution and the Defence, and (ii) gives rise to a number of direct exchanges between the Prosecution and the Defence. The Prosecution and the Defence must only file with the Registry disclosure notes, pre-inspection reports and inspection reports listing the documents and information exchanged but they do not need to file the actual documents and materials exchanged in the record of the case kept by the Registry.¹⁰¹

96. Nevertheless, the Single Judge notes that the Trial Chamber which is currently seized with the *Lubanga Case* has, to a certain extent, departed in its 18 January 2008 Decision from the previous case law of this Chamber on the nature of the disclosure process. According to the Trial Chamber:

Turning to inspection, the Trial Chamber agrees with the prosecution that inspection, as provided for in Rules 77 and 78 of the Rules relates only to the prosecution and the defence. However, as a matter of general principle, and in order to give effect to the rights accorded to

⁹⁷ ICC-01/04-01/06-102, para 66

⁹⁸ ICC-01/04-01/06-102, p. 5, ICC-01/04-01/07-T-12-ENG ET, p 4, lines 14-25 and p 18, lines 4-11, ICC-01/04-01/07-T-21-Conf-Exp-ENG ET, p 20, lines 21-25 and p 21, lines 1-8

⁹⁹ ICC-01/04-01/07-428, para 101

¹⁰⁰ England, Criminal Procedure and Investigations Act 1996, *R v. Ward* [1993] 1 WLR 619; (1993) 96 Cr App R1, Canada, *R v Stinchcombe* (1991) 68 CCC (3d) 1 and *R v O'Connor* (1994) BCCA 65, United States of America *Giles v State of Maryland*, 386 US 66 (1967).

¹⁰¹ ICC-01/04-01/06-102, paras 74-76 ICC-01/04-01/06-T-9-EN [23JUNE2006 Edited] p 49, line 14 to p 50, line 17, ICC-01/04-01/06-T-12-ENG ET WT 14-12-2007 at p 8, line 18 to p 10, line 15, ICC-01/04-01/06-T-21-ENG ET WT 01-04-2008 at p 20 line 15 to p 21, line 19

victims under Article 68(3) of the Statute, the prosecution shall, upon request by the victims' legal representatives, provide individual victims who have been granted the right to participate with any materials within the possession of the prosecution that are relevant to the personal interests of victims which the Chamber has permitted to be investigated during the proceedings, and which have been identified with precision by the victims in writing.¹⁰²

97. From an overall reading of the 18 January 2008 Decision, the Single Judge infers that the overriding goal behind the approach taken by the Trial Chamber appears to be to ensure that those granted the procedural status of victim are placed in a position to effectively exercise their rights pursuant to article 68(3) of the Statute. In particular, the Trial Chamber seems to be especially concerned with establishing the conditions to allow victims to effectively exercise their right to propose the introduction of additional evidence at trial, which is defined by the 18 January 2008 Decision as follows:

The Trial Chamber considers that the right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right (that is not dependent on the cooperation or the consent of the parties) to request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69(3) of the Statute. Rule 91(3) of the Rules enables participating victims to question witnesses with the leave of the Chamber (including experts and the defendant). The Rule does not limit this opportunity to the witnesses called by the parties. It follows that victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has "requested" the evidence. Furthermore, for the reasons set out above, the Chamber will not restrict questioning by victims to reparations issues, but instead will allow appropriate questions to be put by victims whenever their personal interests are engaged by the evidence under consideration.¹⁰³

98. In other words, according to the Trial Chamber, since those granted the procedural status of victim may be permitted, under certain conditions, to introduce at trial additional evidence on which neither the Prosecution nor the Defence intend to rely, they should also be granted certain "disclosure rights" in relation to those materials contained in the Prosecution case file.¹⁰⁴

99. The Single Judge does not intend to discuss in the present decision the merits of this "triangular approach" to the disclosure process for the purpose of the trial. Nevertheless, she would like to emphasise that the concerns that have led the Trial

¹⁰² ICC-01/04-01/06-1119, para 111

¹⁰³ ICC-01/04-01/06-1119, para 108

¹⁰⁴ However, no disclosure rights are necessary, in relation to the evidence on which the Prosecution and the Defence decide to rely at trial because victims can have access to them by consulting the record of the case kept in the Registry

Chamber to adopt this “triangular approach” to the disclosure process have no impact at the pre-trial stage of a case.

100. In this regard, the Single Judge recalls that in the recent Decision on the Evidentiary Scope of the Confirmation Hearing, the Chamber has found that the “confirmation hearing has a limited scope and by no means can it be seen as an end in itself, but it must be seen as a means to distinguish those cases that should go to trial from those that should not go to trial.” Therefore, the confirmation hearing is neither a “mini-trial” nor a “trial before the trial”, and the Prosecution should carefully analyse the evidence on which it intends to rely so as to limit it to “the very core evidence of the case”.¹⁰⁵

101. Within this framework, the Single Judge considers that the introduction of additional evidence on which neither the Prosecution nor the Defence 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.

102. Moreover, the Single Judge observes that the Chamber has already underlined the role of the Defence at the confirmation hearing in that:

[...] rule 79 of the Rules makes it clear that the Defence may raise any alibi or any other defence, under article 31 (1) of the Statute, either at the confirmation hearing or at the trial. Likewise, under article 61 (5) of the Statute and rule 121 (6) of the Rules, the Defence need not present any evidence at the confirmation hearing. Hence, while articles 67 (1) (b) and 67 (2) of the Statute

¹⁰⁵ ICC-01/04-01/07-428-Corr, paras 5-6, and 78-81 See also ICC-01/04-01/07-446, p 7, ICC-01/04-01/07-412, p 4, ICC-01/04-01/07-T-25-ENG ET, p 14, lines 4-11

and rule 77 of the Rules impose on the Prosecution the obligation to disclose to the Defence before the confirmation hearing those materials that are potentially exculpatory or are otherwise material for the Defence's preparation for the confirmation hearing, the Defence need not rely on those materials at the confirmation hearing if it considers that this option will be advantageous to its success at trial. [...] In the view of the single judge, if all materials disclosed by the Prosecution before the confirmation hearing, on which neither party intends to rely, were filed in the record of the case and presented thereat, the nature of the confirmation hearing would be significantly altered and the right of the Defence to decide whether to rely on such materials at the hearing would be infringed on.¹⁰⁶

103. As a result, the Single Judge considers that the introduction of additional evidence on which neither the Prosecution nor the Defence intend to rely at the confirmation hearing by those granted the procedural status of victim - and which has been disclosed to the Defence pursuant to article 67(2) of the Statute or rule 77 of the Rules- will infringe upon the Defence's right not to rely on such materials for the purpose of the confirmation hearing.

104. As to the role of the Pre-Trial Chamber at the confirmation hearing, the Single Judge notes that such role is defined in article 61(7) of the Statute in a manner consistent with the limited scope, as well as the object and purpose of the confirmation hearing.

105. According to this provision, if, after the confirmation hearing, the Pre-Trial Chamber is not convinced that the evidentiary threshold provided for in article 61(7) of the Statute has been met with regard to a given charge, it can - in addition to rejecting the confirmation of the relevant charge - adjourn the hearing and request the Prosecution to consider providing further evidence or, if further evidence is not available, to conduct further investigations with regard to that particular charge.¹⁰⁷

106. In the view of the Single Judge, this means that before making such a request, the Pre-Trial Chamber must first hear the presentation by the Prosecution and the

¹⁰⁶ ICC-01/04-01/06-102, paras 54 and 55

¹⁰⁷ The Pre-Trial Chamber can also request the Prosecution to amend a charge when it considers that the evidence submitted appears to establish a different crime within the jurisdiction of the Court

Defence of the evidence on which they have decided to rely at the confirmation hearing.¹⁰⁸

107. Moreover, according to article 61(7) of the Statute, the power of the Pre-Trial Chamber is confined to requesting “the consideration” by the Prosecution of the opportunity to provide additional evidence. Therefore, in principle the Prosecution makes a final decision whether to provide the additional relevant evidence.

108. The Single Judge is of the opinion that this marks an important difference between articles 61(7) and 69(3) of the Statute, because the last provision gives the competent Chamber “the authority to request the submission”, as opposed to simply making a “request to consider providing” additional evidence.

109. Moreover, the Single Judge notes that article 69(3) of the Statute expressly refers to the authority of the competent Chamber “to request the submission of all evidence that it considers necessary for the determination of the truth”. However, as this Chamber has repeatedly stated in previous decisions:

[...] according to article 61 (7) of the Statute, at the confirmation hearing the Pre-Trial Chamber must determine “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.” Therefore, the Pre-Trial Chamber is not a finder of truth in relation to the guilt or innocence of the person against whom a warrant of arrest or a summons to appear has been issued.¹⁰⁹

110. As a result, the Single Judge considers that 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 Defence is “necessary for the determination of the truth.”

¹⁰⁸ Moreover, the Single Judge considers that, apart from matters relating to the protection of victims and witnesses, the main task of the Pre-Trial Chamber in the proceedings leading to the confirmation hearing consists of ensuring that (i) the Defence has adequate time and facilities to prepare for the confirmation hearing, which include having access to the evidence on which the Prosecution intends to rely at the confirmation hearing at least thirty days prior to the commencement of the hearing, and (ii) the disclosure of material potentially exculpatory or otherwise material for the Defence’s preparation of the confirmation hearing takes place in a timely and effective manner, so that the Defence can make an informed decision as to how to use such materials

¹⁰⁹ ICC-01/04-01/06-102, para 55

111. This, in the view of the Single Judge, prevents the Pre-Trial Chamber from authorising victims to introduce additional evidence, on which neither the Prosecution nor the Defence intend to rely at the confirmation hearing, under the general umbrella of article 69(3) of the Statute.

112. In other words, regardless of what the situation might be at the trial stage, the Single Judge considers that those granted the procedural status of victim cannot introduce additional evidence at the confirmation hearing on the ground that "victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has "requested" the evidence."¹¹⁰

113. In light of the above, the Single Judge finds that the statutory framework provided for by the Statute and the Rules for the pre-trial stage of a case leaves no room for the presentation of additional evidence by those granted the procedural status of victim. As a result, the main argument put forward by the Trial Chamber to depart from the traditional *inter partes* approach to the disclosure process is not applicable at the pre-trial stage of a case.

114. Hence, the Single Judge finds that the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules in light of the provisions of the Statute and the Rules that regulate the pre-trial stage of a case, leads to the conclusion that 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.

V.1.4. Specific Procedural Rights that are Consistent with Contextual Interpretation of Article 68(3) of the Statute and Rules 91 and 92 of the Rules

V.1.4.1. Preliminary Considerations

¹¹⁰ ICC-01/04-01/06-1119, para 108.

115. The Single Judge recalls that the Chamber has repeatedly stated that, after the completion of the disclosure process, the Prosecution and the Defence:

[...] 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.¹¹¹

116. In describing the object and purpose of the provisions on the Prosecution and Defence mandatory filing with the Registry of the evidence on which they intend to rely at the confirmation hearing, the Chamber also stated that:

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.¹¹²

117. As a result, the record of any given case before the Court must contain, well in advance prior to the commencement of the confirmation hearing, the originals and electronic versions with the details requested by the e-Court Protocol of the evidence on which the Prosecution and the Defence intend to rely at the confirmation hearing.

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¹¹¹ ICC-01/04-01/06-102, para 37 See also, "Decision Establishing a New Calendar according to the Date of the Confirmation Hearing" 27 June 2008", ICC-01/04-01/07-459, issued on 29 April 2008 As this Chamber has also explained in previous decisions, this interpretation is based *inter alia* on the fact that rule 122(1) of the Rules

[.] is drafted on the premise that the evidence to be presented at the confirmation hearing must previously have been filed in the record of the case, insofar as it establishes that, at the beginning of the confirmation hearing, the Presiding Judge "shall determine how the hearing is to be conducted and, in particular, may establish the order and the condition under which he or she intends the evidence contained in the record of the proceedings to be presented (ICC-01/04-01/06-102, para 33)

¹¹² ICC-01/04-01/06-102, para 34

¹¹³ According to the interpretation by the Chamber of rules 121(3) to (5) of the Rules, the Prosecution must file with the Registry the originals, as well as electronic copies with the details requested by the e-Court Protocol, by (i) no later than 30 days prior to the initiation of the confirmation hearing in relation to the evidence contained in the Prosecution List of Evidence; and (ii) no later than 15 days prior to the start of the hearing in the case of the evidence included in the Prosecution Additional List of Evidence Likewise, according to the case law of this Chamber, the Defence, pursuant to rule 121 (6) of the Rules, must file with the Registry the originals of the evidence on which it intends to rely at the confirmation hearing no later than 15 days (in the case of the evidence included in the Defence List of Evidence) or 7 days (in the case of the evidence included in the Defence List of Additional Evidence) prior to the start of the confirmation hearing— electronic copies with the details required by the e-Court Protocol must also be filed by the Defence a few days prior to the initiation of the hearing, See "Decision Establishing a New Calendar according to the Date of the Confirmation Hearing" 27 June 2008", ICC-01/04-01/07- 459, issued on 29 April 2008

118. In light of the above, the Single Judge considers that, 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.¹¹⁴

119. The Single Judge also notes that she has recently stated, in the Decision on the Evidentiary Scope of the Confirmation Hearing, that "it is the Prosecution who exercises the penal action"¹¹⁵ by filing in the record of the case, thirty days prior to the initiation of the confirmation hearing the Prosecution Charging Document and List of Evidence, in which the Prosecution sets out the factual and evidentiary basis of the charges brought against the suspects.

120. Once the Prosecution Charging Document and List of Evidence is filed, the factual basis of the charges against the suspect can by no means be extended unless the Prosecution decides to amend the charges pursuant to article 61(4) of the Statute and rule 121(4) of the Rules. The Prosecution Amended Charging Document and List of Evidence will then have to be filed at least 15 days prior to the start of the confirmation hearing.

121. Once the fifteen day deadline provided for in rule 121(4) of the Rules has expired, the factual basis of the charges cannot be extended before the start or during the confirmation hearing. Even after the presentation at the confirmation hearing of the evidence relied on by the Prosecution and the Defence and contained in the record of the case, the Pre-Trial Chamber does not have the power, pursuant to article 61(7) of the Statute, to confirm the charges for a factual basis broader than the one contained in the Prosecution [Amended] Charging Document.

¹¹⁴ ICC-01/04-01/06-102, paras 74-76 ICC-01/04-01/06-T-9-EN [23JUNE2006 Edited] p 49, line 14 to p 50, line 17, ICC-01/04-01/06-T-12-ENG ET WT 14-12-2007 at p 8, line 18 to p 10, line 15, ICC-01/04-01/06-T-21-ENG ET WT 01-04-2008 at p 20 line 15 to p. 21, line 19 Moreover, as the Prosecution and the Defence have the duty to file in the record of the case disclosure notes, pre-inspection reports and inspection reports listing the documents and information exchanged between them during the disclosure process, granting victims access to the record of the case would also make them familiar with the type of materials exchanged by the Prosecution and the Defence prior to the confirmation hearing through the disclosure process.

¹¹⁵ ICC-01/04-01/07-428, para 29

122. As a result, the Single Judge considers that 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 [Amended] Charging Document.

123. Nevertheless, in the view of the Single Judge, the same limitation does not apply in relation to the legal characterisation of the facts contained in the Prosecution [Amended] 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 characterisation of such facts if it considers that the evidence submitted appears to establish a different crime.¹¹⁶

V.1.4.2. Specific Procedural Rights

124. The Single Judge observes that the differences between the procedural framework of the pre-trial stage of a case in those national systems that provide for a procedural status of victim at such stage, and the procedural framework embraced by the Statute and the Rules, are important.

125. As a result of these differences, the set of procedural rights that could be attached to the procedural status of victim at the pre-trial stage of a case before the Court cannot be as broad as it is in some of the above-mentioned national systems, particularly in light of the limitations referred to in the previous sections concerning the prohibition to extend the factual and evidentiary basis of the confirmation hearing, as well as the limited content of the record of the case.

¹¹⁶ As the Chamber has stated in previous decisions

The purpose of this provision is to prevent the Chamber from committing a person for trial for crimes which would be materially different from those set out in the Document Containing the Charges and for which the Defence would not have had the opportunity to submit observations at the confirmation hearing (Decision on the Confirmation of the Charges, 29 January 2008, ICC-01/04-01/06-803, para 233)

Nevertheless, as the Chamber has also affirmed at para 234 of the same decision, this provision is not applicable, however, when the Statute criminalises the same conduct, whether it is committed in the context of a conflict or an international character or in the context of a conflict not of an international character

126. The question then arises as to which specific procedural rights are consistent with the procedural framework provided for by the Statute and the Rules for the pre-trial stage of a case before the Court and could therefore be attached to the procedural status of victim pursuant to article 68(3) of the Statute and rules 91 and 92 of the Rules.

127. In the view of the Single Judge, these specific procedural rights can be divided into six groups. The first group is comprised of the right to have access, prior to and during the confirmation hearing, to the record of the case kept by the Registry, including to the evidence filed by the Prosecution and the Defence pursuant to rule 121 of the Rules.

128. The Single Judge considers that this right includes the right to have access to all filings and decisions contained in the record of the case regardless of whether they are classified as public or as confidential. It does not, however, include the right to access those filings and decisions classified as "*ex parte*" and only available to the Prosecution, the Defence, a different participant, the Registry or a combination thereof.

129. In the view of the Single Judge, this first group also includes the right to be notified on the same basis as the Prosecution and the Defence of all decisions, requests, motions, responses and other procedural documents which are filed in the record of the case and are not classified "*ex parte*" and only available to the Prosecution, the Defence, a different participant, the Registry or a combination thereof.

130. Furthermore, the right to have access to the transcripts of hearings contained in the record of the case regardless of whether such hearings were held in public or in closed session also falls within this first group. The same cannot be stated, however, for the right to access the transcripts of those hearings held on an *ex parte* basis with the Prosecution, the Defence, a different participant, the Registry or a combination thereof.

131. In the view of the Single Judge, this first group also includes the right to be notified on the same basis as the Prosecution and the Defence of all proceedings before the Court, including public and closed session hearings (including those held *ex parte*) and any postponements thereof, and the date of delivery of decisions.

132. Furthermore, the right to have access to the evidence proposed by the Prosecution and the Defence and contained in the record of the case also falls within this first group. However, this right to have access to the evidence is limited to the format (unredacted versions, redacted versions or summaries, as well as electronic versions with the data required by the e-Court Protocol) in which the evidence is made available to the party which has not proposed it.

133. Finally, the Single Judge underlines that the right to have access to non-public filings and decisions included in the Registry's record of the situation to which the relevant case is related falls outside this first group of rights. In this regard, the Single Judge recalls that such non-public filings and decisions concern the Prosecution investigation of other aspects of the relevant situation, and that a copy of all those materials included in the record of a situation which are relevant for a given case are incorporated into the record of such a case when it arises.¹¹⁷

134. The second group is comprised of the rights (i) to make submissions on all issues relating to the admissibility and probative value of the evidence on which the Prosecution and the Defence intend to rely at the confirmation hearing; and (ii) to examine such evidence at the confirmation hearing.

135. The third group relates to the examination of witnesses. In this regard, the Single Judge recalls that the Chamber, in its 7 November 2006 Decision on the Practices of Witness Familiarization and Witness Proofing in the *Lubanga* Case, made the following finding:

[...] rule 140 of the Rules does not use the expressions "examination-in-chief", "cross-examination" and "re-examination", which have a very technical and specific meaning in a

¹¹⁷ ICC-01/04-01/06-8-Corr, ICC-01/04-01/06-35, ICC-01/04-01/07-27, ICC-01/04-01/07-59

number of national jurisdictions, and instead uses expressions such as "question the witness" or "examine the witness". Therefore, within the process of witness familiarisation, the VWU shall inform the witness of the process of its examination by the Prosecution and the Defence, as opposed to the process of "examination-in-chief", "cross-examination" and "re-examination" referred to by the Prosecution in paragraph 16 (vi) of the Prosecution Information.¹¹⁸

136. The Single Judge observes that this finding was made against the backdrop of the limited procedural rights attached to the procedural status of victim when victims are granted anonymity throughout the pre-trial stage of a case, including the fact that they are not entitled to examine witnesses pursuant to the procedure provided for in rule 91(3) of the Rules.¹¹⁹

137. In the view of the Single Judge, when the limitations deriving from the principle of prohibiting anonymous accusations are not applicable, this third group includes the right to examine, at the confirmation hearing, any witness proposed by the Prosecution and the Defence, as this is part of the evidentiary debate that takes place at the confirmation hearing.

138. The Single Judge considers that the examination of witnesses by those granted the procedural status of victim should take place after their examination by the Prosecution and within the amount of time allocated by the Chamber. Moreover, those granted the procedural status of victim, like the Prosecution and the Defence, should not have to file the list of questions that they intend to pose to the relevant witnesses prior to the examination of the witnesses. In this regard, the Single Judge notes that the Prosecution, the Defence and those granted the procedural status of victim can always, after a question is posed and before it is answered by the witness, make an oral motion requesting the Chamber not to admit the relevant question or to request the examining party to reformulate it.

139. Finally, the examination of witnesses by those granted the procedural status of victim should take place subject to any other direction that the Chamber may give prior to, or during, the said examination.

¹¹⁸ Decision on the Practices of Witness Familiarization and Witness Proofing, 7 November 2006, ICC-01/04-01/06-679, p 13, footnote 30

¹¹⁹ See Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006, ICC-01/04-01/06-462-tEN, pp 8 and 9

140. The fourth group is comprised of the right to attend all public and closed session hearings convened in the proceedings leading to the confirmation hearing, as well as in all public and closed sessions of the confirmation hearing. However, it does not include the right to attend those hearings held on an *ex parte* basis with the Prosecution, the Defence, a different participant, the Registry or a combination thereof.

141. The fifth group includes the right to participate by way of oral motions, responses and submissions in: (i) all those hearings in which those granted the procedural status of victim have the right to attend; and (ii) in relation to all matters other than those in which their intervention has been excluded by the Statute and the Rules - for instance, matters relating to the *inter partes* disclosure process or any discussion of the evidence which aims at extending the factual basis contained in the Prosecution [Amended] Charging Document.

142. The sixth and last group is comprised of the right to file written motions, responses and replies in accordance with regulation 24 of the Regulations, in relation to all matters other than those in which the victim's intervention has been excluded by the Statute and the Rules.

143. In the view of the Single Judge, the fifth and the sixth groups of rights also include the right to (i) file, in accordance with rule 121(7) of the Rules, written submissions with the Pre-Trial Chamber on evidentiary and legal issues to be discussed at the confirmation hearing; (ii) make opening and closing statements at the confirmation hearing as provided for in rule 89(1) of the Rules; and (iii) raise objections or make observations concerning issues related to the proper conduct of the proceedings prior to the confirmation hearing in accordance with rule 122(3) of the Rules.

144. Nevertheless, the Single Judge considers that the right to resort to certain procedural remedies that, according to the Statute and the Rules, can only be exercised by Prosecution, Defence and/or other participants, falls outside of these last

two groups of rights. This is the case, *inter alia*, for the right to make challenges to, or raise issues relating to, the jurisdiction of the Court or the admissibility of a case pursuant to article 19(2) and (3) of the Statute and rule 122(2) of the Rules.

145. Furthermore, the Single Judge would like to highlight that any procedural rights attached to the procedural status of victim at the pre-trial stage of the case cannot be exercised retroactively. Moreover, unless otherwise provided by the Chamber in any future decision granting the procedural status of victim in the pre-trial proceedings of the present case, the set of specific procedural rights embraced in the present decision shall also belong to all natural and legal persons to whom such status shall be granted by the Chamber.¹²⁰

V.1.4.3. Limitations to the Specific Procedural Rights

146. In the view of the Single Judge, the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules requires that the set of procedural rights referred to in the previous subsection can be subject to limitations under certain conditions.

147. In this regard, the Single Judge considers that the set of procedural rights referred to in the previous subsection - and in particular the right to access confidential filings, decisions and transcripts contained in the record of the case, as well as the right to attend and participate in closed session hearings - can be limited by the Chamber *proprio motu*, or at the request of the parties, the Registry or any other participant, if it is shown that the relevant limitation is necessary to safeguard another competing interest protected by the Statute and the Rules - such as national security, the physical or psychological well-being of victims and witnesses, or the Prosecution's investigations.

148. Furthermore, in the view of the Single Judge, the scope of any such limitation shall be carefully delimited on the basis of the principle of proportionality.

¹²⁰ ICC-02/05-121, p 9

149. As a result, the Single Judge would like to highlight that she agrees with the Trial Chamber in that the victim's right to access the record of the case and to participate in the evidentiary debate at the confirmation hearing can be limited for reasons relating, *inter alia*, to "national security, protection of witnesses and victims, and Prosecution's investigations."¹²¹

150. Nevertheless, the Single Judge considers that, according to the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules, preventing victims, when victims are not granted anonymity, from accessing confidential materials is the exception and not the general rule - at least in relation to the pre-trial proceedings of a case, where the record of the case is certainly limited.

151. In this regard, the Single Judge notes that in the *Lubanga* Case, as well as in the present case, the bulk of the evidence filed by the Prosecution and the Defence in the record of the respective cases has been classified as confidential. Therefore, if victims were to be denied access to confidential filings, they would essentially be prevented from effectively participating in the evidentiary debate held at the confirmation hearing.

152. Furthermore, the Single Judge also observes that, in principle, those filings, decisions and transcripts included in the record of the case that could contain information affecting, *inter alia*, national security, the protection of witnesses and victims and the Prosecution's investigations (such as rules 81(2) and (4) requests for redactions, reports on the status of requests for admission into the Court's Witness Protection Programme or unredacted versions of statements which are only disclosed to the Defence in a redacted format) are classified *ex parte*, and therefore they cannot be accessible to victims.

V.2. The Object and Purpose of Article 68(3) of the Statute and Rules 91 and 92 of the Rules: Meaningful Role for Victims in Pre-Trial Proceedings before the Court

¹²¹ ICC-01/04-01/06-1119, para 106

153. At the outset, the Single Judge is of the view that the role of victims in criminal proceedings before this Court, provided for in article 68(3) of the Statute and rules 91 and 92 of the Rules, constitutes one of the main features of the procedural framework of the Statute and the Rules,¹²² as well as a novelty in international criminal law.¹²³

154. As the Chamber has already indicated, these provisions - which complement those other provisions setting out the role of victims in the proceedings concerning the initiation of the investigation of a situation and in the proceedings relating to the issue of reparations - "ensued from a debate that took place in the context of the growing emphasis placed on the role of victims by the international body of human rights law and by international humanitarian law."¹²⁴

155. In the view of the Single Judge, they are the result of acknowledging that the interests of victims do not always correlate with those of the Prosecution. In this regard, the Chamber has already found that, in particular article 68(3) of the Statute:

[...] grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests. As the European Court has affirmed on several occasions, victims participating in criminal proceedings cannot be regarded as "either the opponent - or for that matter necessarily the ally - of the prosecution, their roles and objectives being clearly different".¹²⁵

Furthermore, the Chamber notes, with regard to systems in which victims are authorised to participate in criminal proceedings, that the European Court of Human Rights has applied article 6 (1) of the European Convention on Human Rights to victims from the investigation stage, even before confirmation of the charges, particularly where the outcome of the criminal proceedings is of decisive importance for obtaining reparations for the harm suffered.¹²⁶

156. As a result, the Single Judge cannot agree with those claiming that the object and purpose of these provisions is confined to provide victims with a limited access

¹²² ICC-01/04-101-tEN-Corr, para 50

¹²³ See *inter alia* C Jorda and J Hemptinne, *The Status and Role of the Victim*, in Cassese / Gaeta / Jones (ed.), *The Rome Statute of the International Criminal Court A Commentary*, Oxford University Press, pp 1387-1419, W A Schabas, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2nd ed , 2004, p 172, G Bitti and H Friman, *Participation of Victims In the Proceedings*, in Roy S Lee (ed), *The International Criminal Court - Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers Inc , pp. 456-474, and A Cassese, "*The Statute of the International Criminal Court: Some Preliminary Reflections*", 10 EJIL (1999), pp 167 and 168 See also ICC-01/04-01/06-1119, para. 85

¹²⁴ ICC-01/04-101-tEN-Corr, para 50 See also W A Schabas, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2nd ed , 2004, p 172

¹²⁵ ICC-01/04-101-tEN-Corr, para 51

¹²⁶ ICC-01/04-101-tEN-Corr, para. 52

to the Court's criminal proceedings, so that they become "second-class" participants, who have a sort of "in-courtroom observer status" and must request the leave of the Court at any time if they would like to perform any kind of procedural activity.¹²⁷

157. Quite the contrary, the Single Judge considers that 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 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.¹²⁸

158. The Single Judge has already found that, due to the differences in the procedural framework provided for the pre-trial stage of a case, the set of procedural rights that could be attached to the procedural status of victim in the system of the Statute cannot be as broad as it is in some of the above-mentioned national systems belonging to the Romano-Germanic tradition.

159. Nevertheless, the Single Judge observes that the set of procedural rights which are consistent with the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules enables victims to fully participate in the debate held at the confirmation hearing of the evidence contained in the record of the case kept by the Registry. This, in the view of the Single Judge, constitutes as well a key feature of the role granted to victims at the pre-trial stage of a case in the said national systems.

160. Furthermore, the Single Judge also observes that the object and purpose of article 68(3) of the Statute and rules 91 and 92 of the Rules do not differ from those considerations that are at the roots of the role granted to victims in a number of systems belonging to the Romano-Germanic tradition that is to say, the recognition that, as the issue of guilt or innocence of those investigated and prosecuted affect to

¹²⁷ See Prosecution's Observations, ICC-01/04-01/07-392

¹²⁸ See *supra* note 123 See also David Donat-Cattin, "Article 68: Protection of victims and witnesses and their participation in the proceedings", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, pp. 876-882, in particular p 880

victims' core interests, such interests will be better protected if they are granted a meaningful and independent role in criminal proceedings.¹²⁹

161. Moreover, the Single Judge considers that the participation of those granted the procedural status of victim at the evidentiary debate held at the confirmation hearing will also be material in achieving other important goals of the Court. Due to the safeguards and limitations provided for in this decision, this goals could be achieved without risking infringing upon the right of the suspects to the holding of the confirmation hearing within a reasonable period of time after their surrender or voluntary appearance before the Court.

162. Firstly, in the view of the Single Judge, such participation will be an important tool to ensure that certain cultural features and perceptions that are specific to the DRC in general, and to the Ituri region in particular, be taken into consideration by the Chamber when assessing the evidence.

163. Secondly, the Single Judge also considers that such participation - coupled with the efforts taken by the Court to publicise the proceedings through a variety of technical means - will bring the proceedings conducted at the Seat of the Court, in The Hague, closer to the inhabitants of the Ituri region. This will strengthen the legitimacy of the court proceedings in such area and increase the effectiveness of the Court's function to disseminate a culture of accountability for human rights violations.¹³⁰

¹²⁹ V Gimeno Sendra / V Moreno Catena, and V Cortés Domínguez, *Derecho Procesal Penal*, 2nd ed, Colex, Madrid, 1997, p. 171, A. Cassese, "The Statute of the International Criminal Court Some Preliminary Reflections", 10 EJIL (1999), pp 167 and 168, for the French system see, *inter alia* P Bonfils, "La Participation de la victime au procès pénale – une action innomée", in *Le Droit Pénale À L'Aube du Troisième Millénaire – Mélanges offerts à Jean Pradel*, Éditions Cujas, pp 179-192; and V Dervieux, "The French system", in M Delmas-Marty / J R Spencer (ed), *European Criminal Procedures*, Cambridge University Press, p 226, and for the German system see, *inter alia* R. Roth / Y Jeanneret, "Droit allemand", in A Cassese / M Delmas-Marty (ed), *Juridictions nationales et crimes internationaux*, Presses Universitaires de France, pp 27-29, R. Juy-Birmann, "The German system", in M Delmas-Marty / J R Spencer (ed), *European Criminal Procedures*, Cambridge University Press, pp. 301-302; T. Inc, "Das Opfer zwischen Parteirechten und Zeugenpflichten", *Nomos*, pp 50, 135-137, and 141-146, K. Schroth, "Die Rechte des Opfers im Strafprozess", C F Müller Verlag Heidelberg, pp 3, 8-9, 53-54, and 56-62, and see also the *Opferschutzgesetz* (1986) and the *Opferentschädigungsgesetz*. See also W.A. Schabas, "An Introduction to the International Criminal Court", Cambridge University Press, pp 146-147, and M. Chavarrio, "Private parties the rights of the defendant and the victim", in M Delmas-Marty / J.R. Spencer (ed.), *European Criminal Procedures*, Cambridge University Press, pp. 542-545

¹³⁰ Preamble of the Statute, paragraphs 3 to 6. See also Darmarska, M, "What is the point of International Criminal Justice?", 83 *Chicago-Kent Law Review* 329, 2008, pp 340-347

164. As a result, in the view of the Single Judge, the interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules in light of their object and purpose requires that the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case include all those procedural rights that, according to the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules, are consistent with the specific procedural framework provided for by the Statute and the Rules for the pre-trial stage of a case.

VI. Set of Procedural Rights for Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 at the Pre-Trial Stage of the Present Case

165. In the present case, the Single Judge recalls that only four of those granted the procedural status of victim have not requested anonymity. They all appear, *prima facie*, to have been victimised by members of the FRPI and/or FNI during the alleged 24 February 2003 attack on the village of Bogoro, and they are all represented by the same Legal Representative, Ms. Carine Bapita Buyagandu.

166. The Single Judge also underlines that in the present case only the names of those witnesses who have been relocated – alone or with their families – or who have consented to the disclosure of their identities to the Defence after rejecting the adoption of protective measures are included in documents filed as confidential in the record of the case.

167. The names of the other few witnesses on which the Prosecution intends to rely at the confirmation hearing and for whom anonymity *vis-à-vis* the Defence has been granted are either not part of the record of the case or included in documents classified as “*ex parte* only available to the Prosecution” or “*ex parte* only available to the Registry.”

168. Furthermore, all requests for redactions pursuant to rules 81(2) and (4) of the Rules, and their respective annexes, are filed as “*ex parte* only available to the

Prosecution." Only after the issuance by the Single Judge of the six Decisions on Redactions, have the interview notes, interview transcripts, statements and documents on which the Prosecution intends to rely at the confirmation hearing been disclosed to the Defence and filed as confidential in the record of the case.

169. Under these circumstances, the Single Judge considers that, *prima facie*, there is no reason that could justify any limitation to the set of procedural rights referred to above in subsection V.1.4.3.

170. Nevertheless, before Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 can effectively exercise the set of procedural rights attached to their procedural status of victim in the present decision (in particular those relating to their access to the record of the case and to attend closed session hearings), the Single Judge will give the Prosecution, the Defences for Germain Katanga and Mathieu Ngudjolo Chui, and the Registry until Tuesday 20 May 2008 at 16h00 to request any limitation that they might consider necessary.

VII. Set of Procedural Rights for Victim Granted Anonymity: Victim a/0333/07

171. Victim a/0333/07 has requested that his identity remain confidential during the proceedings leading to and at the confirmation hearing in the present case.

172. In support of his request, the Legal Representatives of Victim a/0333/07 stress: (i) the vulnerability of Victim a/0333/07 who was still a minor at the time he submitted his application; (ii) the present security situation in the Ituri district, where Victim a/0333/07 currently lives; and (iii) he fears that his identity be disclosed to the Defences for Germain Katanga and Mathieu Ngudjolo Chui because he is from the same ethnicity as the suspects and participated in the Bogoro attack as a member of the FRPI.

173. The Prosecution, taking into consideration the security reasons outlined by the Legal Representatives of Victim a/0333/07, does not oppose the request for

anonymity of Victim a/0333/07.¹³¹ The Prosecution further submits that the same set of procedural rights as those granted to the anonymous victims at the pre-trial stage of the *Lubanga* Case should be granted to Victim a/0333/07.¹³²

174. The Defence for Mathieu Ngudjolo Chui submits that there is a risk that the participation of anonymous victims may be prejudicial to the rights of the Defence and is not consistent with the principle of equality of arms.¹³³ It also submits that such anonymous participation should be strictly limited to issues pertaining to protective measures intrinsically linked to the anonymous victim.¹³⁴ In addition, the Defence for Mathieu Ngudjolo Chui advances that: (i) the participation of anonymous victims is not in conformity with the Statute, the Rules and the Regulations; (ii) no national systems allows anonymous participation of victims and witnesses in proceedings; and (iii) article 68(3) of the Statute is subordinated to the internationally recognised human rights standards, which prohibits anonymous accusers and plaintiffs.

175. The Defence for Germain Katanga submits that he adopts and agrees with the observations made by the Prosecution on the issue of anonymity of victims and does not oppose to the request for anonymity of Victim a/0333/07.¹³⁵

176. As the Single Judge has recently affirmed in the Sixth Decision on Redactions, issued on 18 April 2008, the security situation in the DRC, and particularly in the Ituri and Kinshasa areas, remains as volatile as the one described in the First Decision on Redactions.¹³⁶

177. This, in the view of the Single Judge, has repercussions on the range of protective measures currently available and which might be implemented to protect Victim a/0333/07, who is particularly vulnerable and lives in a risk area in the DRC.

¹³¹ ICC-01/04-01/07-392, para 10.

¹³² ICC-01/04-01/07-392, para 12.

¹³³ ICC-01/04-01/07-433, paras 22-23

¹³⁴ ICC-01/04-01/07-433, para 22

¹³⁵ ICC-01/04-01/07-400, para 3

¹³⁶ First Decision on Redactions, paras. 13-22 (ICC-01/04-01/07-224) The security situation was subsequently confirmed by the Single judge in her Second Decision on Redactions (ICC-01/04-01/07-160), para. 10, Third Decision on Redactions (ICC-01/07-01/07-249), para. 9, Fourth Decision on Redactions (ICC-01/04-01/07-361), para 8, Fifth Decision on Redactions (ICC-01/04-01/07-427), para 10 and the Sixth Decision on Redactions (ICC-01/04-01/07-425), para 7

In this regard, the Single Judge recalls that it is her duty, pursuant to articles 57(3)(c) and 68(1) of the Statute, to minimise this risk.

178. Under these circumstances, the Single Judge considers that Victim a/0333/07 can participate in the proceedings effectively only if his anonymity is preserved.

179. The question then arises as to the set of procedural rights that can be attached to the procedural status of victim at the pre-trial stage of a case when anonymity is granted.

180. In the view of the Single Judge, the departing point to determine such procedural rights is the principle of prohibiting anonymous accusations.

181. Concerning this principle, the Chamber has already held in the *Lubanga Case*:

The fundamental principle prohibiting anonymous accusations would be violated, if victims a/0001/06 to a/0003/06 were permitted to add any point of fact or any evidence at all to the Prosecution's case-file presented against Thomas Lubanga Dyilo in the notification of charges document and the list of evidence.

182. As a result, the Chamber decided that victims granted anonymity could not add any point of fact or any evidence, nor could they "question the witnesses according to the procedure set out in rule 91(3) of the Rules".¹³⁷ The Chamber held, however, that the following procedural rights were compatible with the anonymity of those granted the procedural status of victim at the pre-trial stage of a case:

- (i) notification of the public documents contained in the record of the relevant case;
- (ii) attendance at those status conferences, or the parts of those status conferences, which are to be held in public;
- (iii) making opening and closing statements at the confirmation hearing, in which they can, *inter alia*, address points of law, including the legal characterisation of the modes of liability included in the Prosecution Charging Document; and

¹³⁷ ICC-01/04-01/06-462-tEN, p. 8.

- (iv) requesting during the said status conferences and during the public sessions of the confirmation hearing, leave to intervene, in which case the Chamber would rule on a case by case basis.¹³⁸

183. Moreover, in the *Lubanga* Case, the Chamber also held that this set of procedural rights could be extended “in light of exceptional circumstances”.¹³⁹

184. The Single Judge considers that the Defence for Mathieu Ngudjolo Chui has offered no compelling arguments to depart from the previous case law of the Chamber on this matter. Therefore, the Single Judge agrees with the Prosecution and with the Defence for Germain Katanga that the same procedural rights granted to anonymous victims at the pre-trial stage of the *Lubanga* Case must be afforded to Victim a/0333/07.

VIII. Timetable for the Transmission of New Applications for the Recognition of the Status of Victim in the Present Case

185. The Single Judge recalls that Germain Katanga was transferred to the seat of the Court in The Hague on 18 October 2007, and Mathieu Ngudjolo Chui was transferred on 6 February 2008.

186. As a result, the Single Judge notes that those natural and legal persons wishing to participate in the pre-trial proceedings of the present case have had several months to present their applications.

187. The Single Judge also observes that the pre-trial proceedings in the present case are at an advanced stage, and that the commencement of the confirmation hearing is currently scheduled for Friday 27 June 2008.

188. Furthermore, the Single Judge is mindful that sufficient time must be allocated for the Registry to transmit the applications upon making the redactions ordered by

¹³⁸ ICC-01/04-01/06-462-tEN, p 8 See also Decision on the Schedule and Conduct of the Confirmation Hearing, ICC-01/04-01/06-678, p 7

¹³⁹ ICC-01/04-01/06-462-tEN, p 7

the Single Judge, for the parties to make their observations and for the Single Judge to consider and decide upon them.

189. The Single Judge therefore considers that any applications for the recognition of the status of victim in the present case transmitted by the Registry to the Chamber, pursuant to rule 89 of the Rules and regulation 86 of the Regulations, after Monday 26 May 2008, will not be considered prior to the conclusion of the confirmation hearing.

FOR THESE REASONS

DECIDE that:

- (i) the request of Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 not to have their identities disclosed to the public and the media during the pre-trial proceedings of the present case is granted;
- (ii) the Prosecution and the Defences for Germain Katanga and Mathieu Ngudjolo Chui and any other participant in the proceedings shall only refer to Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 by the numbers assigned to them by the Registry;

DECIDE that:


- (i) in application of the above-mentioned general principle, Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07, who have been granted the procedural status of victim at the pre-trial stage of the present case and whose identity has been disclosed to both Defences, shall have the set of procedural rights provided for in Sections V.1.4.2. and VI of the present decision – including the right to attend the status conferences scheduled for 14 May, 3 June and 19 June 2008;
- (ii) before Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 can effectively exercise such procedural rights (in particular those relating to their access to the record of the case and to attend closed sessions hearings), the Single Judge will give the Prosecution, the Defences for Germain Katanga and Mathieu Ngudjolo Chui, and the Registry until 20 May 2008 at 16h00 to request any limitation that they might consider necessary pursuant to Sections V.1.4.3 and VI of the present decision;

DECIDE to grant the request of Victim a/0333/07 not to have his identity disclosed to the Defence for Germain Katanga, the Defence for Mathieu Ngudjolo Chui, any other participant in the proceedings, the public and the media during the pre-trial stage of the present case;

DECIDE that Victim a/0333/07 shall have the set of procedural rights provided for in Section VII of the present decision, including the right to attend the public parts of the status conferences scheduled for 14 May, 3 June and 19 June 2008;

DECIDE that any applications for the recognition of the status of victim in the present case transmitted by the Registry, pursuant to rule 89 of the Rules and regulation 86 of the Regulations, to the Single Judge after Monday 26 May 2008 will not be considered for the purposes of the confirmation hearing.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner
Single Judge

Dated this Tuesday 13 May 2008

At The Hague, The Netherlands