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No.: ICC-02/05  
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**THE APPEALS CHAMBER**

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

**Registrar:** Mr Bruno Cathala

**SITUATION IN DARFUR, SUDAN**

**Public Document**

**OPCD Appeal Brief on the "The Decision on the Application for Participation in the Proceedings of Applicant a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07"**

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## 1. Introduction

This appeal concerns the methodology for assessing whether an applicant<sup>1</sup> meets the requisite criteria under article 68(3), which must be fulfilled in order to trigger a right to present views and concerns before the Court, in relation to issues which impact on the personal interests of the applicant.

The OPCD is aware that this right would become a dead letter if the Court were to impose insurmountable and impractical procedural and evidential requirements for potential applicants. Nonetheless, this right should also be construed in a manner which is consistent with the applicant's overarching right to an effective remedy – which is the impartial and fair adjudication of the alleged crime, by the competent authority.

In this regard, the OPCD submits that the criteria set out in article 68(3) operate as fundamental procedural safeguards for the achievement of this ultimate remedy. Focused, fair, and impartial proceedings are best assured through giving full effect to the requirement that the applicants establish that their personal interests are directly affected by the issues being considered, and by actively monitoring the propriety of their participation.

## 2. Procedural History

1. On 23 May 2007, the Honourable Single Judge issued the “Decision authorising the filing of observations on applications for participation in the proceedings a/0011/06 to a/0015/06”.<sup>2</sup> On 8 June 2007, OPCD filed its confidential observations.<sup>3</sup>
2. On 23 July 2007, the Honourable Single Judge issued the “Decision authorising the filing of observations on applications a/0021/07, a/0023/07 to a/0033/07 and

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<sup>1</sup> For the purpose of this appeal brief, the OPCD will use either the term applicant, participating applicant or alleged victim. In this connection, the OPCD observes that human rights courts expressly eschew the use of the term victim in connection with a person who has not been adjudicated as such in a final judgement: for example, the Inter American Court, in its definition section of the Rules of Procedure and Evidence specifies that “the expression “alleged victim” refers to the person whose rights under the Convention are alleged to have been violated” whereas “ the term “victim” refers to the person whose rights have been violated, according to a judgment pronounced by the Court” (article 2 (30) and (31). The OPCD reiterates its submissions that designating applicants as ‘victims’ as such, impacts on the impartiality of the proceedings – particularly if this nomenclature is utilised by the same Chamber which is tasked with pronouncing on the responsibility of the defendant. It is also particularly problematic in connection with applicants who may subsequently testify as witnesses for the Prosecution as it appears to predetermine elements of their testimony.

<sup>2</sup> ICC-02/05-74.

<sup>3</sup> ICC-02/05-80-Conf.

- a/0035/07 to a/0038/07 for participation in the proceedings”.<sup>4</sup> On 24 September 2007, the OPCD filed its confidential observations.<sup>5</sup>
3. On 6 December 2007, the Honourable Single Judge filed the “Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07”,<sup>6</sup> in which the Single Judge granted the procedural status of victim to Applicants a/011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07, and a/0038/07, “allowing them to participate in the proceedings at the investigation stage of the Situation of Darfur, Sudan”.<sup>7</sup>
  4. On 12 December 2007 OPCD filed a request for leave to appeal the decision of 6 December 2007,<sup>8</sup> in accordance with article 82(1)(d) of the Statute.
  5. On 6 February 2008, the Honourable Single Judge issued the “Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation”,<sup>9</sup> granting OPCD leave to appeal the first issue raised in their request, namely “whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of a specific proceedings on the personal interest of the applicants, and an assessment as to the propriety of their participation”.

### **3. Issue 1: the Methodology of applying the criteria under article 68(3)**

6. In the decision granting leave to appeal, the Honourable Single Judge delineated the methodology which the Chamber considered appropriate to determine participation under article 68(3). First, the Chamber would determine in a general manner whether the personal interests of applicants (in a generic sense) are affected by a particular stage of the proceedings.<sup>10</sup>
7. Secondly, the Honourable Single Judge held that it was necessary to determine which procedural rights attach to persons who have been granted the procedural status of ‘victim’. These participatory rights are subsequently vested with “all

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<sup>4</sup> ICC-02/05-85.

<sup>5</sup> ICC-02/05-103-conf.

<sup>6</sup> ICC-02/05-111-Corr.

<sup>7</sup> Page 23 of the Decision.

<sup>8</sup> ICC-02/05-113.

<sup>9</sup> ICC-02/05-121.

<sup>10</sup> At p. 7.

natural and legal persons for whom the procedural status of victim has been granted in relation to those stages of the proceedings”.<sup>11</sup>

8. It is also apparent from this methodology that the Honourable Single Judge does not consider that it is necessary to render a specific determination as to whether it is appropriate for the applicants to participate at the situation stage, as this necessarily flows from the fact that their personal interests are impacted upon.<sup>12</sup>
9. The OPCD therefore sought leave to appeal in relation to whether it is possible to grant applicants a general right to participate, or whether participation is conditioned upon a determination concerning the impact of specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation.
10. In this regard, the OPCD respectfully submits that:
  - the criteria of personal interests and appropriate in article 68(3) must be interpreted in an effective manner, and each criterion should be given independent legal effect;
  - the criterion of personal interests must be assessed in light of the particular circumstances of each applicant, in connection with the particular issues being addressed by the Chamber;
  - the ‘personal interests’ of the applicants are not affected in a ‘general manner’ by the judicial proceedings which occur during the investigative stage;
  - the criterion of appropriate requires the Chamber to consider the particular circumstances of the proceedings in question, and the applicants in question; and
  - the unique features of the situation phase militate against the general propriety of participation under article 68(3).
11. For these reasons, there can be no procedural status of ‘victim’ during the investigative and pre-confirmation phase, and the methodology espoused by the Honourable Single Judge should be reformulated accordingly.

*3.1 The criteria of personal interests and appropriate in article 68(3) must be interpreted in an effective manner, and each criterion should be given independent legal effect*

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<sup>11</sup> At page 11 of Decision of 6 February 2008.

<sup>12</sup> “[A]fter undertaking analysis of whether the victims’ personal interests are affected at the investigation stage of a situation and at the pre-trial phase of a case, the Single Judge has found that the personal interests of victims are generally affected at these two stages of the proceedings; that, consequently, these are appropriate stages of the proceedings for victims’ participation in all situations and cases before the Court [...]” at p. 10.

12. The OPCD firstly refers to its submissions set out in its Appeal brief of 4 February 2008 to the effect that the terms ‘personal interests’ and ‘appropriate’ should be interpreted in an effective manner.<sup>13</sup>
13. Pursuant to the methodology employed by the Honourable Single Judge, if applicants meet the definition of victim under rule 85, then they are automatically granted a right to participate in the proceedings, since the elements of personal interests and propriety of participation are *ipso facto* fulfilled.
14. The OPCD respectfully submits that this interpretation contravenes the conclusion of the Appeals Chamber that notwithstanding the fact that applicants have been accorded the status of ‘victim’ by the Pre-Trial Chamber, the Appeals Chamber retains the right to determine “whether, and in what manner, the victims may participate in the appeal, necessarily taking into account the provisions of article 68 (3) (emphasis added)”;<sup>14</sup> the role of the Chamber at this point is thus not limited to determining the modalities of participation.
15. The OPCD further submits that even if the criterion of personal interests is fulfilled, an analysis as to whether it is appropriate for the applicant to participate encompasses a range of different factors, and as such, constitutes a distinct component of the Chamber’s assessment.<sup>15</sup>
16. The OPCD therefore submits that actively assessing each criteria set out in article 68(3) is an intrinsic component of the Chamber’s positive duty to ensure the fairness and impartiality of the proceedings,<sup>16</sup> and that as such, reliance on presumptions constitutes an abrogation of this fundamental duty.

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<sup>13</sup> OPCD Appeal brief on the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, ICC-02/05-119 at paras. 26-32.

<sup>14</sup> Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*” ICC-01/04-01/06-824, 13 February 2007, at para. 48.

The OPCD further refers to the observation of Honourable Judge Pikis that “[t]he status or identity of a person as a victim does not legitimise as such participation in any proceedings before the Court.” Separate Concurring Opinion in Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, ICC-01/04-01/06 OA8, 13 June 2007 at para. 13.

<sup>15</sup> The OPCD refers to the Appeals Chamber’s finding that “[e]ven when the personal interests of victims are affected within the meaning of article 68 (3) of the Statute, the Court is still required, by the express terms of that article, to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings”. Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, ICC-01/04-01/06-925.

<sup>16</sup> See the opinion of Judge Sylvia Steiner in Annex I to Prosecutor v Thomas Lubanga Dyilo (Case No. ICC-01/04-01/06), ‘Decision on the Final System of Disclosure and the Establishment of a Timetable’, 15 May 2006, para. 97. See also Prosecutor v Kupreskic (Case No. IT-95-16), Separate Opinion of Judge David Hunt on

3.2 *The criterion of personal interests must be assessed in light of the particular circumstances of each applicant, in connection with the particular issues being addressed by the Chamber.*

17. The underlying purpose of participation is not to give effect to a right of revenge or an *actio popularis*:<sup>17</sup> it is to ensure that applicants are provided an opportunity to present their views and concerns in relation to issues which directly impact on their “judicially recognisable personal interests”.<sup>18</sup>
18. The OPCD further submits that the applicant must establish that they are personally affected by the interest at stake.<sup>19</sup> Whereas human rights courts permit the next of kin in defined circumstances to pursue certain claims for their deceased relatives,<sup>20</sup> some rights or interests are not transferable in the sense that their protection is only vested in the person who suffered from the specific violation.<sup>21</sup> As such, applicants cannot claim to be affected by violations of these rights in a general or indirect manner.<sup>22</sup>
19. In the context of the ICC, since the personal interests of applicants are not impacted in the same manner, their right to submit views and concerns should be adjusted accordingly.

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Appeal by Dragan Papić against Ruling to Proceed by Deposition, ICTY Appeals Chamber, 15 July 1999, para. 18; Prosecutor v Milutinović et al (Case No. IT-99-37-I), Decision on Application by Dragoljub Ojdanić for Disclosure of Ex Parte Submissions, 8 November 2002, para. 13; Prosecutor v Ndindiliyimana et al (ICTR-00-56-T), Decision on Nzuwonemeye’s Request to Vary his Witness List, 31 January 2008 at para. 6; and the Canadian case R v Finta, 1994, 1 SCR 701.

<sup>17</sup> Perez v. France, Appl. no. 47287/99, Judgment of 12 February 2004, par. 70 and 71.

<sup>18</sup> E. Haslam ‘Victim participation at the ICC’ in McGoldrick, Rowe and Donnelly (eds.): The Permanent International Criminal Court (2004) at p. 326.

<sup>19</sup> McCordie Morrison v. Jamaica, Communication No. 663/1995, U.N. Doc. CCPR/C/64/D/663/1995 (25 November 1998) at para 6.7; Ponsamy Poongavanam v. Mauritius, Communication No. 567/1993, U.N. Doc. CCPR/C/51/D/567/1993 (1994) at para 42; Stichting Greenpeace Council (Greenpeace International) v Commission of the European Communities (C321/95 P) [1998] All E.R. (EC) 620 (ECJ).

<sup>20</sup> The OPCD notes that participation in such cases is generally only permitted on an exceptional basis, and if the person who suffered direct harm is not able to file an application themselves: Kurt v Turkey, Appl No. 24276/9, 25/05/98; (1999) 27 EHRR 373; GJ v Luxembourg 21156/93; Vatan v Russia, 47978/99, at para. 48: ‘accepting an application from a “person” indirectly affected by the alleged violation will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the direct victim to apply to the Court.’

<sup>21</sup> The European Court of Human Rights has held that the following rights are non-transferable: Article 2 (Right to Life); Article 3 (Prohibition of Torture), Article 5 (Right to Liberty and Security), Article 8 (Right to respect for private and family life), Article 9 (Freedom of thought, conscience and religion), Article 14 (Prohibition of discrimination): see Sanles Sanles v Spain (48335/99, 9/11/2000) Thevenon v France, 2476/02, 28/02/2006 (inadmissible), Biç and Others v. Turkey, (55955/00, 02/02/2006) (inadmissible) at para. 22; Fairfield v. the United Kingdom (24790/04, 08/03/2005); Agrotexim v Greece Appl No. 14807/89, 24/10/95; (1996) 21 EHRR 250 at para 59.

See also decision of the Human Rights Committee, Fei v. Colombia, Communication No. 514/1992, U.N. Doc. CCPR/C/53/D/514/1992 (1995), to the effect that certain claims could only be raised on behalf of the applicant’s children, and not under the name of the applicant herself (para 5.2).

<sup>22</sup> The OPCD further refers to its submissions at para. 61 of its Observations dated 8 June 2007.

20. Whereas a person who alleges to be directly harmed may have a personal interest in particular proceedings, a person whose standing is predicated on the basis of harm which occurred to someone else might not be impacted in the same manner. For example, it could be possible to conclude that the interests of an applicant, who has suffered harm as the result of activities in a specific region, and who may be at risk by virtue of his or her role in the proceedings, are affected by decisions concerning the availability of protective measures to persons in this position. In contrast, such decisions cannot be said to impact on the rights of an applicant, who resides in a completely different area or country, and who is not in a position to provide any sensitive information which could trigger a safety risk.
21. The OPCD observes in this regard that some of the applicants, who have been granted the right to participate, did not personally suffer harm, and indeed, were not even present when the alleged crime took place.<sup>23</sup> Do such applicants – as held by the Pre-Trial Chamber – have an interest in clarifying facts or identifying the perpetrator if they are not in a position to do so? Indeed, the OPCD respectfully submits that admitting factual allegations from indirect applicants could in fact impede the rights of persons actually harmed if the indirect applicant were to wrongly or mistakenly present the facts and thus jeopardise their right to a remedy by misleading the proper course of investigations and judicial inquiry.<sup>24</sup> This aspect

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<sup>23</sup>The OPCD refers to its submissions at paras. 52-54 of its 8 June Observations, and paras. 72-74 of its 24 September 2007 Observations.

The OPCD also respectfully submits that there is a distinction between on the one hand, applicants who have submitted applications with the consent of an alleged victim or on behalf of an alleged victim who is unable to participate themselves (minors or disabled persons) and who are thus able to seek information and clarification from the actual alleged victim, and on the other hand, applicants who have submitted an application based on moral harm which resulted from acts which occurred to an alleged victim who is still alive, and could thus participate for the same acts in their own name, and who has not necessarily consented to the applicant basing their standing on these acts.

<sup>24</sup> “To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadequately presented.” *Henchy J, Cahill v. Sutton* [1980] I.R. 269. See also the case of *Toğcu v. Turkey*, in which the European Court of Human Rights dismissed a complaint because of the fact that the applicant and his family had provided inconsistent statements. The Court observed that various members of the applicants family had provided conflicting versions of the event at different times, including in statements given to human rights organisations, and furthermore, noted “that the applicant – who was legally represented in the present proceedings – has not provided any explanation for these serious discrepancies” (at para 93). The Court found that such inconsistencies “detract from the credibility of his account to the extent that, on the basis of his submissions, the Court is unable to draw a clear picture of the events of 29 November 1994 and it cannot, therefore, find it established that Ender was taken into custody by security forces” (at para 94). Although the Court recognized “the difficulties for an applicant to obtain the necessary evidence in support of his or her allegations which is in the hands of the respondent Government in cases where that Government fail to submit relevant documentation”, it nonetheless emphasised that “to shift the burden of proof onto the Government in such circumstances requires, by implication, that the applicant has already made out a prima facie case” (at para 95). The Court therefore held that “[i]n the light of the contradictory versions of events put forward by the applicant in the present case, the Court cannot but conclude that he has failed to make out his case to the extent



strongly militates against permitting applicants to base their standing on moral harm, if the actual alleged victim is alive and has not consented to the applicant claiming independent standing on this basis.

22. The OPCD further submits that in assessing whether the personal interests of the applicants are affected, it is necessary to consider this in light of whether their interests are impacted on by issues directly raised in the proceeding, and not the actual outcome of the proceeding.
23. It is self-evident that all proceedings at the ICC are ultimately connected to the investigation, prosecution and adjudication of the crimes which fall within the jurisdiction of the Court. It is also self-evident that all alleged victims, and indeed, all members of the international community have an interest in this outcome. It is thus arguable that if this criterion is to be interpreted in an effective manner, it must equate to an interest in the issues which are being directly considered by the Chamber.
24. For this reason, the Appeals Chamber rejected requests to participate in proceedings concerning the admissibility of an appeal against the confirmation hearing on the basis that the interests of the applicants were not directly affected by the Appeals Chamber's determination of the preliminary admissibility issue.<sup>25</sup>

### *3.3 The criterion of personal interests is not met 'in a general sense' at the situation phase.*

25. In its decision of 17 January 2006, the Honourable Pre-Trial Chamber held that "the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the

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necessary for the burden to shift onto the Government to explain that the custody records withheld by them contained no relevant information concerning Ender" (at para 96). Case of Toğcu v. Turkey (Application No. 27601/95) Judgment 31 May 2005.

<sup>25</sup> The Appeals Chamber reasoned as follows: "The relevant part of the Application for Participation reads as follows:

"The interests of the Victims in participating in these appeal proceedings is obvious, as the appellant is requesting, *inter alia*, that the decision confirming the charges be quashed. Such a decision would mean the end of the prosecution and, as such, would preclude any possibility for the Victims to later seek compensation for the harm they have suffered."

At this stage of the proceedings, the Appeals Chamber is determining, by way of a preliminary issue, whether the appeal can be heard at all. As such, the decision of the Appeals Chamber on that preliminary issue will be limited to whether or not the Appellant is entitled to bring this appeal under article 82 (1) (b) of the Statute. The decision of the Appeals Chamber on the preliminary issue will neither result in the termination of the prosecution nor preclude the Victims from later seeking compensation; and the Victims have not put forward any other basis on which their personal interests are affected by the determination of that issue." Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, ICC-01/04-01/06 OA8, 13 June 2007 at paras 25-26.



perpetrators of crimes and to request reparations for the harm suffered”.<sup>26</sup> This conclusion has been routinely applied in both the Sudan situation, and subsequent participation decisions in the DRC situation.

26. The personal interest of an applicant must relate to “an ICC function”,<sup>27</sup> which is operative at that stage of the proceedings;<sup>28</sup> the power of the Judge to grant applicants participatory rights is necessarily linked to and limited by the powers which the Judges themselves exercise at this stage.<sup>29</sup> The OPCD thus submits that the overarching goals which the Pre-Trial Chamber has ascribed to the applicants at the investigative stage fall outside the realm of the powers and prerogatives of either the applicants or the Chamber itself.
27. The duty to clarify or adjudicate the truth is vested in the Trial Chamber, subject to final adjudication by the Appeals Chamber. The Chamber may only convict the defendant for crimes based on the factual allegations charged by the Prosecutor;<sup>30</sup> the Chamber is thus prohibited from taking into consideration extraneous allegations postulated by participating applicants, which are not contained within the charging document.
28. The duty to identify crime base incidents, which are amenable to investigation and prosecution under the Rome Statute, is vested in the Prosecutor, based on an impartial and independent search for the truth.<sup>31</sup> As submitted in the OPCD Appeal brief of 4 February 2008, the Chamber cannot ‘second guess’ the Prosecutor’s exercise of discretion concerning the threshold of evidence necessary to sustain an

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<sup>26</sup> Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, at para 63. This conclusion arguably applies to all stages of the proceedings at the ICC, which begs the question (and underscores the central tenet of this appeal) as to why the drafters nonetheless expressly included a requirement that the Chamber render such an assessment before granting a right to participate.

<sup>27</sup> E. Haslam ‘Victim participation at the ICC’, in McGoldrick, Rowe and Donnelly (eds.): *The Permanent International Criminal Court* (2004) at p. 326.

<sup>28</sup> This is consistent with the fact that in accordance with the jurisprudence of the European Court of Human Rights, the right to a remedy under article 13 does not create a free-standing basis for a claim before the Court; it must be invoked in conjunction with an alleged violation of another right under the Convention: *Silver and others v. UK* (Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75), Judgement 25 March 1983, para. 113; *Boyle and Rice v UK* (Application no. 9659/82; 9658/82), Judgement 27 April 1988, para. 52; *Khatsiyeva and others v. Russia* (Application no. 5108/02), Judgement 17 January 2008, para. 161.

<sup>29</sup> The OPCD refers to the principle of *nemo plus iuris ad alium transferre potest quam ipse habet* (one may not transfer more legal rights than one has), which is considered to be a general principle of international law: See V. Degan, ‘On the Sources of International Criminal Law’, (2005) 4 *Chinese Journal of International Law*, 45 at 70, and A. Reinisch, ‘Developing human rights and humanitarian law accountability of the Security Council for the imposition of economic sanctions’, (2001) 95 *Am. J. Int’l L.* 851, at 858, also pointing for an overview to M. Bos, *A Methodology of International Law* 5 (1984).

<sup>30</sup> *Prosecutor v. Naletilic and Martinovic*, Appeals Judgement of 3 May 2006 at para 26 – citing *Prosecutor v. Kvocka*, Appeals Judgement of 28 February 2005 at para 33.

<sup>31</sup> As noted in the OPCD’s Appeal brief of 4 February 2008, the Prosecution is obliged to evaluate any alleged victim complaints submitted directly to him. This obligation exists independently of the modalities of participation under article 68(3), and is thus not contingent on a formal application for ‘victim’ status.

investigation or prosecution.<sup>32</sup> Issuing public factual findings concerning the existence of crimes which might not be the subject of an actual prosecution investigation or prosecution – based solely on the applicant’s assertions – thus circumvents the clear intention of the drafters of the Rome Statute to protect this independence of the Prosecutor.

29. Allowing applicants to fulfil this fact-finding function also usurps the role of the Prosecutor. In this connection, the Appeals Chamber has previously found that “an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor”.<sup>33</sup>
30. This position is buttressed by the use of the words ‘views and concerns’ in article 68(3),<sup>34</sup> which clearly implies that the purpose of participation is to facilitate their ability to express concerns, not to provide them with a mechanism for mounting a *de facto* prosecution through the presentation of detailed legal and factual submissions.<sup>35</sup>
31. The OPCD further submits that participation during the situation phase is also unnecessary to secure applicants’ right to reparation since firstly, the Chamber can only award reparation after a judgment,<sup>36</sup> and secondly, there is no requirement under article 75 that reparations are limited to alleged victims who have been granted the right to participate.

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<sup>32</sup> Under article 53(3)(a), the Pre-Trial Chamber may only request the Prosecutor to reconsider a decision not to investigate or prosecute. Moreover, the power of the Pre-Trial Chamber under article 53(3)(b) is confined to assessing non-evidential issues. It would thus be inappropriate and potentially deleterious to the investigation process if factual findings contained within decisions on article 68(3) participation were the catalyst for *proprio motu* review by the Chamber.

<sup>33</sup> Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, ICC-01/04-01/06 OA8, 13 June 2007 at para 28.

<sup>34</sup> See the analysis of the term ‘views and concerns’ in French, Spanish, Russian texts of the Statute in the Separate Opinion of Judge Pikis in Decision ICC-01/04-01/06-925 (13 June 2007), para 15. Further, the word “意见和关注” in the Chinese version of Article 68(3) also signifies opinion and preoccupations. Moreover, the Decision of the Appeals Chamber of 12 December 2006, ICC-01/04-01/06-769, at p. 3 further underlined that the expression of applicants’ views and concerns must be correlated to their personal interests.

<sup>35</sup> The extent which the role of participation at the ICC and private prosecution have been conflated thus far is evidenced by the press release issued by the legal representatives of the applicants: ‘Victims sue Sudanese government in ICC’ 18 October 2006, Sudan Tribune.

<sup>36</sup> Peter Lewis and Håkan Friman in Roy Lee (Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*) 474, at 488: ‘Although reparations were seen as a way of providing redress for victims, it was clear to many delegations [at Workshop 4 of the Paris Seminar, (PCNICC/1999/WGRPE/INF/2, 6 July 1999)] that they were nevertheless part of the sanction of the Court to be ordered against a convicted defendant, and that making an interim award before a trial, it was concluded, may be an indication that the Court had already determined the guilt of the person. ... [I]t was decided that reparations were not an appropriate place to deal with interim relief.’

32. Finally, for reasons which will be elaborated below, it would also be inappropriate for participation at the situation phase to be utilised as a vehicle “to punish the perpetrators of crimes”.

*3.4 The criterion of appropriate requires the Chamber to consider the particular circumstances of the proceedings in question, and the applicants in question.*

33. The Honourable Single Judge held that a determination as to whether an applicant was entitled to participate would encompass the stage of proceedings in its entirety, irrespective of whether specific investigations relating to the situation had commenced or ceased,<sup>37</sup> or were entirely unrelated to the actual applicants.
34. The OPCD respectfully submits that the situation phase cannot necessarily be considered as an indivisible proceeding for the purposes of an assessment under article 68(3). Indeed, the Pre-Trial Chamber has expressly recognised that the situation phase is an amorphous concept, which potentially encompasses several distinct proceedings that impact on the rights of the different participants in different ways. For this reason, the Defence has not been granted a generic procedural status, but has been required to apply to the Chamber to access prior motions and decisions which were filed in the situation phase,<sup>38</sup> and to seek leave to file observations which are unrelated to an existing invitation by the Chamber to do so.<sup>39</sup>
35. The OPCD therefore submits that the Appeals Chamber’s findings that an interlocutory appeal constituted a separate stage of the proceedings and thus required a separate examination as to whether the criteria under article 68(3) were fulfilled,<sup>40</sup> can be applied by analogy to the distinct proceedings within the situation phase.

<sup>37</sup> “[T]he Single Judge does not need to review her findings on this matter each time a new investigation of a situation is opened or a new case is initiated” p 10.

<sup>38</sup> Decision on the request by the OPCD for access to previous filings, 11 September 2007, ICC-01/04-389.

<sup>39</sup> Request for leave to file observations in relation to the “Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential annex”, 6 February 2008, ICC-02/04 -115.

<sup>40</sup> “The Appeals Chamber, pursuant to article 68 (3), is required to determine whether the participation of victims in relation to that particular appeal is appropriate. It cannot automatically be bound by the previous determination of the Pre-Trial Chamber that it was appropriate for the victims to participate before the court of first instance. The Pre-Trial Chamber could not, at that stage, have had any mandate which could grant the victim participants the right automatically to participate in any interlocutory appeal that may arise. The subject matter and nature of any interlocutory appeal would, at that stage, have been unknown. Hence it would be impossible for the Pre-Trial Chamber, in effect, to deem it to be appropriate for victims to participate in that stage of the proceedings or to determine that their interests would be affected by particular interlocutory appeal. The Appeals Chamber therefore reads regulation 86 (8) to be confined to the stage of the proceedings before the Chamber taking the decision referred to in the text of the regulation. The Appeals Chamber notes, in any event, that regulation 86 (8) is subordinate to article 68 (3) (see articles 21 (1) (a) and 52 (1) of the Statute and regulation 1 (1) of the Regulations of the Court). Any contrary reading of its provisions to that set out above would conflict with the requirements of article 68 (3) that it is for the Appeals Chamber to determine whether the

36. Hence, in the same manner that the Appeals Chamber has actively regulated the scope and manner of participation at the appellate stage, it would also be appropriate for the Pre-Trial Chamber to ascertain which issues in a particular proceeding impact on the personal interests of the applicants and are thus appropriate for them to address. This would avoid the situation whereby the parties are forced to address a range of potentially extraneous submissions by virtue of the fact that the applicants have received no directions as to which issues the Chamber considers it appropriate for them to address.
37. It would also avoid the situation whereby the Defence is faced with 'two' Prosecutors by virtue of the fact that the applicants have submitted observations which fall within the role of adversarial opponent: as noted above, the Chamber has a positive obligation to ensure that the views and concerns presented by applicants do not address issues which properly fall within the purview of the Prosecutor. Judicial intervention is also required to ensure that the right to present views and concerns does not transform to a right to seek revenge against the Defendant by opposing - in a highly partial and vigorous manner - all Defence submissions and applications, thereby exhausting Defence time and resources.

*3.5 The unique features of the situation phase militate against the general propriety of participation under article 68(3).*

38. The decision of the Single Judge that it is appropriate to accord the applicants a procedural status of 'victim' appears to be predicated on the view that it is necessary (and consistent with the expeditious and fair conduct) to accord applicants a permanent procedural status during this stage.
39. The OPCD submits that such a construction could create a fundamental imbalance in the proceedings, particularly as there is no permanent procedural status for the Defence during the situation phase.
40. The presentation of views and concerns, in conjunction with the use of the past tense 'affected', also suggests that the role of participating applicants is predominantly reactive; the right to participate is triggered by something, such as a Prosecution motion or a Chamber's decision. Any other interpretation would invite delays in the

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participation of victims in a particular interlocutory appeal is appropriate." ICC-01/04-01/06-824, 13 February 2007 at p. 13.

proceedings due to countless petitions filed *proprio motu* by the applicants, and could entangle the Chamber in endless speculative debates.

41. This interpretation is also consistent with the fact that the State Parties clearly decided not to vest participating applicants with an independent right to trigger a review of an Prosecutorial decision not to investigate or prosecute;<sup>41</sup> it was concluded that it would be appropriate to provide them with an opportunity to react to such a request through the presentation of observations.
42. The OPCD also refers to its appellate submissions to the effect that issuing free-standing factual conclusions concerning the ‘victim’ status of applicants, and the existence of crimes risks transforming the situation phase into a truth commission forum, and creates a due process deficit. In this regard, it has been observed in the context of the relationship between truth commission findings and the due process requirements of trials that:

“ The legitimacy of a decision- either to name names or to withhold them - depends on whether prosecutions and trials (and with them a more exhaustive exploration of the truth ) are available after the truth commission issues its report. If the possibility of trials is open, it is perhaps a good idea to allow the courts to rule on matters of personal criminal liability after a fair trial takes place - a fair trial necessitating the withholding of names in the truth commission report. If, on the other hand, the report is likely to be the last opportunity to air these matters, an honest deference to truth suggests the need to disclose reliable information about the behaviour of certain individuals because they can hide behind the impunity given to them by amnesties and pardons. Even in that case, however, some measure of due process is necessary: at the very least, the truth commission is required to give them a chance to rebut the incriminating information. If names are going to be named, it is also important that the truth commission deal honestly and impartially with the information and be perceived by the public as having done so. Because the Truth Commission for El Salvador was widely seen as having received many more names than it published, the duty should have been incumbent upon it to be more clear and forthright as to the criteria by which some names were published while other names were suppressed. Possibly improving upon that experience, the South African Truth and Reconciliation Commission is charged not only with investigating and disclosing the circumstances of each case, but also with identifying the perpetrators. At the same time, however, the statute that created the Commission requires that persons accused of human rights violations be given a chance to respond before their names find their way to the final report”.<sup>42</sup>

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<sup>41</sup> Jorda and Hemptinne, ‘The Status and Role of the Victim’, The Rome Statute of the International Criminal Court vol. 2, (Cassese, Gaeta and Jones eds., Oxford Press, 2002) at p. 1406. See also Stahn, Olásolo and Gibson, ‘Participation of Victims in Pre-Trial Proceedings of the ICC’ (2006) 4 *J. Int'l Crim. Just.* 219 at 230, and H Friman in The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (Lee (ed.)) 493, at 498.

<sup>42</sup> J Mendez, *Accountability for Past Abuses*, *Human Rights Quarterly*, (1997) 19: 2, 255-282.

43. It was also confirmed by the South African Supreme Court that truth commission factual inquiries should endeavour to comply with the principles of procedural fairness, in particular, the principle of *audi alteram partem*. Given the gravity of the allegations, any persons detrimentally implicated by the factual findings should be accorded an opportunity to submit representations to or to give evidence before the commission.<sup>43</sup>
44. As noted in its brief of 4 February 2008, rule 89 expressly provides that the Defence should be accorded a right to be heard: such a right should be interpreted in a manner which is practical and effective, and not illusory.<sup>44</sup>
45. In challenging these assertions, the OPCD does not have any investigative facilities nor has it received any exculpatory or relevant disclosure from the Prosecution. In addition, due to the confidentiality of the process, and possible conflicts of interest, it would also be highly inappropriate for the OPCD to seek instructions from the persons and groups named as perpetrators in the applications. As such, these persons and entities do not have an effective right to be heard or to dispute these factual allegations and conclusions during the situation phase, and may be permanently deprived of this right if the allegations are not litigated and adjudicated in trial proceedings.<sup>45</sup>
46. The OPCD also respectfully contests the proposition that granting the applicants the procedural status of 'victim' at the investigative stage is consistent with the interests of judicial economy. Irrespective of the overall question as to whether participating applicants can subsequently testify as witnesses, the mere fact that the applicants have submitted one or several amended applications forms could trigger convoluted

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<sup>43</sup> Du Preez and Another v Truth and Reconciliation Commission (S. African Supreme Court, Appellate Division) [1998] 1 LRC 86, per Corbett J: "I am of the view that likewise in the present case the commission and the Committee are under a duty to act fairly towards persons implicated to their detriment by evidence or information coming before the Committee in the course of its investigations and/or hearings. As I have indicated, the subject-matter of inquiries conducted by the Committee is 'gross violations of human rights'. Many of such violations would have constituted criminal conduct of a serious nature, or at any rate very reprehensible conduct. The Committee is charged with the duty of establishing, inter alia, whether such violations took place and the identity of persons involved therein. The Committee's findings in this regard and its report to the commission may accuse or condemn persons in the position of the appellants. Subject to the grant of amnesty, the ultimate result may be criminal or civil proceedings against such persons. Clearly the whole process is potentially prejudicial to them and their rights of personality. They must be treated fairly. [...] [P]ersons detrimentally implicated should be afforded the opportunity subsequently to submit representations to or to give evidence before the commission."

The Judge expressly relied (at p. 99) on the findings of Lord Denning MR in the case of *Re Pergamon Press Ltd* [1970] 3 All ER 535, concerning the due process protections which apply to investigative inquiries, which could "expose persons to criminal proceedings of civil actions" (at 539). The OPCD refers in this regard to its submissions [request for leave to appeal] that findings concerning the responsibility of the Sudanese government could trigger civil actions against them.

<sup>44</sup> *Airey v. Ireland*, 9 October 1979, Series A No.32, para. 24.

<sup>45</sup> The OPCD refers to its submissions at paras 7-11 of its Observations of 24 September 2007.



disclosure obligations concerning these statements and communications with the Registry if they are listed as witnesses in the future.<sup>46</sup> Their collaboration with other applicants and potential access to prosecution evidence could also taint the credibility if they were to testify subsequently – thus impeding their overall right to a remedy through the judicial process.<sup>47</sup> These issues would need to be defined and resolved by the Chamber seised of the case. As such, when applying to participate in the situation phase, the applicant will not be able to ascertain the possible future legal consequences of their participation.

47. The OPCD therefore submits that the applicant's right to make an informed choice concerning their role in the proceedings cannot be made in such a legal vacuum, but would be more appropriately deferred to case proceedings, in which the Chamber can provide appropriate direction concerning the potential repercussions of their participation.
48. Finally, the OPCD refers to its submissions at paragraphs of its Appeal brief, concerning the impropriety of issuing factual conclusions concerning the existence of crimes under the Rome Statute, in the absence of any evidence that the threshold elements of the alleged crimes have been met.<sup>48</sup>

#### 4. Relief Sought

49. For the reasons set out above, the OPCD respectfully requests the Honourable Appeals Chamber to:

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<sup>46</sup> See Decision on Ojdanic Motion for Disclosure Of Witness Statements And For Finding Of Violation Of Rule 66(A)(i) 29 September 2006.

<sup>47</sup> The OPCD refers to its submissions set out at paras 41-54 of its Request for Supporting Documentation, ICC-02/05-94-Conf, 21 August 2007, and paras. 22-33 of its Observations dated 24 September 2007.

<sup>48</sup> For this reason, United States courts have rejected claims under the Alien Torts Act concerning serious international crimes, such as genocide, which cannot be established through the testimony of a limited number of individuals: "Only individualized human rights claims against local government officials of the People's Republic of China (PRC) for torture, cruel, inhuman, and degrading treatment, and arbitrary detention of the individual Falun Gong practitioners were justiciable; broader claims of genocide and crimes against humanity were non justiciable since they required findings of facts beyond those to which individual Falun Gong practitioners could competently testify and would enlarge the scope of the necessary factual inquiry." *Doe v. Qi*, 349 F. Supp. 2d at para. 25. UN Human rights mechanisms concerning widespread and gross violations of human rights also require complainants to adduce evidence that a pattern of gross violations exists: 'What should complaints under the 1503 procedure include?'

<http://www.un.or.th/ohchr/complaints/faq.html#compindtreat>

In line with this requirement, the OPCD referred in its observations dated 24 September 2007 (at para 43, and paras 53-62) to the absence of evidence that there was either an international or an internal armed conflict in the areas in question in Darfur or that there was an organised Government or Janjaweed policy or plan concerning the alleged offences during the time period preceding March/April 2003.

The Honourable Single Judge nonetheless held that there were grounds to believe that the applicants suffered harm as the result of crimes falling under article 5 of the Statute from July 2002 onwards.



- i. reverse the methodology employed by the Honourable Single Judge in connection with article 68(3); and
- ii. order that the criteria of personal interests and appropriate must be interpreted in accordance with the principle set out above.



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Mr Xavier-Jean Keita  
Principal Counsel orf OPCD

Dated this Monday, the 18th of February 2008

At The Hague, The Netherlands