

**Cour
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**International
Criminal
Court**

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No.: ICC-01/04
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THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public

Prosecution's Consolidated Response to Applications by Victims to Participate in the Appeals by the Prosecution and OPCD against the 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia, Senior Appeals Counsel
Mr Ekkehard Withopf, Senior Trial Attorney

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta

Legal Representatives of Victims and Victim applicants

Ms Carine Bapita Buyangandu
Mr Patrick Baudoin
Mr Sylvestre Bisimwa
Mr Emmanuel Daoud
Mr Joseph Keta
Mr Michel Shebele
Mr Michael Verhaeghe

The Office of Public Counsel for Victims

Ms Paolina Massidda

Introduction

The appeals against this Decision concern the manner in which applications by victims to participate are to be addressed and victim participation is to be realised during the early stages of the Court's proceedings.

Various legal representatives of victims have applied to present the views and concerns of two distinct groups of individuals in relation to these appeals. Similar applications to participate have been lodged in OPCD's appeal against a predicate decision regarding access to documents and information.

The Prosecution, consistent with its previous position,¹ does not oppose the participation in this appeal of those victims who the Single Judge has determined to fulfil the criteria of "victim" under Rule 85(a), and has granted participatory status: this appeal does affect their personal interests; and their participation is appropriate. On the other hand, the Prosecution submits that those applicants who the Single Judge has not granted the procedural status of victim cannot be permitted to participate in this appeal, in particular as in most cases no finding has been made that they fulfil the criteria set out in Rule 85.

Procedural History

1. The Prosecution refers to the procedural history set out in its Document in Support of Appeal² and its Response to OPCD's Appeal Brief in this appeal.³
2. On 28 and 31 August 2007, the OPCD applied to the Single Judge to order the production of supporting information by the applicants, and the disclosure of potentially exculpatory information by the Prosecution.⁴ On 7 December 2007, the Single Judge rejected both requests.⁵ OPCD sought leave to appeal that decision on 13 December 2007,⁶ and on 23 January 2008 the Single Judge granted leave to appeal a single, overarching issue.⁷

¹ ICC-01/04-483 OA4, 4 March 2008.

² ICC-01/04-454 OA5, 18 February 2008, paras. 1-5.

³ ICC-01/04-482 OA6, 29 February 2008, paras. 4-9.

⁴ ICC-01/04-378 and ICC-01/04-381-Conf. On 18 September 2007, the Prosecution objected to both requests (ICC-01/04-396-Conf).

⁵ ICC-01/04-417.

⁶ ICC-01/04-419.

⁷ ICC-01/04-438. OPCD filed its appeal brief on 4 February 2008 – ICC-01/04-440 OA4 ("OPCD's predicate appeal").

3. On 24 December 2007, the Single Judge issued the Decision on victim participation in the situation.⁸
4. On 7 January 2008, both the Prosecution and OPCD also sought leave to appeal this substantive decision on victim participation.⁹
5. On 6 February 2008, the Single Judge granted leave for the Prosecution to appeal one issue and for OPCD to appeal two issues arising out of the Decision.¹⁰
6. On 18 February 2008, the Prosecution¹¹ and OPCD¹² filed their document in support of this appeal. Responses were filed on 29 February 2008.¹³
7. On 28 February 2008, the legal representative of victims VPRS1 to 6 and a/0071/06 filed an application to participate in the appeals against the Decision by both OPCD and the Prosecution.¹⁴
8. On the same date, the Office of Public Counsel for Victims ("OPCV") filed a series of requests to participate in the appeals of both OPCD and the Prosecution: as legal representative of victims who had been granted procedural status in the situation;¹⁵ and as legal representative of applicants who have not yet been granted any procedural status or participatory rights in the situation.¹⁶
9. On 29 February 2008, the Appeals Chamber issued orders on the filing of applications for participation in this appeal,¹⁷ which specified that any applications for participation were to be filed by 10 March 2008, and were to:

⁸ ICC-01/04-423, 24 December 2007. On 31 January 2008, the Single Judge issued a corrigendum to this decision (ICC-01/04-423-Corr - hereinafter "the Decision").

⁹ ICC-01/04-428; ICC-01/04-429.

¹⁰ ICC-01/04-444 (hereinafter "Decision Granting Leave"). The Prosecution was granted leave to appeal the issue of "whether a 'procedural status of victim', within the terms of the Decision, can be granted independent of any finding by the Chamber that the requirements of article 68(3) and rule 89 are satisfied, and without addressing and providing for a definition of the personal interests, or following the steps required by the Appeals Chamber's jurisprudence." OPCD was granted leave to appeal the issues of "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 specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation"; and "whether, in order to establish moral harm on the basis of harm suffered by a second person, it is necessary to adduce some level of proof concerning the identity of the second person and the applicant's relationship with this person". See Decision Granting Leave, pp. 6-7, 15.

¹¹ ICC-01/04-454 OA6.

¹² ICC-01/04-455 OA5.

¹³ ICC-01/04-479 OA6; ICC-01/04-482-OA5.

¹⁴ ICC-01/04-474 OA6.

¹⁵ ICC-01/04-475 OA5; ICC-01/04-476 OA6.

¹⁶ ICC-01/04-477 OA5; ICC-01/04-478 OA6.

¹⁷ ICC-01/04-480 OA5; ICC-01/04-481 OA6 ("Appeals Chamber's Order").

“include a statement in relation to whether and how the personal interests of the victims concerned are affected by this appeal, indicating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings and why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence.”

The order further granted the Prosecution and OPCD until 20 March 2008 to respond to any applications, “which may include submissions with regard to the right of victims to participate in this appeal, and the modalities for such participation.”

10. On 10 March 2008, a further legal representative filed an application to participate in the appeals against the Decision by both OPCD and the Prosecution.¹⁸
11. The Prosecution hereby files its consolidated response pursuant to the Appeals Chamber’s Order.

The Existence of Overlapping Appeals and Applications by Victims to Participate

12. The Prosecution and OPCD have both appealed the same impugned Decision on very similar issues.¹⁹ In addition, OPCD has appealed a predicate decision, regarding access to documents and information, in respect of an issue which is intrinsically linked with the present appeal.²⁰ On that basis, the Prosecution requested that the Appeals Chamber consider dealing with the appeals jointly.²¹
13. The Prosecution notes that two of the three legal representatives that have applied to participate in these appeals filed a single application to participate in both the appeals by OPCD and the Prosecution; and that OPCV noted in its applications that “like the Prosecution, one cannot but observe that the issues raised in the said appeals are intrinsically related and could have similar legal implications”.²² Given the similarity in the underlying issues and their impact of the victims, as recognised by all legal representatives, and in the interests of judicial economy, the Prosecution has filed a single consolidated

¹⁸ ICC-01/04-486 OA5 OA6 (legal representative of victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06).

¹⁹ ICC-01/04-454 OA6, 18 February 2008; ICC-01/04-455 OA5, 18 February 2008.

²⁰ ICC-01/04-440 OA4, 4 February 2008.

²¹ ICC-01/04-454 OA6, 18 February 2008, para. 7; ICC-01/04-482 OA5, 29 February 2008, paras. 13-14. See also ICC-01/04-452 OA4, 15 February 2008, para. 12.

²² e.g. ICC-01/04-475-tENG OA5, 28 February 2008, para. 17. OPCV explained that it filed applications to participate in the appeals against the Decision by OPCD and the Prosecution separately on the basis that they “appear to give rise to two separate proceedings.”

response covering the applications for participation in the appeals by both the Prosecution and OPCD against the Decision.²³

14. Given the overlapping and intrinsically linked nature of the various appeals, each of which deals with the same overarching issue,²⁴ the Prosecution also: requests that the Appeals Chamber consider dealing with the victims' applications to participate in the appeals jointly; and (as set out below) submits that it may be in the interests of the efficient and expeditious resolution of the appeal for each of the legal representative to submit a single, consolidated presentation of the views and concerns of the victims which could be considered in relation to each of the appeals.²⁵

Nature of Victim Participation in Interlocutory Appeals

15. As confirmed by the Appeals Chamber's Order and previously argued by the Prosecution,²⁶ victims must apply to participate in interlocutory appeals under Article 82(1)(d), demonstrating: (a) how their personal interests are affected by the particular appeal; (b) that their participation is appropriate at this stage of the proceedings; and (c) that the presentation of their views and concerns is not prejudicial to or inconsistent with the rights of the defence or a fair trial.²⁷ These showings, combined with the Pre-Trial (or Trial) Chamber's finding that a person fulfils the criteria of a victim under Rule 85,²⁸ will form the basis for any participation in the appeal.²⁹
16. In relation to the manner of participation, the Prosecution recalls that the Appeals Chamber has held that "Observations to be received by the victims were therefore limited and had to

²³ The Prosecution submits that this response could be jointly registered in both appeals OA5 and OA6, as was done in respect of ICC-01/04-486 OA5 OA6. See further footnote 75, below.

²⁴ In granting leave to appeal, the Single Judge noted that the first issue for which the Prosecution and OPCD sought leave to appeal were "inextricably linked" and were both part of the same "overarching issue" as OPCD had previously been granted leave to appeal (Decision Granting Leave, pp. 7, 12); and that the second issue for which OPCD was granted leave to appeal was also "one of the many aspects included in the overarching issue for which leave to appeal was granted [to OPCD] in the 23 January 2008 Decision" (Decision Granting Leave, p. 15). See further footnote 74, below.

²⁵ See para. 35, below.

²⁶ *Situation in the DRC*, ICC-01/04-483 OA4, 4 March 2008, see in particular paras. 13-14.

²⁷ *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 37-55 (recognizing also that the "precise application of the principles ... is likely to be guided by practice and experience"); *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, paras. 21-28. The Prosecution further recalls that the Appeals Chamber has previously ruled that "An application to participate should in principle be made as soon as possible after appeal is filed" (*Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 46). The Prosecution has previously set out its submissions on the interpretation and implications of this principle in the context of appeals under Article 82(1)(d) at *Situation in the DRC*, ICC-01/04-483 OA4, 4 March 2008, para. 14.

²⁸ *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 45.

²⁹ This was explicitly recognized by some applicants in the present proceedings – see e.g. ICC-01/04-474 OA6, 28 February 2008, para. 15.

be specifically relevant to the issues arising in the appeal rather than more generally”;³⁰ and that “Should the Appeals Chamber permit the victims to participate in the appeal, the Prosecutor and the Defence shall be allowed to reply to any filing of the victims, in accordance with the provisions of rule 91 (2).”³¹

Response to Applications

17. The issue in this appeal, in essence, concerns the principles for assessing and potentially granting applications by victims to participate during the situation, including whether a procedural status can be granted without any findings relating to specific proceedings or procedural rights.
18. The Prosecution acknowledges that the subject matter of the appeals may have significant repercussions on the victims who have been granted “procedural status of victim” in the situation to date, their standing and the manner in which they are able to exercise their rights under the Statute and the Rules. The Prosecution therefore submits that the personal interests of victims who have been admitted to participate so far are affected by the appeals.
19. The Prosecution notes that there is no particular urgency attached to the resolution of the appeals.³² In light of this lack of urgency, the nature of the issue under appeal, and additional considerations identified by applicants, the Prosecution submits that the expression of views and concerns by victims who have been previously admitted to participate or granted procedural status of victim by the Pre-Trial Chamber is appropriate at this stage, in accordance with the modalities proposed below. The Prosecution also submits that the participation of such victims in the appeals through those proposed modalities is not inconsistent with the rights of the defence or a fair and impartial trial.
20. Therefore, consistent with its previous submissions, the Prosecution in general does not oppose the participation of victims who have been granted the procedural status of victim in the appeals.³³ However, as previously argued, the Prosecution submits that mere applicants who have not yet been granted procedural status by the Pre-Trial Chamber, or whose applications have been found to be incomplete, cannot be permitted to participate.³⁴

³⁰ *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 55.

³¹ *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 49.

³² For example, resolution of this issue at the situation stage has no influence on trial proceedings; nor are their proceedings pending in the situation which are awaiting the resolution of this issue to continue.

³³ ICC-01/04-483 OA4, 4 March 2008, paras. 17-20, 22-23, 36.

³⁴ ICC-01/04-483 OA4, 4 March 2008, paras. 20, 31-34, 37.

21. The Prosecution will respond to the various applications and other documents filed by each of the legal representatives separately below.

Legal Representative of victims VPRS 1 to 6 and a/0071/06

22. The Prosecution does not oppose victims VPRS 1 to 6 and a/0071/06, who have been granted procedural status of victim,³⁵ being permitted to present their views and concerns in the appeals. This application properly recalls that, in accordance with the jurisprudence and order of the Appeals Chamber, there is no need to revisit the question of whether the person qualifies as a “victim” under Rule 85.³⁶ The issues on the appeals do affect the victims’ personal interests,³⁷ and it is appropriate that they be permitted to express their views and concerns.³⁸
23. The victims recognize that the Prosecution and OPCD will have the right to respond to their views and concerns if they are allowed to participate,³⁹ therefore the Prosecution submits that participation in accordance with modalities proposed below is not inconsistent with rights of the defence or a fair trial.⁴⁰

Office of Public Counsel for Victims

24. The OPCV filed separate applications to participate in the appeals on behalf of victims admitted to participate in the situation,⁴¹ and on behalf of applicants who have not yet been admitted to participate.⁴² These applications are substantively similar to the applications

³⁵ Victims VPRS 1 to 6 were granted the status of victim and allowed to participate in the stage of the investigation of the situation on 17 January 2006 (ICC-01/04-101-Corr, 23 January 2006); and victim a/0071/06 was admitted on 24 December 2007 (ICC-01/04-423, 24 December 2007, p. 58).

³⁶ ICC-01/04-474 OA6, 28 February 2008, para. 15.

³⁷ As the application notes, the appeal will impact on their status and the rights conferred upon them at the situation stage - ICC-01/04-474 OA6, 28 February 2008, para. 20.

³⁸ While the Prosecution does not dispute that the presentation of views and concerns by victims is appropriate at this stage of this interlocutory appeal, the Prosecution does not agree with some of the arguments made by the legal representative in this regard. In particular, and as previously argued, the submission to the effect that the participation of a victim is necessarily appropriate in an interlocutory appeal because it was appropriate in the situation out of which the appeal arose (ICC-01/04-474 OA6, 28 February 2008, para. 20) is erroneous, based on a ruling which is disputed in this appeal, and is contradictory to the jurisprudence of the Appeals Chamber (see further ICC-01/04-483 OA4, 4 March 2008, paras. 28-29).

³⁹ ICC-01/04-474 OA6, 28 February 2008, paras. 31-32.

⁴⁰ The Prosecution submits that the fact that the participation of the victims in this interlocutory appeal would not address questions of the guilt or innocence of the accused, or credibility of witnesses (ICC-01/04-474 OA6, 28 February 2008, paras. 29-30), does not necessarily mean that such participation could not be prejudicial to the rights of the defence – see further footnote 67, below; ICC-01/04-483 OA4, 4 March 2008, footnote 63.

⁴¹ ICC-01/04-475 OA5 and ICC-01/04-476 OA6, 28 February 2008 (“OPCV Victim Submissions”). The substance of the two applications is the same.

⁴² ICC-01/04-477 OA5 and ICC-01/04-478 OA6, 28 February 2008 (“OPCV Applicant Submissions”). The substance of the two applications is the same.

made for participation on behalf of both victims and applicants in OPCD's predicate appeal relating to Regulation 86(2)(e).⁴³

Victims who have been granted procedural status may participate in the appeals

25. In relation to those victims who have been granted the status of victim authorised to participate in the situation,⁴⁴ the Prosecution does not oppose their participation in the appeal.
26. While the Prosecution submits that the issue in these appeals do affect the personal interests of those victims, it does not agree with each of the arguments raised by OPCV in support of its application.⁴⁵ In particular, the Prosecution disputes the argument that because Pre-Trial Chambers I and II have held that the interests of victims are affected in general by the investigation, the personal interests of all victims are therefore necessarily affected by every interlocutory appeal arising out of an investigation.⁴⁶ The Appeals Chamber has previously ruled that the mere fact that a victim participated in, and that their personal interests were affected by, proceedings before a Pre-Trial or Trial Chamber does not mean that their personal interests are necessarily affected by the issue in the appeal.⁴⁷ In addition, this argument is based on a ruling which is at the heart of the dispute in these appeals.⁴⁸
27. The Prosecution has also recognised that the participation of victims in this appeal is appropriate, but again does not agree with some of the reasons put forward by OPCV.⁴⁹ In

⁴³ ICC-01/04-466 and 467 OA4, 21 February 2008.

⁴⁴ Contrary to the submissions of OPCV (OPCV Victim Submissions, para. 12), the Prosecution submits that a/0047/06 to a/0051/06 cannot be considered *de facto* as victims who have been granted procedural status in the situation. The Single Judge decided that as the applications were pending before the Trial Chamber (in relation to the case of *Prosecutor v Lubanga*), she would not rule on their status in the situation. The Prosecution submits that for the Appeals Chamber to consider these individuals as victims with the right to participate in the context of this appeal could be seen as prejudicing this determination by the Single Judge.

⁴⁵ For example, the Prosecution does not agree that the regime proposed differs from that in Article 68(3), or that upholding the appeals would deny these victims the right to participate in future specific proceedings – contrast OPCV Victim Submissions, para. 20.

⁴⁶ OPCV Victim Submissions, para. 21.

⁴⁷ See e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 43-44; *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 29 (see more generally paras. 23-28). The Prosecution submits that the contrast between OPCV's arguments (i.e. that every victim's personal interests are necessarily affected by every interlocutory appeal in the situation) and the Appeals Chamber's Order and prior jurisprudence and (i.e. that victims must show how their personal interests are affected by the specific issues in this appeal) reinforces the need for appellate review of the impugned ruling.

⁴⁸ ICC-01/04-454 OA6, 18 February 2008, paras. 20-35; ICC-01/04-455 OA5, 18 February 2008, paras. 13-14, 23-30. See also ICC-01/04-440 OA4, 4 February 2008, paras. 25-30; ICC-01/04-452 OA4, 15 February 2008, paras. 15-18.

⁴⁹ In particular, the Prosecution notes that the determination of whether participation of victims at a particular stage of the proceedings is appropriate is not simply a derivation of whether their personal interests are affected, as OPCV asserts (OPCV Victim Submissions, para. 22). This assertion repeats one of the very errors against which the Prosecution is appealing in its related appeal – see ICC-01/04-454 OA6, 18 February 2008, paras. 36-45.

particular, for similar reasons to those set out above, the mere fact that a Pre-Trial Chamber has ruled that a victim's participation in the investigation of a situation is appropriate does not in itself make that victim's participation in every appeal arising out of the investigation of that situation also necessarily appropriate.⁵⁰ Once again, this proposition contradicts existing jurisprudence of the Appeals Chamber⁵¹ and the Appeals Chamber's order;⁵² and is based on another disputed aspect of the ruling which is at the heart of the Prosecution's appeal.⁵³

28. The Prosecution further recognises that participation in accordance with modalities proposed below is not inconsistent with the rights of the defence or the fairness of the proceedings.

Applicants who have not been held to be victims or granted procedural status may not participate in the appeals

29. In relation to those applicants who have not been granted the procedural status of victim in relation to the situation, and in respect of whom the Pre-Trial Chamber has generally made no finding that they qualify as "victims" for the purposes of Rule 85(a), the Prosecution opposes their participation in this appeal.⁵⁴

30. Only victims may present their views and concerns to the Court. There has generally been no ruling that the applicants in question fulfil the criteria of "victim" pursuant to Rule 85(a).⁵⁵ and many were denied the procedural status of victim in the situation on the basis that their applications were incomplete.⁵⁶ The scheme for the participation of victims in interlocutory appeals developed by the Appeals Chamber requires a prior ruling that a

⁵⁰ OPCV Victim Submissions, para. 23.

⁵¹ See jurisprudence referred to in footnote 27, above.

⁵² If this argument is correct, then the requirement in the Appeals Chamber's Order that victims include in their application a statement "indicating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage in the proceedings" would be redundant.

⁵³ ICC-01/04-454 OA6, 18 February 2008, paras. 36-45.

⁵⁴ The Prosecution refers to its more details submissions on this issue in ICC-01/04-483 OA4, 4 March 2008, paras. 31-34.

⁵⁵ An exception is victims a/0047/06 to a/0051/06, in respect of whom OPCV notes that the Pre-Trial Chamber has previously found that they have provided sufficient evidence that they suffered harm as a result of crimes within the jurisdiction of the Court (OPCV Applicant Submissions, paras. 12-13, referring to *Prosecutor v Lubanga*, ICC-01/04-01/06-601, 20 October 2007).

⁵⁶ See for example ICC-01/04-423, 24 December 2007, paras. 17 (applicants a/0005/06, a/0019/06, a/0027/06, a/0153/06, a/0155/06, a/0156/06, a/0157/06, a/0159/06, a/0203/06, a/0220/06, a/0222/06, a/0224/06, a/0227/06, a/0229/06, a/0230/06, a/0234/06, a/0236/06, a/0240/06); 18 (applicant a/0036/06); 20 (applicant a/0004/06); 21 (applicant a/0035/06); 22 (applicants a/0073/06 to a/0080/06 and a/0110/06); and 26 (applicants a/0006/06, a/0020/06, a/0039/06, a/0043/06, a/0144/06, a/0154/06, a/0160/06).

person is a victim in relation to the underlying proceedings.⁵⁷ The applicants in question cannot be permitted to present their views and concerns, based on OPCV's application, because there has been, and can be, no finding that they are victims.⁵⁸

31. The Prosecution also strongly disputes OPCV's submissions that Article 68(3) allows alleged victims to present their views and concerns prior to a ruling on their application to participate.⁵⁹ The arguments raised by OPCV are entirely circular – the participation referred to by OPCV is the expression of views and concerns; thus OPCV is effectively arguing that victims may present their views and concerns regardless of whether or not they are authorised to present their views and concerns. Rule 89 governs the procedure by which victims may be authorised to present their views and concerns.⁶⁰ A formal application is required, which must be adjudicated by the Chamber, including whether the person is a victim pursuant to Rule 85. It is this process which results in a victim being authorised to present their views and concerns, and defines the parameters within which they can be presented.⁶¹ To allow victims to present their views and concerns before that application is granted would pre-empt and defeat the very purpose of that application.
32. OPCV also refers to Rule 93.⁶² The Prosecution submits that this, and not Article 68(3), is the only provision which could allow for victims to present their views in the absence of a Chamber accepting an application for participation under Article 68(3) and Rule 89. However the Prosecution submits that this rule grants a Chamber the prerogative to seek the views of victims, and is not a question on which the representative of an applicant may

⁵⁷ *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 45; as recognized in ICC-01/04-474 OA6, 28 February 2008, paras. 15-16. This is the basis for the briefing requested in the Appeals Chamber's order, which only requested submissions on the additional requirements of personal interests, appropriateness, and prejudice. The Prosecution notes that the Appeals Chamber's order requests submissions on "whether and how the personal interests of the victims concerned are affected by this appeal" (emphasis added).

⁵⁸ As explained in detail in ICC-01/04-483 OA4, 4 March 2008, footnote 56, the Prosecution submits that the Appeals Chamber is not in a position to make the finding of whether or not the individuals are victims itself. The situation is before the Pre-Trial Chamber, and it is that Chamber which has the jurisdiction to properly consider whether an individual is a victim for the purposes of participation during this phase of the proceedings. In addition, the information required to determine whether the applicants are victims is not (to the Prosecution's knowledge) before the Appeals Chamber.

⁵⁹ OPCV Applicant Submissions, para. 21.

⁶⁰ Rule 89 is the mechanism by which the presentation of views and concerns in Article 68(3) is implemented and realized – it is not separate from or superfluous to it. Rule 89 requires that "In order to present their views and concerns" the victims shall make an application under it; which the Chamber shall rule on and specify how that participation is to take place. The Rules were drafted "as an instrument for the application of the Rome Statute", and "constitute the indispensable procedural legal basis for the functioning of the Court" – Fernandez de Gurmendi, "Elaboration of the Rules of Procedure and Evidence," in Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), 235-235.

⁶¹ i.e. specifying the proceedings and the manner in which participation is considered appropriate (Rule 89(1)), which is subject to modification (Rule 91(1)).

⁶² OPCV Applicant Submissions, para. 27.

petition the Chamber.⁶³ In the present proceedings, the Prosecution further submits that there is no reason for the Chamber to avail itself of this exceptional power, especially in light of the range of victims who have made proper applications and will likely present their views and concerns.

Legal Representative of victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06⁶⁴

33. As with the previous applications to participate in this appeal by victims who have been given the status of victim and admitted to participate in the situation, the Prosecution does not object to such persons being granted the right to present their views and concerns, based on the modalities of participation proposed below. As the legal representative notes, the appeals are against the Decision which granted them the procedural status of victim, and the outcome of will impact on their procedural status and their ability to express their views and concerns.⁶⁵ The participation of victims at this stage of the interlocutory appeals and in accordance with the proposed modalities set out below is further appropriate, especially as it will “facilitat[e] the presentation of contradicting views to ensure a binding and considered ruling on the issues under examination”.⁶⁶ and is not prejudicial to the defence or a fair trial.⁶⁷

Modalities of Participation

34. As the Appeals Chamber has previously ruled, “the Prosecutor and the Defence shall be allowed to reply to any filing of the victims, in accordance with the provisions of rule

⁶³ Amongst other reasons, a person who has been granted no procedural status or participatory rights has no standing to lodge a request with a Chamber.

⁶⁴ The Prosecution notes that, in contrast to the previous application for participation in OPCD’s predicate appeal in relation to Regulation 86(2)(e) (ICC-01/04-468, 21 February 2008), this application is made on behalf only of victims who have been admitted to participate in the situation, and not also in relation to applicants who have not yet been granted any procedural status or participatory rights.

⁶⁵ ICC-01/04-486 OA5 OA6, 10 March 2008, paras. 18-20.

⁶⁶ ICC-01/04-486 OA5 OA6, 10 March 2008, para. 24.

⁶⁷ The Prosecution notes that the legal representative has submitted, in the context of arguing that participation would not prejudice the defence, that “Provided that submissions do not expressly or impliedly point to the particular guilt of an accused in respect of actual charges, it is difficult to see how any prejudice might arise” (ICC-01/04-486 OA5 OA6, 10 March 2008, para. 22). The Prosecution does not agree with this submission. The Prosecution considers that the views and concerns which victims may properly express under Article 68(3) generally will not go the proof of the guilt or innocence of the accused (see further *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, paras. 16, 18-19), and that the participation of victims in some circumstances may nevertheless be prejudicial to the rights of the defence or a fair trial.

91 (2).⁶⁸ The Prosecution submits, consistent with its previous position,⁶⁹ that the appropriate modality for the presentation of victims' views and concerns in this appeal is for those views and concerns to be submitted in writing.⁷⁰ The views and concerns should be limited to the specific issue arising in the appeals,⁷¹ to the extent that it affects their personal interests. In this regard, the purpose is to present the views and concerns of the victims relating to this issue: the filing is not a legal response to the brief filed by the Appellant;⁷² their role is to provide the Appeals Chamber with the views of the victims on the issue under appeal, not to refute particular legal arguments.⁷³

35. The issues in the appeals against this Decision by both the Prosecution and OPCD, as well as in OPCD's appeal against the predicate decision regarding access to documents and information, are overlapping, similar in scope and intrinsically linked.⁷⁴ The legal representatives dealt with in this response have each applied to present views and concerns in respect of each of these three appeals. Given that the issues involved in the appeals are so substantively similar, and their impact on the interests of the victims will likely be the same,⁷⁵ the Prosecution submits that the Appeals Chamber should consider ordering that each legal representative submits a single set of views and concerns in respect of the three

⁶⁸ *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 49.

⁶⁹ ICC-01/04-483 OA4, 4 March 2008, paras. 38-41.

⁷⁰ The Prosecution submits that written observations will be sufficient to convey the views and concerns of the victims in relation to this appeal. The practice of the Appeals Chamber to date has not been to hold hearings for interlocutory appeals, consistent with Rule 156(3).

⁷¹ The Appeals Chamber has held that "Observations to be received by the victims were therefore limited and had to be specifically relevant to the issues arising in the appeal rather than more generally" - *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 55.

⁷² In this regard, the Prosecution disagrees with OPCV's request that the Appeals Chamber set a time limit for them to file a response to the Appeal Briefs of OPCD and the Prosecution (OPCV Victim Submissions, p. 15 (dispositif); OPCV Applicant Submissions, p. 15 (dispositif)).

⁷³ See e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, paras. 15-16. See further Prosecution's submissions in *Prosecutor v Lubanga*, ICC-01/04-01/06-1219 OA9, 10 March 2008, para. 50.

⁷⁴ In granting leave to appeal this Decision, the Single Judge noted that the first issues for which each of the Prosecution and OPCD sought leave to appeal "are inextricably linked because both issues relate to the manner in which the Single Judge analysed the victims' personal interests and the appropriate stages of the proceedings" (Decision Granting Leave, p. 7), that these were also part of the same "overarching issue" as OPCD had been granted leave to appeal against the prior decision (Decision Granting Leave, p. 12), and that the second issue for which OPCD was granted leave to appeal was also "inextricably linked" with issues of the standard of proof, and therefore "is one of the many aspects included in the overarching issue for which leave to appeal was granted [to OPCD] in the 23 January 2008 Decision" (Decision Granting Leave, p. 15).

⁷⁵ The Prosecution notes that of the three legal representatives applying to participate in the present appellate proceedings against the Decision, two filed a single application to participate in both the appeals of the OPCD (OA5) and the Prosecution (OA6); and the third (OPCV) noted in its applications that "like the Prosecution, one cannot but observe that the issues raised in the said appeals are intrinsically related and could have similar legal implications" (e.g. ICC-01/04-475-tENG OA5, 28 February 2008, para. 17).

appeals, which would be considered in relation to each appeal,⁷⁶ rather than each representative filing three separate sets of views and concerns. The Prosecution submits that such a course would foster judicial economy and facilitate the efficient and expeditious disposition of the appeals. To require the victims to file multiple copies of their views and concerns with only trivial variations (and thus the parties to file multiple responses) would place a burden on their limited resources without producing any benefit for the parties, the victims, or the Chamber.

36. The Prosecution further submits that a modest timeframe should be prescribed by the Appeals Chamber for the submission of these views and concerns. A number of pending victims' applications will be affected by the resolution of this appeal. Further, the legal representatives have had an opportunity to consider the issues, and the impact on the victims represented by them, and should be in a position to present those views and concerns promptly.
37. The Prosecution finally submits that the Appeals Chamber should allow it and OPCD to respond to the various views and concerns of the victims. The Prosecution submits that the period prescribed by the Appeals Chamber for the filing of such a response should reflect the number of filings to which it will be responding.⁷⁷


Conclusion

38. For the reasons referred to above, the Prosecution respectfully requests that the Appeals Chamber:
 - (a) grant the applications to participate in these appeals of those victims who have been granted "procedural status of victim" by the Pre-Trial Chamber;
 - (b) deny the applications to participate in these appeals of those applicants who have not yet been granted "procedural status of victim" by the Pre-Trial Chamber;
 - (c) order those victims who are permitted to participate in these appeals to file their views and concerns in writing with a defined period; and

⁷⁶ The Prosecution notes that documents ICC-01/04-486 has been registered against both appeals OA5 and OA6. Similarly, the application by the legal representative to participate in the analogous appeals in the *Situation in Darfur* was also registered against more than one appeal – see *Situation in Darfur*, ICC-02/05-134 OA2 OA3, 11 March 2008. The Prosecution further recalls that it has previously requested that the Appeals Chamber consider treating all three appeals jointly and issuing a consolidated and comprehensive judgement – ICC-10/04-454 OA6, 18 February 2008, para. 7.

⁷⁷ Depending on the number and extent of observations filed by victims, adjustments to the page limit for the responses by the Prosecution and OPCD may be required.

(d) permit the Prosecution and OPCD to respond to the various submissions of views and concerns within a deadline prescribed by the Appeals Chamber.


for **Luis Moreno-Ocampo**
Prosecutor

Dated this 20th day of March 2008
At The Hague, The Netherlands