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THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Observations of the Legal Representatives of a/0071/06, VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 Following the Appeal Filed by the OPCD against the Decision of the Pre-Trial Chamber Dated 7 December 2007 and the Appeals Filed by the Office of the Prosecutor and the OPCD Against the Decisions of the Pre-Trial Chamber dated 24 December 2007

I. PROCEDURAL BACKGROUND

1. On 17 August 2007, Pre-Trial Chamber I issued the *Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation*.¹
2. As part of its observations on the applications for victims' participation submitted in accordance with rule 89 of the *Rules of Procedure and Evidence*,² on 28 and 31 August 2007, the Office of Public Counsel for the Defence ("the OPCD") filed two applications seeking notification of certain documents.³
3. On 7 December 2007, the Single Judge of Pre-Trial Chamber I rendered 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* ("the Decision of 7 December") by which it rejected the said applications.⁴
4. On 13 December 2007, the OPCD filed the "Request for leave to appeal the 'Decision on the request 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'".⁵
5. On 23 January 2008, Pre-Trial Chamber I issued the *Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the*

¹ ICC-01/04-374.

² See the *Decision authorising the filing of observations on applications for participation in the proceedings* of Pre-Trial Chamber I dated 17 July 2007.

³ See the OPCD's "Request for Single Judge to order the Prosecutor to disclose exculpatory materials" dated 28 August 2007 (ICC-01/04-378) and the OPCD's "Request for the Single Judge to order the production of relevant supporting documentation pursuant to regulation 86(2)(e)" dated 31 August 2007 (ICC-01/04-382).

⁴ ICC-01/04-417.

⁵ ICC-01/04-419.

Prosecutor,⁶ by which it granted the OPCD leave to appeal the Decision of 7 December 2007 on the following issue:

[W]hether article 68(3) of the Statute can be interpreted as providing for a ‘procedural status of victim’ at the investigation stage of a situation and the pre-trial stage of a case; and

(i) if so, whether rule 89 of the Rules and regulation 86 of the Regulations provide for an application process which only aims to grant the procedural status of victim and is thus distinct and separate from the determination of the procedural rights attached to such status; and what are the specific procedural features of the application process? or

(ii) if not, how applications for participation at the investigation stage of a situation and the pre-trial stage of a case must be dealt with.

6. On 4 February 2008, the OPCD filed the “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’”.⁷

7. On 6 February 2008, the Office of Public Counsel for Victims (OPCV) filed the “Request from the OPCV Acting as Legal Representative for Clarifications on Victim Participation in the Interlocutory Appeal filed by the OPCD under article 81(2) of the Rome Statute”.⁸

8. The Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and a/0071/06 submitted their application to participate in the said interlocutory appeal on 8 February 2008.⁹

9. On 13 February 2008, the Appeals Chamber issued the *Decision of the Appeals Chamber on the OPCV’s request for clarification and the legal representative’s request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the response thereto by the OPCD and the*

⁶ ICC-01/04-438.

⁷ ICC-01/04-440.

⁸ ICC-01/04-446-tENG.

⁹ ICC-01/04-446-tENG: “Application from the Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 and a/0071/06 for Leave to Participate in the Appeal filed by the OPCD on 13 December 2007 and Authorised by Pre-Trial Chamber I on 23 January 2008”.

*Prosecutor*¹⁰ (“the Decision of 13 February 2008”), by which it dismissed the request for clarification filed by the OPCV on 6 February 2008 and ordered the filing of the applications for participation in the said interlocutory appeal by 21 February 2008 at the latest.

10. On 15 February 2008, the Prosecution filed the “Prosecution’s Response to OPCD’s 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 Potentially Exculpatory Materials’”.¹¹

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11. On 24 December 2007, the Single Judge of Pre-Trial Chamber I issued the *Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo* by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 to a/0241/06 to a/0250/06¹² of 24 December 2007, by which it granted Applicant a/0071/06 the status of victim in the situation in the DRC.

12. On 7 January, the Prosecution and the OPCD filed applications for leave to appeal the Decision of 24 December 2007.¹³

¹⁰ ICC-01/04 OA4.

¹¹ ICC-01/04-452.

¹² ICC-01/04-423.

¹³ ICC-01/04-428: “Prosecution’s Application for Leave to Appeal the Single Judge’s 24 December 2007 ‘*Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo*’”.

ICC-01/04-429: Request for Leave to appeal the ‘*Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo* par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06,

13. On 14 January 2008, the Legal Representatives of a/0071/06 filed their observations further to the Prosecutor's and the OPCD's requests for leave to appeal the decision of Pre-Trial Chamber I of 24 December 2007.¹⁴

14. On 6 February 2008, the Single Judge of Pre-Trial Chamber I rendered her *Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation*¹⁵ ("the Chamber"), by which she granted the Prosecutor's application of 7 January 2008 on the following point:

[W]hether 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

and the request of the OPCD on the following points:

(i) 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

(ii) 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.

15. On 18 February 2008, the Prosecution and the OPCD filed their documents in support of the appeal against the Decision of 24 December 2007.¹⁶

a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 à a/0241/06 à a/0250/06" ("the OPCD's request for leave to appeal").

¹⁴ ICC-01/04-436: "Observations des représentants légaux de a/0071/06 suite à la requête du Procureur et de l'OPCD sollicitant l'autorisation d'interjeter appel de la décision de la chambre préliminaire I sur les demandes de participation à la procédure en République Démocratique du Congo de a/0071/06".

¹⁵ ICC-01/04-444.

¹⁶ ICC-01/04-454: "Prosecution's Document in Support of Appeal against the 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings"

ICC-01/04-455: "OPCD Appeal Brief on the 'Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République Démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06'".

16. On 28 February 2008, the Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and a/0071/06 filed their application to participate in the appeal filed by the OPCD and the Prosecutor on 7 January 2008 and authorised by the Pre-Trial Chamber on 6 February 2008.¹⁷

17. On 29 February 2008, the OPCD filed the “OPCD Response to the Prosecution’s Document in Support of Appeal against the 24 December 2007 Decision on Victims’ Applications for Participation in the Proceedings”.¹⁸

18. That same day, the Prosecution filed the “Prosecution Response to OPCD Appeal against the 24 December 2007 Decision on the Victims’ Applications for Participation in the Proceedings”.¹⁹

19. On 20 March 2008, the Prosecutor filed the “**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**”.²⁰

20. That same day, the OPCD filed the “OPCD Response to the submissions of the Legal Representatives”.²¹

21. On 30 June 2008, the Appeals Chamber issued the *Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007*,²² by which it joined the three appeals, on the ground that “the issues concern the manner in which applications by victims to participate at the investigation stage of a situation

¹⁷ ICC-01/04-474-tENG.

¹⁸ ICC-01/04-479.

¹⁹ ICC-01/04-482.

²⁰ ICC-01/04-488.

²¹ ICC-01/04-489.

²² ICC-01/04-503.

and the pre-trial stage of a case should be addressed”, and **granted Victims VPRS 1 to VPRS 6 and a/0071/06 leave to participate in the appeals.**

22. The Appeals Chamber set the time limit for submission of the observations of the Legal Representatives of VPRS 1 to VPRS 6 and a/0071/06 to 8 July 2008.

23. Accordingly, the Legal Representatives of VPRS 1 to VPRS 6 and a/0071/06 hereby submit their observations on their personal interests directly concerned by the said appeals.

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II. PRELIMINARY COMMENT on the inadmissibility of the first issue raised by the Pre-Trial Chamber in its decision of 23 January 2008

24. In its request for leave to appeal,²³ the OPCD did not raise the issue of the status of victims at the situation stage. In fact, the issue was not dealt with in the decision challenged by the OPCD.²⁴

25. Accordingly, the overall issue raised by Pre-Trial Chamber I concerning the existence of a victim status at the investigation and pre-trial stage cannot be admissible, because it goes beyond the subject matter of the appeal.²⁵

26. Thus, the arguments raised by the OPCD on this point in its appeal brief are equally inadmissible.

III. DISCUSSION

27. The Office of the Prosecutor claims that the decisions of the Pre-Trial Chamber which are being reviewed by the Appeals Chamber contain a “series of interlocking errors of law”.²⁶

²³ ICC-01/04-419.

²⁴ ICC-01/04-358.

²⁵ ICC-01/04-438, p. 8.

It thus criticises the Pre-Trial Chamber for having:

- “allow[ed] formal procedural status to be granted to victims in an investigation solely on the basis of the findings made in the Decision, and in particular without fulfilling the criteria and complying with the requirements of Rule 89(1)”. According to the Office of the Prosecutor, article 68(3) and rule 89(1) exclude the granting of a “procedural status of victims” and allow the participation of victims at the situation and investigation stages only for “specific proceedings in which victims could exercise meaningful rights” and according to “modalities through which those rights could be exercised”.²⁷
- Furthermore, the Office of the Prosecutor is of the view that the impugned decision did not assess whether and how the “personal interests” of the victims would be affected at the investigation stage of the situation in the DRC,²⁸ or provide any evidence that the participation of victims at this stage was “appropriate”,²⁹ according to the provisions of article 68(3).

28. The OPCD criticises the Single Judge for systematically granting victims leave to participate if the conditions stipulated by rule 85(a) are satisfied.³⁰ According to the OPCD, the methodology applied by the Single Judge does not take account of the need to determine whether “it is appropriate for the applicants to participate at the situation stage”.³¹

Lastly, the OPCD is of the view that “there can be no procedural status of ‘victim’ during the investigative and pre-confirmation stage”³² and, more broadly, asserts that there cannot be any participation of victims at the situation stage. According to

²⁶ ICC-01/04-454, para. 10.

²⁷ ICC-01/04-454, para. 11.

²⁸ *Id.*, paras. 20 ff.

²⁹ *Id.*, paras. 36 ff.

³⁰ ICC-01/04-455, para. 11.

³¹ *Id.*, para. 6.

³² *Id.*, para. 9.

the OPCD, such participation “would be more appropriately deferred to case proceedings”.³³

29. It must be noted that the issues raised by the Prosecution and the OPCD in their appeals are intrinsically linked and may have similar legal consequences.

Both maintain that the Single Judge did not apply the criteria of article 68(3) and rule 89 correctly.

30. The Legal Representatives of VPRS 1 to VPRS 6 and a/0071/06 consider that the Single Judge of the Pre-Trial Chamber correctly interpreted article 68(3) of the *Rome Statute*, under which victims may be authorised to participate in the proceedings before the Court only if their “personal interests [...] are affected [...] at stages of the proceedings determined to be appropriate [by the Chamber] and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.

A. Granting victims a specific procedural status at the situation and pre-trial stage of the case pursuant to article 68(3) of the *Rome Statute*

1. Use of the term “victim” prior to judgment

31. The OPCD notes that the term “victim” cannot be used prior to the issuance of a judgment, since establishing that the crime has been committed is a prerequisite to the existence of any such “victim”.³⁴

32. How can such observations be accepted when the crime has already been committed? While it is true that the crime has not yet been established legally at the situation stage, the crime existed before the investigation phase itself.

³³ *Id.*, para. 45.

³⁴ ICC-01/04-440, para. 66.

33. It must be pointed out that national legal systems employ the term “victim” as of the investigation stage. How, then, can it be acceptable for the International Criminal Court, itself a product of the Member States, to fail to observe fundamental rights by refusing *a priori* the very term of victim as of the application for participation?

34. The fact that a person is considered a victim as soon as it has been established that he or she has suffered harm, regardless of whether the perpetrator of the violation has been identified, arrested, prosecuted or found guilty, is also a recognised principle established in international law, in particular, by the United Nations General Assembly in its *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*³⁵ and its *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.³⁶

35. Under article 21(1)(b) of the Statute, the Court is required to apply the principles and rules of international law, including the established principles of the international law of armed conflicts.

36. The definition of “victim” in article 85 of the *Rules of Procedure and Evidence* of the Court, moreover, uses the most important elements of the definition of “victim” in international law.³⁷

2. Establishment of a general procedural right of victims

37. The basic documents of the Court contain no definition of the concept of “personal interests” or any details about which stage may be deemed “appropriate”

³⁵ Resolution 40/34 of 29 November 1985.

³⁶ Resolution 60/147 of 16 December 2005.

³⁷ Cf. *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, *id.*

for the participation of victims. Under Article 68(3), the judges (“the Court”) have full discretion to determine the stages at which such participation is appropriate.

38. The OPCD and the Prosecution maintain that, where the Statute gives the Court discretionary power to grant the status of victim, it may exercise this discretion only on a case-by-case basis without establishing general rules.³⁸ However, they do not advance any valid legal argument to support this assertion.

39. Both repeatedly cite a previous judgment of the Appeals Chamber.³⁹ However, it must be emphasised that when interpreting the decision of the Appeals Chamber of 13 June 2007, the Single Judges of Pre-Trial Chamber I explained that (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 assesses whether the personal interests of the victims are affected by the *overall* interlocutory appeal.⁴⁰

40. The Single Judges of Pre-Trial Chamber I also considered that if the personal interests of the victims in relation to each procedural activity or piece of evidence were to be assessed:

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

³⁸ ICC-01/04-440, para. 27; ICC-01/04-454, paras. 12 ff; and ICC-01/04-455, para. 12 referring to ICC-01/04-01/06-925 OA8.

³⁹ *The Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007.

⁴⁰ ICC-02/05-121, p. 6; ICC-01/04-01/07-474, para. 46.

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)⁴¹

41. By granting a general status of victim, the Court in no way violates article 68(3) of the Statute. The principle set out in that article and recalled above – that is, the Court’s discretion to determine on a case-by-case basis whether the views and concerns of the victims shall be presented and considered – relates to the issue of the scope of the procedural rights of victims (the modalities of participation), and not to the very principle of the existence of those rights.

42. The argument of the OCPD and the Prosecution whereby granting a “general” procedural status to victims would be contrary to the case-by-case review which the Court must undertake is therefore inappropriate, and results from confusion between the granting of a procedural status – which is a general issue likely to arise in relation to many victims at the situation stage – and the content of that status – which can be determined only on a case-by-case basis, taking into account the criteria set by the Court’s now well-established case law.⁴²

43. Lastly, it should be noted that the requirement of expeditiousness and effectiveness in international justice, as well as the requirement of a fair and expeditious trial, mean that procedural frameworks must be created to enable the Court to progress in its consideration of specific issues on which it must rule, thereby enabling it to carry out its task efficiently.

3. *Appropriateness of the existence of a status of victim at the situation stage*

44. The OPCD and the Prosecution maintain that assigning a status of victim at the situation stage is inconsistent with the principles set out in article 68(3) of the *Rome*

⁴¹ ICC-02/05-121, pp. 6-7; ICC-01/04-01/07-474, para. 47.

⁴² See, for example, the decision of Pre-Trial Chamber I on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (ICC-01/04-101), or the judgment issued by the Appeals Chamber on 13 February 2007 concerning the conditions of victims’ participation in the specific interlocutory appeals (ICC-01/04-01/06-824).

Statute since (i) the Pre-Trial Chamber would not assess on a case-by-case basis whether the personal interests of the victims are affected and whether their participation at the investigation stage is appropriate; (ii) the victims would have no interest to participate in the situation.⁴³

- ***locus standi*: should the interest required be personal or generic?**

45. Regarding the criterion of the personal interests of victims, the OPCD submits that the victims cannot justify a particular interest in participating in the proceedings at this stage since they can already submit complaints to the Prosecutor. The OPCD further adds that if there were no victim status at the situation stage, their interests would be adequately protected by pre-existing mechanisms:

The Statute permits victims to submit complaints directly to the Prosecution, which triggers an automatic obligation to investigate the complaint, subject to the criteria set out in article 53(1). If the Prosecutor requires the authorisation of the Chamber to commence an investigation, then the Prosecutor is also obliged – to the extent which is consistent with their safety or the integrity of the investigation – to notify any victims who are known to the Prosecutor or the Victims and Witnesses unit, for the purpose of enabling them to submit representations to the Pre-Trial Chamber. If the Prosecutor decides not to proceed with a prosecution, the Prosecutor is obliged to take into consideration the interests of victims under article 53(2)(c).⁴⁴

46. However, such reasoning cannot succeed. It does not take account of the following considerations: (i) the interests of the victims may be different from the those of the Prosecutor; (ii) the views and concerns of the victims are not restricted only to a general desire for certain crimes to be subject to investigations and prosecutions; those views and concerns may in fact also concern specific aspects of the investigations and prosecutions.

47. Indeed, the President of the Inter-American Court of Human Rights emphatically recalled that the existence and broadening of the procedural rights of victims is fundamental in international justice:

The broader legitimization of the victim or alleged victim in the inter-American judicial proceedings has produced excellent results, from the perspective of both justice and

⁴³ ICC-01/04-440, paras. 20-23; ICC-01/04-454.

⁴⁴ ICC-01/04-440, para. 38.

procedural practice. It constitutes, in our understanding, progress in the protection of human rights; the victim cannot be a ‘third party’ in his own case.⁴⁵

48. The jurisprudence of Pre-Trial Chamber I also recalls that:

[T]he Statute [of the ICC] 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 numerous 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”.⁴⁶

49. The fact that, in connection with the first cases before the Court, the Prosecutor has on numerous occasions expressed views at odds with those defended by the victims further illustrates the fact that the victims’ interests cannot be equated with or reduced to those advanced by the Prosecutor.

50. Accordingly, at the confirmation hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, the Prosecutor pressed charges in the context of an armed conflict not of an international character, which was challenged by the victims, who considered that the conflict was an armed conflict of an international character. The Pre-Trial Chamber ultimately sided with the Legal Representatives of the victims, at least for part of the period in question.

51. Both the OPCD and the Prosecution maintain in their appeals that there is no place for the participation of victims at the situation stage because the Prosecutor is obliged to investigate both incriminating and exonerating circumstances in the search for the truth. However, as the above example shows, it is possible that in certain circumstances the Office of the Prosecutor may seek not to establish the truth but to support the charges it considers it can prove. It is not for the Office of the Prosecutor to establish the truth, but rather for the Chambers of the Court. The judges’ assessment may be different as regards the standard of evidence required.

⁴⁵ “Report of the President of the Inter-American Court of Human Rights to the OAS General Assembly”, Mr Sergio Garcia-Ramirez, dated 5 June 2007.

⁴⁶ ICC-01/04-101-tEN, para. 51.

They may therefore benefit from the observations of the victims, as was the case at the aforementioned confirmation hearing.

52. In any event, article 68(3) is clear regarding the assessment of the victim's personal interest in acting. As explained above, it must not be sought in connection with each act of participation, but only at the various stages in the proceedings, such as the situation or the case. The Prosecutor and the OPCD claim that the situation is not a "stage" within the meaning of article 68(3). However, it should be noted that it is assigned a separate record and that it is in fact subject to proceedings separate from those of the case.

53. In order to analyse the appropriateness of the participation of victims at the situation stage, we should recall the in-depth analysis by Pre-Trial Chamber I in its decision of 17 January 2006⁴⁷ concerning the interpretation of the term "proceedings" in article 68(3). After a long and detailed analysis, the Chamber found that there are indeed "proceedings" at the investigation stage.

54. Furthermore, and in the context of a teleological interpretation of article 68(3), we should recall the historical background of the incorporation into the ICC Statute of the right of victims to participate in the proceedings.

55. Recognition of the rights of victims in international criminal law follows the increasing importance of the individual in general international law. This increasing importance is reflected, on the one hand, by the increased role of victims in regional (European and Inter-American) human rights systems and, on the other, by the United Nations General Assembly's adoption of declarations and principles.⁴⁸ Lastly, the incorporation of the right of victims to participate in proceedings before the ICC is also a consequence of the permanent feature included by the drafters of the *Rome Statute* based on the fact that the interests of victims had repeatedly been neglected

⁴⁷ ICC-01/04-101.

⁴⁸ Cf. footnotes 34 and 35 *supra*.

by the pre-existing international criminal tribunals. As explained above, the interests of the victims may be different from those of the Prosecutor. That is the reason for the introduction of the right of victims to participate in proceedings so that they may present their views and concerns. To illustrate this situation in relation to the historical background to the drafting of the *Rome Statute*, reference should be made to the case of *The Prosecutor v. Akayesu* before the International Criminal Tribunal for Rwanda (ICTR). In that prominent case, the Prosecutor of the ICTR had not included charges of sexual violence in the initial indictment. However, after hearing the testimony of several witnesses, the judges realised that the indictment did not correspond to the reality of the crimes committed and asked the Prosecutor to consider amending the indictment – which he did, this time including the charges of sexual violence against Mr Akayesu. In the same way, certain judges of the International Criminal Tribunal for the Former Yugoslavia drew the Prosecutor's attention to sexual crimes which were not included originally.

56. This remarkable role of the judges at the ad hoc tribunals has been criticised by some on the ground that they had gone beyond their functions as judges. The situation of the ICC is different, because it has a pre-trial chamber with powers to supervise the Prosecutor's investigation. The Pre-Trial Chamber effectively has a decisive power when it comes to establishing the charges against an accused.⁴⁹ The system of victims' participation set out in the *Rome Statute* enables the Pre-Trial Chamber to benefit from the presentation of the views and concerns of the victims when it considers such issues.

57. Although the aforementioned example refers to specific cases, it would also be appropriate for the Pre-Trial Chamber of the ICC to consider the views and concerns of the victims at the situation stage, even prior to the issuance of a warrant of arrest; this is the case for the proceedings under article 15(3) and rule 92(2). Other proceedings may be envisaged, such as the presentation of views and concerns

⁴⁹ Article 61(7) of the *Rome Statute*.

relating to the Office of the Prosecutor's failing to consider certain crimes or evidence which are an essential aspect of the conflict.

58. As Pre-Trial Chamber I recalled in its decision of 17 January 2006:

The Chamber considers 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 perpetrators of crimes and to request reparations for the harm suffered.⁵⁰

59. It should be noted that, contrary to what the OPCD maintains,⁵¹ victims' participation is not only "reactive". In fact, they may instigate specific proceedings.⁵²

60. Both the Office of the Prosecutor and the OPCD consider the participation of victims in the situation inappropriate because it is devoid of any meaning.⁵³ That does not justify abolishing the system of participation at the situation stage, but should, instead, motivate the Court to establish an enhanced system offering additional possibilities for the victims to present their views and concerns.

- **General procedural interest and action of the victims**

61. Regarding the general interest criterion, the OPCD submits that victim status cannot be ascertained at this stage because it is based solely on the assertions of the applicant, and that since the characterisation of the alleged crimes is as yet uncertain, the Court may well devote time and effort to facts that, in the final analysis, will be considered as falling outside its jurisdiction. The OPCD thus maintains that granting procedural rights to a victim prior to the selection of incidents by the Prosecutor impedes the expeditious conduct of the trial.⁵⁴

62. However, these arguments cannot succeed, as one of the conditions for the participation of a victim at the situation stage (as set out below) is the causal link

⁵⁰ ICC-01/04-101-tEN, para. 63

⁵¹ ICC-01/04-455, para. 38.

⁵² ICC-01/04-101-tEN, para. 75.

⁵³ ICC-01/04-454, p. 3.

⁵⁴ ICC-01/04-440, paras. 32-33, 40-49, 60.

between the harm alleged and a crime *within the jurisdiction of the Court*. Accordingly, upon undertaking this examination, the Court conducts a review and a selection of the victims in order to avoid overstepping its jurisdiction.

63. The Chamber's review is in fact a *prima facie* review for the purpose of complying with the requirement of an expeditious trial.

64. Whilst the Prosecutor's selection of the alleged crime for trial before the Court is uncertain at this stage, the very existence of the situation phase is designed to enable the victims to make known what was inflicted upon them and the investigation of these events by the Office of the Prosecutor. Victim participation at this stage of the proceedings cannot therefore be construed as impeding the expeditiousness of the trial, but must of course be understood as indispensable to the missions of the Prosecutor and the Pre-Trial Chamber, which is supposed to exercise its reviewing power over the actions of the Prosecutor at the investigation stage, particularly his prosecutorial choices.

65. In any event, Pre-Trial Chamber I has noted that granting the status of victim at the situation stage was not, *per se*, prejudicial to the rights of the Defence,⁵⁵ as the Defence would have the right to respond to all observations of the victims during the proceedings.

66. The OPCD considers that the participation of victims in the situation affects the right to a fair and impartial trial. However, it should be pointed out that, in article 68(3), the requirement of a fair and impartial trial is independent of and distinct from the rights of the accused. It follows that the concept of a "fair and impartial trial" is not only an element of the rights of the accused, but rather like a general concept relating both to the rights of the accused and the rights of victims. Hence, the OPCD's assertion cannot succeed.

⁵⁵ ICC-02/05-110: Pre-Trial Chamber I's *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*, 3 December 2007.

4. The jurisdiction of the Pre-Trial Chamber and the Court

67. In the view of the OPCD, by granting the procedural status of “victim” to the applicants at the situation stage, the Pre-Trial Chamber and the Court might exceed their jurisdiction.

68. The OPCD bases this representation on the premise that granting victim status necessarily requires the Pre-Trial Chamber to rule on the actuality of the crimes alleged by the victims, which could lead it to exceed its jurisdiction if the said crimes were subsequently found not to fall within the jurisdiction of the Court, but within the jurisdiction of national courts.

69. The Pre-Trial Chamber has clearly stated that:

[...] the complementarity principle is applicable to the ongoing proceedings relating to the investigation in the Situation [...]. However, it is inapplicable to the application process because the object and purpose of the application process is confined to the determination of whether the procedural status of victim can be granted to applicants in such ongoing proceedings.⁵⁶

70. Furthermore, it should be pointed out that the statutory mechanisms for ensuring respect of the principle of complementarity, such as the warning mechanism in article 15(2) mentioned by the OPCD, pertain in the main to the investigation stage, which is the natural stage at which the issue of competition may arise between the two legal systems and two modes of prosecution. Conversely, the effect of the application process, whose purpose is to grant victim status to applicants, is not to determine whether the charged person is responsible for the crimes alleged by the victims, as this issue falls within the case and trial stages.

71. This is, in fact, the reading evident in article 15(4) of the Statute, which states that when the Pre-Trial Chamber authorises the Prosecutor to commence an investigation – which implies an examination of the admissibility of the crimes alleged and, by extension, the jurisdiction of the Court – this is only a provisional

⁵⁶ ICC-02/05-110.

assessment, conducted as it is “without prejudice to subsequent determinations by the Court with regard to jurisdiction and admissibility of a case”.

72. Accordingly, the arguments advanced by the OPCD must be rejected.

B. The application process, in response to the specific arguments of the OPCD

1. Characteristics of the application process

a) Autonomous nature of the process

73. Recalling that the application process is governed by rule 89 of the *Rules of Procedure and Evidence* and by regulation 86 of the *Regulations of the Court*, the Court established the principle of autonomy of the application process, its object being confined to the determination of whether to grant victim status to applicants:

[T]he application process is prior to, distinct and separate from, the determination and exercise of the modalities of participation by those to whom the procedural status of victim has been granted.⁵⁷

74. The Court further observed that the application process is also distinct from the general criminal proceedings applicable before the Court, the aim of which is to bring to light and try the crimes committed:

[T]he application process is not related to questions pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witnesses as it only aims at determining whether the procedural status of victim should be granted to applicants. Hence, it can be distinguished from criminal proceedings before the Court [...] which are governed by specific articles, rules and regulations.⁵⁸

75. Having set out these principles in the context of the situation in Darfur, Pre-Trial Chamber I merely recalled this normative position in the decision under appeal by the OPCD.⁵⁹

⁵⁷ ICC-02/05-110, para. 5.

⁵⁸ ICC-02/05-110, para. 6.

⁵⁹ ICC-01/04-417, paras. 5-6.

b) Non-prejudicial nature of the process

76. Pre-Trial Chamber I stated that, in the context of the application process, its analysis did not pertain to assessing the credibility of the applicants or engaging in a process of corroboration.⁶⁰

77. Accordingly, granting victim status cannot be prejudicial to the Defence, since it has no direct bearing on the reinforcement of a potential charge.

78. Pre-Trial Chamber I was indeed able to specify that, as a result of the limited purpose of the application process, the safeguards applicable in criminal proceedings before the Court were not applicable to the application process.⁶¹

ii) Restriction of the information required

79. Reiterating rule 85(a) of the *Rules of Procedure and Evidence*, according to which “[v]ictims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”,⁶² Pre-Trial Chamber I identified four criteria for considering applications for participation: the natural person criterion, the notion of harm, the context of a crime within the jurisdiction of the Court and the causal link between the crime committed and the harm suffered.⁶³

80. The information required for the purposes of the application process and necessary for a decision to be taken were listed: the applicant’s identity, the date of the crime, the location of the crime, a description of the harm suffered in connection with the crime within the jurisdiction of the Court, proof of the applicant’s identity, the express consent of the victim if he or she is being represented or the document

⁶⁰ ICC-01/04-100, para. 101.

⁶¹ ICC-02/05-110, para. 8 and ICC-01/04-417, para. 8.

⁶² ICC-ASP/1/3, *Rules of Procedure and Evidence*, rule 85(a).

⁶³ ICC-01/04-101, paras. 77-94.

proving any legal representation, and the signature or thumb-print of the applicant on the last page of the form.⁶⁴

81. Regulation 86(2) of the Regulations of the Court enumerates the information which must be provided in the standard forms or applications for participation by victims:

- (a) The identity and address of the victim, or the address to which the victim requests all communications to be sent; in case the application is presented by someone other than the victim in accordance with rule 89, sub-rule 3, the identity and address of that person, or the address to which that person requests all communications to be sent;
- (b) If the application is presented in accordance with rule 89, sub-rule 3, evidence of the consent of the victim or evidence on the situation of the victim, being a child or a disabled person, shall be presented together with the application, either in writing or in accordance with rule 102;
- (c) A description of the harm suffered resulting from the commission of any crime within the jurisdiction of the Court, or, in case of a victim being an organization or institution, a description of any direct harm as described in rule 85 (b);
- (d) A description of the incident, including its location and date and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the harm as described in rule 85;
- (e) Any relevant supporting documentation, including names and addresses of witnesses;
- (f) Information as to why the personal interests of the victim are affected;
- (g) Information on the stage of the proceedings in which the victim wishes to participate, and, if applicable, on the relief sought;
- (h) Information on the extent of legal representation, if any, which is envisaged by the victim, including the names and addresses of potential legal representatives, and information on the victim's or victims' financial means to pay for a legal representative.

82. The OPCD maintains that the Chamber cannot fix a generic model for the list of information required for the purposes of the application process, as such information depends on the victims' nationality and the reliability of the official documents produced. The OPCD concludes that the Chamber cannot deny it disclosure of information deriving from that list.⁶⁵

⁶⁴ ICC-01/04-374, para. 12.

⁶⁵ ICC-01/04-440, para. 65.

83. The OPCD's interpretation is, however, erroneous. The Chamber neither draws up a list of the requisite documents nor enumerates the requisite information on a discretionary basis: it merely repeats what is set out in regulation 86(2) of the *Regulations of the Court*.

84. Accordingly, despite the fact that, pursuant to the *Regulations of the Court*, "[b]efore deciding on an application, the Chamber may request, if necessary with the assistance of the Registrar, additional information from, inter alia, States, the Prosecutor, the victims or those acting on their behalf or with their consent",⁶⁶ these extrinsic documents are not part of the application *strictu sensu* and serve only to enlighten the judges prior to their decision, but will not form the basis thereof.

2. Applications submitted by indirect victims

a) Disclosure of the applications to the Defence

85. Rule 89(1) of the *Rules of Procedure and Evidence* states that "the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber".⁶⁷ In this respect, the Chamber's only obligation is to order the disclosure of documents calling for observations.⁶⁸ The Chamber is therefore under no obligation to disclose to the Defence extrinsic documents which, although attached to the application, do not form the basis for its decision.⁶⁹

86. Above all, it should be recalled that we are referring here to victims and not to witnesses whose credibility the Defence must ascertain.

87. In its request of 31 August 2007, the OPCD sought the disclosure of any information which may concern the applicants' possible pre-existing medical conditions, possible national criminal records, any relationship they might have with

⁶⁶ ICC-BD/01-01-04/Rev.01-05, *Regulations of the Court*, regulation 86(7).

⁶⁷ ICC-ASP/1/3, *Rules of Procedure and Evidence*, rule 89(1).

⁶⁸ ICC-01/04-374, para. 35.

⁶⁹ ICC-02/05-110, para. 15.

persons who have been granted victim status by the Court, any relationship they might have with the witnesses or interpreters, if the interpreters or witnesses have submitted applications to participate in the proceedings, and the qualifications of the interpreters mentioned.⁷⁰

88. The OPCD cannot argue that it is unable to effectively exercise its right to make observations on the application without this information,⁷¹ when such information is outside the scope of that required of the alleged victims in connection with their applications for participation. This information does not fall within the disclosure rules under rule 89(1) of the *Rules of Procedure and Evidence*, as the Chamber will not provide a copy of information which it did not itself require to take its decision.

89. In any event, the OPCD cannot rely on some deviation from the fair trial principle as a result of article 89(1) being inapplicable to documents which are extrinsic to the applications for participation. The very disclosure of the applications for participation to the parties is proof that basic procedural rules apply. Simply put: the disclosure of extrinsic documents is of no use to the Defence at this stage, since the applicant has not yet acquired victim status and cannot influence the prosecution.

90. Similarly, when the OPCD justifies its request by a desire to forestall frivolous applications for participation, it overlooks the fact that the founding texts of the Court and its jurisprudence have clearly circumscribed the notion of victim status and that, after all, it can only make observations.

91. Thus, the OPCD's application could not succeed and the decision of Pre-Trial Chamber I should be upheld in this respect.

⁷⁰ ICC-01/04-382.

⁷¹ ICC-01/04-440, para. 64.

b) The Prosecutor's disclosure of potentially exculpatory evidence

92. In its request of 28 August 2007, the OPCD requested that the Prosecutor disclose to it any information in the applications for participation concerning the intensity of hostilities in the villages mentioned in the applications, the presence of persons affiliated with the armed groups in these villages, possible links between the applicants and the armed groups, possible acts of violence committed by the applicants and the applicants' overall credibility.⁷²

93. The OPCD argues that this information must be disclosed as it could be exculpatory to a potential future suspect or accused, pursuant to article 67(2) of the *Rome Statute* and rule 77 of the *Rules of Procedure and Evidence*.

i) The scope of article 67(2) of the Statute

94. Under article 67(2), "the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide [...]".⁷³

95. The Court has in fact taken a decision in this, as Pre-Trial Chamber I stated that the application process is not likely to affect issues pertaining to the guilt or innocence of a suspect or an accused or even the credibility of Prosecution witnesses.⁷⁴

96. Accordingly, the provisions of article 67(2) are by no means applicable to the requested information.

⁷² ICC-01/04-378.

⁷³ A/CONF.183/9, *Rome Statute*, article 67(2).

⁷⁴ ICC-01/04-100; ICC-01/04-170.

97. Moreover, it must be emphasised that the Chamber did indicate that the alleged victim must not be equated with a witness whose credibility would be ascertained:

[T]he role of Applicants in the application process can by no means be confused with that of witnesses in criminal proceedings.⁷⁵

ii) The scope of rule 77 of the Rules

98. Rule 77 requires the disclosure of three types of information: material which the Prosecution will rely on at the confirmation hearing or at trial, material to be used for the preparation of the defence for the confirmation hearing or trial, and material obtained directly from or which belonged to the accused or the suspect.

99. As seen above, the application process does not affect issues pertaining to the guilt or innocence of a suspect or accused. Accordingly, the material on which this process depends cannot serve as a basis for the prosecution or the preparation of the defence. Since the application for participation process is distinct from the overall pre-trial process, the documents relating thereto are not part of the evidence which may be used by the Prosecutor to support his charges.

100. Since by its very nature the material does not come from a suspect or an accused person but from alleged victims, the OPCD's request does not fall within the scope of rule 77.

101. Accordingly, this request could also not succeed and Pre-Trial Chamber I's decision in this respect should be upheld.

⁷⁵ ICC-02/05-110, para. 20.

III. CONCLUSIONS

For these reasons, the Legal Representatives of a/0071/06, VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 request that the Appeals Chamber uphold the decisions of the Pre-Trial Chamber dated 7 and 24 December 2007.

[signed]

Emmanuel DAOUD

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

[signed]

Patrick BAUDOUIN

Legal Representative of a/0071/06

Dated this 8 July 2008

At Paris