

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05 OA OA2 OA3

Date: 2 February 2009

THE APPEALS CHAMBER

Before:

**Judge Georgios M. Pikis, Presiding Judge
Judge Philippe Kirsch
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Daniel David Ntanda Nsereko**

SITUATION IN DARFUR

Public Document

Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

The Office of Public Counsel for the Defence

Mr Xavier Keïta

Legal Representatives of Victims

Wanda M. Akin
Raymond M. Brown

REGISTRY

Registrar

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court (hereinafter “Court”),

In the appeal of the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber I entitled “Decision on the Requests of the OPCD and the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor” of 3 December 2007 (ICC-02/05-110),

In the appeals of the Prosecutor and the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber I entitled “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” of 6 December 2007 (ICC-02/05-111)¹,

After deliberation,

Delivers unanimously the following

JUDGMENT

1. The decision of Pre-Trial Chamber I of 3 December 2007 entitled “Decision on the Requests of the OPCD and the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor” (ICC-02/05-110) is reversed.
2. The decision of Pre-Trial Chamber I of 6 December 2007 entitled “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” (ICC-02/05-111)² is reversed.

¹ A corrigendum to the decision of 6 December 2007 was issued on 14 December 2007 entitled “Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07” (ICC-02/05-111-Corr).

² A corrigendum thereto was issued (ICC-02/05-111-Corr).



REASONS

I. PROCEDURAL HISTORY

1. The subject-matter of each one of the three appeals under review is identical, to the following effect: “Is it possible to acknowledge to victims general participatory rights in the investigation of crimes committed in a situation referred to the Court?”³

2. On 18 June 2008, the Appeals Chamber decided that efficiency in the disposition of the three appeals justifies their joint consideration “for the purpose of determining victim participation in the appeals”⁴. A decision to the same effect and for similar reasons was taken on 30 June 2008⁵ in appeals OA4, OA5, OA6 (DRC)⁶, three appeals raising issues identical to the present ones. Sequentially, the issues raised in the three appeals were addressed in the same judgment, an exercise, as the Appeals Chamber underlined in its judgment of 19 December 2008⁷ in the appeals OA4, OA5, OA6 (DRC) “conducive to the interests of justice given that their subject matter is identical, avoiding in that way

³ *Democratic Republic of the Congo*, “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007” 19 December 2008 (ICC-01/04-556), para. 36.

⁴ *Darfur, Sudan* “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 6 December 2007” 18 June 2008 (ICC-02/05-138), para. 27.

⁵ *Democratic Republic of the Congo* “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” 30 June 2008 (ICC-01/04-503).

⁶ See *Democratic Republic of the Congo*, OA4: “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’” 4 February 2008 (ICC-01/04-440); OA5: “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” 18 February 2008 (ICC-01/04-455); OA6: “Prosecution’s Document in Support of Appeal against the 24 December 2007 Decision on the Victims’ Applications for Participation in the Proceedings” 18 February 2008 (ICC-01/04-454).

⁷ *Democratic Republic of the Congo*, “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007” 19 December 2008 (ICC-01/04-556).



unnecessary repetition”⁸. As in the appeals OA4, OA5, OA6 (DRC), in this case too “[t]he three appeals have a common theme: the existence of power, if any, to accord procedural status to victims with a view to participating in the Prosecutor’s investigations in a situation”⁹.

3. The three issues raised for resolution by the Appeals Chamber, identical to three of the four issues raised in the appeals OA4, OA5 and OA6 (DRC), are recited below:

Appeal OA (Darfur) by the OPCD:

whether 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.¹⁰

Appeal OA2 (Darfur) by the Prosecutor:

whether a “procedural status of victim” can be granted in the proceedings, independent of victims who are granted the right to participate within the terms of Article 68(3) and Rule 89, and provides for a definition of the personal interests diverting from the Appeals Chamber’s jurisprudence¹¹

Appeal OA3 (Darfur) by the OPCD:

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;¹²

⁸ *Ibid*, para. 37.

⁹ *Ibid*, para. 1.

¹⁰ *Darfur, Sudan* “Decision on the 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) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor” 23 January 2008 (ICC-02/05-118), page 8.

¹¹ *Darfur, Sudan* “Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation” 6 February 2008 (ICC-02/05-121), page 4.

¹² *Ibid*, pages 4 and 5.



4. The fourth issue in the appeals OA4, OA5 and OA6 (DRC)¹³ was the following: “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?”¹⁴ The Appeals Chamber refrained from addressing it in view of its decision on the other three issues.¹⁵

5. The arguments of the appellants, namely OPCD in OA and OA3 (Darfur) and the Prosecutor in OA2 (Darfur), in support of their appeals that victims have no right to participate in the investigations into crimes are similar, if not identical, to the ones advanced in the appeals OA4, OA5 and OA6 (DRC).¹⁶ Also, the arguments of victims a/0011/06 to a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07 and a/0036/07 to a/0038/07 to the contrary are in essence to the same effect as those of victims in the appeals OA4, OA5 and OA6 (DRC), i.e. that victims do have a right to participate in the Prosecutor’s investigations into crimes committed in the context of a

¹³ Raised in the appeal OA5 (DRC).

¹⁴ *Democratic Republic of the Congo* “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” 6 February 2008 (ICC-01/04-444), page 7.

¹⁵ See *Democratic Republic of the Congo*, “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007” 19 December 2008 (ICC-01/04-556), para. 58: “Having determined that victims cannot be granted procedural status of victim entitling them to participate generally in the investigation, leading to the collapse of the foundation of the decisions of the Single Judge, the particulars to be provided for a person to qualify as a victim on grounds of moral harm becomes a theoretical one and need not be answered.”

¹⁶ See *Darfur, Sudan, OA*: “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’” 4 February 2008 (ICC-02/05-119), “Prosecution’s Response to OPCD’s Appeal Brief and 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 Material’” 15 February 2008 (ICC-02/05-123), *OA2*: “Prosecution’s Document in Support of Appeal against the 6 December 2007 Decision on the Victims’ Applications for Participation in the Proceedings” 18 February 2008 (ICC-02/05-125), “OPCD’s Response to Prosecution’s Document in Support of Appeal against the 6 December 2007 Decision on the Victims’ Applications for Participation in the Proceedings” 29 February 2008 (ICC-02/05-131); *OA3*: “OPCD Appeal Brief on ‘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’” 18 February 2008 (ICC-02/05-126), “Prosecution’s Response to OPCD’s Document in Support of Appeal against the 6 December 2007 Decision on the Victims’ Applications for Participation in the Proceedings” 29 February 2008 (ICC-02/05-130).



situation.¹⁷ In their submission, the status acknowledged to them, “victim procedural status”, is both feasible under the law and warranted by their circumstances.

II. DETERMINATION:

6. In its judgment of 19 December 2008¹⁸, disposing of the appeals OA4, OA5, OA6 (DRC), the Appeals Chamber reversed the *sub judice* decisions bearing on the granting of procedural status to victims that would entitle them to participate generally in the Prosecutor’s investigations into a crime or crimes within the jurisdiction of the Court. The reasons for so holding are set out in the determinative part of that judgment, extending from paragraphs 36 to 59. The Appeals Chamber adopts those reasons without need arising either to reframe or rephrase them.

7. This being the case, the Appeals Chamber can do no better than to reproduce them as part of the reasoning of this case, leading inexorably to the reversal of the two decisions under appeal:¹⁹

36. The issue common to all three appeals is the following: Is it possible to acknowledge to victims general participatory rights in the investigation of crimes committed in a situation referred to the Court? Only this question poses for resolution and shall be determined in this appeal. The present judgment should not be understood as determining any other issue in relation to victim participation.

¹⁷ See *Darfur, Sudan* “Consolidated Statement of Views and Concerns of the Legal Representatives of the Participating Victims (a/0011/06 to a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07 and a/0036/07 to a/0038/07) With Respect to the Appeal Chamber’s 18 June 2008 Decision on Victim Participation in the Interlocutory Appeals of the Office of Public Counsel for the Defence and the Office of the Prosecutor” 24 June 2008 (ICC-02/05-144); see also “Prosecution’s Response to Consolidated Statement of Views and Concerns of Participating Victims pursuant to Appeals Chamber’s Decision of 18 June 2008” 3 July 2008 (ICC-02/05-145) and “OPCD’s Response to the 24 June 2008 Consolidated Statement of Views and Concerns of the Legal Representatives of the Participating Victims (a/0011/06 to a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07 and a/0036/07 to a/0038/07)” 3 July 2008 (ICC-02/05-146-Conf).

¹⁸ *Democratic Republic of the Congo*, “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007” 19 December 2008 (ICC-01/04-556).

¹⁹ The text of the footnotes in the cited passage is identical to the original; the numbering is different from the original.



37. In the decision of the Appeals Chamber of 30 June 2008²⁰ concerning victims' applications to participate in appeal proceedings, the Appeals Chamber dealt with the applications raised in all three appeals in the same spell, commenting, "[v]iewed collectively, the issues concern the manner in which applications by victims to participate at the investigation stage of a situation and the pre-trial stage of a case should be addressed. In the interests of efficiency the Appeals Chamber will consider the appeals jointly for the purpose of determining victim participation in these appeals"²¹. Thus, the three appeals will be addressed in the same judgment, an exercise conducive to the interests of justice given that their subject matter is identical, avoiding in that way unnecessary repetition.

[...]

39. The following propositions emerge from the Impugned Decisions of 7 December 2007 (OA4) and 24 December 2007 (OA5 and OA6):

- a. Victim procedural status can be granted to victims outside a judicial proceeding, entitling them to participate generally in the investigatory process.
- b. The investigation into a situation is a stage at which victim participation under article 68 (3) of the Statute can be authorised.
- c. Article 68 (3) of the Statute grants discretion to the Pre-Trial Chamber to determine "the modalities of participation which are attached to such procedural status".

40. In the *sub judice* decision in the appeal OA4 it is stated that the personal interests of victims are generally affected by the outcome of an investigation into

²⁰ *Democratic Republic of the Congo* "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" 30 June 2008 (ICC-01/04-503).

²¹ *Ibid.*, para. 44



a situation, legitimising victim participation therein.²² The following passage from the decision of the Pre-Trial Chamber is hard to decipher:

[...] that an assessment of the personal interests of the victims in specific proceedings carried out during these two stages of the proceedings is only to be conducted for the determination of the specific set of procedural rights attached to the procedural status of victim.²³

Seemingly, what is sought to be conveyed thereby, is the following. Procedural status can be granted to victims at the investigation stage of a situation entitling them to express their views and concerns generally in respect of the investigatory process.

41. In the Impugned Decision the subject of the appeals OA5 and OA6, the Single Judge is somewhat more informative about the implications of procedural status of victims. Reciting the first decision of the Pre-Trial Chamber on victim participation,²⁴ she states, “the Chamber considered that it was not necessary to determine in any great detail at this stage of the proceedings the precise nature of the causal link between the crime and the alleged harm and that the determination of a single instance of harm suffered was sufficient”²⁵. What emerges therefrom is that no need arises at the investigation stage to indicate the nexus between a crime and the harm suffered by a victim, relieving the victims thereby from the obligation to demonstrate affection of personal interests by the investigation as such. The conclusion of the Single Judge on the matter is revealed in the following passage of her decision:

a) the investigation stage of a situation and the pre-trial stage of a case are appropriate stages of the proceedings for victim participation as provided for in article 68 (3) of the Statute; and that b) it is therefore possible to have the status of victim

²² See Impugned Decision OA4, para. 3.

²³ Impugned Decision OA4, para. 3.

²⁴ See *Democratic Republic of the Congo* “Decision on the applications for participation in the proceedings of VPRS 1, VPRS2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” 17 January 2006 (ICC-01/04-101-tEN-Corr).

²⁵ Impugned Decision OA5 and OA6, para. 3.



authorised to participate in situation- and case-related proceedings before the Pre-Trial Chamber.²⁶

42. Evidently, the Impugned Decisions reflect the approach of the Pre-Trial Chamber in its decision²⁷ of 17 January 2006 as to the implications of such participation. This is explained in paragraph 71 of the decision of 17 January 2006, the following extract from which records the understanding of the Pre-Trial Chamber on the matter:

In the light of the core content of the right to be heard set out in article 68 (3) of the Statute, persons accorded the status of victims will be authorised, *notwithstanding any specific proceedings being conducted in the framework of such an investigation*, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in the DRC. [*emphasis added*]

43. The notion of procedural status of victims is nowhere defined, and it is difficult to attach a specific meaning to it. Are there other forms of victim status? Is the term “procedural status of victim” used in order to distinguish such status from the status of a victim having a right to participate in concrete judicial proceedings? Moreover, is there a substantive victim status in contrast to a procedural one?

44. The term “procedural status of victim” is not a phrase with a distinct meaning or a word coined as a term of art. The word “procedural” indicates something pertaining to procedure. Procedure is the code regulating the exercise of judicial power, known as adjectival law. It is contrasted to substantive law, definitive of the rights, duties and obligations of a person. The word “status” signifies a person’s legal condition, whether personal or proprietary.²⁸ Procedure is not of itself determinative of the status of any person.

²⁶ Impugned Decision OA5 and OA6, para. 5.

²⁷ See *Democratic Republic of the Congo* “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 (ICC-01/04-101-tEN-Corr).

²⁸ See *Garner B A* (ed.) *Black’s Law Dictionary*, Eighth Edition, page 1447; see also *Shorter Oxford English Dictionary* on historical principles, Volume 2, N-Z, Fifth Edition, page 3011.



45. The article of the Statute that confers power upon a victim to participate in any proceedings is article 68 (3). What emerges from the case law²⁹ of the Appeals Chamber is that participation can take place only within the context of judicial proceedings. Article 68 (3) of the Statute correlates victim participation to “proceedings”, a term denoting a judicial cause pending before a Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible. The modalities of participation under article 68 (3) of the Statute must be specified by the Chamber in a manner not prejudicial to the rights of the person under investigation or the accused, and in a way non-antagonistic to a fair and impartial trial. A person has the right to participate in proceedings if a) he/she qualifies as a victim under the definition of this term provided by rule 85 of the Rules, and b) his/her personal interests are affected by the proceedings in hand in, i.e. by the issues, legal or factual, raised therein.

46. Rules 89, 91 and 92 of the Rules relied upon by the Pre-Trial Chamber as supporting the position that victims can participate at the investigation stage of a situation outside the framework of judicial proceedings, far from supporting the position adopted, contradict it. Rule 89 of the Rules is specifically fashioned to the provisions of article 68 of the Statute and aims to regulate the steps that must be taken in order for a victim to participate in judicial proceedings. Rule 91 of the

²⁹ See *inter alia* *Prosecutor v Lubanga Dyilo* “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’” 13 February 2007 (ICC-01/04-01-06-824) OA7; *Prosecutor v Lubanga Dyilo* “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” 13 June 2006 (ICC-01/04-01/06-925) (Separate opinions by Judge Pikis and Judge Song); *Prosecutor v Lubanga Dyilo* “Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision entitled ‘Decision on Victims’ Participation’” 16 May 2008 (ICC-01/04-01/06-1335) (separate opinion of Judge Pikis, partly dissenting opinion of Judge Song); *Democratic Republic of the Congo* “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” 30 June 2008 (ICC-01/04-503); *Darfur* “Decision on Victim Participation I the appeal of the Office of Public counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 6 December 2007” 18 June 2008 (ICC-02/05-138); *Prosecutor v Lubanga Dyilo* “Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008” 11 July 2008 (ICC-01/04-01/06-1432).



Rules acknowledges that victims may participate through a legal representative whereas rule 92 of the Rules adverts to notification of judicial proceedings to victims and their legal representatives in which they may have an interest to seek participation and decisions which may affect them. The class of victims to whom notification must be given is also specified.³⁰

47. Rule 92 of the Rules has one other aspect that merits reference to. It exempts from its provisions proceedings under Part 2 of the Statute (see rule 92 (1) of the Rules). Articles 15 (3) and 19 (3) do belong to that Part of the Statute. They make provision, the former for representations by victims in relation to the authorisation of an investigation, and the latter for the submission of observations by victims with regard to the jurisdiction of the Court to take cognisance of a case or its admissibility. Rules 50 and 59 of the Rules regulate, respectively, the procedure applicable to a) victims' representations, and b) the submission of victims' observations.

48. Rule 93 confers power upon a Chamber to seek the views of victims or their legal representatives on any matter arising in the course of proceedings before it, including issues referred to it pursuant to rules 107, 109, 125, 128, 136, 139, and 199 of the Rules. The views of victims may be solicited independently of whether they participate or not in any given proceedings before the Court. Initiative for soliciting the views of victims under this rule rests entirely with a Chamber. Victims may express their views on any given subject identified by the Chamber. Here again, the process is distinguished from victim participation under article 68 (3) of the Statute.

49. Regulation 86 (6) of the Regulations of the Court does not envisage participation outside the confines of rule 89 of the Rules. It merely regulates victim participation under article 68 (3) of the Statute.

³⁰ Sentence 2 of rule 92 (2) of the Rules reads: "Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question."



50. There is yet another species of proceedings that must be distinguished from participation under article 68 (3) of the Statute. These are proceedings which the victims may initiate themselves under statutory provisions. Pursuant to the provisions of article 75 of the Statute and rule 94 of the Rules, they may make a request for reparations against the convicted person in the manner envisaged by the aforesaid rule. Furthermore, victims as well as witnesses may move the Court to take protective measures for their safety, physical and psychological well-being, dignity and privacy as foreseen *inter alia* in article 68 (1) and (2) of the Statute and rules 87 and 88 of the Rules. The protection of victims and witnesses and that of members of their families may justify the non-disclosure of their identity prior to the trial, as provided in rule 81 of the Rules.

51. The initial appraisal of a referral of a situation by a State Party, in which one or more crimes within the jurisdiction of the Court appear to have been committed as well as the assessment of information reaching the Prosecutor and in relation to that the initiation by the Prosecutor of investigations *proprio motu* are the exclusive province of the Prosecutor (see, *inter alia*, articles 14, 15, 53, and 54 of the Statute).

52. The domain and powers of the Prosecutor are outlined in article 42 of the Statute, paragraph 1 of which reads:

The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not see or act on instructions from any external source.

Manifestly, authority for the conduct of investigations vests in the Prosecutor. Acknowledgment by the Pre-Trial Chamber of a right to victims to participate in the investigation would necessarily contravene the Statute by reading into it a power outside its ambit and remit.



53. In their submissions the victims argue that granting them victim status at the investigation stage would, *inter alia*, enable them to “clarify the facts”³¹, “to make known what was inflicted upon them”³² and that, following this information, the Prosecutor would investigate the events.³³ In the view of the Appeals Chamber, there is ample scope within the statutory scheme of the Statute for victims and anyone else with relevant information to pass it on to the Prosecutor without first being formally accorded “a general right to participate”. For example under Article 15 (2) the Prosecutor is authorised to receive information from, *inter alia*, any “reliable source” – including victims. He is similarly authorised under article 42 (1) to receive and consider “any substantiated information on crimes within the jurisdiction of the Court”. Victims may thus make representations to the Prosecutor on any matter pertaining to the investigations and to their interests. They are also specifically granted the right to make representations under articles 15 (3) and 19 (3) of the Statute.

54. Furthermore, victims should be reminded that their protection and the sustenance of their interests is a recurring theme of the Statute. Article 54 (1) (b) of the Statute lays down that in carrying out his investigations, the Prosecutor must “respect the interests and personal circumstances of victims and witnesses [...]”. Article 53 (1) (c) of the Statute makes the interests of victims one of the factors to which the Prosecutor should attach due importance in deciding whether to start an investigation into a particular crime. The interests of victims are likewise a factor to be taken into account by the Prosecutor in deciding whether to mount a prosecution. By the terms of article 68 (1) of the Statute, the Prosecutor is bound to take measures protective of the safety and well-being of victims. The Prosecutor is equally under obligation to take measures or request that measures be taken for the protection of any person including no doubt victims (article 54 (3)

³¹ *Democratic Republic of the Congo* “Observations of the OPCV as Legal Representative of Victims a/0007/06, a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06 and a/0209/06 in Response to the Interlocutory Appeals Filed by the Prosecution and the OPCD against the Decisions of 7 and 24 December 2007” 8 July 2008 (ICC-01/04-507-tENG-Corr), para. 27.

³² *Ibid.*, para. 64

³³ See *ibid.*



(f) of the Statute). Information that victims can provide to the Prosecutor about the scope of his investigations cannot but be welcome as it could provide nothing other than assistance.

55. Participation pursuant to article 68 (3) of the Statute is confined to proceedings before the Court, and aims to afford victims an opportunity to voice their views and concerns on matters affecting their personal interests. This does not equate them, as the case law of the Appeals Chamber conclusively establishes, to parties to the proceedings before a Chamber, restricting their participation to issues arising therein touching upon their personal interests, and then at stages and in a manner not inconsistent with the rights of the accused and a fair and impartial trial.³⁴

56. The Pre-Trial Chamber also acknowledges in its decision that article 68 (3) of the Statute is the provision that confers a right upon victims to participate in any proceedings before a Chamber. Nevertheless, the Pre-Trial Chamber adopts the position that the provision could be extended beyond its self-evident confines, to areas outside its ambit. Article 68 (3) of the Statute is treated as a hybrid provision, allowing the participation of victims in any matter dealt with by the Statute, including investigations. This is a position that can find no justification under the Statute, the Rules of Procedure and Evidence or the Regulations of the

³⁴ See *Prosecutor v Lubanga Dyilo* “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’” 13 February 2007 (ICC-01/04-01-06-824) OA7; *Prosecutor v Lubanga Dyilo* “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” 13 June 2006 (ICC-01/04-01/06-925) (Separate opinions by Judge Pikis and Judge Song); *Prosecutor v Lubanga Dyilo* “Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision entitled ‘Decision on Victims’ Participation’” 16 May 2008 (ICC-01/04-01/06-1335) (separate opinion of Judge Pikis, partly dissenting opinion of Judge Song); *Democratic Republic of the Congo* “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” 30 June 2008 (ICC-01/04-503); *Darfur* “Decision on Victim Participation I the appeal of the Office of Public counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 6 December 2007” 18 June 2008 (ICC-02/05-138); *Prosecutor v Lubanga Dyilo* “Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008” 11 July 2008 (ICC-01/04-01/06-1432).



Court. On the other hand, it must be clarified that victims are not precluded from seeking participation in any judicial proceedings, including proceedings affecting investigations, provided their personal interests are affected by the issues arising for resolution.

57. Having determined that the Pre-Trial Chamber cannot grant the procedural status of victim entailing a general right to participate in the investigation, the Appeals Chamber is not in a position to advise the Pre-Trial Chamber as to how applications for participation in judicial proceedings at the investigation stage of a situation should generally be dealt with in the future, in the absence of specific facts. It is for the Pre-Trial Chamber to determine how best to rule upon applications for participation, in compliance with the relevant provisions of the Court's texts. The Pre-Trial Chamber must do so bearing in mind that participatory rights can only be granted under article 68 (3) of the Statute once the requirements of that provision have been fulfilled.

58. [...]

59. In the result, the decisions of the Pre-Trial Chamber acknowledging procedural status to victims, entitling them to participate generally in the investigation of a situation are ill-founded and must be set aside. The reversal of the Impugned Decisions is the unavoidable outcome of these proceedings.

8. For similar reasons, the Appeals Chamber repeats that the *sub judice* decisions are liable to be reversed. And so it is ordered.

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



Judge Georghios M. Pikis
Presiding Judge

Dated this 2nd day of February 2009

At The Hague, The Netherlands