

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04 OA4 OA5 OA6

Date: 19 December 2008

**THE APPEALS CHAMBER**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**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 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**

**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**

Mr Emmanuel Daoud  
Mr Patrick Baudoin  
Ms Carine Bapita Buyangandu  
Mr Joseph Keta

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda, Principal Counsel

**REGISTRY**

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**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 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” of 7 December 2007 (ICC-01/04-417),

In the appeals of the Office of Public Counsel for the Defence and the Prosecutor against the decision of Pre-Trial Chamber I entitled “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” of 24 December 2007 (ICC-01/04-423)<sup>1</sup>,

After deliberation,

*Delivers* unanimously the following

## JUDGMENT

1. The decision of Pre-Trial Chamber I of 7 December 2007 entitled “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor” (ICC-01/04-417) is reversed.

<sup>1</sup> A corrigendum to the decision of 24 December 2007 was filed entitled “Corrigendum à la ‘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’” 31 January 2008 (ICC-01/04-423-Corr).



2. The decision of Pre-Trial Chamber I of 24 December 2007 entitled “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” (ICC-01/04-423) is reversed.

## REASONS

### I. PROCEDURAL HISTORY

1. The 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.
2. Pre-Trial Chamber I (hereinafter the “Pre-Trial Chamber”, jurisdiction in the matter being exercised by a Single Judge) determined that it is feasible to accord victim procedural status to persons who qualify as victims under rule 85 of the Rules of Procedure and Evidence (hereinafter “Rules”), a status outside the framework of proceedings before a Chamber and irrespective of the impact of concrete judicial proceedings upon their personal interests.
3. In so holding, the Single Judge treaded along the path earlier mapped by the decision of the Pre-Trial Chamber sitting en banc of 17 January 2006.<sup>2</sup> It is in furtherance to the application of victims for participation in the investigation of crimes in the situation in the Democratic Republic of the Congo that the Single Judge rendered her decision adopting the approach of the Pre-Trial Chamber in its aforesaid decision. The

<sup>2</sup> 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)



following passages from that decision provided the *raison d'être* for the two decisions that gave rise to the appeals OA4, OA5 and OA6:

63. 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.

66. In light of this distinction, the Chamber considers that, during the stage of investigation of a situation, the status of victim will be accorded to applicants who seem to meet the definition of victims set out in rule 85 of the Rules of Procedure and Evidence in relation to the situation in question. At the case stage, the status of victim will be accorded only to applicants who seem to meet the definition of victims set out in rule 85 in relation to the relevant case.

72. The right to present their views and concerns and to file material pertaining to the ongoing investigation stems from the fact that the victims' personal interests are affected because it is at this stage that the persons allegedly responsible for the crimes from which they suffered must be identified as a first step towards their indictment. [...]

4. The Appeals Chamber understands the Single Judge to have intended the granting of "procedural status of victim" to confer upon victims participatory rights, entitling them to express their views and concerns generally in respect of the Prosecutor's investigation into the situation. The Appeals Chamber will therefore limit its judgment to that subject and will not rule upon any other issue.

5. The facts surrounding each appeal are outlined below.

#### **A. Appeal OA4:**

6. The substance of the Impugned Decision is encapsulated in the following passages:

2. At the outset, the Single Judge recalls that in the Chamber's decisions of 17 January 2006, 22 June 2006 and 28 July 2006, it held that (a) the stage of investigation into 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 (b) that, accordingly, there is a procedural status of victim in relation to situation and case proceedings before the Pre-Trial Chamber. Moreover, the Chamber has also stated that



(a) article 68(3) of the Statute grants discretion to the Chamber to determine the modalities of participation which are attached to such procedural status; and (b) that the Chamber must exercise its discretion to delineate the modalities of participation “in a manner which is not prejudicial to or inconsistent with the rights of the accused”.

3. The Chamber reached these conclusions after finding (a) that the personal interests of victims are generally affected by the outcome of the investigation into a situation and the pre-trial stage of a case; (b) 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; and (c) that it is with regard to the determination of the modalities of participation that the Chamber must ensure that they are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>3</sup>

7. Victim procedural status at the investigation stage of a situation is distinguished, as stated in the Impugned Decision, from criminal proceedings before the Court or proceedings where the reception of the views of victims is specifically envisaged by the Statute, the Rules of Procedure and Evidences or the Regulations of the Court.

8. The process for the acknowledgment of such status is, in the view of the Single Judge, unrelated to questions affecting the guilt or innocence of a person under investigation or the accused and to questions of reparations.<sup>4</sup>

9. The Single Judge determined that rule 89 of the Rules and regulation 86 of the Regulations of the Court provide the legal basis for the acknowledgment of procedural victim status to a person;<sup>5</sup> a status unrelated to any proceeding before the Court. In the decision granting leave to appeal, it is pointed out that “article 68 (3) of the Statute, rule 89 of the Rules and regulation 86 of the Regulations provide for two distinct and separate procedures [...]”<sup>6</sup>.

<sup>3</sup> *Democratic Republic of the Congo* “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 December 2007 (ICC-01/04-417) (hereinafter “Impugned Decision OA4”), para. 3.

<sup>4</sup> See Impugned Decision OA4, para 6.

<sup>5</sup> See Impugned Decision OA4, para 5.

<sup>6</sup> *Democratic Republic of the Congo* “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



### 1. *Decision Granting Leave to Appeal*

10. The Office of Public Counsel for the Defence (hereinafter “OPCD”) sought leave to appeal the Impugned Decision with regard to two issues, “inextricably linked”<sup>7</sup> as the Pre-Trial Chamber says in its decision granting leave, re-fashioned by the Single Judge as quoted below:

Considering that the Single Judge is of the view that in this context the overarching issue is 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.<sup>8</sup>

### 2. *Submissions of the OPCD*

11. OPCD advocates that participation by victims in any proceeding can only be sought under article 68 (3) of the Statute. The proceedings must be extant, while participation is not unconditional but confined to the expression of their views and concerns at approved stages of the proceedings and in a manner not prejudicial to the rights of the accused or adverse to a fair and impartial trial. Participation cannot be authorised outside the framework of article 68 (3) of the Statute presupposing, as stated,

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86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor” 23 January 2008 (ICC-01/04-438 OA4), page 6; and see Impugned Decision OA4., paras. 5 and 6.

<sup>7</sup> *Democratic Republic of the Congo* “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 Prosecutor”” 23 January 2008 (ICC-01/04-438), page 4.

<sup>8</sup> *Democratic Republic of the Congo* “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 Prosecutor”” 23 January 2008 (ICC-01/04-438), page 6.



the existence of distinct judicial proceedings affecting the personal interests of a victim seeking participation.<sup>9</sup>

12. In the submission of the OPCD, where the legislator intended to bestow upon victims a right to make representations before the Court, not in the capacity of participants, this was done expressly, as is the case of article 15 (3) of the Statute. In the contention of the OPCD, the finding of the Single Judge that there is power to confer upon victims procedural status should be reversed.<sup>10</sup>

### 3. *Response of the Prosecutor*

13. In his response<sup>11</sup>, the Prosecutor espouses by-and-large the position of the OPCD.<sup>12</sup> In his suggestion, affection of personal interests is the “cornerstone” upon which victim participation may be premised. This does not and should not preclude any victim from bringing to the notice of the Prosecutor a matter affecting the investigation into a situation. Not only is the granting of procedural status to a victim outside the framework of article 68 (3) of the Statute impermissible, but such a course would impact adversely on the fairness and impartiality of the proceedings by acknowledging to victims a right and a role outside the remit of the Statute and the Rules.

## **B. Appeals OA5 (by the OPCD) and OA6 (by the Prosecutor) in the Situation in the Democratic Republic of the Congo**

14. The two appeals stem from the same decision of the Single Judge given on 24 December 2007.<sup>13</sup> By virtue of this decision, procedural status was acknowledged to 31 victims in the Situation in the Democratic Republic of the Congo.

<sup>9</sup> See *Democratic Republic of the Congo* “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), paras. 24 to 33.

<sup>10</sup> See *ibid*, page 20.

<sup>11</sup> See *Democratic Republic of the Congo* “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 and Disclosure of Potentially Exculpatory Material’” 15 February 2008 (ICC-01/04-452).

<sup>12</sup> *Ibid.*, paras. 16, 20, 22, 24.

<sup>13</sup> See *Democratic Republic of the Congo* “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,





*I. Decision granting leave*

15. On 6 February 2008, the Single Judge granted leave to the OPCD to appeal the decision in relation to the following two issues:

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?

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?<sup>14</sup>

16. By the same decision, leave was granted to the Prosecutor to appeal the Impugned Decision with regard to the following issue, likewise arising from the Impugned Decision, namely:

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?<sup>15</sup>

17. Sequentially, the Prosecutor and the OPCD mounted two separate appeals numbered OA6 and OA5 respectively.<sup>16</sup>

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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" 24 December 2007 (ICC-01/04-423); a corrigendum thereto was filed entitled "Corrigendum à la "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" 31 January 2008 (ICC-01/04-423-Corr-tENG), hereinafter "Impugned Decision OA5 and OA6".

<sup>14</sup> *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" of 6 February 2008 (ICC-01/04-444), pages 6, 7 and 15.

<sup>15</sup> *Ibid.*, pages 6 and 15

<sup>16</sup> See OA5: *Democratic Republic of the Congo* "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,

### 1. *Arguments of the appellant (OPCD) in OA5*

18. In the submission<sup>17</sup> of the appellant, a situation is an amorphous concept and not “an indivisible proceeding for the purposes of an assessment under article 68 (3)”<sup>18</sup>. Article 68 (3) of the Statute is the only provision conferring a right upon a victim to participate in proceedings before a Chamber. It is to extant, pending proceedings that personal interests of victims must be correlated. Their personal interests must be affected by the issues in any given proceeding is a prerequisite for victim participation. Procedural status of victim or victim procedural status is a notion unknown to the Statute and instruments founded thereupon. In the contention of the appellant, the role of victims under article 68 (3) is reactive. Judicial economy is yet another reason put forward for not countenancing the acknowledgment of victim procedural status.<sup>19</sup> The decision of the Appeals Chamber of 13 February 2007 is invoked in support of the OPCD’s arguments.<sup>20</sup>

19. Moral harm, on the other hand, i.e. harm emanating from physical harm occasioned to another person, could defeat, as alleged, the evidentiary protection provided by rule 89 (4) of the Rules.<sup>21</sup>

### 2. *Response of the Prosecutor*

20. In his response,<sup>22</sup> the Prosecutor adopts in essence the position of the appellant in relation to issue one in the appeal OA5. In his view the affection of the personal interests

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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: *Democratic Republic of the Congo* “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).

<sup>17</sup> See *Democratic Republic of the Congo* “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).

<sup>18</sup> *Ibid.*, para. 32.

<sup>19</sup> See *ibid.*, para. 44.

<sup>20</sup> See *ibid.*, para. 33.

<sup>21</sup> See *ibid.*, para. 48.

<sup>22</sup> See *Democratic Republic of the Congo* “Prosecution’s Response to OPCD Appeal against the 24 December 2007 Decision on the Victims’ Applications for Participation in the Proceedings” 29 February 2008 (ICC-01/04-482).



of a victim by the issues raised in any given proceeding is a *sine qua non* for victim participation. The case law of the Appeals Chamber, to which reference is made,<sup>23</sup> supports, as suggested, this position.

21. The Prosecutor distances himself from the OPCD in relation to the second issue raised on appeal.<sup>24</sup> He does not subscribe to the proposition that in order to substantiate a claim for moral harm, detailed evidence must be provided in relation to the identity of the person physically harmed or his/her relationship to the victim claiming victim status on that account.

### 3. *Arguments of the appellant (Prosecutor) in OA6*

22. In the submission of the appellant (Prosecutor), the decision of the Single Judge is vitiated by the following errors:

- a. Victim status was acknowledged independently of and outside pending judicial proceedings,
- b. "Procedural status of victim" is unknown to the law,
- c. Such status is fraught with confusion and opens the door to victims intruding into the investigation process, the exclusive province of the Prosecutor.<sup>25</sup>

23. The appellant argues that contrary to the decision of the Single Judge, rule 89 (1) of the Rules is fashioned to the needs of article 68 (3) of the Statute. Reference is made, in support of the arguments of the Prosecutor, to the Judgment of the Appeals Chamber of 13 February 2007 and the decision on victim participation of 13 June 2007, and to a passage from one of the separate opinions<sup>26</sup> in the same case.<sup>27</sup> The Prosecutor also draws attention to the fact that, in the exercise of his investigatory tasks, he is duty-bound by article 54 (1) (a) of the Statute to collect both inculpatory and exculpatory evidence. He

<sup>23</sup> See *ibid.*, paras. 22 and 24.

<sup>24</sup> See *ibid.*, paras. 29 *et seq.*

<sup>25</sup> See *ibid.*, page 7 *et seq.*

<sup>26</sup> That of Judge Pikis.

<sup>27</sup> See *Democratic Republic of the Congo* "Prosecution's Response to OPCD Appeal against the 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings" 29 February 2008 (ICC-01/04-482), paras. 16 and 19.



points out that the Single Judge, in coming to her decision, as stated, treaded along the lines of an earlier, legally ill-founded, as alleged, unappealed decision of the Pre-Trial Chamber, where it was held “that the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered”<sup>28</sup>.

#### 4. *Response of the OPCD*

24. On the whole, the OPCD agrees with the position of the appellant. The OPCD concurs with the Prosecutor that the identity of a victim as such is no leeway to victim participation. For a victim to be entitled to participate, he/she must satisfy all the conditions set down in article 68 (3) of the Statute, procedurally articulated in rule 89 of the Rules. The OPCD also refers to decisions of the Appeals Chamber laying emphasis on a case-by-case consideration of the requisites for victim participation underline the importance of identifying affection of personal interests by the issues raised in the distinct proceedings. The remit of rule 103 of the Rules is confined to the power of the Chamber to seek the views of a State or a third party, if it so deems appropriate, in any proceedings. It does not open another avenue for victim participation.<sup>29</sup>

### C. **The position of victims in the appeals OA4, OA5 and OA6**

#### 1. *Submissions of victims*

25. Three groups of victims and a single victim submitted their views and concerns in relation to their personal interests on the *sub judice* issues after authorisation by the Appeals Chamber. Their participation was authorised pursuant to article 68 (3) of the

<sup>28</sup> *Ibid*, para. 26 (making reference to *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)).

<sup>29</sup> See *Democratic Republic of the Congo* “OPCD Response to Prosecution's Document in Support of Appeal against the 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings” 29 February 2008 (ICC-01/04-479).



Statute after the Appeals Chamber concluded that the applicants satisfied the four requisites for victim participation in the proceedings.<sup>30</sup>

26. Brief reference will be made to the principal arguments advanced by the three groups of victims and the singular one in support of the *sub judice* decisions.

27. The first group of victims disputes the admissibility of the appeal OA4. The issues certified were not the ones raised by the appellants. Notwithstanding the fact that the issues certified incorporate the substance of the questions raised by the appellants, the appeals must be dismissed as no power lies with the court to set down issues subject to appeal other than those sought by the parties. They contend that in so holding the Pre-Trial Chamber violated the rule prohibiting deviation from the relief sought by the petitioning party, known by the Latin legal maxim *non ultra petita*.<sup>31</sup>

28. In their submission, rules 50 (1) and (3) of the Rules confer a right upon victims to be heard at the investigation stage. Rule 92 (2) of the Rules is also cited in support of the proposition that it is possible to acknowledge procedural status to victims. Regulation 86 (6) of the Regulations of the Court regulatory of victim participation in proceedings under rule 89 of the Rules is also relied upon in support of their case.<sup>32</sup>

29. They argue that their personal interests are affected by the investigation in a situation and maintain that their participation is justified as it may help in (a) the clarification of facts, (b) the punishment of those responsible and (c) claiming reparations.<sup>33</sup> It is their position that no decision of the Appeals Chamber illuminates the scene with regard to victim participation at the situation stage of investigations.<sup>34</sup>

<sup>30</sup> *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).

<sup>31</sup> See *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), paras. 17 to 20.

<sup>32</sup> See *ibid*, para. 25.

<sup>33</sup> See *ibid*, para. 26.

<sup>34</sup> See *ibid*, para. 28.



Significantly, they submit that acknowledgment of procedural status to victims does not require affection of their personal interests.<sup>35</sup>

30. The second group of victims likewise supports the *sub judice* decision in every respect.<sup>36</sup> They suggest that over time more extensive rights for victims have been recognized nationally and internationally.<sup>37</sup> Article 15 (3) of the Statute and rule 92 (2) of the Rules show, in their contention, the amplitude of the right of victims to participate at the investigation stage.<sup>38</sup> At that point, the object of participation is to bring to the notice of the Prosecutor their suffering and crimes committed of which they are aware. Lastly, they point out that personal interests as such and what the notion imports are not defined by the Statute.

31. In the submission of the third group of victims, article 68 (3) of the Statute confers discretion upon a Chamber to determine the stage at which victim participation is appropriate. If the Pre-Trial Chamber erred in the exercise of its discretion, so they argue, this would not invalidate the *sub judice* decision and for that reason the appeal should be dismissed. There is room for interpreting article 68 (3) of the Statute as providing for victim procedural status at the investigation and pre-trial stages. Reference is also made to the United Nations Declaration of Basic Principles of Justice for Victims and Abuse of Power<sup>39</sup>. Participation does not prejudice the rights of the defence. At the end, they submit that victim participation is not dependent on the impact of specific proceedings on the personal interests of applicants.<sup>40</sup>

<sup>35</sup> See *ibid*, para. 31.

<sup>36</sup> See *Democratic Republic of the Congo* "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" 8 July 2008 (ICC-01/04-508-tENG).

<sup>37</sup> See *ibid*, para. 55.

<sup>38</sup> See *ibid*, para. 57.

<sup>39</sup> Adopted by General Assembly resolution 40/34 of 29 November 1985.

<sup>40</sup> See *Democratic Republic of the Congo* "Observations of the Legal Representative of Victims a/0016/06, a/0018/06, /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 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" 8 July 2008 (ICC-01/04-509).



32. Lastly, the single victim raises arguments similar to those advanced by the three groups of victims in support of the *sub judice* decision, converging in the proposition that victim procedural status can be acknowledged at the stage of investigations into a situation irrespective of personal interests being affected by distinct proceedings.<sup>41</sup>

33. In relation to moral harm, the victims assert that their application for participation before the Pre-Trial Chamber is comprehensive. No further particulars are needed to support their claim, such as the nature of the harm suffered by the primary victim or the exact relationship of that victim to the person who allegedly suffered moral harm.

## 2. *Consolidated Response of Prosecutor to Victims' Submissions*

34. In the submission of the Prosecutor, the case law of the Appeals Chamber, especially the decision of 13 June 2007, confines victim participation to expressing views and concerns with regard to the issues raised in the particular proceedings before a Chamber. Article 68 (3) of the Statute does not provide for victim procedural status. Participation must be linked to and be identified with specific stages of judicial proceedings. Participation may be sought through the process stipulated for in rule 89 (1) of the Rules. Victims' applications can only be assessed with respect to specific proceedings impacting upon their personal interests.<sup>42</sup>

## 3. *Submissions of the OPCD in response to Victims' Submissions*

35. In the contention of the OPCD, the framing of the questions raised by the Pre-Trial Chamber was in its power. In this regard, they cite in support the judgment of the Appeals Chamber of 13 July 2006.<sup>43</sup> In essence, the issues posed for resolution are the same as those for which the appellants sought leave to appeal. Respecting moral harm, they submit that it is necessary for every applicant to provide sufficient information

<sup>41</sup> See *Democratic Republic of the Congo* "Participation of the Legal Representative of Victim a/0105/06 in the Appeal by the Office of Public Counsel for the Defence (OPCD) against the Decision by Pre-Trial Chamber I of 7 December 2007 and in the Appeals by the Prosecutor and the OPCD against the Decision by Pre-Trial Chamber I of 24 December 2007" 8 July 2008 (ICC-01/04-510-tENG).

<sup>42</sup> See *Democratic Republic of the Congo* "Prosecution's Consolidated Response to Four Statements of Views and Concerns of Participating Victims pursuant to Appeals Chamber's Decision of 30 June 2008" 18 July 2008 (ICC-01/04-524).

<sup>43</sup> See *Democratic Republic of the Congo* "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (ICC-01/04-168).



concerning the primary victim and his/her relationship to that person. Historically, article 68 (3) of the Statute derives, as they indicate, from the 1985 United Nations Declaration of Basic Principles of Justice for Victims and Abuse of Power.<sup>44</sup>

## II. DETERMINATION BY THE APPEALS CHAMBER

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.

37. In the decision of the Appeals Chamber of 30 June 2008<sup>45</sup> 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"<sup>46</sup>. 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.

<sup>44</sup> See *Democratic Republic of the Congo* "OPCD's Consolidated Response to the Observations of Legal Representatives of Victims in the Appeal of the OPCD against the Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the OPCD against the Pre-Trial Chamber I's Decision of 24 December 2007" 25 July 2008 (ICC-01/04-529).

<sup>45</sup> *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).

<sup>46</sup> *Ibid.*, para. 44.





### A. Admissibility of appeal OA4

38. The judgment of the Appeals Chamber of 13 July 2006<sup>47</sup> provides a conclusive answer to the submission that the appeal is inadmissible owing to the absence of identification of the issues raised for consideration by the Appeals Chamber with those set down by the parties seeking leave to appeal. A right to appeal arises if the Chamber itself is of the opinion that an issue arising from a decision or an aspect of it merits, for the reasons indicated in article 82 (1) (d) of the Statute, immediate resolution by the Appeals Chamber. Power to state an issue emanating from a decision of a first-instance court vests in that Chamber itself, as the wording of article 82 (1) (d) of the Statute clearly suggests. The judgment of 13 July 2006 removes any doubt there might be on the subject. As stated therein the first instance court's "opinion constitutes the definitive element for the genesis of a right of appeal"<sup>48</sup>. In the same judgment, it is underlined that the Pre-Trial or Trial Chamber may, on its own motion, certify the existence of an appealable issue. Consequently, the objection to the admissibility of the appeal is groundless. What else may be said in this connection in order to complete the picture is to repeat what was said in the aforesaid judgment of the Appeals Chamber:

An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.<sup>49</sup>

### B. Merits

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.

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<sup>47</sup> *Democratic Republic of the Congo* "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" 13 July 2006 (ICC-01/04-168).

<sup>48</sup> *Ibid.*, para. 20.

<sup>49</sup> *Ibid.*, para. 9.



- 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 a situation, legitimising victim participation therein.<sup>50</sup> 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.<sup>51</sup>

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,<sup>52</sup> 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”<sup>53</sup>. 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

<sup>50</sup> See Impugned Decision OA4, para. 3.

<sup>51</sup> Impugned Decision OA4, para. 3.

<sup>52</sup> 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).

<sup>53</sup> Impugned Decision OA5 and OA6, para. 3.



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 authorised to participate in situation- and case-related proceedings before the Pre-Trial Chamber.<sup>54</sup>

42. Evidently, the Impugned Decisions reflect the approach of the Pre-Trial Chamber in its decision<sup>55</sup> 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

<sup>54</sup> Impugned Decision OA5 and OA6, para. 5.

<sup>55</sup> 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)



personal or proprietary.<sup>56</sup> Procedure is not of itself determinative of the status of any person.

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 law<sup>57</sup> 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,

<sup>56</sup> 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.

<sup>57</sup> 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).



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 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.<sup>58</sup>

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.

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<sup>58</sup> 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”<sup>59</sup>, “to make known what was inflicted upon them”<sup>60</sup> and that, following this information, the Prosecutor would investigate the events.<sup>61</sup> 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) (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.

<sup>59</sup> *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

<sup>60</sup> *Ibid*, para. 64.

<sup>61</sup> See *ibid*



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.<sup>62</sup>

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 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.

<sup>62</sup> 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).





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. 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.

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.

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



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**Judge Georghios M. Pikis**  
**Presiding Judge**

Dated this 19<sup>th</sup> day of December 2008

At The Hague, The Netherlands