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Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: 3 October 2012

**TRIAL CHAMBER V**

**Before:** Judge Kuniko Ozaki, Presiding  
Judge Christine Van den Wyngaert  
Judge Chile Eboe-Osuji

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
*THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

**Public**

**Decision on victims' representation and participation**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**  
Ms Fatou Bensouda

**Counsel for William Samoei Ruto**  
Mr Kioko Kilukumi Musau  
Mr David Hooper

**Legal Representatives of Victims**  
Ms Sureta Chana

**Counsel for Joshua Arap Sang**  
Mr Joseph Kipchumba Kigen-Katwa  
Mr Joel Kimutai Bosek  
**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

*Amicus Curiae*

## REGISTRY

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**Registrar**  
Ms Silvana Arbia

**Deputy Registrar**

**Victims and Witnesses Unit**  
Ms Maria Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations  
Section**  
Ms Fiona McKay

**Others**

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**Trial Chamber V** (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (“*Ruto and Sang* case”), pursuant to Articles 51, 64(2), 67(1) and 68(1) and (3) of the Rome Statute (“Statute”), Rules 89(1), 90, 91, 101 of the Rules of Procedure and Evidence (“Rules”) and Regulations 79, 80 and 86 of the Regulations of the Court (“Regulations”), issues the following Decision on victims’ representation and participation.

## **I. Overview and procedural background**

### **1. Overview**

1. The present decision aims to establish the procedure as well as the modalities for the participation of victims in the *Ruto and Sang* case. For that purpose, following a brief description of the procedural background in the paragraphs below, the Chamber will first recall the applicable law and relevant jurisprudence of other Trial Chambers and the Appeals Chamber relating to the procedure for and modalities of victim participation in proceedings before the Court (Section II). The Chamber will then outline its determination of the appropriate interpretation and application of the law having regard to the specific circumstances of the *Ruto and Sang* case (Section III). Next, the Chamber will set out the specific procedure to be applied to the participation of victims in the present case (Section IV). Finally, the Chamber will outline general guidelines concerning the modalities of victim participation in the proceedings (Section V). The operative parts of this Decision are set out in the Orders (Section VI).
2. The Chamber emphasises that the principles set out in the present decision are limited to victims’ participation in the proceedings under Article 68(3) of the Statute. As such, they are not applicable to reparations pursuant to Article 75 of the

Statute and Rules 94 to 99 of the Rules, which will be addressed at a later stage of the proceedings as necessary.

## ***2. Procedural background***

3. The relevant procedural background to the present decision is as follows. On 30 March 2011 the Single Judge of Pre-Trial Chamber II (“Single Judge”) issued the “First Decision on Victims’ Participation in the Case”.<sup>1</sup> The Single Judge instructed the Victims Participation and Reparations Section (“VPRS”) to take certain measures relating to victims’ applications and future participation with a view to ensuring the expeditious and efficient preparation and conduct of the proceedings. This included an instruction to begin organising common legal representation for the confirmation of charges hearing pursuant to Rules 16(1)(b) and 90(2) of the Rules.<sup>2</sup>
4. On 5 August 2011 the Single Judge issued the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in Related Proceedings”.<sup>3</sup> The Single Judge, *inter alia*, granted the applications of 327 victims to participate in the proceedings and appointed Ms Sureta Chana as common legal representative of all victims participating in the case.<sup>4</sup> This appointment was based on the Registry’s proposal of 1 August 2011, which concluded that a single legal representative should be appointed to represent all participating victims and set out a new system of merit-based applications for the position as common legal representative.<sup>5</sup>
5. On 9 September 2011 the Single Judge affirmed Ms Chana’s appointment as legal representative of all victims in a decision on five victims’ applications for

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<sup>1</sup> ICC-01/09-01/11-17.

<sup>2</sup> ICC-01/09-01/11-17, para. 24.

<sup>3</sup> ICC-01/09-01/11-249.

<sup>4</sup> ICC-01/09-01/11-249, pages 46 – 48.

<sup>5</sup> Proposal for the common legal representation of victims, 1 August 2011, ICC-01/09-01/11-243 and annexes 1-5.

reconsideration of the appointment.<sup>6</sup> The Judge held that the decision to appoint Ms Chana was made pursuant to Regulation 80(1), not Regulation 79(3), and therefore, no review of the decision was possible.<sup>7</sup>

6. On 23 January 2012 Pre-Trial Chamber II issued the decision on the confirmation of charges (“Confirmation Decision”)<sup>8</sup> in which it confirmed, by majority, charges against the accused for the crimes against humanity of murder, deportation or forcible transfer of population, and persecution under Articles 7(1)(a), (d) and (h) of the Statute.
7. On 23 April 2012 the Appeals Chamber issued a decision confirming that Ms Chana’s appointment as common legal representative of the victims in the proceedings was not limited to the pre-trial phase and would continue until expressly brought to an end. The Appeals Chamber emphasised that this decision in no way limited the future regulation, by this Chamber, of the common representation of victims at trial.<sup>9</sup>

## II. Applicable law and jurisprudence

### 1. Article 68(3) of the Statute

8. The participation of victims in the proceedings before this Court is premised on Article 68(3) of the Statute, which provides:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and

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<sup>6</sup> Decision on the “Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta Chana for All Victims”, ICC-01/09-01/11-330, page 9.

<sup>7</sup> ICC-01/09-01/11-330, paras 14 – 15.

<sup>8</sup> Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373.

<sup>9</sup> Decision on the “Application of the Victims’ Representative pursuant to Article 83 of the Regulations,” ICC-01/09-01/11-409, para. 21.

a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

9. In accordance with this provision, the Chambers of this Court have an obligation to permit victims whose personal interests are affected to have their views and concerns presented and considered, subject to the qualifying criteria discussed in paragraphs 11 to 15 below.
10. In assessing whether the personal interests of victims are affected, useful guidance can be found in the jurisprudence of Trial Chamber I which stressed that the victims' personal interests are not limited to reparation issues and, accordingly, that participation by victims should encompass their personal interests in an appropriately broad sense.<sup>10</sup> With regard to the nature of participation of victims, Trial Chambers I, II and III and the Appeals Chamber have held that this needs to be "meaningful" as opposed to "purely symbolic."<sup>11</sup>
11. However, as is clear from the established jurisprudence of the Court, Article 68(3) of the Statute does not provide an "unfettered right for victims to participate".<sup>12</sup> There are two important qualifying criteria which must be taken into account when providing for victim participation. First, the Chamber has a discretion to determine

<sup>10</sup> *The Prosecutor v. Thomas Lubanga Dyilo* ("Lubanga"), Trial Chamber I, Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, para. 98.

<sup>11</sup> ICC-01/04-01/06-1119, para. 85; *Lubanga*, Appeals Chamber, 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, para. 97; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ("Katanga and Ngudjolo"), Trial Chamber II, Order on the Organisation of Common Legal Representation of Victims, 22 July 2009, ICC-01/04-01/07-1328, para. 10(a); *Katanga and Ngudjolo*, Decision on the modalities of victim participation at trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, para. 57; *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba"), Trial Chamber III, Decision on common legal representation of victims for the purpose of trial, 10 November 2010, ICC-01/05-01/08-1005, para. 9 (a).

<sup>12</sup> See ICC-01/04-01/06-1432, paras 99-101, where the Appeals Chamber clarified that victims do not have an unfettered right to lead or challenge the admissibility of evidence. See also *Lubanga*, Annex to: Order issuing public redacted version of the "Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial", 9 July 2009, ICC-01/04-01/06-2032-Anx, para. 5; *Lubanga*, Decision on the request by the legal representative of victims [...] for admission of the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo as evidence, 22 September 2009, ICC-01/04-01/06-2135, para. 17; *Bemba*, Order regarding applications by victims to present their views and concerns or to present evidence, 21 November 2011, ICC-01/05-01/08-1935, para. 3.

the appropriate stage(s) for victims to present their views and concerns. Second, the Chamber must ensure that the manner of participation is not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial. Indeed, victims participation and the qualifying criteria specifically engage the Chamber's primary mandate to "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses." The Chamber addresses the qualifying criteria in further detail in sub-sections (i) and (ii) below.

12. An additional consideration to be taken into account by the Chamber is the duty under Article 68(1) of the Statute to protect the safety, physical and psychological well-being, dignity and privacy of victims. In accordance with this article, the Chamber needs to ensure that all eligible victims who participate in the proceedings are treated in a fair and equitable manner, without discrimination among the victims. It is also important that victims are not subjected to an unnecessarily complicated or protracted procedure and that their safety, physical and psychological well-being, dignity and privacy are duly protected.

*(i) First qualifying criterion: determination of the appropriate stage of the proceedings*

13. The Statute gives the Chamber discretion to determine the appropriate timing of any intervention of victims. The exercise of that discretion will no doubt be largely guided by considerations of the second qualifying criterion to be discussed in the next subsection. In that context, the Chamber accepts the observations of Trial Chamber I that "participation is not a once-and-for-all event, but rather should be decided on the basis of the evidence or issue under consideration at any particular point in time."<sup>13</sup> Accordingly, the appropriateness of the timing of an intervention

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<sup>13</sup> ICC-01/04-01/06-1119, para. 101.



by one or more victims or by their legal representative will need to be determined on a case-by-case basis, taking into consideration the rights of the accused, the need to ensure that the proceedings are effective and expeditious and the interests of the victims concerned.

*(ii) Second qualifying criterion: manner not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*

14. The Chamber emphasises that, in order to ensure the rights of the accused and a fair and impartial trial, the manner of participation by victims in the proceedings is limited to the presentation of their views and concerns and that participating victims are not parties to the proceedings.<sup>14</sup> This general principle is premised on Article 66(2) of the Statute which provides that “[t]he onus is on the Prosecutor to prove the guilt of the accused”. This interpretation is further supported by the disclosure regime established in Rules 76 to 84 of the Rules, which as the Appeals Chamber has noted is “directed towards the parties and not victims”.<sup>15</sup> Further, in accordance with the approach of other Trial Chambers, the Chamber must ensure that victims are not considered as a support to the prosecution,<sup>16</sup> assisting the prosecution in meeting its burden of proof, as this would undermine the principle of equality of arms and the fairness of the proceedings.<sup>17</sup> For example, the accused should not be forced to address a large volume of views and concerns from victims which go beyond the case of the prosecution that the accused must also meet.

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<sup>14</sup> See *Katanga and Ngudjolo*, Appeals Chamber, Judgment on the Appeal of Mr Katanaga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, 16 July 2010, ICC-01/04-01/07-2288, para. 39.

<sup>15</sup> ICC-01/04-01/06-1432, para. 93, confirmed in ICC-01/04-01/07-2288, para. 74.

<sup>16</sup> *Katanga and Ngudjolo*, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr, para. 82; *Bemba*, Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023, para. 17.

<sup>17</sup> *Katanga and Ngudjolo*, Decision on the Modalities of Victim Participation at Trial, 22 January 2012, ICC-01/04-01/07-1788-tENG, 3 March 2010, para. 102.

15. The accuseds' statutory rights also include the right to be tried without undue delay, the importance of which is demonstrated by the related duty imposed on the Chamber to ensure that the trial proceedings are expeditious.<sup>18</sup> Also of relevance is the accuseds' right under Article 67(1)(b) of the Statute "[t]o have adequate time and facilities for the preparation of the defence". In accordance with these provisions, when deciding on the participation of victims in the trial, the Chamber must ensure that such participation does not unduly delay the proceedings or limit the accuseds' preparation of their defence due to the time and resources required for reviewing, and submitting observations on, victims' applications.
16. The foregoing requirements adequately evince the delicate balancing exercise that must be carried out by the Court whenever it is required to decide on questions of participation of victims in the proceedings.

## *2. Rules 89 to 91 of the Rules*

17. Rules 89 to 91 of the Rules lay down the procedure to be followed in the implementation of the regime of victim participation provided for in Article 68(3). Rule 89 of the Rules provides:

In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, and in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber.

18. The application procedure is also addressed in Regulation 86 of the Regulations, which specifies in detail the information to be provided in the application and the manner in which the applications are to be managed by the Registry and assessed by the Chamber.

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<sup>18</sup> See Articles 67(1)(c) and 64(2) of the Statute.

19. Commenting on the wording and purpose of Rule 89 of the Rules, the Appeals Chamber has stated that “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.”<sup>19</sup> Indeed, Rule 89 of the Rules makes express reference to Article 68(3) of the Statute and the criteria set forth therein. In particular, consistent with Article 68(3) of the Statute, Rule 89(1) of the Rules provides that the Chamber shall specify “the proceedings and manner in which participation is considered appropriate”. The importance of the qualifying criteria in the victim participation regime is particularly underscored by the fact that Rule 89(2) of the Rules provides for the possibility of rejecting applications for participation which do not meet the criteria set forth in Article 68(3) of the Statute.
20. The Chamber considers that a primary concern of the procedure set out in Rule 89 of the Rules is thus to ensure that the conditions for participation set forth in Article 68(3) of the Statute are met.
21. Rules 90 and 91 of the Rules elaborate upon the second sentence of Article 68(3) of the Statute, which provides for the possibility of participation of victims through common legal representatives. The Chamber notes, in particular, the relevant portions of Rule 90 of the Rules which provide:

2. Where there are a number of victims, the Chamber may for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives.

3. If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.

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<sup>19</sup> *Situation in Darfur*, 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, 2 February 2009, ICC-02/05-177, para. 46.

This provision, read together with the second sentence of Article 68(3), makes it clear that there is no unqualified right on behalf of victims to participate individually in the proceedings.

### **III. Interpretation and application of the legal framework**

22. At the outset, the Chamber notes that in interpreting and applying the legal framework to the present case, it has been mindful of Articles 51(4) and (5) of the Statute. These articles provide that the Rules shall be consistent with the Statute and that, in the event of a conflict between the Statute and the Rules, the Statute shall prevail. Accordingly, in conducting its analysis of the Rules, and Rule 89(1) in particular, the Chamber has placed primary importance on the letter as well as the object and purpose of Article 68(3) of the Statute. That is to say, the Chamber will apply Rule 89(1) of the Rules in the manner that it considers to be most consistent with the norms indicated in Article 68(3) of the Statute.

#### ***1. Distinction between direct individual participation and participation through a common legal representative***

23. The Chamber notes that other Trial Chambers of this Court have required all victims who wish to participate in the proceedings to follow the application procedure established by Rule 89 of the Rules. Once the victims' applications for participation are granted by the Trial Chamber, they are represented by the legal representatives in accordance with Rules 90 and 91 of the Rules. Whilst this approach may well have been appropriate under the circumstances of those cases, this Chamber considers that in the current case a different approach is warranted in consideration of the need to give effect to the qualifying criteria in Article 68(3) of the Statute as they operate in the particular circumstances of this case.

24. In the current case, there are a large number of victims involved and also unprecedented security concerns and other difficulties<sup>20</sup> that may be associated with the completion of a detailed application form. Under these circumstances, the Chamber considers that requiring all victims to comply with the application procedure set out in Rule 89 of the Rules is not appropriate, nor is it necessary, in order to implement Article 68(3) of the Statute, which requires the Chamber to give effect to the interests of victims while ensuring the rights of the accused and a fair and impartial trial.
25. The Chamber considers, rather, that the appropriate approach in the context of this case is as follows: (i) only victims who wish to present their views and concerns individually by appearing directly before the Chamber, in person or via video-link, should have to go through the procedure established under Rule 89 of the Rules and (ii) other victims, who wish to participate without appearing before the Chamber, should be permitted to present their views and concerns through a common legal representative without having to go through the procedure established by Rule 89 of the Rules. Victims in the second category of participation may register with the Court as victim participants. The registration process will be considerably less detailed and onerous than the application forms required by Rule 89(1) of the Rules and Regulation 86 of the Regulations and will not be subject to individual assessment by the Chamber. Full details regarding the procedure for this form of victim participation are set out in Section IV below.
26. The Chamber considers that this approach is the most appropriate way to give effect to Article 68(3) of the Statute in the circumstances of the present case. The basic principle, contained in Article 68(3), and arguably one of the key innovations of the Statute, is that victims are allowed to address the Court in their own name.

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<sup>20</sup> Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 58

This implies that victims may, at appropriate stages of the proceedings to be determined by the Chamber, appear individually, so that their voice may be heard directly. However, Article 68(3) of the Statute also provides that the views and concerns of victims may equally “be presented by the legal representatives of victims”. Article 68(3) thus envisages both direct individual participation and participation through a common legal representative.

27. In the Chamber’s view, the application procedure established in Rule 89(1) of the Rules is appropriate and necessary for victims intending to present their views and concerns individually, by appearing directly before the Chamber. It may also be appropriate and necessary for victims intending to participate through a common legal representative in cases with a relatively small number of victims, because in such cases the common legal representative may be able to actually present the individual views and concerns of the victims he or she represents.
28. However, when the number of victims makes it impossible for the common legal representative to present the individual views and concerns of identified or identifiable victims, the Chamber considers that the Rule 89(1) procedure is no longer appropriate. Furthermore, the Chamber considers that, due to the large number of expected victim participants, it is not feasible to apply the Rule 89(1) procedure to all victims in this case whilst at the same time respecting the letter, object and purpose of Article 68(3) of the Statute.
29. For these reasons and in accordance with Article 51(5) of the Statute the Chamber therefore determines that, in the present case, establishing a differentiated procedure for direct individual participation and participation through a common legal representative best allows the Chamber to comply with the requirements of Article 68(3) of the Statute. In particular, the Chamber is of the view that the envisaged system strikes the correct balance between the need to allow for the

presentation and consideration of victims' views and concerns, on the one hand, and to safeguard the rights of the accused and a fair and impartial trial, on the other. The manner in which the envisaged system respects these competing interests is addressed below.

## ***2. Compliance with the requirements under Articles 68(1) and (3) of the Statute***

### *(i) The interests of victims*

30. Rule 89 of the Rules must be applied in a way that minimises the risk of prejudice to victims in accordance with Article 68(1). In cases involving crimes that allegedly caused harm to a large number of victims, the process of assessing their applications is time consuming.<sup>21</sup> In the present case, due to the number of charges and the widespread nature of the alleged crimes, the number of eligible victims is

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<sup>21</sup> For instance, the Chamber notes that in the *Bemba* case, as of the start of the trial on 22 November 2010, final determinations had been issued on 918 victims' applications. A further 3993 victims' applications were submitted to the parties for observations and determined by the Chamber on a rolling basis in December 2010 and throughout 2011 and 2012. A decision on a further 799 victims' applications, which have already been the subject of submissions by the parties, is pending. See Fourth Decision on Victims' Participation, 15 December 2008, ICC-01/05-01/08-320; Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr; Decision on 772 applications by victims to participate in the proceedings, 18 November 2010, ICC-01/05-01/08-1017; Decision on 653 applications by victims to participate in the proceedings, 23 December 2010, ICC-01/05-01/08-1091; Corrigendum to Decision on 401 applications by victims to participate in the proceedings and setting a final deadline for the submission of new victims' applications to the Registry, 21 July 2011, ICC-01/05-01/08-1590-Corr; Decision on 270 applications by victims to participate in the proceedings, 25 October 2011, ICC-01/05-01/08-1862; Decision on 418 applications by victims to participate in the proceedings, 15 December 2011, ICC-01/05-01/08-2011; Decision on 471 applications by victims to participate in the proceedings, 9 March 2012, ICC-01/05-01/08-2162; Decision on 1400 applications by victims to participate in the proceedings, 21 May 2012, ICC-01/05-01/08-2219; Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings, 19 July 2012, ICC-01/05-01/08-2247-Red; Prosecution's Observations on 350 Applications for Victims' Participation in the Proceedings, 21 February 2012, ICC-01/05-01/08-2133; Prosecution's Observations on 308 Applications for Victims' Participation in the Proceedings, 9 March 2012, ICC-01/05-01/08-2159; Prosecution's Observations on 69 Applications for Victims' Participation in the Proceedings, 23 March 2012, ICC-01/05-01/08-2174; Prosecution's Observations on 72 Applications for Victims' Participation in the Proceedings, 27 April 2012, ICC-01/05-01/08-2195; Observations de la Défense sur les 350 demandes de participation transmises le 18 novembre 2011, 12 December 2011, ICC-01/05-01/08-2001 and confidential Annex A; Observations de la Défense sur les 350 demandes de participation transmises le 2 décembre 2011, 20 January 2012, ICC-01/05-01/08-2056 and confidential Annex A; Observations de la Défense sur les 350 demandes de participation transmises le 16 décembre 2011, 27 January 2012, ICC-01/05-01/08-2077 and confidential Annex A; Observations de la Défense sur les 350 demandes de participation transmises le 13 janvier 2012, 6 February 2012, ICC-01/05-01/08-2122 and confidential Annex A.

estimated to be in the thousands.<sup>22</sup> If all victims were required to comply with the procedure set out in Rule 89 of the Rules, for practical reasons it would not be possible to process all of the applications before the start of the trial, scheduled for April 2013. As a result, a number of victims might not be fully represented during a significant part of the proceedings even if they apply for participation at an early stage. Such delay would compromise the presentation of their views and concerns, as set out in Article 68(3) of the Statute.

31. Moreover, in the present case, a large number of victims may be vulnerable and feel afraid to relate the events they suffered. Some victims may face difficulties in completing and submitting the detailed application forms required under Rule 89(1) of the Rules and Regulation 86 of the Regulations and in assembling the necessary documents prior to a particular deadline. In addition, bearing in mind the precarious security situation in Kenya,<sup>23</sup> the process of completing and submitting detailed application forms may increase the risk of threats or retaliation against individual victims or intermediaries assisting victims in completing these forms.
32. In light of the above, the Chamber is of the view that an application of the Rule 89(1) procedure to all victims, regardless of the level of participation sought, would not be in the interests of victims. Conversely, limiting the application of the Rule 89(1) procedure to victims who wish to participate individually by appearing directly before the Chamber will ensure that all victims, including the vulnerable ones, are treated in a fair and consistent manner. No victim will be excluded from participation solely because of administrative difficulty in complying with the specific formal requirements under Rule 89 of the Rules and Regulation 86 of the Regulations, or because of fear of submitting an application caused by security or

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<sup>22</sup> See Draft Protocol on the application process for victim participation and reparations at the Trial stage, 20 July 2012, ICC-01/09-01/11-441-Conf-Exp and Annex 2 thereto, ICC-01/09-01/11-441-Conf-Exp-Anx2.

<sup>23</sup> ICC-01/09-01/11-145-Conf-Red, para. 58.



other concerns. As such, the Chamber is of the view that the envisaged approach is appropriate in light of the Chamber's duty under Article 68(1) of the Statute to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims [...]."

33. The Chamber is also of the view that limiting the number of individual applications submitted in accordance with Rule 89 of the Rules will by no means impede the effective representation of the victims' interests by the legal representative. Indeed, while it is practically impossible to represent the individual views and concerns of thousands of victims, it is possible to represent their interests by voicing their shared legal and factual concerns in the present proceedings.

*(ii) The rights of the accused and a fair and impartial trial*

34. The Chamber considers that limiting the application of Rule 89 of the Rules to victims who wish to participate individually and directly is not prejudicial to the rights of the accused and a fair and impartial trial. The manner, timing and content of interventions by the common legal representative on behalf of the victims as a whole will be strictly controlled by the Chamber to ensure that the intervention is not prejudicial to the rights of the accused. Indeed, in accordance with Rule 91 of the Rules, each request for intervention by the common legal representative will be subject to a ruling by the Chamber and both parties will be given the opportunity to submit observations on such requests.
35. More importantly, as outlined in Section IV below, the parties will be provided with ample opportunity to present their observations on the applications of individual victims who may potentially appear directly before the Chamber. The Chamber will ensure that the information provided for the purpose of these victims' applications includes sufficient detail to permit meaningful observations. In particular,

considering the extent and significance of individual participation by victims, and its implication for the right of the accused and a fair and impartial trial, the Chamber will require these victims to identify themselves *vis-à-vis* the parties.<sup>24</sup>

36. The proposed system will require considerably less time and resources to be spent by the Chamber and the parties on processing and assessing victims' requests for participation. As such, and in the particular circumstances of this case, the Chamber considers that the proposed system will be more consistent with the rights of the accused to be tried without undue delay and to have adequate time to prepare their defence.
37. In addition, if all victims were required to submit application forms under Rule 89 of the Rules, the extent of the redaction applied to most of the application forms would be considerable, due to potential security concerns, and those applications would be assessed by the Chamber on a *prima facie* evidentiary standard.<sup>25</sup> The Chamber is of the view that the use of such extensive resources by the Chamber, the parties and the Court as a whole would not be justified in light of the provisional nature of the Chamber's individual assessments.
38. The Chamber believes that no prejudice to the defence results from the fact that the Court will not assess the eligibility of each individual victim who registers under the common legal representation system. This is because the common legal

<sup>24</sup> This approach has been taken by Trial Chambers I, II, and III. See ICC-01/04-01/06-1119, para. 131; ICC-01/04-01/07-1665-Corr, para.22; ICC-01/04-01/07-1788-tENG, para. 92; *Bemba*, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, 21 December 2011, ICC-01/05-01/08-2027, para. 19.

<sup>25</sup> In previous cases, the initial determination on victims' applications was on a *prima facie* basis, and the Chamber's review did not involve "assessing the credibility of the statement or engaging in a process of corroboration *strictu sensu*". See *The Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, 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 (translation 22 March 2006), ICC-01/04-101-tEN-Corr, paras 66 and 101. See also *Lubanga*, where Trial Chamber I initially authorised 129 victims to participate based on a *prima facie* determination, but in the final judgment withdrew the victim status of a number of these individuals having concluded that its original evaluation was incorrect. ICC-01/04-01/06-2842, para. 484.

representative is expected to voice the interests of all victims.<sup>26</sup> Accordingly, registration does not imply any judicial determination of the status of the individual victims. Moreover, when assessing any submissions or requests made by the common legal representative, the Chamber will be mindful of the fact that the represented victims have not been subject to an individual assessment by the Court.

39. Finally, as set out in the Section IV below, the Chamber will direct the VPRS in conjunction with the common legal representative to prepare and submit statistics and reports on the victims' population. This will enable the parties to be sufficiently informed about whose interests the common legal representative is expected to represent and, in a more general way, serve to ensure the transparency of the proceedings related to the participation of victims under Article 68(3) of the Statute.

#### **IV. Procedure for victim participation in the present case**

40. Having concluded that the introduction of a differentiated procedure for victims' applications is appropriate and necessary in the present case and strikes an appropriate balance between the rights of the accused and the interests of victims under Article 68(3) of the Statute, the Chamber determines that victims' applications in the present case shall be governed by the procedure set out below.

##### ***1. Common legal representation***

41. The procedure for victim participation will be based on common legal representation, which will include both an appointed common legal representative of victims ("Common Legal Representative") and the Office of Public Counsel for victims ("OPCV") acting on the Common Legal Representative's behalf.

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<sup>26</sup> See Section IV below for details of the registration procedure.

42. The Common Legal Representative will have primary responsibility for being the point of contact for the victims whom he/she represents, to formulate their views and concerns and to appear on their behalf at critical junctures of the trial.
43. The OPCV's primary responsibility will be to act as the interface between the Common Legal Representative and the Chamber in day-to-day proceedings. To that end, the OPCV will be allowed to attend hearings on behalf of the Common Legal Representative, during which it may be permitted to intervene and question witnesses. The OPCV shall also assist the Common Legal Representative in preparing relevant written submissions. The representation in the courtroom through the OPCV will allow the victims to benefit from the experience and expertise of the OPCV and thereby maximise the efficiency of their legal assistance. Involvement of the OPCV will also ensure that confidential information is handled safely and securely.
44. The Chamber considers that this approach is consistent with Regulation 80(1) of the Regulations, which provides that "[t]he Chamber may appoint counsel from the Office of Public Counsel for victims." Further, as the OPCV will be acting on behalf of the Common Legal Representative when appearing before the Chamber, this approach is also consistent with Rule 91(2) of the Rules which entitles a legal representative of victims to attend and participate in hearings.
45. In order to determine the detailed arrangements of the common legal representation scheme in the present case, the Chamber instructs the Registry and the OPCV to consult with each other and to submit a joint proposal on the division of responsibilities and effective functioning of the common legal representation system set out in this Decision. This proposal shall be submitted within 14 days of notification of this Decision.

## *2. Definition of victims*

46. A general definition of a victim is set out in Rule 85 of the Rules. Rule 85(a) of the Rules provides that victims must be “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”. In addition, in accordance with Rule 85(b) of the Rules, “[v]ictims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.” This general definition was further elaborated by the Appeals Chamber, which held that the harm suffered, be it direct or indirect,<sup>27</sup> must be linked with the charges confirmed against the accused.<sup>28</sup>
47. In the present case, in order to qualify as a victim under Rule 85 of the Rules, an individual, organisation or institution must therefore have suffered harm as a result of an incident falling within the scope of the confirmed charges.

## *3. Victims wishing to participate under the common legal representation system*

48. Natural persons or, as the case may be, organisations and institutions, qualifying as victims under the Chamber’s definition set out above may participate through common legal representation pursuant to Rules 90 and 91 of the Rules.
49. Victims who do not wish to present their views and concerns individually and directly to the Chamber, but rather to express those views and concerns solely through common legal representation, will not be required to submit an application under Rule 89(1) of the Rules. However, these victims may, if they so wish, register with the Registry, indicating their names, contact details as well as information as to

<sup>27</sup> ICC-01/04-01/06-1432, paras 38 – 39.

<sup>28</sup> ICC-01/04-01/06-1432, para. 65.

the harm suffered. The Registry shall enter these victim registrations into a database, which it will administer and make accessible to the Common Legal Representative.

50. The purpose of this registration is threefold: first, to provide victims with a channel through which they can formalise their claim of victimhood; second, to establish a personal connection between the victim and the Common Legal Representative, enabling victims to provide their input and allowing the Common Legal Representative to give relevant feedback to the victims; third, to assist the Court in communicating with the victims and in preparing the periodic reports referred to in paragraph 55 below.
51. The Chamber is also mindful that, despite the adoption of this significantly simplified system, there may still be instances where registration is not possible for the victims concerned. For example, some victims may face difficulties as a result of their age or their mental or physical capacities and may not be willing or able to ask another person to register on their behalf. Other victims may be subject to social pressure not to report the crimes they claim to have suffered or be afraid of intimidation or ostracism in the event that their registration becomes known in their community. This is of particular relevance in the present case, where a number of victims were subjected to the alleged crime of rape and where the alleged events occurred less than five years ago.
52. Consequently, the Chamber decides that the views and concerns of victims who choose not to register or who are, for practical or security reasons barred from doing so, shall nevertheless be voiced, in a general way, through common legal representation.<sup>29</sup> The Chamber believes, in this respect, that it is essential that

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<sup>29</sup> The Chamber points out that such victims shall not be regarded as “other victims” within the meaning of Rule 93 of the Rules.

victims' representation is as inclusive as possible, without discrimination against victims who are, for a variety of reasons, unable to register.

53. During the trial phase all victims, regardless of whether they have registered or not, will be represented through common legal representation. The Common Legal Representative will have the responsibility of representing the victims' views and concerns, with the assistance of the OPCV. In this context, the Common Legal Representative will ensure that the views and concerns he or she represents are those of all individuals qualifying as victims in the present case. It will be the responsibility of the Common Legal Representative not to take into consideration the views and concerns of persons whom he or she has reason to believe do not qualify as victims in the present case.
54. In order to facilitate victim participation, the VPRS and the Common Legal Representative shall make sure that the victims in the present case are informed of the new procedure.
55. Finally, on the basis of the registration database administered by the Registry, the Chamber will direct the VPRS to periodically provide detailed statistics about the victims' population. These statistics shall be appended to a comprehensive report on the general situation of the victims as a whole, including registered and non-registered victims. The reports shall be prepared in cooperation with the Common Legal Representative who shall provide the VPRS with detailed information relating to his or her activities amongst the victims.

#### ***4. Victims wishing to present their views and concerns individually***

56. Victims wishing to present their views individually by appearing directly before the Chamber, in person or via video-link, may be allowed to do so at various stages of

the trial and in a manner to be determined by the Chamber.<sup>30</sup> The Common Legal Representative shall submit a request on behalf of these individuals, explaining why they are considered to be best placed to reflect the interests of the victims, together with a detailed summary of the aspects that will be addressed by each victim if authorised to present his or her views and concerns. For the purpose of the preparation of this filing, the Common Legal Representative may seek the assistance of the OPCV, as required.

57. In addition, these victims will be required to submit to the Registry a written application under Rule 89(1) of the Rules and Regulation 86 of the Regulations. These applications shall be assessed by the Registry for completeness before being transmitted to the Chamber. On the basis of these applications, in conjunction with the Common Legal Representative's filing, the Chamber will make a preliminary assessment as to whether the suggested form of participation is appropriate and identify a limited number of victims who may be authorised to participate individually by appearing directly before the Chamber. Where necessary, the Chamber may ask the Common Legal Representative to make a selection of a specified number of applications, from which the Chamber will select those eligible for personal appearance.
58. The application forms of each victim selected in the Chamber's preliminary assessment will be transmitted to the parties for their observations. The victims identities will be disclosed to the parties at this stage. Based on the parties' observations, the Chamber will then make a final determination as to which victims shall be authorised to participate individually, either in person or via video-link, and at which point of the proceedings. Further details regarding the appropriate

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<sup>30</sup> As set out in Section V below, this may include opening and closing statements.



timing of victims' participation and the regime governing redactions, if any, of application forms will be provided by the Chamber in due course.

### *5. Selection of Common Legal Representative*

59. When deciding on the selection of the Common Legal Representative, the Chamber must find a balance between a number of requirements. These requirements include in particular (a) the need to ensure that the participation of victims, through their legal representative, is as meaningful as possible, as opposed to purely symbolic; (b) the purpose of common legal representation, which is not only to represent the views and concerns of the victims, but also to allow victims to follow and understand the development of the trial; (c) the Chamber's duty to ensure that the proceedings are conducted efficiently and with the appropriate celerity; and (d) the Chamber's obligation under Article 68(3) of the Statute to ensure that the manner in which victims participate is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>31</sup>
60. In the present case, the Chamber is of the view that the abovementioned requirements may best be achieved with a Common Legal Representative based in Kenya. The Chamber believes that greater geographic proximity between victims and the Common Legal Representative is important to ensure that victims can communicate easily and personally with their representative and thus ensure meaningful representation. In order to ensure that the Common Legal Representative is fully informed of the day-to-day developments in the proceedings, the OPCV will, as stated above, be permitted to attend all hearings in which victims are allowed to participate. It will be the responsibility of the OPCV to

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<sup>31</sup> See generally, ICC-01/04-01/06-1119, paras 116, 123-125; ICC-01/04-01/07-1328, para. 10; ICC-01/04-01/07-1788tENG, para. 57; ICC-01/05-01/08-1005, para. 9.

communicate with the Common Legal Representative, who will instruct the OPCV to make submissions on his or her behalf.

61. The Common Legal Representative will be appointed by the Chamber in accordance with Rule 90 of the Rules and Regulation 80 of the Regulations. For this purpose, the Chamber will direct the Registry to submit a recommendation for the position of Common Legal Representative. In selecting a candidate, the Registry should consider the candidate's knowledge of the details of the case and of the specific situation of the victim community and the candidate's willingness and ability to maintain an ongoing presence in Kenya throughout the course of the proceedings. For the purpose of its recommendation, the Registry may also consider the "General criteria for the selection of common legal representatives under rule 90(3) of the Rules of Procedure and Evidence",<sup>32</sup> provided by the Registry and approved by the Single Judge at the confirmation of charges stage, which includes:

- (i) An established relationship of trust with the victims or ability to establish such a relationship;
- (ii) Demonstration of an ability and willingness to take a victim-centred approach to their work;
- (iii) Familiarity with the country where the crimes in connection to which the victims are admitted to participate in the proceedings have been allegedly committed;
- (iv) Possession of relevant expertise and experience, demonstrated by previous experience in criminal trials, experience representing large groups of victims and specialised study in relevant academic fields;
- (v) Readiness to commit a significant amount of time to maintain contact with a large number of clients, to follow developments in Court's

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<sup>32</sup> ICC-01/09-01/11-243-Anx3, as summarised in ICC-01/09-01/11-249, paras 69 to 74.

proceedings, to take any appropriate steps in the proceedings, and to maintain adequate contact with the Court; and

- (vi) A minimum level of knowledge in information technology.

***6. Victims authorised to participate at the confirmation of charges stage***

62. Victims who were authorised to participate at the confirmation of charges stage shall be considered as having registered for the purpose of participation through the common legal representation system provided that they still fall under the definition set out above. The Registry shall review the applications of individuals who were authorised to participate at the confirmation of charges stage and assess whether they still fall under the definition. In the event that the Registry identifies any individuals who have been authorised to participate at the confirmation of charges stage but who do not fall under the definition set out above, it shall submit a report to the Chamber on this issue and inform the Common Legal Representative.

**V. Modalities of victim participation through the Common Legal Representative**

63. For the purpose of the proceedings in the present case and against the background of the considerations outlined above, the Chamber considers it appropriate to provide a set of general guidelines concerning the modalities of victims' participation through the Common Legal Representative to be appointed in accordance with the procedure set out in Section IV above.

***1. Access to the record, documents and filings, including confidential material***

64. As a general principle, the Chamber notes that in accordance with Rule 131(2) of the Rules, victims or the legal representatives shall be granted the right to consult the

public record of the proceedings, including the index, subject to any restrictions concerning confidentiality and the protection of national security information.

65. Rule 92(5) of the Rules provides that “victims or their legal representatives participating in the proceedings shall, in respect of those proceedings, be notified by the Registrar in a timely manner of (a) [p]roceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decisions; (b) [r]equests, submissions, motions and other documents relating to such requests, submissions or motions.”
66. As regards access to confidential material, the Chamber notes that different Chambers of this Court have taken various approaches,<sup>33</sup> in accordance with the circumstances of each case. During the pre-trial phase of the present case, the Single Judge was of the view that “[i]n relation to those decisions, filings or evidence that are classified as ‘confidential’, the Chamber retains the option to decide on a case-by-case basis, either *proprio motu* or upon receipt of a specific and motivated request, whether to grant victims' legal representative access thereto.”<sup>34</sup>
67. In view of the specific circumstances of the present case, and in order to ensure that the participation by victims is meaningful, the Chamber is of the view that the Common Legal Representative may have access to confidential filings, to the extent that their content is relevant to the personal interests of the victims he or she

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<sup>33</sup> In *Lubanga*, Trial Chamber I granted victims access, in defined circumstances, to confidential documents or information in the record, subject to relevant protective measures. ICC-01/04-01/06-1119, paras 106 - 107. In *Katanga and Ngudjolo*, Trial Chamber II decided that the legal representatives should have access to all confidential decisions and documents in the record of the case, with the exception of any document classified as *ex parte*, but restricted access to evidence to the legal representatives alone and not their clients. ICC-01/04-01/07-1788-tENG, paras 121 - 123. In *Bemba*, Trial Chamber III decided that “in order to guarantee the effective expression of the views and concerns of participating victims, they are, through their legal representatives, to be notified in a timely manner of public and confidential filing whenever the Trial Chamber has resolved that their interests are engaged” and ordered the parties and participating victims “to inform the Chamber whenever confidential filings may engage the interests of particular participating victims”. In addition, in following Trial Chamber II’s approach, Trial Chamber III instructed the legal representatives not to communicate confidential information to their clients, without the Chamber’s permission. ICC-01/05-01/08-807-Corr, para. 47.

<sup>34</sup> ICC-01/09-01/11-249, para. 92.

represents. It will be the responsibility of the filing party<sup>35</sup> to indicate on the notification page whether the Common Legal Representative shall be notified.<sup>36</sup>

68. In addition, given the security situation in Kenya, the Chamber considers it appropriate to restrict access to confidential documents to the Common Legal Representative and to the OPCV when acting on the Common Legal Representative's behalf. Communication of confidential material to specific individual victims shall be subject to prior approval. Any requests for access for individual victims shall be specifically motivated and provide detailed information about 1) the necessity of sharing the information with a particular victim or group of victims, 2) the identity of the victim(s) who would have access to the confidential material, and 3) how the Common Legal Representative would guarantee that the information would not be circulated beyond the specifically authorised victim(s).
69. In relation to evidence, as has been the practice of other Trial Chambers,<sup>37</sup> the Common Legal Representative will have access to the public and confidential documents in Ringtail. In line with the procedure applied to filings, the party submitting an item to be uploaded into Ringtail shall indicate whether or not the Common Legal Representative shall have access to the document. Again, access to such material will be restricted to the Common Legal Representative, and the OPCV when acting on the Common Legal Representative's behalf. The Common Legal Representative may share the material with a particular victim or group of victims only with prior approval of the Chamber.

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<sup>35</sup> In this context, the reference to 'filing party' includes the Registry.

<sup>36</sup> This approach was adopted by Trial Chamber I in *Lubanga*. See ICC-01/04-01/06-1119, para. 107.

<sup>37</sup> See for example, ICC-01/04-01/07-1788-tENG, para. 122.

## ***2. Presence and participation in hearings and filing of written submissions***

70. Pursuant to Rule 91(2) of the Rules “[a] legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under Rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative’s intervention should be confined to written observations or submissions.”
71. In the context of the present case, and in accordance with the common legal representation system outlined above, the Chamber decides that the OPCV shall be entitled, based on Rule 91(2) of the Rules, to attend public hearings, as well as closed and private sessions. Participation in *ex parte* hearings shall be determined by the Chamber on a case-by-case basis.<sup>38</sup> The Chamber emphasises that the OPCV will be appearing in these circumstances on behalf of the Common Legal Representative rather than in its own right. As discussed below, at critical junctures involving victims’ interests, notably opening and closing statements, the Common Legal Representative may make these representations in person. At other times during the trial, the Common Legal Representative may be allowed to participate in person upon specific request to be filed with Chamber.
72. Furthermore, in accordance with Regulation 24(2) of the Regulations, the Chamber finds that the Common Legal Representative may file responses to documents but must demonstrate that the subject matter at issue is directly related to the interests of victims. If the Chamber is not convinced of the link to victims’ interests, it will not consider the submission.

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<sup>38</sup> For a similar approach, see Trial Chamber I, ICC-01/04-01/06-1119, para. 113; and Trial Chamber II, ICC-01/04-01/07-1788-tENG, para. 71.

### 3. Oral submissions at critical junctures

73. The Chamber decides to follow the practice of Trial Chambers I, II and III, which authorised the legal representatives of victims to make opening and closing statements at the trial.<sup>39</sup> These statements may be made by the Common Legal Representative in person. Additionally, the Chamber may invite individual victims, who have been selected in accordance with the procedure outlined in Section IV above, to present their views and concerns during opening and closing statements.

### 4. Questioning of witnesses or the accused

74. Rule 91(3)(a) of the Rules provides that when a legal representative wishes to question a witness, an expert or the accused, he or she must make application to the Chamber. Rule 91(3)(b) of the Rules provides as follows:

The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64.<sup>40</sup>

75. If questioning is allowed by the Chamber it will be conducted by the OPCV acting on behalf of the Common Legal Representative, except where the Chamber has authorised the Common Legal Representative to appear in person. In order to guarantee the accused's right to a fair and expeditious trial, questions put by the

<sup>39</sup> ICC-01/04-01/07-1788-tENG, para. 68; *Bemba*, Transcript of hearing of 21 October 2010, ICC-01/05-01/08-T-30, page 6, lines 16 to 19.

<sup>40</sup> In accordance with this provision, Trial Chamber I held that "the Chamber will not restrict questioning by victims to reparation issues, but instead will allow appropriate questions to be put by the victims whenever their personal interests are engaged by the evidence under consideration." ICC-01/04-01/06-1119, para. 108. Trial Chamber II subjected the questioning rights of victims to stricter requirements by specifying that in order to comply with the Article 68(3) requirements and since the victims are not parties to the trial and have no role to support the case of the prosecutor, such questioning must have as its main aim the ascertainment of the truth. ICC-01/04-01/07-1665-Corr, para. 82; ICC-01/04-01/07-1788-tENG, para. 75. In relation to the manner of questioning, Trial Chamber II further held that any application for questioning must state how the intended question is relevant and that the legal representatives' questions "must essentially relate to points to clarify or supplement evidence already given by the witness." ICC-01/04-01/07-1788-tENG, para. 78. See also ICC-01/04-01/07-1665-Corr, paras 90 - 91.

OPCV, on behalf of the Common Legal Representative, shall be limited to issues relevant to the victims' interests. They shall not be repetitive of questions already asked by the calling party.<sup>41</sup> It must be stressed in this context that the Common Legal Representative may not formulate any new allegations against the accused.

76. Concerning the mode of questioning, the Chamber endorses the approach of Trial Chamber I that there is a presumption in favour of a neutral form of questioning and that any requests for questions departing from a neutral style need to be made by oral submission at the stage of the examination when the possibility arises.<sup>42</sup> Considering the scope of the issues to be addressed in the context of the Common Legal Representative's questioning, the Chamber may limit the questioning time in proportion to that used for that witness by the calling party.

### *5. Presentation of evidence*

77. While it has been emphasised that "the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility and relevance of evidence in trial proceedings lies primarily with the parties",<sup>43</sup> the Appeals Chamber and other Trial Chambers of this Court<sup>44</sup> have acknowledged that victims may possess evidence that may assist the Chamber in its determination of the truth in accordance with Article 69(3) of the Statute. In line with these precedents, the Common Legal Representative may submit a discrete application for the presentation of evidence.<sup>45</sup> After having granted the parties an opportunity

<sup>41</sup> See ICC-01/04-01/07-1665-Corr, para. 90.

<sup>42</sup> *Lubanga*, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, 16 September 2009, ICC-01/04-01/06-2127, para. 29. See also ICC-01/04-01/07-1665-Corr, para. 91; ICC-01/04-01/07-1788-tENG, para. 78.

<sup>43</sup> ICC-01/04-01/06-1432, para. 93; cited in *Bemba*, Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr, para. 31.

<sup>44</sup> ICC-01/04-01/06-1119, para. 108; ICC-01/04-01/07-1788-tENG, paras 81-83, 86, 94, 98-99; ICC-01/05-01/08-807-Corr, paras 29-36.

<sup>45</sup> This application procedure is different from that under Rule 89 of the Rules.



to provide their observations on such requests, the Chamber will then determine, pursuant to Articles 64(6)(d) and 69(3) of the Statute, whether the proposed evidence is relevant to the personal interests of victims, may contribute to the determination of the truth and whether it would be consistent with the rights of the accused and a fair and impartial trial.

## **VI. ORDERS**

**For the foregoing reasons, the Chamber hereby:**

**DETERMINES** that victim participation in the proceedings will take place in line with the procedure and modalities outlined in Sections IV and V of this Decision;

**DIRECTS** the VPRS, in the context of its outreach activities, and the Common Legal Representative, once appointed, to make sure that the victims in the present case are informed of the new procedure and to report back to the Chamber on the implementation thereof;

**DIRECTS** the Registry and the OPCV to consult and to submit a joint proposal on the division of responsibilities and effective functioning of the common legal representation system within 14 days of notification of this Decision;

**DIRECTS** the Registry to create a database for the purposes of victims' registrations in accordance with paragraph 49 of this Decision;

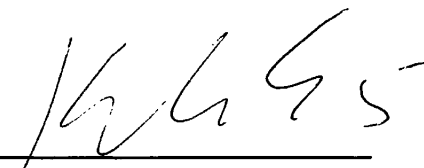

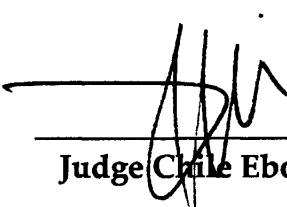
**DIRECTS** the Registry to submit a recommendation for the position of Common Legal Representative within 30 days of notification of this Decision;

**DIRECTS** the Registry to review and assess the applications of victims authorised to participate at the confirmation of charges hearing to determine whether those persons still fall within the definition of a victim as outlined in this Decision;

**DIRECTS** the Registry, in the event it identifies any individuals who no longer fall within the definition of a victim as set out in this Decision, to submit a report to the Chamber with its findings and inform the Common Legal Representative, once appointed, thereof; and

**DIRECTS** the VPRS to file, every two months, in cooperation with the Common Legal Representative, once appointed, detailed statistics and a comprehensive report on the victims in accordance with paragraph 55 of this Decision.

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

  
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**Judge Kuniko Ozaki, Presiding**  
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**Judge Christine Van den Wyngaert**  
\_\_\_\_\_  
**Judge Chile Eboe-Osuji**

Dated 3 October 2012

At The Hague, The Netherlands

No. ICC-01/09-01/11

34/34

3 October 2012