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THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

**Request of the OPCV Acting as Legal Representative of the Applicants in the Situation
in the Democratic Republic of the Congo for Participation in the Interlocutory Appeal
Filed by the OPCD on 4 February 2008**

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I. BACKGROUND

1. On 17 August 2007, Pre-Trial Chamber I issued the *Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation*.¹ Pursuant to this decision, on 24 August and 13 September 2007, the Registrar appointed the Principal Counsel of the Office of Public Counsel for Victims (“the OPCV” or “the Office”) as Legal Representative of all applicants who had no representation. These letters were filed in the record of the situation on 31 August and 27 September 2007, respectively.²

2. In connection with its observations on the victims’ applications for participation submitted pursuant to rule 89 of the *Rules of Procedure and Evidence*,³ the Office of Public Counsel for the Defence (“the OPCD”) filed two requests on 28 and 31 August 2007 seeking to obtain notification of certain documents.⁴

3. On 7 December 2007, the Single Judge of Pre-Trial Chamber I issued the *Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor* (“the Decision of 7 December 2007”) by which she rejected the said requests.⁵

¹ See *Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation* (Pre-Trial Chamber I), ICC-01/04-374, 17 August 2007.

² See “Registration of a Letter from the Legal Representative Withdrawing his Request for Anonymity and of Other Documents Relating to the Legal Representation of the Applicants for the Purposes of Participation”, ICC-01/04-380-tENG, 31 August 2007. See also “Registration of appointment of the OPCV and amendment to appointment”, ICC-01/04-401-Conf, 27 September 2007.

³ See *Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06* (Pre-Trial Chamber I), ICC-01/04-228, 22 September 2006; the *Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06* (Pre-Trial Chamber I), ICC-01/04-241, 29 September 2006; the *Decision authorising the filing of observations on applications for participation in the proceedings* (Pre-Trial Chamber I), ICC-01/04-329-tENG, 23 May 2007; the *Decision on the time limit to submit observations on applications a/0163/06 to a/0187/06 for participation as victims* (Pre-Trial Chamber I), ICC-01/04-375 and the *Order concerning the transmission of further information on victims' applications* (Pre-Trial Chamber I), ICC-01/04-376, 24 August 2007.

⁴ See “Request for Single Judge to order the Prosecutor to disclose exculpatory materials”, ICC-01/04-378 and ICC-01/04-378-Conf-Exp-AnxA and AnxB, 28 August 2007 and the “Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e)”, ICC-01/04-381-Conf and ICC-01/04-381-Conf-AnxA, AnxB and AnxC, 31 August 2007.

⁵ See *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* (Pre-Trial Chamber I), ICC-01/04-417, 7 December 2007.

4. On 13 December 2007, the OPCD filed the “Request for leave to appeal the ‘Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor’”.⁶

5. On 24 December 2007, the Single Judge of Pre-Trial Chamber I issued the *Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 à a/0241/06 à a/0250/06*,⁷ by which she decided not to rule at this juncture on the applications for participation of, *inter alia*, a/0004/06 to a/0006/06, a/0019/06, a/0020/06, a/0027/06, a/0035/06, a/0036/06, a/0039/06, a/0043/06, a/0047/06 to a/0052/06, a/0073/06 to a/0080/06, a/0110/06, a/0144/06, a/0153/06 to a/0157/06, a/0159/06, a/0160/06, a/0203/06, a/0220/06, a/0222/06 and a/0240/06.

6. On 23 January 2008, the Single Judge of Pre-Trial Chamber I issued the *Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor"*,⁸ by which she granted the OPCD leave to appeal the Decision of 7 December 2007 in relation to the following issue:

[W]hether article 68(3) of the Statute can be interpreted as providing for a ‘procedural status of victim’ at the investigation stage of a situation and the pre-trial stage of a case; and (i) if so, whether rule 89 of the Rules and regulation 86 of the Regulations provide for an application

⁶ See “Request for leave to appeal the "Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor"”, ICC-01/04-419, 13 December 2007.

⁷ See *Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 à a/0241/06 à a/0250/06* (Pre-Trial Chamber I), ICC-01/04-423, 24 December 2007. See also Corrigendum to that decision (Pre-Trial Chamber I), ICC-01/04-423-Corr, 31 January 2008.

⁸ See *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"* (Pre-Trial Chamber I), ICC-01/04-438, 23 January 2008.

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.⁹

7. On 4 February 2008, the OPCD filed the “OPCD appeal brief on the ‘Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor’”.¹⁰

8. On 6 February 2008, the Office filed the “Request from the OPCV Acting as Legal Representative for Clarifications on Victim Participation in the Interlocutory Appeal filed by the OPCD under article 81(2)(d) of the Rome Statute”¹¹ in which the Office stated that, pursuant to regulation 24(2) of the *Regulations of the Court*, the victims authorised to participate in the proceedings could file a response to the appeal taken by the OPCD, and, in the alternative, requested the Appeals Chamber to specify the procedure to be followed for the purpose of participating in the said appeal.

9. On 13 February 2008, the Appeals Chamber issued the *Decision of the Appeals Chamber on the OPCV's request for clarification and the legal representative's request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the response thereto by the OPCD and the Prosecutor*¹² (“the Decision of 13 February 2008”), by which it dismissed the request for clarifications filed by the OPCV on 6 February 2008 and ordered the filing, no later than 21 February 2008, of the applications for participation in the said interlocutory appeal.

10. In its Decision of 13 February 2008, the Appeals Chamber indicated that applications for participation in the interlocutory appeal had to include a statement specifying how the personal interests of the applicants were affected by the said appeal, explaining why the

⁹ *Ibid.*, p. 8.

¹⁰ See “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’”, ICC-01/04-440, 4 February 2008.

¹¹ See “Request from the OPCV Acting as Legal Representative for Clarifications on Victim Participation in the Interlocutory Appeal filed by the OPCD under article 81(2) of the Rome Statute”, ICC-01/04-442-tENG, 6 February 2008.

¹² See *Decision of the Appeals Chamber on the OPCV's request for clarification and the legal representative's request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the response thereto by the OPCD and the Prosecutor* (Pre-Trial Chamber I), ICC-01/04-450, 13 February 2008 (the “Decision of 13 February 2008”).

presentation of their views and concerns would be appropriate at this stage and showing that such participation would not be prejudicial to or inconsistent with the rights of the Defence.¹³

11. The Office submits that the Appeals Chamber's decision of 13 February 2008 does not specify from whom the applications for participation in the interlocutory appeal may originate. It therefore seems that the decision pertains not only to those victims already authorised to participate in the situation in the Democratic Republic of the Congo, but also covers those applicants seeking victim status in the said situation. Accordingly, the Principal Counsel of the Office, the Legal Representative of the applicants in the situation in the Democratic Republic of the Congo a/0004/06 to a/0006/06, a/0019/06, a/0020/06, a/0027/06, a/0035/06, a/0036/06, a/0039/06, a/0043/06, a/0047/06 to a/0052/06, a/0073/06 to a/0080/06, a/0110/06, a/0144/06, a/0153/06 to a/0157/06, a/0159/06, a/0160/06, a/0203/06, a/0220/06, a/0222/06 and a/0240/06 respectfully submits to the Appeals Chamber a request for the said applicants to participate in the appeal of 4 February 2008 against the Decision of 7 December 2007.

II. SUBMISSIONS FOR PARTICIPATION IN THE APPEAL OF 4 FEBRUARY 2008

12. Pursuant to the Appeals Chamber's Decision of 13 February of 2008, the Office responds successively to the following questions: (1) how are the personal interests of the victims affected by that appeal? (2) why is the presentation of their views and concerns appropriate at this stage? and (3) why is such participation not prejudicial to or inconsistent with the rights of the Defence?

13. The Office observes first and foremost that the Decision of 13 February 2008 is consistent with previous decisions of the Appeals Chamber, since the same conditions were required on 13 February 2007 in respect of victim participation in an interlocutory appeal taken under article 82(1)(b) of the *Rome Statute*.¹⁴

¹³ *Ibid.*, p. 3.

¹⁴ See *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"* (Appeals Chamber), ICC-01/04-01/06-824, 13 February 2007.

1. The personal interests of the applicants are affected by the appeal of 4 February 2008

14. The Office submits that the issue on the basis of which leave to appeal was granted (the “Issue under Appeal”) affects the personal interests of the applicants whose status is pending before Pre-Trial Chamber I. Indeed, the Appeals Chamber’s decision in the instant case could have an impact on how applications for participation will be dealt with.

15. Indeed, article 68(3) of the *Rome Statute* explicitly grants victims of crimes within the jurisdiction of the Court the right to submit observations and to present their views and concerns when their personal interests are affected. Accordingly, it does not differentiate between applicants and victims authorised to participate in proceedings before the Court, and thus covers these two categories of persons when their personal interests are affected. This interpretation is supported by the broad definition of the term “victim” as contained in rule 85 of the *Rules of Procedure and Evidence*. Indeed, this definition does not contain any restriction on participation and only associates the term “victim” with the commission of a crime within the jurisdiction of the Court.

16. Moreover, the Office submits that the applicants’ interest in participating in this interlocutory appeal is obvious to the extent that the application made by the OPCD clearly seeks to deny the victims their right to participate at the investigation stage in a situation by proposing a regime which is different from that set forth in article 68(3) of the *Rome Statute*, and which does not involve granting the applicants the procedural status of victim. Thus, if the Appeals Chamber were to allow the OPCD’s appeal, the applicants would, as a result, be deprived of all the procedural rights flowing from the status which could be granted to them. In particular, the applicants will no longer be able to present their views and concerns, nor to initiate certain proceedings before the Pre-Trial Chamber in the event that their personal interests were to be affected, for example, in relation to protection.¹⁵

¹⁵ See *Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06* (Pre-Trial Chamber II), ICC-02/04-101, 10 August 2007, paras. 96-98. The Single Judge of Pre-Trial Chamber II stated in particular: “*That the "personal interests" of victims may be affected by the adoption of, or the failure to adopt, measures bearing upon their security and privacy appears hardly debatable. Accordingly, it would be consistent with article 68, paragraph 3, and therefore appropriate for victims (specifically those victims who may be affected by the measures in question) to be authorised to present their "views and concerns" for these purposes even prior to and irrespective of their being granted victim status in a given case*” (emphasis added) (footnote omitted), para. 98.

17. Moreover, the Issue under Appeal as set out by the Single Judge in her decision of 23 January 2008 is considerably broader than the issue outlined in the OPCD application of 13 December 2007¹⁶ and thus further calls into question the applicants' rights. Indeed, the OPCD restricted its questions to the existence of two distinct procedures concerning, on the one hand, the applications for participation as such and, on the other hand, the determination of the modalities of participation at various stages of the proceedings.¹⁷ The Single Judge reformulated this issue by elaborating upon and extending it to the issue of the existence of a procedural status of victim (at the investigation stage of a situation and at the pre-trial stage of a case) and to the issue of the existence of distinct objectives between the applications for participation and the procedural rights attached to victim status.¹⁸

18. In this respect, the Office notes not only that the OPCD restricted its request to the situation stage and that broadening the Issue under Appeal at the pre-trial stage of a case is beyond the jurisdiction of the Single Judge in the present matter. Hence, the personal interests of the applicants are affected even more by the outcome of the appellate proceedings as a result of the broadening of the Issue under Appeal, insofar as the Appeals Chamber's decision on the matter may affect the review of the applications for participation over which the Chamber has not yet ruled.

19. This is particularly true given that the applicants' applications for participation have already undergone a partial review, and that they were not rejected by the Single Judge; instead, their review was *suspended*.

20. In this respect, the Office notes that the circumstances of a/0047/06 to a/0052/06, the review of whose applications was also suspended¹⁹ differs from that of the other applicants, insofar as Pre-Trial Chamber I considered "*that by their statements, Applicants a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0051/06 and a/0052/06 have provided sufficient evidence*

¹⁶ See "Request for leave to appeal the "Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor" ", *supra*, note 6, para. 22: "*The OPCD respectfully submits that the decision of the Honourable Single Judge raises the following appealable issues: - whether the application process is a distinct procedure, unrelated to the modalities of participation or the criminal proceedings before the Court, which is not per se prejudicial to the Defence; and - whether the Chamber is only obliged to provide the Prosecution and the Defence with copies of the applications, and is thus not obliged to provide or order the applicants to provide information extrinsic to the applications themselves*".

¹⁷ *Ibid.*, para. 22, 25-38 and 56.

¹⁸ See Decision of 23 January 2008, *supra*, footnote 8, p. 8.

¹⁹ See Corrigendum to the Decision of 24 December 2007, *supra*, footnote 7, para. 144 and p. 58.

*to satisfy the Court that there are reasonable grounds to believe that they suffered emotional and physical harm due to their enlistment in the Union des Patriotes Congolais (“UPC”) militia; that, in addition, the applicants have provided sufficient evidence to satisfy the Chamber that there are reasonable grounds to believe that they suffered harm as a result of the crimes set forth in the warrant of arrest issued against Thomas Lubanga Dyilo”.*²⁰ The Chamber nevertheless held that *“the status of victims with standing to participate in the proceedings in the case of The Prosecutor v. Thomas Lubanga Dyilo cannot be granted to Applicants a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0051/06 and a/0052/06 at this particular stage of the proceedings [the confirmation hearing]”.*²¹

21. With regard to a/0047/06 to a/0052/06, the Office recalls the arguments advanced in paragraph 11 of the “Request of the OPCV Acting as Legal Representative of the Victims Authorised to Participate in the Proceedings in the Situation in the Democratic Republic of the Congo for Participation in the Interlocutory Appeal Filed by the OPCD on 4 February 2008”.²² In the alternative, the Office requests that the Appeals Chamber consider the application of a/0047/06 to a/0052/06 for participation in this interlocutory appeal in the context of this request.

22. Furthermore, the Office recalls that, in accordance with the Court’s previous decisions, *“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”.*²³ Moreover, this is settled case law before Pre-Trial Chamber I, which has, in turn, been adopted by Pre-Trial Chamber II, which established identical principles in the situation in Uganda.²⁴ It follows that the personal interests of the victims are affected in general in all proceedings in connection

²⁰ See *Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo* (Pre-Trial Chamber I), ICC-01/04-01/06-601, 20 October 2006, p. 10.

²¹ *Ibid.*, p. 13.

²² See “Request of the OPCV Acting as Legal Representative of the Victims Authorised to Participate in the Proceedings in the Situation in the Democratic Republic of the Congo for Participation in the Interlocutory Appeal Filed by the OPCD on 4 February 2008”, 21 February 2008, para. 11, p. 6.

²³ See *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, ICC-01/04-101, 17 January 2006, para. 63.

²⁴ *Ibid.* See also *Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, supra*, footnote 15, paras. 7-10 and 84. Finally, see *Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07* (Pre-Trial Chamber I), ICC-02/05-111-Corr, 14 December 2007, para. 1, p. 6.

with the investigation in a situation, including interlocutory appeals, if any, since such proceedings would result from an issue raised in a proceeding in which the victims were authorised to participate in the first instance.

23. Moreover, the Office emphasises that there is no doubt about the applicants' personal interest in participating in the interlocutory appeal as authorised by the Single Judge, insofar as the OPCD itself observes that "*the issue as to whether the process for granting applicants the status of victims is a separate and distinct procedure, has implications for all future victim applications, at all stages of the proceedings*".²⁵

24. Lastly, the Office draws the Appeals Chamber's attention to rule 93 of the *Rules of Procedure and Evidence*, under which it may "*seek the views of other victims [on any issue]*". In light of the very broad formulation of this rule, the Office submits that the Chamber may invite any victim, within the broad meaning of this term as used in article 68(3) of the *Rome Statute*, to express his or her views on the Issue under Appeal.²⁶

2. The participation of the applicants in the appeal of 4 February 2008 is appropriate

25. The Office submits that the participation of the applicants in the interlocutory appeal taken by the OPCD is appropriate insofar as the outcome of the proceedings, given the formulation of the Issue under Appeal, is likely to directly affect the handling of their applications for participation in the proceedings before the Court.

26. The Office also recalls that, following the Court's previous decisions, the investigation stage in a situation is an appropriate stage of the proceedings for the participation of victims pursuant to article 68(3) of the *Rome Statute*.²⁷ It follows, therefore,

²⁵ See "Request for leave to appeal the 'Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor'", *supra*, footnote 6, paras. 37-38: "*The OPCD observes that the issue as to whether the process for granting applicants the status of victims is a separate and distinct procedure, has implications for all future victim applications, at all stages of the proceedings. [...] As such, the OPCD respectfully submits that an immediate resolution of this issue would ensure that all future victim applications are processed and adjudicated in accordance with the correct legal principles, and would eliminate the necessity of revising the status of victims, if they have been incorrectly accorded this status.*"

²⁶ *Ibid.*, para. 102.

²⁷ See, *inter alia*, the Decision of 24 December 2007 and the Corrigendum to the said Decision, *supra*, footnote 7, para. 5; the *Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor* (Pre-Trial Chamber I, ICC-02/05-110, 3 December 2007, para. 2 and the Decision of 7

that the participation of victims in any interlocutory appeal against decisions made in the investigation stage must also be considered to be appropriate.

27. Lastly, the participation of the applicants in the interlocutory appeal taken by the OPCD is appropriate insofar as it gives effect to the rights under article 68(3) of the *Rome Statute*. Indeed, a review of all of the articles and rules governing the participation of victims in proceedings before the Court, such as described above,²⁸ clearly shows that their participation is not restricted to specific stages and hence is possible at all stages of the proceedings.²⁹ Moreover, the participation of the applicants in the interlocutory appeal taken by the OPCD fits precisely the requirements of a fair trial, insofar as it would enable the interests of the applicants – the persons primarily affected by the outcome of this appeal – to be taken into account objectively and in depth.

28. Furthermore, the Office recalls the possibility for the Prosecutor and the Defence to file a response “*to any document filed by any participant in the case*” pursuant to regulation 24(1) of the *Regulations of the Court*. Hence, the appropriateness of the participation of the applicants in this interlocutory appeal is guaranteed by the restrictions placed upon it.

29. Lastly, the Office supports the OPCD’s observation that the United Nations Human Rights Committee has concluded that if certain procedural safeguards are necessary to guarantee a right, the human rights protections which are applicable to achieve the anticipated result apply *a fortiori* to the proceedings leading to that result.³⁰ Thus, victims’ rights guaranteed by the Statute must be exercised effectively, and the applicable safeguards shall

December 2007, *supra*, footnote 5, para. 2. See also *Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, supra*, footnote 24, paras. 7-10 and 84, *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, supra*, footnote 23, para. 63.

²⁸ See *supra*, para. 15.

²⁹ See the proposals from France, UN Doc. PCNICC/1999/DP.2, 1 February 1999, p. 7. See also the proposal from Costa Rica, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999; and the proposal from Colombia, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999. For a review of the preparatory work, see BITTI (G.) and FRIMAN (H.), “Participation of Victims in the Proceedings”, in LEE (R.S.) (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., New York, 2001, pp. 456-474.

³⁰ See “General Comment 29 on States of Emergency (Article 4)”, CCPR/C/21/Rev.1/Add.11 31 August 2001, para. 15. See also “Request for leave to appeal the ‘Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor’”, *supra*, footnote 6, para. 31: “*The OPCD observes in this regard that the United Nations Human Rights Committee has concluded that if certain procedural safeguards are necessary to secure an ultimate right, then the human rights protections applicable to the result, apply to the procedure itself*”.

consist of the procedural rights granted to the victims themselves.³¹ In the instant case, this translates, in particular, into the opportunity offered to the applicants to present their views and concerns with regard to proceedings which ensue directly from their applications for participation, and, hence, into the opportunity which should be offered to them to participate in the interlocutory appeal taken by the OPCD.

3. The participation of the applicants in the appeal of 4 February 2008 is not inconsistent with or prejudicial to the rights of the Defence

30. As the Office has already noted, the term “victim” must be given a broad meaning.³²

31. Firstly, the Office is of the opinion that protection of the rights of the Defence is a fundamental principle, without which the integrity of criminal proceedings could not be safeguarded and justice could not be done.

32. The Office notes that the participation of victims in proceedings before the Court is not in itself liable to affect the rights of the Defence. Indeed, as Judge Blattmann emphasised:

[B]oth the rights of victims and that of the accused are amply protected under the Statute. Further, many major legal systems are able to incorporate victims' participation into their proceedings while ensuring the rights of the accused to both a fair and expeditious proceeding.³³

33. In this respect, the Office also notes that the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted by the United Nations General Assembly on 29 November 1985 spells out the principle of victims' access to justice and their right to fair treatment.³⁴

34. Furthermore, the participation of the applicants in this interlocutory appeal would be neither inconsistent with nor prejudicial to the rights of the Defence, since under regulation

³¹ The term “victim” is used in the broad sense to encompass both victims authorised to participate in the proceedings and applicants; see *supra*, para. 15.

³² See *supra*, para. 15.

³³ See *Separate and Dissenting Opinion* of Judge René Blattmann within the *Decision on victims' participation* (Trial Chamber I), ICC-01/04-01/06-1119, para. 26, p. 58. See also *ibid.*, footnote 127.

³⁴ See United Nations General Assembly resolution 40/34 of 29 November 1985, available at: <http://www2.ohchr.org/english/law/victims.htm>, principles 4 to 7.

24(1) of the *Regulations of the Court* the Defence may file a response to any document that would be filed by the applicants as a result.³⁵

35. Moreover, the Office submits that the participation of victims is an integral part of the concept of a fair and impartial trial, since it is expressly embodied in the Court's texts. Furthermore, this right granted to victims is consistent with international human rights law and is recognised in many national systems. Consequently, the equilibrium within criminal trials would not be affected by the participation of victims. On the contrary, taking their interests into account constitutes one of the contributory factors in balancing the proceedings, especially because the proceedings concern a violation of the fundamental rights of the victims themselves.³⁶ Hence, the participation of victims in this interlocutory appeal would not be prejudicial to the interests of the Defence.³⁷

Accordingly, the Office submits that the personal interests of the applicants are affected by the instant interlocutory appeal, that the presentation of their views and concerns appears appropriate at this stage, and that such participation is neither inconsistent with nor prejudicial to the rights of the Defence. Accordingly, the Principal Counsel of the Office of Public Counsel for Victims respectfully requests the Appeals Chamber to allow the applicants' request in the context of the situation in the Democratic Republic of the Congo and to grant them the right to participate in the OPCD's appeal against the decision of the Single Judge of Pre-Trial Chamber I of 7 December 2007.

The Principal Counsel also requests the Appeals Chamber to set a time limit for the filing of the response to the document filed in support of the appeal taken by the OPCD on 4 February 2008, and requests leave to participate in the hearings, if any, that will be held by the Chamber to consider this appeal.

³⁵ See *supra*, para. 28.

³⁶ See "Response of the Legal Representatives of Victims to the Prosecution's Application and the OPCD's Request for Leave to Appeal the 'Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0027/07 to a/003/07 and a/0035/07 to a/0038/07'", ICC-02/05-116, 17 December 2007, para. 30, pp. 9-10.

³⁷ See DONAT-CATTIN (D.), "Article 68", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Nomos Verl. Ges., Baden-Baden, 1999, pp. 876-877: "The victims' genuine wish is that the truth be established and the case solved. [...] The second [concept of due process for defendant] is fair trial, which is comprehensive of, but not limited to, the respect for all the rights of the suspect/accused; it means equitable justice for defendants, victims and international society as such, the foundation of all procedural norms of the Statute."

[signed]

Paolina Massidda
Principal Counsel
Office of Public Counsel for Victims

Dated this 21 February 2008

At Genoa, Italy