Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04**
Date: **28 February 2008**

THE APPEALS CHAMBER

Before: **Judge Navanethem Pillay, Presiding Judge**
Judge Philippe Kirsch
Judge Georghios 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 Victims Authorised to Participate in the Proceedings in the Situation in the Democratic Republic of the Congo for Participation in the Interlocutory Appeals Filed by the Prosecution and the OPCD against the Decision of 24 December 2007

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I. BACKGROUND

1. On 22 and 29 September 2006 and 24 May and 17 July 2007, the Pre-Trial Chamber and the Single Judge, respectively, authorised the Prosecution, Ad Hoc Counsel for the Defence and the Office of Public Counsel for the Defence ("the OPCD") to file observations on the applications for participation in the proceedings.[1]

2. On 28 November 2006, Ad Hoc Counsel for the Defence filed his observations on the applications for participation in the proceedings a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the investigation in the Democratic Republic of the Congo ("the DRC").[2]

3. On 30 November 2006, the Prosecution filed its observations on the applications for participation a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06 in the record of the investigation into the situation in the DRC.[3]

4. On 25 June 2007, the Prosecution filed its observations on the applications for participation a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06 in the record of the investigation into the situation in the DRC.[4] On the same day, the OPCD filed its observations on the said applications for participation in the proceedings.[5]

5. On 24 December 2007, the Single Judge of Pre-Trial I issued the decision entitled *Décision sur les demandes de participation à la procédure déposées dans le cadre de*

[1] 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*, No. ICC-01/04-228, 22 September 2006 and 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. See also *Decision authorising the filing of observations on applications for participation in the proceedings*, ICC-01/04-329-tENG, 23 May 2007 and the *Decision authorising the filing of observations on applications for participation in the proceedings*, ICC-01/04-358-tENG, 17 July 2007.

[2] See "Observations du Conseil ad hoc de la Défense sur les demandes de participation à la procédure 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 dans le cadre de l'enquête en République démocratique du Congo", ICC-01/04-314-Conf and ICC-01/04-314-Conf-Anx1-2, 28 November 2006.

[3] See "Prosecution's Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06", ICC-01/04-315, 30 November 2006.

[4] See "Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06", ICC-01/04-346, 25 June 2007.

[5] See "Observation[s] du Bureau du conseil public pour la Défense sur les demandes de participation à la procédure en qualité de Victimes ", ICC-01/04-347-Conf, 25 June 2007.

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[6] (the "Decision of 24 December 2007"), by which she granted the status of victim participating in the proceedings in the situation in the Democratic Republic of the Congo to, inter alia, a/0007/06, a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06 and a/0209/06 and ordered the Registrar to appoint the Office of Public Counsel for Victims ("the OPCV'' or "the Office") "[TRANSLATION:] *as legal representative for the purpose of providing help and assistance to the persons who have been granted victim status until these persons choose a legal representative or the Court assigns one*".[7]

6. On 4 January 2008, the OPCV submitted a request for leave to appeal the Decision of 24 December 2007.[8]

7. On 7 January 2008, the Prosecution and the OPCD submitted requests for leave to appeal the Decision of 24 December 2007.[9]

8. On 8 January 2008, the Head of the Division of Victims and Counsel, on behalf of the Registrar and pursuant to the order of the Single Judge, appointed the Principal Counsel of

[6] 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 et a/0241/06 à a/0250/06* (Pre-Trial Chamber I), ICC-01/04-423, 24 December 2007. See also the Corrigendum to that decision, ICC-01/04-423-Corr, 31 January 2008.

[7] *Ibid*, p. 58.

[8] See "*Demande du BCPV aux fins d'autorisation d'interjeter appel à l'encontre de la Décision rendue le 24 décembre 2007 relative aux demandeurs a/0047/06 à a/0052/06***"**, ICC-01/04-426, 4 January 2008.

[9] See "Prosecution's Application for Leave to Appeal the Single Judge's 24 December 2007 "Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo'", ICC-01/04-428 and ICC-01/04-428-Anx1, 7 Janaury 2008 and the "Request for leave to appeal the 'Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06'" (Pre-Trial Chamber I), ICC-01/04-429, 7 January 2008.

the Office as the Legal Representative of the victims authorised to participate and who had no representation. The said letter of appointment was filed in the record of the situation on 8 January 2008.[10]

9. On 11 January 2008, the OPCV responded to the requests for leave to appeal the decision of 24 December 2007 filed by the Prosecution and the OPCD.[11]

10. On 6 February 2008, the Single Judge issued her decision on the Prosecution, OPCD and OPCV requests for leave to appeal[12] by which she rejected the OPCV's request and granted the Prosecution leave to appeal in relation to whether "*a procedural status of victim*" can be guaranteed independently of an assessment of the requirements of article 68(3) of the *Rome Statute* and rule 89 of the *Rules of Procedure and Evidence*, without determining whether and how the personal interests of the victims would be affected at the investigation stage of the situation in the Democratic Republic of the Congo and without taking into consideration the jurisprudence of the Appeals Chamber.[13] She also granted leave to appeal the Decision of 24 December 2007 to the OPCD in relation to whether victims have a general right to participation or whether victim participation is conditioned upon an assessment of their personal interests and the appropriateness of their participation, as well as in relation to whether, in order to establish moral harm on the basis of harm suffered by another person, it was necessary to adduce proof concerning the identity of that other person and the applicant's relationship with that person.[14]

11. On 18 February 2008, the Prosecution and the OPCD filed their documents in support of the appeal against the Decision of 24 December 2007.[15]

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[10] See "*Enregistrement de la désignation du Bureau du conseil public pour les victimes en qualité de représentant légal conformément à la décision de la Chambre préliminaire I en date du 24 décembre 2007*", ICC-01/04-431, 8 January 2008. The appointment concerns victims a/0007/06, a/0008/06, a/0022/06, a/ 0023/06, a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06 and a/0209/06.

[11] See "Réponse du BCPV aux demandes d'autorisation d'interjeter appel de la décision du 24 décembre 2007 déposées par le Bureau du Procureur et le Bureau du conseil public pour la Défense", ICC-01/04-435, 11 January 2008.

[12] See *Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation* (Pre-Trial Chamber I)**,** ICC-01/04-444, 6 February 2008.

[13] *Ibid.*, p. 15.

[14] *Ibid.*

[15] See "Prosecution's Document in Support of Appeal against the 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings ", ICC-01/04-454, 18 February 2008 and the "OPCD Appeal

II. CLARIFICATION OF AND BASIS FOR THE REQUEST

1. Clarification

12. The Office notes that the circumstances of a/0047/06 to a/0052/06, the review of whose applications was suspended by the Single Judge of Pre-Trial Chamber I,[16] must be clarified at this stage. Indeed, 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 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*".[17] The Chamber nevertheless held that "*granting Applicants a/0047/06 to a/0052/06 the status of victims with standing to participate would be inappropriate at this particular stage in the proceedings* [the confirmation hearing]."[18] Accordingly, for the purpose of these interlocutory appeals, the Office is of the opinion that a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0051/06 and a/0052/06 fall *de facto* under the present application for participation.

2. The basis for the request

13. 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*

Brief on the 'Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République Démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06'", ICC-01/04-455, 18 February 2008.

[16] See Corrigendum to the Decision of 24 December 2007, *supra*, footnote 6, para. 144 and p. 58.

[17] 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-tENG, 20 October 2006, p. 10.

[18] *Ibid.* p. 11.

Prosecutor[19] ("the Decision of 13 February 2008"), by which it ordered the filing of the applications for participation in the interlocutory appeal taken by the OPCD on the basis of article 82(1)(d) of the *Rome Statute*.[20]

14. 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 victims were affected by the said appeal, explaining why the 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.[21]

15. The Office notes 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*.[22]

16. The Office recalls its position according to which victims authorised to participate in the proceedings in the situation in the Democratic Republic of the Congo should, *a fortiori*, be authorised to participate in an interlocutory appeal arising from a decision rendered by the Pre-Trial Chamber in connection with the same situation. Nevertheless, in view of the Appeals Chamber's jurisprudence on victim participation in interlocutory appeals, the Principal Counsel of the Office, the Legal Representative of the victims authorised to participate in the proceedings in the situation in the Democratic Republic of the Congo a/0007/06, a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06 and a/0209/06 as well as a/0047/06 to a/0052/06 ("the Victims"), respectfully submits to the Appeals Chamber a request for the victims whom

[19] 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* (Appeals Chamber), ICC-01/04-450, 13 February 2008 ("the Decision of 13 February 2008"). See also "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.
[20] 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*, *ibid.*, p. 3.
[21] *Ibid.*
[22] 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.

she is representing to participate in the appeals of 18 February 2008 against the Decision of 24 December 2007.

17. Lastly, the Office notes that the appeals taken by the Prosecution, on the one hand, and the OPCD, on the other, appear to give rise to two separate proceedings.[23] However, like the Prosecution, one cannot but observe, that the issues raised in the said appeals are intrinsically related and could have similar legal implications[24] Accordingly, in this request, the Office will cover the relevant aspects of the two above-mentioned appeals.

II. SUBMISSIONS IN FAVOUR OF PARTICIPATION IN THE APPEALS OF 18 FEBRUARY 2008

18. Pursuant to previous decisions of the Appeals Chamber on the participation of victims in interlocutory appeals,[25] 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?

1. The personal interests of the victims are affected by the appeals of 18 February 2008

19. The appeals of 18 February 2008 taken by the Prosecution and the OPCD relate in general to the interpretation of article 68(3) of the *Rome Statute*, together with that of rule 89 of the *Rules of Procedure and Evidence*. The Office submits that, since these provisions directly concern the victims, they should therefore be able to express their views and concerns on the matter.

20. The Office further submits that the victims' interest in participating in this interlocutory appeal is obvious to the extent that the applications made by the Prosecution and the OPCD clearly seek to restrict, if not deny, the victims' right to participate at the

[23] In this respect, see *Decision on the Presiding Judge of the Appeals Chamber in the appeal of the Prosecutor pursuant to the decision of Pre-Trial Chamber I of 6 February 2008* (Pre-Trial Chamber I), ICC-01-04-464, 21 February 2008 and *Decision on the Presiding Judge of the Appeals Chamber in the appeal of the Office of Public Counsel for the Defence pursuant to the decision of Pre-Trial Chamber I of 6 February 2008* (Pre-Trial Chamber I), ICC-01-04-465, 21 February 2008.
[24] See "Prosecution's Document in Support of Appeal against the 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings", *supra*, footnote 15, para. 7, p. 5.
[25] See *supra*, paras. 13 to 16.

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 appeals of the Prosecution and the OPCD, the victims would, as a result, be deprived of all the procedural rights flowing from the status granted to them under article 68(3) of the *Rome Statute*. Indeed, victim participation in a situation cannot be effective without explicit recognition of their procedural status under article 68 of the *Rome Statute*.

21. 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*".[26] 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.[27] It follows that the personal interests of victims are affected in general in all proceedings in connection with the investigation into a situation. Thus, the personal interests of the victims are also affected by any potential interlocutory appeal, since it would result from an issue raised in a proceeding in which the victims were authorised to participate in the first instance.[28]

2. The participation of the victims in the appeals of 18 February 2008 is appropriate

22. The Office submits that the participation of the Victims in the interlocutory appeals taken by the Prosecution and the OPCD is appropriate insofar as the outcome of the proceedings, given the formulation of the issues on the basis of which leave to appeal was

[26] 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-tEN, 17 January 2006, para. 63.
[27] *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,* (Pre-Trial Chamber II), ICC-02/04-101, 10 August 2007, 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.
[28] The Office recalls the *Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims* appended to the *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 líberté provisoire de Thomas Lubanga Dyilo"* (Appeals Chamber), ICC-01/04-01/06-824, 13 February 2007, in particular, paras. 3, 4, 6, and 7. By way of example, see para. 3, *ibid*: "*In my view, no application by the victims is necessary to file a response to the document in support of the appeal in appeals proceedings pursuant to article 82(1)(b) of the Statute, provided that the victims in question have participated in the proceedings that gave rise to the appeal.*"

granted ("the Issues under Appeal") is likely to directly affect their status and their procedural rights.

23. 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*.[29] It follows, therefore, that the participation of victims in any interlocutory appeal against decisions made at the investigation stage must also be considered to be appropriate. Indeed, the Victims should, *a fortiori,* be authorised to participate in an interlocutory appeal arising from a decision rendered by the Pre-Trial Chamber in connection with the same situation, especially because the instant interlocutory appeals concern issues which directly affect their interests.

24. Lastly, the participation of the victims in the interlocutory appeals taken by the Prosecution and the OPCD is appropriate insofar as it meets the requirements of the victims' right to be heard pursuant to 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 clearly shows that their participation is not restricted to specific stages and hence is possible at all stages of the proceedings.[30]

25. In this regard, the Office recalls that the Prosecutor has, on several occasions, been greatly in favour of the participation of victims in proceedings before the Court, defending their interests and this new right which represents "*a milestone in international criminal justice*".[31] This stance is visibly shared by the OPCD,[32] particularly through its

[29] See Decision of 24 December 2007 and the Corrigendum to the said Decision, *supra,* footnote 6, para. 5; *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 *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, 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 27, paras. 7-10 and 84 and *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 26, para. 63.

[30] See 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.

[31] See "Prosecution's Document in Support of Appeal against the 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings", *supra,* footnote 15, p. 2.

acknowledgement that it subscribes to the principle according to which "*victim participation is a right and not a privilege*".[33] Moreover, it is interesting to note that, in its observations pertaining to Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06, the Prosecution maintained that victims could not be authorised to participate in the situation in the Democratic Republic of the Congo while the investigation is still ongoing[34] but, in the alternative, did not object to the participation of the victims in the situation.[35]

26. Moreover, the participation of victims in the interlocutory appeals taken by the Prosecution and the OPCD fits precisely the requirements of a fair trial, insofar as their participation would enable the interests of the victims – the persons primarily affected by the outcome of the said appeals – to be taken into account objectively and in depth.

27. 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 victims in the said interlocutory appeals is guaranteed by the restrictions placed upon it.

3. The participation of the victims in the appeals of 18 February 2008 is not inconsistent with or prejudicial to the rights of the Defence

28. Firstly, the Office is of the opinion that the 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.

29. 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:

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[32] 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, para. 1, p. 2: "*The framework for victim participation, as enshrined in the Rome Statute […], constitutes a legal landmark in international criminal law*."
[33] *Ibid.*
[34] See "Prosecution's Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06", *supra*, footnote 3, paras. 18-20, pp. 8-10.
[35] *Ibid.*, paras. 21 and 25, pp. 10 and 12.

> [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.[36]

30. 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.[37]

31. Furthermore, the Office recalls that the role of victims should not be confused with that of the Prosecution. Hence, the participation of victims in the said interlocutory appeals simply concerns the effective exercise of the rights granted to them in the *Rome Statute* and therefore does not affect the rights of the Defence.

32. In addition, the participation of the victims in this interlocutory appeal would be neither inconsistent with nor prejudicial to the rights of the Defence since, under regulation 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.[38]

33. 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 these proceedings, especially because the proceedings concern a violation of the fundamental rights

[36] See *Separate and Dissenting Opinion* of Judge René Blattmann in *Decision on victims' participation* (Trial Chamber I), ICC-01/04-01/06-1119, para. 26, p. 58. See also *ibid.*, footnote 127.
[37] 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.
[38] See *supra*, para. 27.

of the victims themselves.[39] Hence, the participation of the victims in the said interlocutory appeals would not prejudice the interests of the Defence.[40]

Consequently, the Office submits that the personal interests of Victims a/0007/06, a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06 and a/0209/06 as well as a/0047/06 to a/0052/06 are affected by the interlocutory appeals to which this request relates, 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 Victims' request and, consequently, to grant them the right to participate in the appeals taken by the Prosecution and the OPCD against the decision of the Single Judge of Pre-Trial Chamber I of 24 December 2007.

The Principal Counsel also requests the Appeals Chamber to set a time limit for the filing of the response to the documents filed in support of the appeals taken by the Prosecution and the OPCD on 18 February 2008, and to grant her leave to participate in the hearings, if any, that will be held by the Chamber to consider the said appeals.

[39] 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.

[40] 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]

Ms Paolina Massidda,
Principal Counsel,
Office of Public Counsel for Victims

Dated this 28 February 2008

At Genoa, Italy