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No.: ICC-01/04  
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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 CONGO**

**Public Document**

**OPCD Response to the submissions of the Legal Representatives**

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## 1. Procedural history

1. On 6 February 2008, the Honourable Single Judge granted the Office of Public Counsel for the Defence (OPCD) and the Prosecution 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/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’<sup>1</sup> of 24 December 2007 (Decision of 24 December 2007).
2. The OPCD and Prosecution filed their respective appeal briefs on 18 February 2008.
3. On 29 February 2008, the Appeals Chamber issued an order, in which the Chamber directed the legal representatives to file applications to participate in these appeals by 10 March 2008, setting out “whether and how the personal interests of the victims concerned are affected by this appeal, indicating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings and why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence.”<sup>2</sup>
4. On 28 February 2008, the Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6, and a/0071/06 filed a request to participate on behalf of these alleged victims.<sup>3</sup>
5. On 28 February 2008, the Office of Public Counsel for Victims (OPCV) submitted three requests to participate: the first on behalf of applicants, with respect to whom the Single Judge had suspended her decision pending the Trial Chamber’s determination of these applicants’ status in the Thomas Lubanga Dyilo case;<sup>4</sup> the second on behalf of those applicants who had not been granted the status of victim pursuant to the

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<sup>1</sup> ICC-01/04-423

<sup>2</sup> Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor, ICC-01/04-481

<sup>3</sup> Demande des représentants légaux de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 et a/0071/06 aux fins d’autorisation de participer à l’appel interjeté par l’OPCD et le Procureur le janvier 2008 et autorisé par la Chambre préliminaire I le 6 février 2008, ICC-01/04-474

<sup>4</sup> ‘Requête du BCPV en tant que représentant légal des demandeurs dans le cadre de la situation en République démocratique du Congo aux fins de participation aux appels interlocutoires déposés par l’Accusation et le BCPD à l’encontre de la décision du 24 décembre 2007’ ICC-01/04-478, and ‘Requête du BCPV en tant que représentant légal des demandeurs dans le cadre de la situation en République démocratique du Congo aux fins de participation aux appels interlocutoires déposés par l’Accusation et le BCPD à l’encontre de la décision du 24 décembre 2007’ ICC-01/04-477

Decision of 24 December 2007;<sup>5</sup> and the third on behalf of those applicants who were granted the status of victim in the Decision of 24 December 2007, and who had not yet secured legal representation of their choice.<sup>6</sup>

6. On 10 March 2008, the Legal Representative of a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 filed a request to participate on behalf of these alleged victims.<sup>7</sup>
7. The OPCD hereby files its consolidated response.

## **2. Submissions**

8. In applying the criteria established by Article 68(3), the Appeals Chamber has held that that “[i]n order to allow for a proper determination of the issue by the Appeals Chamber pursuant to article 68 (3) of the Statute, an application should include a statement from the victims in relation to whether and how their personal interests are affected by the particular interlocutory appeal, as well as why it is ‘appropriate’ for the Appeals Chamber to permit their views and concerns to be presented. Furthermore, it is for the Appeals Chamber to ensure that any views and concerns of victims must be presented ‘in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’”.<sup>8</sup> This test was previously applied by the Appeals Chamber in relation to the interlocutory appeal concerning Thomas Lubanga Dyilo’s application for interim release.<sup>9</sup> The criteria are to be applied cumulatively, as is apparent from Article 68(3) and the judgement of the Appeals Chamber.
9. The first part of this response will address the respective issues of (i) personal interests (ii) appropriateness and (iii) prejudice to the defence. The second part will refer to the modalities of participation, should leave to participate be granted. The OPCD would

<sup>5</sup> ‘Requête du BCPV en tant que représentant légal des demandeurs dans le cadre de la situation en République démocratique du Congo aux fins de participation aux appels interlocutoires déposés par l’Accusation et le BCPD à l’encontre de la décision du 24 décembre 2007’ ICC-01/04-477 and ICC-01/04-478.

<sup>6</sup> 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, ICC-01/04-476 and ICC-01/04-475.

<sup>7</sup> Application of the Legal Representative of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 for Leave to Participate in the Appeal filed by the OPCD and the Prosecution against the 24 December 2007 Decision, ICC-01/04-486.

<sup>8</sup> “Decision of the Appeals Chamber on the OPCV’s request for clarification and the legal representatives’ 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 responses thereto by the OPCD and the Prosecutor,” ICC-01/04-450, 13 February 2008.

<sup>9</sup> The Prosecutor v Thomas Lubanga Dyilo, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo,’” ICC-01/04-01/06-824, 13 February 2007, at para. 44.

also like to respectfully request the Appeals Chamber to consider the OPCD's recognition that the personal interests of certain alleged victims might be affected for the purposes of this specific interlocutory appeal, to be without prejudice to the merits of the OPCD's submissions concerning whether the personal interests of alleged victims are affected by proceedings during the situation phase.

## **2.1 Personal Interests**

10. In addressing the alleged victims' personal interests the OPCD notes that the procedure established by the Appeals Chamber requires that "an application should include a statement from the victims in relation to whether and how their personal interests are affected by the particular interlocutory appeal"<sup>10</sup> and that, specifically, the alleged victims are required to make "explicit link[s] between their submissions and the specific issues raised on appeal".<sup>11</sup>
11. Relevant personal interests that have been previously recognised by the Appeals Chamber include such tangible issues as the potential for continuation of crimes, or further hostility<sup>12</sup> as well as "when their [the alleged victims'] protection is in issue and in relation to proceedings for reparations".<sup>13</sup>
12. The OPCD also endorses the views of Judge Pikis who, in a separate opinion, offers further examples of relevant personal interests such as "the elicitation of evidence revealing the injury inflicted upon victims by the crime"<sup>14</sup> (this being the subject matter of the relevant proceedings) and "protection and support in the proceedings".<sup>15</sup> Judge Pikis further opines that "participating victims' views and concerns are referable to the cause that legitimizes their participation, the cause that distinguishes them from other victims, namely their personal interests to the extent they are affected by the proceedings",<sup>16</sup> thereby emphasising the particularity of each alleged victim's personal interests and the need for those interests to be tied inimitably to the relevant proceedings.

<sup>10</sup> The Prosecutor v Thomas Lubanga Dyilo, Appeals Chamber Judgement of 13 February 2007, ICC-01/04-01/06-824, at para. 44.

<sup>11</sup> The Prosecutor v Thomas Lubanga Dyilo, Appeals Chamber Judgement of 13 February 2007, at para. 44.

<sup>12</sup> The Prosecutor v. Thomas Lubanga Dyilo: 'Observations of victims a/0001/06, a/0002/06 and a/0003/06 in respect of the application for release filed by the Defence', ICC-01/04-01/06-530-tEN, 9<sup>th</sup> October 2006, at paras 11-15; confirmed by Appeals Chamber, decision of 13 February 2007, ICC-01/04-01/06-824, at para. 54.

<sup>13</sup> The Prosecutor v Thomas Lubanga Dyilo, "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007," ICC-01/04-01/06-925, 13 June 2007, at para. 28.

<sup>14</sup> Separate Opinion of Judge Pikis, Appeals Chamber Judgement of 13 June 2007, ICC-01/04-01/06-925 at para. 14.

<sup>15</sup> Separate Opinion of Judge Pikis, Appeals Chamber Judgement of 13 June 2007, ICC-01/04-01/06-925 Para.

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<sup>16</sup> Para. 16.

13. The OPCD therefore submits that the concept of personal interests should continue to be interpreted so as to follow this established trend of tangible and particularised interests.<sup>17</sup>

14. In the context of the present appeal, the OPCD is of the view that the following (non-exhaustive) list of issues could conceivably impact on the personal interests of the alleged victims:

*Issue 1:*

- whether generic presumptions concerning the personal interests of alleged victims during the situation phase facilitate or frustrate the right of alleged victims to express their personal views and concerns in relation to particular proceedings;
- whether, before subjecting the applicants to the scrutiny of the application process, the Chamber should first identify viable proceedings during the situation phase in which they could potentially participate;
- whether there are concrete, as opposed to potential or hypothetical proceedings during the situation phase which directly impact on the personal interests of these particular alleged victims;
- the advantages and/or disadvantages – from the perspective of the alleged victim – of being requested to identify the impact of specific proceedings on their personal interests, for example, in terms of the expenditure of their time and resources that such a requirement might entail, or in terms of whether such a requirement would ensure that their right to have their views and concerns considered would be implemented in an effective and meaningful manner;
- the impact, on the alleged victims, of confining the scope of participation under article 68(3) to persons who have suffered harm as a result of alleged crimes, which are being actively investigated or prosecuted by the Prosecutor;
- whether it is possible to make an informed choice to participate in proceedings during the situation phase, if the applicants are not in a position to assess the consequences as regards their ability to testify as a witness for either the prosecution or the defence in a specific case; and
- whether the impact of a proceeding on the personal interests of alleged victims will differ depending on the type of harm they suffered (for example, moral

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<sup>17</sup> See E. Haslam, “Victim Participation at the ICC”, in McGoldrick, Rowe and Donnelly (eds.): *The Permanent International Criminal Court* (2004) at p. 326.

harm as opposed to direct physical harm), and whether they were physically present when the alleged offence occurred.

*Issue 2:*

- the impact of being requested by the Chamber to supplement their applications forms with additional supporting documentation concerning the identity and their relationship to the person who suffered physical harm.

15. In terms of the particular personal interests cited by the Legal Representatives, the OPCD submits the following observations.

*Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 and a/0071/06*

16. The OPCD observes that the personal interests listed by the legal representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 and a/0071/06, namely the “status and the rights granted to them at the situation stage and pre-trial stages of the case”<sup>18</sup> are generic in nature and not congruent with the requirement that they identify an ‘explicit link’ with the issues raised. The OPCD cites Judge Pikis in this regard, in submitting that “no grounds are put forward establishing personal interests of the Applicants being at stake or apt to be affected by the determination of the appealability of the *sub judice* decision. And none can be directly or inferentially identified.”<sup>19</sup>

17. The OPCD further observes that VPRS 1-6 are subject to the legal regime set out in the Pre-Trial Chamber’s decision of 17 January 2006, in particular, the requirement that participation in specific proceedings could be subject to a further assessment by the Chamber as to whether the specific proceedings impact on their personal interests.<sup>20</sup> As such, it is not apparent from the legal representative’s filing as to how the Appeals Chamber’s resolution of the first appellate issue would impact on the rights previously conferred upon them by the 17 January 2006 decision.

18. In terms of the second appellate issue, the Single Judge found that a/0071/06 suffered physical harm;<sup>21</sup> as such, this issue does not directly impact on the personal interests of a/0071/06.

<sup>18</sup> ‘Demande des représentants légaux de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 et a/0071/06 aux fins d’autorisation de participer à l’appel interjeté par l’OPCD et le Procureur le janvier 2008 et autorisé par la Chambre préliminaire I’ at para. 20.

<sup>19</sup> Separate Opinion of Judge Pikis in Prosecutor v Thomas Lubanga Dyilo, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, ICC-01/04-01/06-925, 13 June 2007, at para. 22.

<sup>20</sup> See paragraphs 64, 73 and 74.

<sup>21</sup> Decision of 24 December 2007 at para. 103.

19. In the decision of 17 January 2006, the Pre-Trial Chamber found that VPRS 1, VPRS 2, VPRS 4, and VPRS 6 suffered moral harm as the result of the death of a relative.<sup>22</sup>

20. However, in light of the fact that the OPCD has not been granted disclosure of the applicants' identities and application forms, the OPCD is unable to conclude whether a requirement that persons claiming to suffer moral harm should submit documentation concerning the identity of the person who suffered physical harm, and their relationship to this person, would impact on the rights of these particular alleged victims.

*Legal Representative of a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06*

21. The Legal Representative submits that the "appeal proceedings will have a direct impact on the said Victims, given that the determination of the appealable issues [...] will impact upon their procedural status and rights in the situation and in the pre-trial stage of a case and consequently will influence their ability to present their views and concerns in accordance with Article 68(3) of the Rome Statute."<sup>23</sup>

22. The OPCD observes firstly that this statement is very broad, and fails to differentiate between the impact of the different issues, for which leave to appeal was granted, on the personal interests of the alleged victims. Whereas the above submission concerning the impact on the personal interests of the alleged victim might be relevant to the OTP appellate issues, and the first appellate issue of the OPCD, it is not directly linked to the second issue.

23. In this regard, according to the Decision of 24 December 2007, applicants a/0034/06, a/0042/06, a/0044/06, and a/0148/06 were recognised to have suffered moral harm as the result of the death of a close relation,<sup>24</sup> and of these applicants, a/0034/06, a/0044/06, and a/0148/06 were admitted to participate on that basis alone.<sup>25</sup> Applicant a/0148/06 did not provide any supporting documentation concerning the identity of their deceased relative, and their relationship to this person. As such, the personal interests of this applicant are directly affected by the OPCD's second appellate issue.

<sup>22</sup> 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, Public redacted version of 22 March 2006, ICC-01/04-101-Corr at para. 117, 132, 162, 183.

<sup>23</sup> Application of the Legal Representative of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 for Leave to Participate in the Appeal filed by the OPCD and the Prosecution against the 24 December 2007 Decision, ICC-01/04-486 at para. 18.

<sup>24</sup> Decision at paras. 23 and 25.

<sup>25</sup> Decision at paras. 71, 79, 128

24. It is not possible, however, for the OPCD to verify whether this is the case with respect to the other applicants, as a result of the fact that the OPCD has never received their applications.

25. The OPCD finally observes that the Legal Representative's reference to the impact on the alleged victims' rights in the pre-trial phase of the case is unfounded, given that firstly, none of these alleged victims have, at this point in time, been granted the right to participate in the pre-trial stage of a case, and secondly, the appellate issues do not concern the pre-trial phase of proceedings.

*Legal Representative of a/0007/06, a/0008/06, a/0022/06, 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 ("the OPCV")*

26. The OPCD firstly notes that in contradistinction to the OPCV's assertion that the Honourable Single Judge granted the status of victim to a/0007/06, a/0008/06, and a/0128/06 to a/0141/06,<sup>26</sup> the Decision of 24 December 2007 did not grant the status of victim to a/0007/06 and a/0008/06, and of a/0128/06 to a/0141/06, only a/0128/06, a/0129/06, a/0132/06, a/0133/06, a/0134/06, a/0135/06, a/0140/06, and a/0140/06 were granted the status of victim.<sup>27</sup>

27. The OPCD observes that notwithstanding the fact that the Legal Representatives have been expressly requested by the Appeals Chamber to provide a statement from the victims as to whether and how their personal interests are affected by the particular interlocutory appeal, the Legal Representatives reiterate the findings of Pre-Trial Chamber I and II that "the personal interests of victims are affected in general at the investigation stage",<sup>28</sup> and opine that since the "personal interests of victims are affected in general in any proceedings relating to a situation [...] the personal interests of the victims are also concerned in any interlocutory appeal".<sup>29</sup>

28. These blanket assertions do not assist the parties to constructively facilitate the right of affected persons to participate, nor are they consistent with the previous findings of the Appeals Chamber on this subject.

<sup>26</sup> ICC-01/04-474-tEng, at para. 5.

<sup>27</sup> Decision of 24 December 2007 at p. 51.

<sup>28</sup> Citing 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6' ICC-01/04-101-tEN-Corr, 17 January 2006, and 'Decision on legal representation, appointment of counsel for the Defence, protective measures, and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, to a/0104/06 and 1/0111/06 to a/0127/06' ICC-02/04-112, 1 February 2007.

<sup>29</sup> Request of the OPCV, ICC-01/04-476-tEng at paragraph 21.



29. The OPCV further contends that by proposing alternative mechanisms to secure the rights of alleged victims during the situation phase, the OPCD clearly wishes to deny the applicants the right to participate at this stage. The OPCD firstly notes that the relevant test for participation is not whether the alleged victim agrees or disagrees with the legal submissions put forth by a party, it is whether their personal interests are directly impacted by this issue, and secondly, observes that these submissions appear to be directed at the appeal of 4 February 2008, rather than the appeals of 18 February 2008, which were focussed on the operation of article 68(3), and the evidentiary requirements for establishing moral harm.
30. Nonetheless, as set out at paragraph 14 *supra*, the OPCD recognises that the personal interests of the alleged victims, who were authorised to participate in the situation phase pursuant to the Decision of 24 December 2007, could be directly impacted by the issues deriving from the first appellate issue of the OPCD, and the appeal of the OTP.<sup>30</sup>
31. However, as regards the second appellate issue of the OPCD, the OPCD observes that a/0024/06, a/0030/06, a/0033/06, a/0041/06, a/0072/06, a/0133/06, a/0145/06, a/0151/06, and a/0209/06 were recognised by the Chamber to have suffered moral harm as the result of the death of a deceased relative.
32. Whereas a/0209/06 furnished “un acte de mariage coutumier” in order to establish the family link with her husband, applicants a/0133/06, a/0145/06, and a/0151/06 did not provide any supporting documentation concerning the identity of their deceased relative, and their relationship to this person. As such, the personal interests of these applicants are directly affected by the OPCD’s second appellate issue.
33. It is not possible, however, for the OPCD to verify whether this is the case with respect to the other applicants, as a result of the fact that the OPCD has never received their applications.

*Legal Representative of 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 (filed by the OPCV)*

<sup>30</sup> The OPCD refers to its submissions at paragraphs 20-22 of its Appeal Brief of 18 February 2008, to the effect that the alleged victims are required to demonstrate that their personal interests are directly affected by the issues being considered on appeal, as opposed to the ultimate outcome of the appeal. This approach is consistent with the conclusions of the Appeals Chamber, as set out in the Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, ICC-01/04-01/06 OA8, 13 June 2007 at paras 25-26.

34. The OPCD notes that the legal representative also advocates for the participation of alleged victims who have not yet been granted permission to participate in the situation.<sup>31</sup>
35. As a preliminary observation, the OPCD refers to the findings of the Honourable Single Judge that “due to the specific object and purpose of the application process, applicants “are neither entitled to reply to the observations of the Prosecution and the Defence nor to request leave to appeal the decision of the Chamber on the merits of their applications””.<sup>32</sup>
36. The OPCD further refers to the following statement of Judge Pikis:
- “Of which victims (of those coming within the definition) the personal interests are at stake in any given proceedings? The inevitable answer is of victims who suffered harm from the crime or crimes, the subject-matter of investigation, confirmation, the trial, appeal, revision (article 84 of the Statute), and reduction of sentence (article 110 of the Statute and rule 224 of the Rules of Procedure and Evidence).”<sup>33</sup>
37. Absent a finding that the applicants have suffered harm from an alleged crime, which is the subject-matter of investigation, confirmation, *et cetera*, the applicants do not fall within the scope of article 68(3). The OPCD therefore submits that in light of their limited procedural stature, the personal interests of applicants are not affected by the interlocutory appeal.
38. In any case, the OPCD notes that the applications of a/0005/06, a/0006/06, a/0019/06, a/0020/06, a/0027/06, a/0036/06, a/0039/06, a/0040/06, a/0043/06, a/0144/06, a/0153/06, a/0154/06, a/0155/06, a/0156/06, a/0157/06, a/0159/06, a/0160/06, a/0203/06, a/0220/06, a/0222/06, a/0240/06 were dismissed due to the absence of reliable documentation concerning the identity of the applicants.<sup>34</sup> This particular issue was not contested by the parties in their appeals. As such, the present status of these applicants will remain wholly unaffected by the outcome of the appeals.
39. Applications a/004/06, a/0035/06, a/0073/06 to a/0080/06 and a/0110/06 were dismissed because they were submitted under rule (3), but lacked the consent from the alleged victim,<sup>35</sup> or identification documents concerning the alleged victim.<sup>36</sup> This

<sup>31</sup> See ICC-01/04-477 at para. 17.

<sup>32</sup> “Decision on the Application for Leave to Appeal the Decision on the Requests of the OPCV”, ICC-01/04-437, 18 January 2008, citing “Decision on the Requests of the OPCV”, ICC-01/04-418, 10 December 2007, at para. 16.

<sup>33</sup> Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, ICC-01/04-01/06-925, 13 June 2006, Separate Opinion of Judge Pikis at paragraph 13.

<sup>34</sup> Decision at paras. 17, 18 and 26.

<sup>35</sup> Decision at paras. 20 and 21.

<sup>36</sup> Decision at paras. 22.

aspect of the decision was also not contested by either the OPCD or the OTP in the three appeals, for which leave to appeal was granted.

*Legal Representative 0047/06 to a/0052/06 (filed by the OPCV)*

40. The OPCV also requests the right to participate on behalf of applicants a/0047/06 to a/0052/06, who have not yet been granted the right to participate in the situation. In the decision of 24 December 2007, the Honourable Single Judge noted that these applications had been submitted in the case file of the Thomas Lubanga Dyilo case, and therefore decided that it would be appropriate to defer consideration of these applications pending the decision of the Trial Chamber.<sup>37</sup>
41. Since the Honourable Single Judge has not granted these applicants the procedural status of victim, the resolution of the first appellate issue will have no impact on their current position, and thus their personal interests. As such, the applicants' interests can only be said to be affected on a purely hypothetical basis.
42. As concerns the second appellate issue, the OPCD is not able to verify whether their personal interests are affected by this issue as a result of the fact that the OPCD has never received their applications. In any case, it can be concluded that in light of the fact that they have been granted an actual right to participate on the basis of moral harm, the applicant do not possess a judicially recognised interest as regards this issue.

## **2.2 Appropriateness**

43. OPCD observes that Article 68(3) requires a "specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration".<sup>38</sup> In this regard the OPCD endorses the opinions expressed by Judge Pikis, namely that "[t]he stage at which the views and concerns of victims may be presented must be at an interval of the proceedings that would be appropriate, regard being had to the norms of a fair and impartial trial and the rights of the accused".<sup>39</sup>
44. The OPCD would also endorse the views of Judge Song, who attaches the notion of appropriateness to that of expediency, such that permitting the airing of alleged

<sup>37</sup> At paragraph 142.

<sup>38</sup> The Prosecutor v Thomas Lubanga Dyilo, Appeals Chamber Judgement of 13 February 2007, ICC-01/04-01/06-824, para. 40.

<sup>39</sup> Separate Opinion of Judge Pikis, Appeals Chamber Judgement of 13 June 2007, ICC-01/04-01/06-925, at para. 20. See also D. Donat-Cattin, 'Article 68 Protection of the Victims and their participation in the proceedings' in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* at p. 886.

victims' views and concerns in situations or modes that may substantially delay the proceedings would not satisfy this criterion.<sup>40</sup>

45. In light of the fact that the current appellate proceedings represent the first occasion in which several key issues concerning article 68(3) and the evidentiary requirements for moral harm will be considered at the appellate level, the OPCD submits that it would be in the interests of justice to ensure that the views and concerns of alleged victims are taken into consideration as it would ensure that the Appeals Chamber has the benefit of considering the appellate issues through the lens of those directly affected by these issues.
46. Their participation could also facilitate the ability of the parties to consider, and proactively devise potential responses to any legitimate concerns proffered by the legal representatives on behalf of the alleged victims. This would ensure an immediate and expeditious resolution from the Appeals Chamber in relation to these concerns. In contrast, if these views and concerns were deferred for consideration to future proceedings in the situation phase, this might result in a need for future appellate intervention, and unnecessary re-litigation of these issues.
47. The OPCD therefore respectfully submits that it would not oppose the Appeals Chamber finding that it is appropriate for the alleged victims to present their views and concerns in relation to those appellate issues which directly impact on their personal interests, notwithstanding the fact that their legal representatives might not have satisfactorily demonstrated the propriety of their clients' participation.
48. Against this background the Legal Representatives of VPRS 1 - 6 and a/0071/06 submit that participation would be appropriate as it "would enable them to defend their interests and exercise their rights at a stage in the proceedings that is likely to affect the rights and benefits of their status as victim at the situation stage of the DRC".<sup>41</sup> The Legal Representatives of a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 also cite the same argument.<sup>42</sup>

<sup>40</sup> Separate Opinion of Judge Song in the Prosecutor v Thomas Lubanga Dyilo, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007," ICC-01/04-01/06-925, 13 June 2007, at para. 23.

<sup>41</sup> ICC-01/04-474 tEng at para. 22.

<sup>42</sup> ICC-01/04-487, at para. 18.

49. In light of fact that the personal interests of VPRS 1-6 are not directly affected by these appeals, the OPCD submits that this argument fails to discharge the requirements of Article 68(3) and the standard set by the Appeals Chamber.<sup>43</sup>
50. However, as regards a/0071/06, and applicants /0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06, the OPCD submits that the appropriate criterion is met for the reasons set out at paragraphs 45-47 above.
51. The filings of the OPCV focus primarily on the abstract propriety of participation, as opposed to the question as to whether it would be appropriate for these specific alleged victims to participate in these specific appellate proceedings.<sup>44</sup> The OPCV further contends that since participation at the situation phase is in general appropriate, participation in interlocutory appeals during the situation phase is also appropriate. These submissions also fail to meet the positive obligation to describe how this criterion is met. Nonetheless, the OPCD agrees with the proposition that the participation of persons directly affected by the appellate issues “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”.<sup>45</sup>

### **2.3 Whether participation would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial**

52. The OPCD notes that, pursuant to Article 68(3) and the findings of the Appeals Chamber, “it is for the Appeals Chamber to ensure that any views and concerns of victims must be presented ‘in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’”.<sup>46</sup> The Appeals Chamber has previously held that this criterion could be fulfilled by virtue of the observations received by the alleged victims being “limited and ... specifically relevant to the issues arising in the appeal rather than more generally”,<sup>47</sup> and by according other parties the right to respond.<sup>48</sup>

<sup>43</sup> The “Decision of the Appeals Chamber on the OPCV’s request for clarification and the legal representatives’ 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 responses thereto by the OPCD and the Prosecutor” (ICC-01/04-450, 14 February 2008) provides that alleged victims must indicate “why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings”.

<sup>44</sup> See for example, paras 25 of ICC-01/04-476-tEng.

<sup>45</sup> ICC-01/04-476-tEng at para. 26.

<sup>46</sup> The Prosecutor v Thomas Lubanga Dyilo, Appeals Chamber Judgement of 13 February 2007, ICC-01/04-01/06-824, para. 44.

<sup>47</sup> The Prosecutor v Thomas Lubanga Dyilo, Appeals Chamber Judgement of 13 February 2007, para. 55.

<sup>48</sup> Para. 55.

53. Judge Pikis has held that the application of this criterion includes a consideration of all aspects of Article 67 of the Statute,<sup>49</sup> and the necessary exclusion of a ‘second accuser’ in line with the principle of equality of arms.<sup>50</sup> Judge Song, in a separate opinion within the same judgement, cites excessive delay as another point to take into consideration.<sup>51</sup>

*Participation of anonymous alleged victims*

54. Notwithstanding the possibility that the criteria of personal interests and appropriateness may be met for the alleged victims, the OPCD respectfully submits that anonymous participation is contrary to the rights of the defence, and the fairness of the proceedings – in particular, the principle of equality of arms.

55. As noted above, the OPCD has not been granted disclosure of the identity or application forms of several of the alleged victims. In addition, the ad hoc counsel for the Defence who was appointed by the Chamber to respond to these applications was only provided with heavily redacted versions of the applications. In contrast the Prosecution has received the full, unredacted version of the applications.

56. The OPCD is therefore not in a position to assess whether the personal interests are affected, in particular, as regards the second appellate issue. If the applicants are granted a right to participate, the OPCD will also not be in a position to assess the relevance or reliability of applicants’ observations. In addition, the submissions of the ad hoc counsel for the Defence cannot assist the OPCD on this point, since the ad hoc counsel for the Defence was also not in a position to analyse the reliability of the applicants.

57. In contrast, since the Prosecution has been fully apprised of the identity of the applicants and the contents of their application forms, the Prosecution will be procedurally advantaged *vis-à-vis* its ability to respond firstly, to the question of whether the personal interests of these applicants are affected by the appellate issues, and secondly, to the substantive views and concerns presented by any such applicants who may be granted the right to participate in either the Prosecution or OPCD appeals.

58. In this regard, the Honourable Pre-Trial Chamber II has concluded the following:

*This conclusion (namely, that any redactions which may be necessary and/or appropriate must be equally made on the copies of the Applications to be transmitted to the Defence and on the copies to be transmitted to the*

<sup>49</sup> Separate Opinion of Judge Pikis, Appeals Chamber Judgement, 13 June 2007, ICC-01/04-01/06-925, para 18.

<sup>50</sup> Para. 19.

<sup>51</sup> Separate Opinion of Judge Song, Appeals Chamber Judgement of 13 June 2007, ICC-01/04-01/06-925, at para. 27.

*Prosecutor) results, in the first place, from the serious security concerns arising from the situation in the field, as highlighted above, and requires a particularly restrictive approach. Second, it results from fundamental considerations of fairness (namely, the need to preserve the equality of arms), which require that both parties be placed on an equal footing in respect of the exercise of a right which is bestowed on them both by the statutory texts.*<sup>52</sup>

59. The OPCD further submits that the participation of anonymous victims is not supported by the Statute, Rules or Regulations. Article 67(1)(d) enshrines the right of the defence to be present and to effectively participate in proceedings which impact on defence rights.
60. Withholding information concerning the identity of persons participating in this appellate process thus excludes the OPCD from these key aspects of the proceedings. It has been observed in this regard by David Donat-Cattin that “non-disclosure of identity to the public or to the media is one thing, anonymity of witnesses/victims to the defence is another. The latter is unacceptable, in the light of the right of the defence [...] in fact, it is not possible to respond to arguments presented by someone ‘without identity’”.<sup>53</sup>
61. It has also been opined that the “words ‘having regard to the provisions of the Statute’ suggest that article 67 can be limited by express provisions to the contrary”.<sup>54</sup> This implies *a contrario* that absent such an express provision to the contrary, the rights of the Defence set out in article 67(1) prevail. The OPCD respectfully submits in this regard that no provision in the Statute or Rules expressly permits applicants to participate on an anonymous basis.
62. Article 68(1) obliges the Court to take “appropriate measures” to protect victims and witnesses. As set out in the OPCD Appeal briefs of 4 and 18 February 2008, the criterion of appropriateness must also take into consideration factors of fairness.
63. In addition, this provision is expressly subject to the caveat that measures authorised under article 68(1) “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial” (emphasis added).
64. The only statutory provision which permits the non-disclosure of information to the defence (as opposed to the public), is article 68(5), which is directed to the non-

<sup>52</sup>Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on 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, ICC-02/04-01/05-134, 1 February 2007, at para. 25.

<sup>53</sup> Otto Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court *Observers' Notes, Article by Article*, ‘Article 68’ at p. 878.

<sup>54</sup> W. Schabas, Article 67, in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft, at page 851.

disclosure of the information concerning prosecution witnesses, and does not apply to proceedings in which the witnesses will participate (namely, the trial stage).

65. In terms of the Rules, Rule 81(4) does not provide a general basis for the redaction of the identity of applicants; it is subject to the requirements of necessity and proportionality,<sup>55</sup> and the overall limitations of article 68, noted above.
66. It is thus apparent that the drafters of the Rome Statute framework clearly intended to eschew the approach of the ECHR (which permits limited use of anonymous witnesses), and the heavily criticized Tadic precedent.<sup>56</sup> In this regard, the Statute was finalised in 1998; the participants in this process would therefore have been aware of the fact that the participation of anonymous witnesses at the ICTY had been problematic, and indeed, that the veil of anonymity had been used to hide the manufacturing of false evidence.
67. In this regard, the ICTY proceedings relating to witness L (Dragan Opacic), demonstrate that the fact that the Chamber has been apprised of the identity of the applicant/victim will not in itself ameliorate the prejudice to the defence and the integrity of the proceedings which could result if the assertions of the applicants are false. In this case, upon application of the Prosecution, the Chamber granted full anonymity to witness L – who alleged that both his father and brother had been killed. It was subsequently discovered by chance that these persons were in fact alive, and

<sup>55</sup> In the present circumstances, the OPCD submits that withholding the identities of the alleged victims from the OPCD or the ad hoc counsel is neither necessary nor proportionate. There is no legitimate basis for deeming either the OPCD or the ad hoc counsel for the defence to constitute a security risk: OPCD/ad hoc counsel do not communicate with any accused persons or potential witness concerning the contents of the applications, nor do they conduct investigative inquiries in the field in relation to the applications. There is also no basis for discriminating between the professional ethical responsibilities of the defence, as compared to the Prosecution.

<sup>56</sup> “The design of the ICC Statute is intended to prevent the Court from adopting the approach of the ICTY majority in *Tadic*. The drafter’s aim was to endorse the approach taken in *Blaskic* of permitting the court ‘to withhold certain identifying information about witnesses prior to trial, but not after the trial commenced [...]’. As one participant at the Treaty Conference stated: ‘Delegations agreed that in certain cases it would be appropriate for the Prosecutor to withhold evidence until the commencement of the trial on the grounds that disclosure could lead to grave endangerment to a witness. However upon the commencement of the trial it would not be appropriate ... In other words the Article does not permit the use of ‘anonymous witnesses’. The accused must be in a position to know his accusers.’ (citing Helen Brady, ‘Trials and Appeals before the International Criminal Court’: [www.redcross.org.au](http://www.redcross.org.au)): David Lusty, ‘Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials’ 24 *Sydney L. Rev.* (2002) 361, at 421-3.

“The commission did not adopt a proposal by Italy, supported by three other states, to permit the court in certain cases to conceal the identity of witnesses from the accused by appointing a “guardian” to investigate the reliability of the victim or witness. Australia, supported by a large number of states, opposed any rule authorizing the use of anonymous witnesses at trial. It reminded delegates that the understanding of the drafters of Article 68(5) at the Diplomatic Conference was that it permitted the court to withhold certain identifying information about witnesses prior to trial, but not after the trial commenced. It also stated that concealing the identity of prosecution witnesses from the accused would violate human rights and that, under the principle of equality of arms, such anonymity would require the court to permit the accused to conceal the identity of defense witnesses from the prosecution.” “Christopher Keith Hall, ‘The First Five Sessions of the Un Preparatory Commission for the International Criminal Court’, 94 *Am. J. Int’l L.* 773 at 784.



Witness L conceded that he had fabricated his testimony, and that he had been coached to do so by videos shown to him by the Bosnian Government.<sup>57</sup>

68. The OPCD therefore submits that in the same manner, the participation of anonymous applicants could prejudice the integrity of these important appellate proceedings; as such, their participation would be inappropriate.

69. In terms of the applicability of other sources of law under article 21 of the Statute, domestic practice does not consistently<sup>58</sup> support the use of anonymous victims and witnesses.<sup>59</sup>

70. The OPCD further submits that the provisions of article 68(3) must be construed in a manner which is consistent with internationally recognised human rights norms. In

<sup>57</sup> Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, 5 December 1996, <http://www.un.org/icty/tadic/trialc2/decision-e/61205pm2.htm>

See Transcript of 26 November 1996, [www.un.org/icty/trans1/961126ED.htm](http://www.un.org/icty/trans1/961126ED.htm) at page 8584.

“Witness L’s false testimony was deliberately fabricated by the Bosnian authorities with no other objective than to secure the conviction of the Serb Dusko Tadic. When witness L finally confessed that he had lied, it became clear that information and video material exists which enables a non-witness to testify as though he had been there. His initial evidence was convincing to the extent that the Prosecution believed it without query. Witness L confessed that he had been set up by the Bosnian authorities after he was captured as a member of the Bosnian Serb Army. After being interviewed by the military and police officers about his own behaviour, he was transferred to (redacted). There at a security centre (that, as we now know turned out to be the building of the secret service of the Bosnian government) he was compelled to co-operate with the Bosnian authorities in testifying against Dusko Tadic. Witness L said that he was trained for a substantial length of time. They showed him all kinds of documents and maps, instructed him on the basis of the statements of others and showed him video tapes of Trnopolje camp and about Dusko Tadic. They instructed him to give statements while he was watching the video tapes. At the conclusion of the training, they gave him three prepared statements to sign. These statements were handed over to the Prosecution of the Tribunal. On the basis of this material, witness L gave evidence in Court, in closed session, as the anonymous Witness L. Further, it has become clear that the Prosecution did not in any way check whether witness L’s statements were correct. This is in spite of the fact that for more than a year the man was at the Prosecution’s disposal in the UN detention unit here in The Hague. It was not until we discovered, by coincidence, during our investigation on location information which indicated that witness L was not telling the truth, that the Prosecution reluctantly started to verify his statements. However, the Prosecution continued to the end to deny the results of the defence’s investigation and to obstruct the Defence’s attempts to expose witness L as a liar.”

<sup>58</sup> As set out at Appeals Chamber’s Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, dated 13 July 2006, ICC-01/04-168, in order to constitute a general principle of law, it is necessary to ascertain that the principle in question is “universally adopted” (see para. 32). See also the ICTY Furundzija Trial Judgement of 10 December 1998, at para 178: “reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world”. Trial Judgement of 10 December 1998, at para 178: <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>

<sup>59</sup> In the United States of America, plaintiffs filing a claim under the Alien Torts Act can request that their identity and documentation be withheld from the public (John Doe procedure). Nonetheless, if the defendant chooses to contest the claim, the “the defendant’s lawyers would still have the right to ask [...] questions (in a proceeding known as a “deposition”) and to ask [the plaintiff] to provide documents in [the plaintiff’s] possession that relate to the case.” This includes the right to request the plaintiff to disclose their identity. If the plaintiff does not wish to do so due to security risks, he or she has the option to withdraw the complaint. *Becoming a Plaintiff Without Revealing Your Identity*, prepared by the Center for Justice and Accountability, <http://www.cja.org/cases/BeingADoe.pdf>

The OPCD further notes that the identities of witnesses may not be kept from the Defence in Cyprus, Finland, Italy, Luxembourg, Malta, and Sweden: The Law Society of England and Wales, ‘Study of the laws of evidence in criminal proceedings throughout the European Union’, Summary Report October 2004, pp43-45. Available at: <http://www.sq3.it/enlsc/docs/materials/LawEvidenceEU.pdf>

this connection, the OPCD refers to the prohibition under human rights law of anonymous accusers,<sup>60</sup> and anonymous complainants.<sup>61</sup>

#### *Participation of applicants*

71. The issue of permitting the participation of alleged victims who have yet to be granted permission to participate in the proceeding may also militate against the fairness and impartiality of the process, in that it may leave the appeal open to alleged victims with a tenuous, if any at all, link to the proceedings.

<sup>60</sup> See for example, Second Report on the Situation of Human Rights in Peru, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, Doc. 59 rev. (2000). (Chapter II) <http://www1.umn.edu/humanrts/iachr/country-reports/peru2000-chap2.html#66#66>; Odolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha and Carlos Florentino Molero Coca v. Peru, Case 11.182, Report N ° 49/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 1126 (1999); Human Rights Committee's Concluding Observations on Colombia, UN Doc. CCPR/c/79/Add. 76, 1 April 1997, paras. 21, 40.

<sup>61</sup> The regimes for individual applications to both regional and UN human rights bodies do not allow for the identity of the applicant to be withheld from the respondent State; the Convention for the Protection of Human Rights and Fundamental Freedoms <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> provides, at Article 35(2)(a), that "The Court shall not deal with any [individual] application that is anonymous"; the Rules of Court of the European Court of Human Rights only permit anonymity vis-à-vis the public, in exceptional cases - Rule 47(3), <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf>.

The Inter-American Court of Human Rights similarly does not allow for such a measure; Article 26 of the Rules of Procedure and Evidence provides that "the following information shall be provided to the Court by the Commission: (a) the parties to the case", whilst Article 28 provides that "[o]n receipt of the application, the Secretary shall give notice thereof and transmit copies to ... the respondent State" <http://www1.umn.edu/humanrts/oasinstr/zoas7ctr.htm>. Article 56 of the African Charter on Human and Peoples' Rights provides that the name of the victim must be provided, whilst Article 57 provides that "prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned." <http://www1.umn.edu/humanrts/instr/z1afchar.htm>.

Similarly, the United Nations Treaty Bodies do not permit consideration of anonymous complaints: "[i]t is not possible to submit a complaint anonymously. The relevant Committee however will normally agree, if requested, to suppress the name of the alleged victim in published documents. It is not possible however to keep the name of the alleged victim from the relevant State, as the State cannot investigate the allegations if it does not know who that person is." S. Joseph, K. Mitchell, L. Gyorki, C. Benninger-Budel, *A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* Part II, Procedures of the Human Rights Committee, at p.55, [http://www.omct.org/pdf/UNT/2006/handbook\\_series/vol4/eng/handbook4\\_full\\_eng.pdf](http://www.omct.org/pdf/UNT/2006/handbook_series/vol4/eng/handbook4_full_eng.pdf)

See First Optional Protocol to the International Convention on Civil and Political Rights, Article 3: "The Committee shall consider inadmissible any communication under the present Protocol which is anonymous..." ([http://www.unhchr.ch/html/menu3/b/a\\_opt.htm](http://www.unhchr.ch/html/menu3/b/a_opt.htm)) and Rules 90-91 of the Human Rights Committee, which provide for the rejection of anonymous applications on consideration of admissibility, whilst requiring that the respondent State be contacted and "shall [be] request[ed] ... to submit a written reply to the communication". Identical provisions can be found in the Rules of Procedure and Evidence of the Committee on Elimination of Racial Discrimination (91-92) and the Committee Against Torture (107-108) (all Rules of Procedure and Evidence of Treaty Bodies available at <http://www1.umn.edu/humanrts/TreatyBodyRulesOfProcedure.pdf>).

See also '23 FAQ about Treaty Body complaints procedures', which distinguishes between the ability of a complaint to request identifying information be suppressed from the final public decision, and their obligation to provide their identity, which is then transmitted to the State to respond:

<http://www2.ohchr.org/english/bodies/petitions/individual.htm>

In terms of the United Nations Human Rights complaint mechanisms, under the revised 1503 complaint mechanism "Manifestly ill-founded and anonymous communications are screened out by the Chairperson of the Working Group on Communications, together with the Secretariat, based on the admissibility criteria. Communications not rejected in the initial screening are transmitted to the State concerned to obtain its views on the allegations of violations.": 'Human Rights Council Complaint Mechanism':

<http://www2.ohchr.org/english/bodies/chr/complaints.htm>

72. To permit these applicants to participate in the present appeal could also unnecessarily enlarge the scope of the submissions presented to the Chamber, and thus impact on the right of the OPCD to have adequate time and facilities to effectively respond to these submissions.

*The participation of the legal representative of a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 and Applicants a/0163/06 to a/0183/06, and a/0185/06 to a/0187/06*

73. The OPCD reiterates its request for further information concerning the fact that the filings of Me. Keta are signed 'At London, UK/ Tours, France'.

### **3. Modalities of Participation**

74. The OPCD respectfully submits that view and concerns should be just that – views and concerns. The purpose of participation under article 68(3) is to enable the alleged victims to voice their personal concerns through their legal representatives; it is not intended to transform the process before the ICC into tripartite proceedings.
75. In this regard, the OPCD has noted the perceptible similarity between the filings of the different legal representatives, and the general emphasis on legal and procedural arguments. The OPCD accepts the possibility that this may be coincidence or may indicate a concurrence of shared views and concerns between the many applicants and alleged victims. The OPCD nonetheless respectfully requests the Honourable Appeals Chamber to direct the legal representatives to focus their observations on the particular views and concerns expressed to them by their respective clients and the manner in which these interests are linked to the appellate issues, as opposed to the general legal views of the legal representatives themselves.
76. In setting the time-limit for the alleged victims' filings, it is submitted that the Appeals Chamber should take into account the need for an expeditious resolution of these important issues. The Appeals Chamber should also bear in mind the date of OPCD's appeal (4 February) and the time that the legal representatives have had thus far to brief their clients, and to consult with them regarding their views and concerns as related to the issues set out in the brief. Finally, the OPCD requests the Honourable Appeals Chamber to consider either setting a total page limit for the combined observations of the respective legal representatives, or to adjust the corresponding page limit for the parties' consolidated response. The OPCD notes that the first option would be more conducive to focussed and expeditious proceedings.

#### 4. Relief Sought

77. As stated above, the OPCD is not, in general terms, opposed to the participation of alleged victims in the present interlocutory appeal; however it submits that alleged victims should only be permitted to participate provides that they satisfy the guidelines delineated above, in accordance with the Rome Statute and the decisions of the Appeals Chamber.

78. The OPCD therefore respectfully requests the Honourable Appeals Chamber

- i. to reject the applications for participation of alleged victims who have not yet been accepted to participate at the situation phase; and
- ii. to admit the participation of the alleged victims whose personal interests are directly (as opposed to hypothetically or indirectly) affected by the issues set out in the Appeal Briefs of 18 February 2008 *insofar* as they fulfil the criteria outlined by the OPCD, and in accordance with the modalities of participation proposed by the OPCD.



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Mr Xavier-Jean Keïta  
Principal Counsel of OPCD

Dated this Thursday, the 20th of March 2008

At The Hague, the Netherlands