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Date: **17 December 2007**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Sylvia Steiner, Single Judge

**Registrar:** Mr Bruno Cathala

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

**Public Document**

**OPCV's Application for Leave to Appeal Against the Decision Rendered on  
10 December 2007 on the Application Filed by the OPCV on 18 October 2007**

**The Office of the Prosecutor**

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## I. BACKGROUND

1. On 17 August 2007, Pre-Trial Chamber I rendered the “*Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation*”.<sup>1</sup>

2. Pursuant to the said decision, on 24 August and 13 September 2007, the Registrar appointed the Principal Counsel of the Office of Public Counsel for Victims (“the OPCV” or “the Office”) to represent all applicants who do not have a legal representative.<sup>2</sup> These letters were filed in the record of the situation on 31 August 2007 and 27 September 2007 respectively.<sup>3</sup>

3. On 18 October 2007, the Office filed an application in which it requested access to certain documents registered in the record of the situation in the Democratic Republic of the Congo (“the DRC”) concerning Applicants a/0004/06 to a/0008/06, a/0019/06, a/0020/06, a/0022/06 to a/0024/06, a/0026/06, a/0027/06, a/0029/06, a/0030/06, a/0033/06, a/0035/06, a/0036/06, a/0039/06 to a/0041/06, a/0043/06, a/0046/06 to a/0052/06, a/0072/06 to a/0080/06 and a/0110/06 (“the Applicants”).<sup>4</sup>

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<sup>1</sup> See the “*Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation*”, No. ICC-01/04-374, 17 August 2007,

<sup>2</sup> See Letters from the Registrar, VPRS/A/037/fm of 24 August 2007 and VPRS/A/044/fm-ig, of 13 September 2007.

<sup>3</sup> See “*Enregistrement d’un courrier du représentant légal retirant sa demande d’anonymat et d’autres documents relatifs à la représentation légale de demandeurs aux fins de participation*”, no. ICC-01/04-380, 31 August 2007. See also “*Registration of Appointment of the OPCV and amendment to appointment*”, No. ICC-01/04-401-Conf., 27 September 2007.

<sup>4</sup> See “*Request of the OPCV to access documents in the situation record related to applicants a/0004/06 to a/0008/06, a/0019/06, a/0020/06, a/0022/06 to a/0024/06, a/0026/06, a/0027/06, a/0029/06, a/0030/06, a/0033/06, a/0035/06, a/0036/06, a/0039/06 to a/0041/06, a/0043/06, a/0046/06 to a/0052/06, a/0072/06 to a/0080/06 and a/0110/06,*” No. ICC-01/04-407, 18 October 2007.

4. On 10 December 2007, the Single Judge issued the “Decision on the Request of the OPCV”<sup>5</sup> (“the Decision”) rejecting the application in its entirety.

5. Accordingly, the Office respectfully applies to the Single Judge for leave to appeal against the Decision pursuant to article 82(1)(d) of the *Rome Statute* on the grounds that the impugned decision raises the question of whether the rights of the victims to be informed of the proceedings – which also includes the right to be notified of any document related to their applications in the proceedings – is infringed by the refusal to grant their legal representative access to those documents filed in the record of the situation which affect their personal interests. Furthermore, the reversal of the practice hitherto available before Pre-Trial Chamber I is an infringement of a right acquired by the legal representatives by virtue of this practice, and this right should not be adversely affected.

6. These issues significantly affect the fairness and expeditiousness of proceedings, and their immediate resolution by the Appeals Chamber would materially advance the proceedings.

## II. LEGAL BASIS OF THE APPLICATION FOR LEAVE TO APPEAL

7. Under article 82(1)(d) of the *Rome Statute*:

*1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:*

8. As legal representative of Applicants a/0004/06 to a/0008/06, a/0019/06, a/0020/06, a/0022/06 to a/0024/06, a/0026/06, a/0027/06, a/0029/06, a/0030/06, a/0033/06, a/0035/06, a/0036/06, a/0039/06 to a/0041/06, a/0043/06, a/0046/06 to a/0052/06, a/0072/06 to a/0080/06 and a/0110/06 (the Applicants), the Principal Counsel instituted proceedings before Pre-Trial Chamber seeking access to certain documents and/or materials concerning the Applicants registered in the record of the situation in

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<sup>5</sup> See the “*Decision on the request of the OPCV*”, No. ICC-01/04-418, 10 December 2007.

the DRC. However, the Single Judge did not question the standing of the Principal Counsel to make such a submission, or the Principal Counsel's power to act on behalf of the Applicants in question. It seems clear that, within the framework of and for the purposes of these proceedings, the Principal Counsel is considered to be a "party" and accordingly falls within the ambit of article 82(1)(d) of the *Rome Statute*.

9. Furthermore, the Office submits that there is no doubt that in this case, the Principal Counsel, as legal representative of the Applicants, has a direct standing to seek leave to appeal the decision rendered as a result of these proceedings. Moreover, the personal interests of the Applicants are directly affected by the Decision within the meaning of article 68(3) of the *Rome Statute* and an appeal against the said decision is "appropriate" in that such appeal is the only effective remedy available to the Applicants to assert the effectiveness of their right to be informed of the proceedings.

### III. CRITERIA SET OUT IN ARTICLE 82(1)(d) OF THE *ROME STATUTE*

10. Pursuant to article 82(1)(d) of the *Rome Statute*, leave to appeal may be granted if the issue raised by the appellant has, firstly, been dealt with in the impugned decision and, secondly, if it meets the following two cumulative criteria: (a) it would significantly affect i) the fair and expeditious conduct of the proceedings or ii) the outcome of the trial; and, (b) in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>6</sup>

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<sup>6</sup> In this light, see "Judgment on the Prosecutor's Application for extraordinary Review of Pre-Trial chamber I's 31 March 2006 Decision denying Leave to Appeal" in which Pre-Trial Chamber I denied an application for leave to appeal, No. ICC-01/04-168, 13 July 2006, paras. 9-20. see also, *inter alia*, the "Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges", ICC-01/04-01/06-915, 24 May 2007, p. 8.

1) *An “issue” likely to give rise to an interlocutory appeal*

11. The Office respectfully submits that the Single Judge erred in denying Principal Counsel access to certain documents which affect the personal interests of the victims and which are registered in the record of the situation on the ground that “even persons to whom the procedural status of victims has been granted before the Chamber have not been entitled to a list of all documents which have been filed in the record of the Situation, including any under seal or confidential documents. They have only been entitled to public information concerning the proceedings”.<sup>7</sup> Using the same line of reasoning, the Single Judge also denied the Office access to all non-public documents which the Principal Counsel might need for the purposes of fulfilling the mandate to represent the Applicants, which was conferred on her by Pre-Trial Chamber I.<sup>8</sup>

12. Lastly, the Single Judge rejected the request by the Office for access to two confidential documents specifically mentioned in its application on the ground that these documents contain information on applicants who are not represented by the Office,<sup>9</sup> indicating, moreover, that the preparation of a redacted version of these submissions for the purpose of disclosing them to the OPCV would affect the efficiency and expeditiousness of the proceedings.<sup>10</sup>

13. In support of this latter conclusion, the Single Judge stated that non-disclosure of the filings to the OPCV was consistent with the need to provide for the protection of victims and witnesses pursuant to article 57(3)c) of the *Rome Statute*, and with the general principle prescribed in rule 86 of the *Rules of Procedure and Evidence* that the Chamber, in making an order, must take into account the needs of the victims and witnesses in accordance with article 68 of the *Rome Statute*.<sup>11</sup> Furthermore, in the opinion of the Single Judge, the non-disclosure to the OPCV of the requested observations does not prejudice the Applicants in that were their

<sup>7</sup> See the “Decision on the request of the OPCV”, *supra*, footnote 5, para. 6, pp. 5-6.

<sup>8</sup> *Ibid.*, para. 7, p. 6.

<sup>9</sup> *Ibid.*, para. 13, p. 8.

<sup>10</sup> *Ibid.*, para. 15, pp. 8-9.

<sup>11</sup> *Ibid.*, para. 14, p. 8.

applications for participation in proceedings before the Court to be rejected, they would be entitled, pursuant to rule 89(2) of the *Rules of Procedure and Evidence*, to submit new applications at a subsequent stage in the proceedings.<sup>12</sup>

14. Accordingly, the decision by the Single Judge not to grant the Principal Counsel access to documents in the record of the situation which affect the personal interests of the Applicants has a direct adverse impact on their right to effective and adequate representation. The record of the situation contains important information that is directly linked to the Applicants. As a case in point, the record is supposed to contain information on facts to which the Applicants make reference in their applications for participation and on the security situation in the regions in which the events occurred, or where their family members reside at present. In any event, this information is necessary for the Principal Counsel to more precisely support the applications for participation and, where necessary, to request protective measures for the Applicants. This information is not in itself confidential. However, neither the Principal Counsel nor the Applicants are in a position to obtain such information by their own devices.

## **2) The “issue” significantly affects the fair and expeditious conduct of the proceedings**

15. The Office maintains that the “issue” which is the subject of its interlocutory appeal significantly affects the fair and expeditious conduct of the proceedings pursuant to article 82(1)(d) of the *Rome Statute*.

16. In this respect, the Office recalls the Decision of the Appeals Chamber, according to which “[a] wrong decision on an issue in the context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those

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<sup>12</sup> *Ibid.*, para. 16, p. 9.

*circumstances the proceedings will not be advanced but on the contrary they will be set back*".<sup>13</sup>

17. Firstly, the Office submits that the Principal Counsel was appointed legal representative of the Applicants further to the decision of Pre-Trial Chamber I dated 17 August 2007 in order to provide to each Applicant "*support and assistance [...] until such time as the applicant has been granted victim status and a legal representative is chosen by him or her or appointed by the Court.*"<sup>14</sup> Since her appointment, the Principal Counsel has thus far had no access to certain documents in the record of the situation which directly concern the Applicants she is representing and, indeed, does not even have access to the index of that record. She is therefore unable to identify the documents and/or materials in the record which she may require to represent the Applicants effectively and therefore fulfil the mandate conferred on her by Pre-Trial Chamber I.

18. Lack of access to certain documents of the record which may have an impact on the personal interests of the victims causes harm to the Applicants, in particular with regard to their right to protection under article 68(1) of the *Rome Statute*. In this respect, the Office would like to emphasize that it is not requesting unconditional and unrestricted access to the record of the situation. In fact, the Office only filed its request in order to have access to documents and/or materials which may have an impact on the personal interests of the Applicants. Furthermore, those documents and/or materials may concern applications for protective measures submitted by the Prosecutor or any other participant in the proceedings. The responses to those applications, in particular any negative responses, or even the type of protective measures granted, directly affect the interests of the Applicants. Moreover, the fact that under rules 87 and 88 of the *Rules of Procedure and Evidence* victims may request the Chamber to adopt certain measures for their protection, and that regulation 42(4)

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<sup>13</sup> See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra*, footnote 6, para. 16, p. 7.

<sup>14</sup> See the "Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation", *supra*, footnote 1, p. 24.

of the *Regulations of the Court* expressly states that “*the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made*” clearly indicates that the said protective measures affect the personal interests of the persons concerned, whether they are applicants or have already been authorised to participate in the proceedings before the Court.

19. In this respect, the Office recalls that, in accordance with the jurisprudence of the Court as enunciated by the Appeals Chamber, “[t]he term “fair” in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1)) and article 21(3); making its interpretation and application subject to internationally recognized human rights”.<sup>15</sup> Furthermore, in the Appeals Chamber’s view, “[b]reach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial”.<sup>16</sup> Lastly, the Appeals Chamber interpreted the term “proceedings”, as set forth in article 82(1)(d) of the *Rome Statute*, as applicable to “proceedings prior and subsequent thereto”.<sup>17</sup>

20. The Office also observes that, in accordance with the “internationally recognized human rights” to which the Appeals Chamber refers in its Judgment of 13 July 2006, the requirements of a “fair trial” imply, *inter alia*, that “each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”<sup>18</sup> and that, moreover, the right to a “fair trial” implies that each participant must have “the opportunity not only to make known any evidence needed for his claims to succeed, but also to

<sup>15</sup> See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra*, footnote 6, para. 11, p. 6.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, para 12, p 6.

<sup>18</sup> See ECHR, *Dombo Beheer B.V. v. The Netherlands*, Application No. 14448/88, Judgment of 27 October 1993, para 33.



*have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision".*<sup>19</sup>

21. In this regard, the Office recalls principle 21 of the Basic Principles on the Role of Lawyers, pursuant to which “[i]t is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time”.<sup>20</sup>

22. The Office submits that the Single Judge's refusal to grant the Principal Counsel access to certain documents of the record of the situation concerning the Applicants she is representing deprives the Principal Counsel of the reasonable opportunity to represent the interests of the Applicants, and of the opportunity to have knowledge of the observations and materials in the record of the situation. In light of the principles of the afore-mentioned “internationally recognized human rights”, any such refusal to grant access may seriously prejudice the Applicants' right to a “fair trial”, which, in the Appeals Chamber's view, may, in turn, affect even the outcome of the trial.

23. Furthermore, the Single Judge is opposed to the disclosure of the redacted version of the observations filed under rule 89(1) of the *Rules of Procedure and Evidence* on the ground that this practice is “not only impractical now, but will be extremely impractical as the number of applicants continues to increase”. The Single Judge's decision directly contradicts her previous decision dated 11 September 2007, whereby she

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<sup>19</sup> See ECHR, *Mantovanelli v. France*, Application No. 21497/93, Judgment of 18 March 1997, para. 33; *Nideröst-Huber v. Switzerland*, Application No. 18990/91, Judgment of 18 February 1997, para. 24; *Lobo Machado v. Portugal*, Application No. 15764/89, Judgment of 20 February 1996, para. 31; *Vermeulen v. Belgium*, Application No. 19075/91, Judgment of 20 February 1996, para. 33; *Ruiz-Mateos v. Spain*, Application No. 12952/87, Judgment of 12 September 1993, para. 63.

<sup>20</sup> See the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from 27 August to 7 September 1990. The document is available on the website of the Office of the United Nations High Commissioner for Human Rights at the following address: <http://www2.ohchr.org/english/law/lawyers.htm>.

granted the request of the Office of Public Counsel for the Defence.<sup>21</sup> Moreover, this reversal of the practice adopted to date by Pre-Trial Chamber I therefore constitutes a breach of a right acquired by the legal representatives under the previous practice.

24. Moreover, the Single Judge bases her refusal on article 57(3)(c) of the *Rome Statute*,<sup>22</sup> pursuant to which the Chamber must “*provide for the protection and privacy of victims*”. However, the Office observes that the restriction of a right of certain victims cannot be imposed by reason of the institution’s alleged inability to fulfil its obligations in respect of the protection and safety of other victims under article 68(1) of the *Rome Statute*.

25. Furthermore, the Single Judge’s reasoning that the practice will become impractical in the future should not be the basis for her decision in this matter. It must be noted that the applicants are always represented in a large group by one legal representative, and that when they have no other representation, the Office also represents them as a group, pursuant to the decision of Pre-Trial Chamber I of 17 August 2007.<sup>23</sup> Therefore, only one document must be drafted for each group of applicants, not for each applicant, and this should not affect the expeditious conduct of the proceedings as asserted by the Single Judge in support of her refusal.

26. Lastly, the appointment of the Office as legal representative of the applicants means *de facto* that it enjoys all of the prerogatives afforded to external legal representatives. This finds further support in the fact that Pre-Trial Chamber I made express reference to regulation 80 of the *Regulations of the Court* when it appointed the Office as legal representative of the applicants in its decision dated 17 August 2007.<sup>24</sup>

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<sup>21</sup> See the “Decision on the request by the OPCD for access to previous filings”, No. ICC-01/04-389, 11 September 2007, p. 8.

<sup>22</sup> See the “Decision on the Request of the OPCV”, *supra*, footnote 5, para. 14, p. 8.

<sup>23</sup> See the “Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation”, *supra*, footnote 1.

<sup>24</sup> *Ibid.*, paras. 41 and 46, pp. 19 and 20.

3) *An immediate resolution of the “issue” by the Appeals Chamber may materially advance the proceedings*

27. Following the Court’s jurisprudence as enunciated by the Appeals Chamber, the “issue” must, moreover, be *“such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”*.<sup>25</sup>

28. On the one hand, by its decision of 17 August 2007,<sup>26</sup> Pre-Trial Chamber I imposed on the Office the obligation to provide appropriate legal representation before the Court to unrepresented applicants under regulation 80 of the *Regulations of the Court*. On the other hand, the same Chamber, by its decision of 10 December 2007,<sup>27</sup> denied the Office access to certain documents and materials registered in the record of the situation in the DRC concerning the Applicants represented by the Principal Counsel. In other words, the Decision restricts unjustifiably and without any legal basis the Office’s powers as a legal representative.

29. The Office wishes to stress that it understands the Single Judge’s wish, as stated in paragraph 6 of her decision of 10 December 2007,<sup>28</sup> to follow the previous jurisprudence of the Court concerning the disclosure of documents and materials classified as confidential found in the record of a situation or of a case. It also shares the Single Judge’s concern, as expressed in paragraph 14 of her decision of 10 December 2007, about ensuring the protection of victims and witnesses.<sup>29</sup>

<sup>25</sup> See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra*, footnote 6, para. 14, p. 7.

<sup>26</sup> See the “Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation”, *supra*, footnote 1.

<sup>27</sup> See the “Decision on the Request of the OPCV”, *supra*, footnote 5.

<sup>28</sup> *Ibid.*, pp. 5-6.

<sup>29</sup> *Ibid.*, p. 8.

30. However, the Office would like to recall that, under regulation 115 of the *Regulations of the Registry*, the members of the Office are bound by the *Code of Professional Conduct for counsel* in discharging their responsibilities and that they are also bound by a confidentiality obligation. In fact, this was the reason for the Pre-Trial Chamber's decision to grant the Office of Public Counsel for the Defence access to observations made under rule 89 of the *Rules of Procedure and Evidence* in unredacted form.<sup>30</sup>

**CONSEQUENTLY**, the Principal Counsel of the Office of Public Counsel for Victims respectfully requests the Single Judge to grant leave, under article 82(1)(d) of the *Rome Statute*, to appeal the decision dated 10 December 2007.

[signed]

**Paolina Massidda**

**Principal Counsel**

**Office of Public Counsel for Victims**

Dated this 17 December 2007

At The Hague

The Netherlands

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<sup>30</sup> See the "Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation", *supra*, footnote 1, para. 22, p. 13 and para. 31, p. 16.