

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04 OA4 OA5 OA6

Date: 30 June 2008

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

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

Mr Xavier-Jean Keïta

Legal Representatives of the Victims

Emmanuel Daoud
Patrick Baudouin
Carine Bapita Buyangandu
Joseph Keta

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda, Principal Counsel

REGISTRY

Registrar

Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of the Office of Public Counsel for the Defence (hereinafter: “OPCD”) against the decision of the Single Judge of Pre-Trial Chamber I entitled “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” of 7 December 2007 (ICC-01/04-417) (hereinafter: “Decision of 7 December 2007”), and

In the appeals of the Prosecutor and the OPCD against the decision of the Single Judge of Pre-Trial Chamber I entitled “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/236/06, 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”¹ of 24 December 2007 (ICC-01/04-423) (hereinafter: “Decision of 24 December 2007”),

Having before it six applications for participation in the appeal of the OPCD against the Decision of 7 December 2007, comprising of documents (ICC-01/04-446-tENG), (ICC-01/04-448-tENG), (ICC-01/04-466-tENG), (ICC-01/04-467-tENG), (ICC-01/04-468) and (ICC-01/04-469-Conf-Exp-tENG), and

Having before it six applications for participation in the appeals of the Prosecutor and the OPCD against the Decision of 24 December 2007, comprising of documents (ICC-01/04-474-tENG), (ICC-01/04-475-tENG), (ICC-01/04-476-tENG), (ICC-01/04-477-tENG), (ICC-01/04-478-tENG) and (ICC-01/04-486),

¹ On 31 January 2008, the Single Judge issued a corrigendum to this decision (ICC-01/04-423-Corr-tENG).

Renders the following

DECISION

- a. The “Observations of the Legal Representative of VPRS 1, VPRS 2, VPRS 3, VPRS 3 [sic], VPRS 4, VPRS 5, VPRS 6 and a/0071/06 on the ‘OPCD appeal brief on the Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor’” (ICC-01/04-451-tENG OA 4) of 14 February 2008 are rejected.

- b. The “Request of the Legal Representative of a/0105/06 for Leave to Participate in the Interlocutory Appeal Authorised on 23/1/2008” (ICC-01/04-469-Conf-Exp) of 22 February 2008 is rejected.

- c. Victims VPRS 1 to VPRS 6, a/0071/06; a/0105/06; 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, a/0209/06; 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 and a/0228/06 are granted the right to participate in these appeals for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal. They may present their submissions by 8 July 2008; the Prosecutor and the OPCD may thereafter file their responses by 18 July 2008 to the submissions presented by the aforesaid victims.

- d. The applications for participation in the appeals by applicants 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, a/0240/06; a/0163/06 to a/0183/06, a/0185/06 to a/0187/06 are rejected.

I. RELEVANT PROCEDURAL HISTORY

1. On 17 July 2007, the Single Judge of Pre-Trial Chamber I issued a decision authorising the Prosecutor and the OPCD to file observations on the applications of a/0163/06 to a/0187/06 to participate as victims in the Situation in the Democratic Republic of the Congo (hereinafter: "DRC").²
2. On 28 August 2007, the OPCD filed its "Request for the Single Judge to order the Prosecutor to disclose exculpatory materials"³ in which the OPCD requests the Single Judge to order the Prosecutor to search for and disclose to the OPCD material falling within the ambit of article 67 (2) of the Statute.
3. On 31 August 2007, the OPCD filed its "Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86 (2) (e)"⁴ in which the OPCD requested the Single Judge to order the legal representatives of the applicants to provide supporting documentation concerning various matters pursuant to Regulation 86 (2) (e) of the Regulations of the Court (hereinafter: "Regulations").
4. On 7 December 2007, the Single Judge rendered the Decision of 7 December 2007 in which both the requests of the OPCD were rejected.
5. On 13 December 2007 the OPCD sought leave to appeal the Decision of 7 December 2007⁵ which the Single Judge granted on 23 January 2008, with regard to a single overarching issue.⁶

² ICC-01/04-358.

³ ICC-01/04-378 and ICC-01/04-378-Conf-Exp-AnxA and AnxB.

⁴ ICC-01/04-381-Conf and ICC-01/04-381-Conf-AnxA, AnxB and AnxC.

⁵ ICC-01/04-419.

⁶ ICC-01/04-438. The issue certified for appeal at page 8 of this decision reads: "[W]hether article 68 (3) of the Statute can be interpreted as providing for a 'procedural status of victim' at the investigation stage of a situation and the pre-trial stage of a case; and (i) if so, whether rule 89 of the Rules and regulation 86 of the Regulations provide for an application process which only aims to grant the procedural status of victim and

6. On 4 February 2008, the OPCD filed its document in support of the appeal⁷ and the Prosecutor filed his response on 15 February 2008.⁸

7. On 6 February 2008, the Office of Public Counsel for Victims (“OPCV”), filed a “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*”⁹ (hereinafter: “Request of the OPCV”). The Request of the OPCV concerned, inter alia, clarification from the Appeals Chamber on the procedure to be followed by victims already authorised to participate and those whose applications were still pending before Pre-Trial Chamber I in the situation in the DRC to participate in the appeal lodged by the OPCD.

8. On 8 February 2008, the legal representatives of victims VPRS 1 to VPRS 6 and a/0071/06 filed an “Application from the Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 and a/0071/06 for Leave to Participate in the Appeal filed by the OPCD on 13 December 2007 and Authorised by Pre-Trial Chamber I on 23 January 2008”¹⁰ (hereinafter: “First Application of victims VPRS 1 to VPRS 6 and a/0071/06”).

9. On 11 February 2008, the legal representatives of victims VPRS 1 to VPRS 6 and a/0071/06 filed an “Application for Extension of Time for the Legal Representatives of Victims VPRS 1 to 6 and a/0071/06 to file a Brief in Response to the Observations submitted by the OPCD 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’”¹¹ (hereinafter: “Request for an extension of time”).

is thus distinct and separate from the determination of the procedural rights attached to such status; and what are the specific procedural features of the application process? or (ii) if not, how applications for participation at the investigative stage of a situation and the pre-trial stage of a case must be dealt with.”

⁷ ICC-01/04-440.

⁸ ICC-01/04-452.

⁹ ICC-01/04-442tENG.

¹⁰ ICC-01/04-446-tENG.

¹¹ ICC-01/04-447-tENG.

10. On 13 February 2008, the Appeals Chamber issued a decision and an order in the appeal of the OPCD against the Decision of 7 December 2007 entitled “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” (hereinafter: “Decision and Order of 13 February 2008”).¹² Herein the request of the OPCV for clarification was dismissed and the Request for an extension of time by the legal representatives was rejected. The Appeals Chamber further ordered that applications for participation in the appeal be filed by 21 February 2008 and that the OPCD and the Prosecutor may thereafter, by 4 March 2008 file a consolidated response to all applications received.

11. On 14 February 2008, the legal representative of victim a/0105/06 filed a “Request of the Legal Representative of Victim a/0105/06 for authorisation to participate in the appeal filed by the OPCD on 13/12/2007 and authorised on 23/01/2008”¹³ (hereinafter: “Application of victim a/0105/06”).

12. On 14 February 2008, the legal representatives of victims VPRS 1 to VPRS 6 and a/0071/06 filed the “Observations of the Legal Representative of VPRS 1, VPRS 2, VPRS 3, VPRS 3 [sic], VPRS 4, VPRS 5, VPRS 6 and a/0071/06 on the “OPCD appeal brief on the Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”¹⁴ (hereinafter: “Observations of the legal representatives of victims VPRS 1 to VPRS 6 and a/0071/06”)

13. On 21 February 2008, the OPCV filed the “Request of the OPCV Acting as Legal Representative of the Victims Authorised to Participate in the Proceedings in the Situation in the Democratic Republic of the Congo for Participation in the Interlocutory

¹² ICC-01/04-450 OA 4. The Decision and Order of 13 February 2008 was dated 13 February 2008 and notified on 14 February 2008.

¹³ ICC-01/04-448-tENG. The filing was dated 11 February but was notified on the 14 February 2008.

¹⁴ ICC-01/04-451-tENG OA 4.

Appeal Filed by the OPCD on 4 February 2008”¹⁵ (hereinafter: “First Application of the OPCV for Victims Authorised to Participate”).

14. On 21 February 2008, the OPCV, in addition, filed the “Request of the OPCV Acting as Legal Representative of the Applicants in the Situation in the Democratic Republic of the Congo for Participation in the Interlocutory Appeal Filed by the OPCD on 4 February 2008”¹⁶ (hereinafter: “First Application of the OPCV for Applicants not yet Authorised to Participate”).

15. On 21 February 2008, the legal representative filed an “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 and Applicants a/0163/06 to a/0183/06, and a/0185/06 to a/0187/06 for Leave to Participate in the Appeal filed by the OPCD on 13 December 2007 and Authorised by Pre-Trial Chamber I on 23 January 2008”¹⁷

16. On 22 February 2008, a second application on behalf of victim a/0105/06 was filed entitled “Request of the Legal Representative of a/0105/06 for Leave to Participate in the Interlocutory Appeal Authorised on 23/1/2008”¹⁸ (hereinafter: the “Second Application of victim a/0105/06”).

17. On 4 March 2008, pursuant to the Decision and Order of 13 February 2008, both the Prosecutor¹⁹ and the OPCD²⁰ filed their respective consolidated responses to all the applications for participation received in the appeal of the OPCD against the Decision of 7 December 2007.

18. On 24 December 2007 the Single Judge of Pre-Trial Chamber I issued the Decision of 24 December 2007. In this decision the Single Judge granted, inter alia, the procedural status of victim to 68 applicants, namely, a/0009/06, a/0016/06, a/0018/06, a/0021/06,

¹⁵ ICC-01/04-466-tENG OA 4.

¹⁶ ICC-01/04-467-tENG OA 4.

¹⁷ ICC-01/04-468 OA 4.

¹⁸ ICC-01/04-469-Conf-Exp-tENG.

¹⁹ ICC-01/04-483.

²⁰ ICC-01/04-484.

a/0022/06, a/0023/06, a/0024/06, a/0025/06, a/0026/06, a/0028/06, a/0030/06, a/0031/06, a/0032/06, a/0033/06, a/0034/06, a/0040/06, a/0041/06, a/0042/06, a/0044/06, a/0045/06, a/0046/06, a/0053/06, a/0055/06, a/0056/06, a/0057/06, a/0058/06, a/0060/06, a/0061/06, a/0062/06, a/0063/06, a/0071/06, a/0072/06, a/0105/06, a/0106/06, a/0107/06, a/0108/06, a/0109/06, a/0128/06, a/0129/06, a/0132/06, a/0133/06, a/0134/06, a/0135/06, a/0140/06, a/0141/06, a/0142/06, a/0145/06, a/0146/06, a/0147/06, a/0148/06, a/0149/06, a/0150/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06, a/0188/06, a/0199/06, a/0209/06, a/0228/06, a/0007/06 and a/0008/06; a/0130/06, a/0131/06 and a/0136/06; and a/0137/06, a/0138/06 and a/0139/06 in the Situation in the DRC.²¹

19. On 7 January 2008 both the Prosecutor²² and the OPCD²³ applied for leave to appeal the Decision of 24 December 2007. On 6 February 2008, the Single Judge of Pre-Trial Chamber I granted leave to appeal to both parties on three issues.²⁴

20. On 18 February 2008, the OPCD²⁵ and the Prosecutor²⁶ filed their respective documents in support of their appeals. The responses were filed on 29 February 2008.²⁷

21. On 28 February 2008, the legal representatives filed the "Request of the Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and a/0071/06 for Leave to Participate in the Appeal Taken by the OPCD and the Prosecutor on 7

²¹ ICC-01/04-423-Corr-tENG, at page 51.

²² ICC-01/04-428.

²³ ICC-01/04-429.

²⁴ ICC-01/04-444. The Prosecutor sought and was granted leave to appeal the issue of "whether a 'procedural status of victim' within the terms of the Decision, can be granted independent of any finding by the Chamber that the requirements of article 68(3) and rule 89 are satisfied, and without addressing and providing for a definition of the personal interests, or following the steps required by the Appeals Chamber's jurisprudence." (ICC-01/04-444 at pp.6 and 15). The OPCD sought and was granted leave to appeal two issues, namely: "(i) whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation, and (ii) whether in order to establish moral harm on the basis of harm suffered by a second person, it is necessary to adduce some level of proof concerning the identity of the second person and the applicant's relationship with this person." (ICC-01/04-444, at pp. 6, 7 and 15).

²⁵ ICC-01/04-455 OA 5.

²⁶ ICC-01/04-454 OA 6.

²⁷ ICC-01/04-482 OA 5 and ICC-01/04-479 OA 6.

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January 2008 and Authorised by Pre-Trial Chamber I on 6 February 2008”²⁸ (hereinafter: “Second Application of victims VPRS 1 to VPRS 6 and a/0071/06 ”).

22. On 28 February 2008, the OPCV filed identical applications in the appeals of the Prosecutor and the OPCD against the Decision of 24 December 2007 entitled “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”²⁹ (hereinafter: “Second Application of the OPCV for Victims Authorised to Participate”).

23. On 28 February 2008, the OPCV in addition filed identical applications in the appeals of the Prosecutor and the OPCD against the Decision of 24 December 2007 entitled “Request of the OPCV Acting as Legal Representative of the Applicants in the Situation in the Democratic Republic of the Congo for Participation in the Interlocutory Appeals Filed by the Prosecution and the OPCD against the Decision of 24 December 2007”³⁰ (hereinafter: “Second Application of the OPCV for Applicants not yet Authorised to Participate”).

24. On 29 February 2008, the Appeals Chamber issued identical orders in the two appeals entitled “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” (hereinafter: “Orders of 29 February 2008”).³¹

25. On 10 March 2008, pursuant to the Orders of 29 February 2008, the legal representative filed an “Application of the Legal Representatives 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” (hereinafter: “Application of Victims a/0016/06, a/0018/06,

²⁸ ICC-01/04-474-tENG.

²⁹ ICC-01/04-475-tENG OA 5 and ICC-01/04-476-tENG OA 6.

³⁰ ICC-01/04-477-tENG OA 5 and ICC-01/04-478-tENG OA 6.

³¹ ICC-01/04-480 OA 5 and ICC-01/04-481 OA 6.

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”).³²

26. On 20 March 2008, pursuant to the Orders of 29 February 2008, the Prosecutor³³ and the OPCD³⁴ filed their consolidated responses to all the applications received for participation in the appeals against the Decision of 24 December 2007.

II. REASONS FOR THE DECISION AND THE ORDER OF 13 FEBRUARY 2008 AND THE ORDERS OF 29 FEBRUARY 2008

27. As noted in paragraph 10 above, the Appeals Chamber having before it: (i) the Request of the OPCV for clarification, and (ii) the Request for an extension of time, rendered the Decision and Order of 13 February 2008, in which both the Request of the OPCV and the Request for an extension of time of the legal representatives were dismissed. In addition, the Appeals Chamber issued two identical orders on 29 February 2008 as noted in paragraph 24 above.

28. The Decision and Order of 13 February 2008 and the Orders of 29 February 2008 stated that the reasons for the decision and the orders (of the majority and the dissent of Judge Song) would be given in the decision of the Appeals Chamber on the participation of victims. Those reasons are set out below and the reasons for the dissent of Judge Song are appended to this decision.

A. Reasons for the Decision

29. The Request of the OPCV, on behalf of certain victims authorised to participate in the Situation in the DRC and certain applicants whose applications are *sub judice* before Pre-Trial Chamber I, recalled that the previous jurisprudence of the Appeals Chamber,

³² ICC-01/04-486.

³³ ICC-01/04-488 OA 5 OA 6.

³⁴ ICC-01/04-489 OA5 OA6.

namely, its Judgment of 13 February 2007³⁵ and its Decision of 13 June 2007³⁶ dealt, inter alia, with victim participation in appeals lodged under article 82 (1) (b) only.³⁷ As the Appeals Chamber had not at that time, had occasion to rule on victim participation in appeals lodged under article 82 (1) (d), as in the instant case, the OPCV requested the Appeals Chamber to specify the procedure to be followed by victims already authorised to participate including those applicants whose applications were still pending before the Pre-Trial Chamber, to participate in the appeal lodged by the OPCD against the Decision of 7 December 2007.³⁸

30. The Appeals Chamber considers the Request of the OPCV to be without legal basis as no provision within the legal instruments of the Court can be said to found such a request. If the Appeals Chamber were to answer such a request, it would have to assume the role of an advisory body, which it considers to be beyond and outside the scope of its authority. The Request of the OPCV was therefore dismissed for lack of jurisdiction.

31. In relation to the Request for an extension of time, the legal representatives of victims VPRS 1 to VPRS 6 and a/0071/06 submitted that pursuant to Regulation 65 (5) of the Regulations of the Court participants may file a response within ten days of notification of the document in support of the appeal. Given that the Appeals Chamber had not, at that stage rendered a decision on the First Application of VPRS 1 to VPRS 6 and a/0071/06 to participate in the appeal the legal representatives sought an extension of the ten-day time limit in order to safeguard their right to respond to the OPCD's document in support of the appeal.³⁹

³⁵ "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 OA7).

³⁶ "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 OA8).

³⁷ ICC-01/04-442-tENG, paragraph 13 and 14.

³⁸ Ibid. Page 8.

³⁹ ICC-01/04-447-tENG, page 3.

32. The Appeals Chamber recalls its Judgment of 13 February 2007⁴⁰ wherein it ruled:

“Furthermore, for the reasons set out above, in the absence of any express mention of victims within regulations 64 (4) or (5), the Appeals Chamber therefore does not interpret the reference to a “participant” or to the filing of “[t]he response” within those provisions to mean that victims have an automatic right to participate in an interlocutory appeal under article 82 (1) (b) of the Statute.”⁴¹

33. In addition, concerning the procedure in relation to applications to participate, the Appeals Chamber, in the abovementioned judgment, determined:

“Once an application to participate has been received, the Prosecutor and the Defence will thereafter be entitled to reply to the application within a time limit to be set by the Appeals Chamber, in line with the provisions of rule 89 (1) of the Rules of Procedure and Evidence. Thereafter, the Appeals Chamber will rule upon whether, and in what manner, the victims may participate in the appeal, necessarily taking into account the provisions of article 68 (3).”⁴²

34. Similarly, for the purpose of appeals under rule 155 of the Rules of Procedure and Evidence (hereinafter: “Rules”), the Appeals Chamber does not interpret the reference to a “participant” or to the filing of “a response” within regulation 65 (5) of the Regulations to mean that victims have an automatic right to participate in an interlocutory appeal under article 82 (1) (d) of the Statute. Accordingly, the Request for an extension of time was without foundation as the timeline prescribed in regulation 65 (5) of the Regulations could have no bearing on victims VPRS 1 to VPRS 6 and a/0071/06. Hence, the Request for an extension of time was rejected.

⁴⁰ “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 OA7).

⁴¹ Ibid. at paragraph 43.

⁴² Ibid. at paragraph 47 and 48.

B. Reasons for the Orders of 13 and 29 February 2008

35. As noted above, on 13 and 29 February 2008, the Appeals Chamber issued similar orders in respect of each appeal⁴³ directing that applications for participation in the appeal were to be filed and were to: “include a statement in relation to 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.” In addition the Prosecutor and the OPCD were directed to file a consolidated response to the applications which may include submissions on the right of victims to participate in the appeals and the modalities for such participation.

36. The Appeals Chamber is mindful that it has not had occasion to rule on the modalities of participation by victims in interlocutory appeals arising from the situation in the DRC pursuant to article 82 (1) (d) of the Statute until now. The Appeals Chamber recalls that in its judgment of 13 February 2007⁴⁴ in relation to the modalities of participation by victims in an interlocutory appeal arising in the case of Mr Lubanga Dyilo, pursuant to article 82 (1) (b), it determined that victims shall file an application seeking leave to participate in this type of appeal and that this arises from the wording of article 68 (3) of the Statute. The stipulation in article 68 (3) that victim participation shall be permitted “at stages of the proceedings determined to be appropriate by the Court” mandated a specific determination by the Appeals Chamber that the participation of victims is appropriate in a particular interlocutory appeal under consideration. It follows that an application from victims seeking leave to participate is required in order to enable the Appeals Chamber appropriately to make that determination.⁴⁵ With regard to the timeline for the filing of such applications, the Appeals Chamber has stated that applications by victims wishing to

⁴³ ICC-01/04-450 OA 4, ICC-01/04-480 OA 5 and ICC-01/04-481 OA6. The order of 13 February 2008, which is subsumed in the Decision of 13 February 2008 (ICC-01/04-450 OA 4) in the OPCD’s appeal against the Decision of 7 December 2007 is similar to the separate orders (of 29 February 2008) issued in the appeals of the Prosecutor and the Defence against the Decision of 24 December 2007, therefore the reasons for all three orders are dealt with collectively.

⁴⁴ See note 40 *supra*.

⁴⁵ *Ibid.* Paragraph 40.

participate in an interlocutory appeal should in principle be made as soon as possible after the appeal is filed.⁴⁶

37. The Appeals Chamber finds these procedures adopted in respect of interlocutory appeals pursuant to article 82 (1) (b) of the Statute to be equally applicable to the instant interlocutory appeals arising under article 82 (1) (d) of the Statute.⁴⁷

38. Accordingly, following the procedure it has established, the Appeals Chamber issued orders in the appeals, stipulating definitive timelines for the filing of applications for participation and the respective responses to these applications by the parties. The issuance of the Orders of 13 and 29 February 2008, in these circumstances, was a measure designed to facilitate the unimpeded and expeditious conduct of the appeal proceedings.⁴⁸

39. The Appeals Chamber directs that in future cases and until such time as the matter is regulated in the constituent documents of the Court, applications by victims for participation in appeals must be filed as soon as possible and in any event before the date of filing of the response to the document in support of the appeal.

III. ADMISSIBILITY OF THE OBSERVATIONS OF THE LEGAL REPRESENTATIVES OF VICTIMS VPRS 1 TO VPRS 6 AND a/0071/06

40. As noted in paragraph 12 above, on 14 February 2008, the legal representatives of victims VPRS 1 to VPRS 6 and a/0071/06 filed observations in response to the OPCD's

⁴⁶ Ibid. Paragraph 46.

⁴⁷ See also the recent Appeals Chamber Decision of 16 May 2008: "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled 'Decision on Victim's Participation'" (ICC-01/04-01/06-1335 OA 9 OA 10), and the Decision of 18 June 2008: "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007" (ICC-02/05-138) where the same procedures were adopted in respect of interlocutory appeals pursuant to article 82 (1) (d) of the Statute.

⁴⁸ See Rule 156(4) of the Rules of Procedure and Evidence, which provides in relation to interlocutory appeals that: "The appeal shall be heard as expeditiously as possible."

appeal against the Decision of 7 December 2007. The observations were filed on the same day as the Decision and Order of 13 February 2008 was notified.

41. The Appeals Chamber considers the Observations of the legal representatives of victims VPRS 1 to VPRS 6 and a/0071/06 to be inadmissible, as they were filed without the leave of the Appeals Chamber. Whether the participation of the relevant victims in the appeal was appropriate had not, at that stage, been determined by the Appeals Chamber. Accordingly, the Observations of the legal representatives of victims VPRS 1 to VPRS 6 and a/0071/06 are rejected.

IV. ADMISSIBILITY OF THE SECOND APPLICATION OF VICTIM a/0105/06

42. As noted in paragraph 16 above, the legal representative of victim a/0105/06 filed a second application for leave to participate in the appeal of the OPCD against the Decision of 7 December 2007. In addition, this request was filed “Confidential, *ex parte*” and notified on 22 February 2008 (ICC-01/04-469-Conf-Exp).

43. The Appeals Chamber determines that the further application of the legal representative is inadmissible for the reasons that: (i) the second application was filed after the expiration of the timeline stipulated in the Appeals Chamber’s Decision and Order of 13 February 2008 and (ii) it was superfluous given that the legal representative had already filed her Application on behalf of victim a/0105/06 on 14 February 2008⁴⁹. Accordingly, the Second Application of victim a/0105/06 is rejected.

⁴⁹ See note 11 *supra*.

V. REASONS FOR THE DECISION ON VICTIM PARTICIPATION IN THE APPEALS

A. Preliminary procedural issue

General considerations in relation to the handling of the appeals

44. This decision is being determined in the context of three appeals. The first appeal lodged by the OPCD arises against a preliminary decision (Decision of 7 December 2007) of the Single Judge of Pre-Trial Chamber I, concerning matters arising during rule 89 proceedings. The second and third appeals result from both the Prosecutor and the OPCD lodging appeals against the same decision (Decision of 24 December 2007) in respect of similar issues which are intrinsically linked to the issue certified for leave in the first appeal. Viewed collectively, the issues concern the manner in which applications by victims to participate at the investigation stage of a situation and the pre-trial stage of a case should be addressed. In the interests of efficiency the Appeals Chamber will consider the appeals jointly for the purpose of determining victim participation in these appeals.

B. The Submissions of the Participants

1. The First and Second Applications of victims VPRS 1 to VPRS 6 and a/0071/06⁵⁰

45. The First and Second Applications of victims VPRS 1 to VPRS 6 and a/0071/06 to participate in the appeals is brought on behalf of applicants who were granted the status of victim in the situation in the DRC by Pre-Trial Chamber I in its Decision of 17 January 2006 in respect of victims VPRS 1 to VPRS 6⁵¹ and a/0071/06 who was granted the status of victim in the Decision of 24 December 2007.

⁵⁰ ICC-01/04-446-tENG OA4 and ICC-01/04-474-tENG OA5 & OA6.

⁵¹ "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-tENG-Corr), at page 41.

46. In support of their application the legal representatives for these victims assert that the issues raised in these appeals directly affect the personal interests of the victims insofar as the determination of the Appeals Chamber could affect their status and the rights granted to them at the situation and pre-trial stages of the case.⁵²

47. In relation to the appropriateness of their participation, the legal representatives argue that their participation is 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 victims at the situation stage in the DRC" but more so because the instant appeals "concern an issue which directly affects their interests."⁵³

48. As to the question of their participation being prejudicial to the rights of the Defence, the legal representatives assert that their participation would not affect the procedural rights of the Defence and since both the Prosecution and the Defence would have the opportunity to respond to any submission of views and concerns by the victims, their participation cannot offend the principle of fairness.⁵⁴

The Prosecutor's Response

49. The Prosecutor has no objection to these victims being permitted to participate in these appeals.⁵⁵ He acknowledges that the issues on appeal do affect the victims' personal interests and that it is appropriate for them to be permitted to express their views and concerns.⁵⁶

The OPCD's Response

50. The OPCD are not opposed, in principle, to the authorisation of applicants who have the status of victim to participate in the appeals. However, the OPCD observes that the personal interests listed by the legal representatives, namely, the status and the rights granted to them at the situation and pre-trial stages of the case are "generic in nature and

⁵² ICC-01/04-446-tENG OA 4, paragraph 18 and ICC-01/04-474-tENG OA 5 & OA 6, at paragraph 20.

⁵³ ICC-01/04-474-tENG OA 5 & OA 6, paragraphs 22 to 24.

⁵⁴ ICC-01/04-446-tENG OA 4, paragraph 24 and ICC-01/04-474-tENG OA 5 & OA 6, paragraph 32.

⁵⁵ ICC-01/04-483 OA 4, paragraph 23 and ICC-01/04-488 OA 5 & OA 6, paragraphs 22 to 23.

⁵⁶ Ibid.

not congruent with the requirement that they identify an ‘explicit link’ with the issues raised”.⁵⁷

51. In addition, OPCD observes that it is unable to fully assess the personal interests of these particular victims in relation to the issues raised on appeal, on account of not having had sight of the victims’ applications and identities.⁵⁸

2. *The Application of victim a/0105/06*

52. Applicant a/0105/06 was granted the status of victim and authorised to participate in the situation DRC by virtue of the Decision of 24 December 2007.⁵⁹

53. In support of her application on behalf of victim a/0105/06 the legal representative asserts that “the personal interests of a/0105/06 are directly affected by the issues raised by the OPCD, which essentially concern the rights and privileges accorded to victims.”⁶⁰

The Prosecutor’s Response

54. The Prosecutor has no objection to this victim being permitted to participate in the appeal.⁶¹

The OPCD’s Response

55. The OPCD is not opposed to the participation of victim a/0105/06 in the appeal and observes that despite being unclear as to what specific personal interests are affected, the general interest expressed in the application namely, that “the personal interests of a/0105/06 are directly affected by the issues raised by the OPCD, which essentially concern the rights and privileges accorded to victims”⁶² suggests that the applicant’s

⁵⁷ ICC-01/04-484 OA 4, paragraphs 21 to 23 and ICC-01/04-489 OA 5 & OA 6, paragraphs 16 to 20.

⁵⁸ Ibid.

⁵⁹ ICC-01/04-423 Corr-tENG at para.107.

⁶⁰ ICC-01/04-448-tENG, paragraph 15.

⁶¹ ICC-01/04-483, paragraph 22.

⁶² See note 60 *supra*.

personal interests are directly affected by the issue as to whether the personal interests of an applicant can be defined in a generic sense.⁶³

3. *The First and Second Applications of the OPCV for Victims authorised to participate*

56. The First and Second Applications of the OPCV are brought on behalf of 35 applicants, namely, 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, who have been granted the status of victim and authorised to participate in the situation in the DRC by Pre-Trial Chamber I in its Decision of 24 December 2007.

57. In addition the OPCV make application on behalf of 6 applicants namely, a/0047/06 to a/0052/06 who do not have the status of victim. In respect of these applicants the Single Judge, in the Decision of 24 December 2007, suspended her review of their applications and ruled that should these victims be allowed to participate in the case of Mr Lubanga then this would “lead directly to their being granted victim status in the investigation in the DRC for the crimes alleged in that case.”⁶⁴

58. In support of their applications the OPCV submit that the victims’ interest in participating in these appeals “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 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”.⁶⁵ Hence, if the appeals were allowed the victims would be deprived of all the procedural rights flowing from the status granted to them. Furthermore, relying on the jurisprudence of the Pre-Trial Chambers, the OPCV submit that the personal interests of victims are affected in general in all proceedings in connection with the investigation in a situation and as such their

⁶³ ICC-01/04-484 OA 4, paragraph 24.

⁶⁴ ICC-01/04-423-Corr-tENG, paragraph 144.

⁶⁵ ICC-01/04-466-tENG OA 4, paragraph 15, ICC-01/04-475-tENG OA 5, paragraph 20 and ICC-01/04-476-tENG OA 6, paragraph 20.

interests are necessarily affected by an interlocutory appeal resulting from an issue, raised in a proceeding in which the victims were authorised to participate, in the first instance.⁶⁶

59. As for the appropriateness of their participation, the OPCV submit, inter alia, that their participation is appropriate given that the resolution of the issues certified for appeal will likely directly affect their status and their procedural rights.⁶⁷

The Prosecutor's Response

60. The Prosecutor, whilst expressing disagreement with some of the arguments raised by the OPCV in support of their application, does not oppose the participation of the 35 victims who have been granted the status of victim and authorised to participate in the situation in the DRC.

61. The Prosecutor disputes the contention that the victims' personal interests are necessarily affected by every interlocutory appeal arising in the situation and submits that this argument is based on a ruling that is at the heart of the dispute in these appeals.⁶⁸ In addition the Prosecutor recognises that participation of these victims in the appeals is appropriate.

The OPCD's Response

62. The OPCD acknowledges 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 Prosecutor.⁶⁹ In addition, the OPCD observes that 9 applicants, namely, 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 Single Judge of Pre-Trial Chamber I to have suffered moral harm as the result of the death of a deceased

⁶⁶ ICC-01/04-475-tENG OA 5, paragraph 21 and ICC-01/04-476-tENG OA 6, paragraph 21.

⁶⁷ ICC-01/04-475-tENG OA 5, paragraph 22 and ICC-01/04-476-tENG OA 6, paragraph 22.

⁶⁸ ICC-01/04-483 OA 4, paragraph 28 and ICC-01/04-488 OA 5 OA6, paragraph 26.

⁶⁹ ICC-01/04-489 OA 5 OA 6, paragraph 30.

relative.⁷⁰ As such, the OPCD concurs that the personal interests of these victims are directly affected by the appellate issues.

4. The First and Second Applications of the OPCV for Applicants not yet authorised to participate

63. The First and Second Applications of the OPCV are brought on behalf of 37 applicants, namely, 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, who do not have the status of victim and have not been authorised to participate in the situation in the DRC.⁷¹

64. In support of their contention that the personal interests of applicants who are not yet authorised to participate are affected by these appeals, the OPCV advance the following:

- (i) The term 'victim' must be given a broad meaning.⁷²
- (ii) If the Appeals Chamber were to allow the OPCD's appeal the applicants would, as a result, be deprived of all the procedural rights flowing from the status which could be granted to them.⁷³
- (iii) The broadening of the issue under appeal by the Single Judge (i.e. the existence of a procedural status of victim at the investigation stage of a situation and at the pre-trial stage of a case) affect the personal interests of the applicants even more, "insofar as the Appeals Chamber's decision on the matter may affect the review of the applications for participation over which the Chamber has not yet ruled."⁷⁴
- (iv) The effect on the personal interest of victims is reinforced by the OPCD's own observation that: "the issue as to whether the process for granting applicants the

⁷⁰ Ibid. at paragraph 31.

⁷¹ ICC-01/04-423-Corr-tENG, paragraphs 17 to 34.

⁷² ICC-01/04-477-tENG OA 5, paragraph 21.

⁷³ Ibid. at paragraph 23.

⁷⁴ ICC-01/04-467-tENG OA 4, paragraph.18.

status of victims is a separate and distinct procedure, has implications for all future victim applications, at all stages of the proceedings."⁷⁵

- (v) Rule 93⁷⁶ permits the Chamber to "seek the views of other victims [on any issue]" therefore OPCV submit the Appeals Chamber may invite any victim to express his or her views on the issues under appeal.

65. As to the appropriateness of the participation of the applicants in these appeals, the OPCV submit that:

- (i) The applicants' participation is appropriate given that the outcome of the appeals is likely to affect the handling of their applications for participation.
- (ii) The participation of the applicants "fits precisely the requirements of a fair trial, insofar as it would enable the interests of the applicants-the persons primarily affected by the outcome of this appeal-to be taken into account objectively and in depth."⁷⁷
- (iii)The OPCD and the Prosecutor would be able to respond to a filing made by any participant in the case pursuant to Regulation 24(1).

66. In support of the argument that the participation of the applicants is not inconsistent with or prejudicial to the rights of the Defence, the OPCV submit that since "the proceedings concern a violation of the fundamental rights of the victims themselves", their participation would bring balance to the proceedings and would not be prejudicial to the interests of the Defence.⁷⁸

⁷⁵ Ibid. at paragraph 23.

⁷⁶ Rule 93, second sentence provides:"In addition, a Chamber may seek the views of other victims as appropriate."

⁷⁷ ICC-01/04-477-tENG OA 5, paragraph 29

⁷⁸ ICC-01/04-467-tENG OA 4, paragraph 35.

Prosecutor's Response

67. The Prosecutor is opposed to the participation of these applicants on the basis that they lack the procedural status of victim and since the Pre-Trial Chamber has made no finding that they qualify as victims for the purposes of Rule 85 (a).⁷⁹

68. The Prosecutor submits that the scheme for participation of victims in interlocutory appeals developed by the Appeals Chamber requires a prior ruling that a person is a victim in relation to underlying proceedings.⁸⁰

69. In addition, he argues that rule 89 of the Rules governs the procedure by which victims may be authorised to participate. It requires an application that must be adjudicated by the Chamber, which includes a determination of whether a person is a victim or not pursuant to rule 85 (a) of the Rules. To allow victims to participate before that application is granted would pre-empt and defeat the very purpose of that application.⁸¹

70. In relation to the applicability of rule 93 of the Rules, the Prosecutor submits that it is the only provision which could allow for victims to participate in the absence of a Chamber considering and accepting an application for participation under article 68 (3) and rule 89. However, the provision grants the Chamber the prerogative to seek the views of victims and cannot be used by an applicant to petition the Chamber. In the present proceedings the Prosecutor submits that there is no reason for the Chamber to "avail itself of this exceptional power, especially in the light of the range of victims who have made proper applications."⁸²

The OPCD's Response

71. The OPCD are opposed to the participation of these applicants in the appeals on the basis that the applicants do not fall within the scope of article 68 (3) as there has been no finding that the applicants have suffered harm from an alleged crime within the

⁷⁹ ICC-01/04-483 OA 4, paragraph 31.

⁸⁰ Ibid. at paragraph 32.

⁸¹ Ibid. at paragraph 33.

⁸² Ibid. at paragraph 34.

jurisdiction of the Court.⁸³ The present status and hence the personal interests of these applicants will remain unaffected by the outcome of the appeals.⁸⁴

72. The OPCD submit that to permit the participation of these applicants in the appeal proceedings would “militate against the fairness and impartiality of the proceedings, in that it may leave the appeal open to alleged victims with a tenuous, if any at all, link to the proceedings”.⁸⁵ In addition, the OPCD argue that their participation “could also unnecessarily enlarge the scope of the submissions presented to the Chamber and impact on the right of the OPCD to have adequate time and facilities to effectively respond to these submissions.”⁸⁶

5. *Application 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*

73. The legal representative of the applicants has applied in two separate applications⁸⁷ for participation in all three appeals, on behalf of the abovementioned 17 victims all of whom have been granted the status of victim in the situation in the DRC pursuant to the decision of 24 December 2007.

74. The legal representative submits with regard to the personal interests of the particular victims, 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 [...]”.⁸⁸

75. In particular, with respect to the issues on appeal in the OPCD’s appeal against the Decision of 7 December 2007, the legal representative states: “[t]o the extent that the

⁸³ ICC-01/04-489, paragraph 37.

⁸⁴ ICC-01/04-484, paragraph 38 and ICC-01/04-489, paragraph 37

⁸⁵ ICC-01/04-489, paragraph 71.

⁸⁶ Ibid. at paragraph 72.

⁸⁷ See ICC-01/04-468 and ICC-01/04-486.

⁸⁸ ICC-01/04-468, paragraph 15 and ICC-01/04-486, paragraph 18.

appealable issue will determine whether the procedural safeguards that apply in criminal proceedings before the Court apply during the application process, and in this respect, the extent of the material the Chamber is obliged to provide to the Prosecution and the Defence, including material extrinsic to the applications themselves, the determination of same, insofar as it could potentially expose the Victims to risks to their personal security and safety and to the extent that it affects their privacy, impacts upon the Victims' personal interests.”⁸⁹

The Prosecutor's Response

76. The Prosecutor does not object to the participation of these victims in the appeals and notes that the outcome of the appeals will impact on the victims procedural status and the manner in which they can express their views and concerns.⁹⁰

The OPCD's Response

77. The OPCD whilst observing that the personal interests of these victims may be affected by the prosecution's appellate issues, avers that with regard to applicants a/0034/06, a/0042/06, a/0044/06 and a/0148/06, they were recognised by Pre-Trial Chamber I to have suffered moral harm as a result of the death of a close relation. In particular, applicant a/0148/06 did not provide any supporting documentation concerning the identity of their deceased relative. The OPCD therefore agrees that the interests of this applicant are directly affected by the OPCD's second appellate issue.⁹¹

*6. Application of applicants a/0163/06 to a/0183/06, and
a/0185/06 to a/0187/06*

78. The application of the abovementioned 23 applicants is lodged on behalf of applicants who do not have the status of victim and who have not been authorised to participate in the situation in the DRC. The application is in respect of the OPCD's appeal against the Decision of 7 December 2007 only.

⁸⁹ ICC-01/04-468, paragraph 17.

⁹⁰ ICC-01/04-483, paragraph 36 and ICC-01/04-488, paragraph 33.

⁹¹ ICC-01/04-489, paragraph 23.

79. The legal representative submit that applicants a/0163/06 to a/0183/06 and a/0185/06 to a/0187/06 whose applications for participation in the situation in the DRC are still pending, are victims within the meaning of rule 85 (1) of the Rules.⁹²

80. In addition, the legal representative submits that these applicants are the subject of the OPCD's request for the production of relevant supporting documentation pursuant to regulation 86 (2) (e) of the Regulations and as such are "not requesting to submit their views and concerns on their status, nor the quality of their applications, but are nonetheless seeking to have their views represented in the Appeal given that they are directly and primarily affected by the issues under examination...".⁹³

The Prosecutor's Response

81. The Prosecutor is opposed to the participation of these applicants in the appeal. He submits that "there is no procedural basis which allows applicants who have not been determined to be victims, or granted any procedural status or participatory rights, by a Pre-Trial Chamber to present their views and concerns in this appeal."⁹⁴

The OPCD's Response

82. The OPCD is opposed to the participation of these applicants in the appeals on the basis that the applicants do not fall within the scope of article 68 (3) as there has been no finding that the applicants have suffered harm from an alleged crime within the jurisdiction of the Court. The OPCD therefore submits that in light of the applicant's limited procedural stature, the personal interests of the applicants are not affected by the interlocutory appeal.⁹⁵

83. The OPCD disagrees that the appellate issue concerning the provision of information extrinsic to the application forms would impact on the safety or privacy of the alleged victims. The OPCD argues that since they already have the identities and addresses of

⁹² ICC-01/04-468, paragraph 20.

⁹³ ICC-01/04-468, paragraph 21.

⁹⁴ ICC-01/04-483, paragraph 37.

⁹⁵ ICC-01/04-484, paragraph 31.

these applicants, the provision of additional information would cause no additional safety risk or loss of privacy to the alleged victims.⁹⁶

7. *Submissions of the Prosecutor and the OPCD on the modalities of participation should victims be permitted to participate in the appeals*

84. The Prosecutor submits that the appropriate modality for the presentation of the victims' views and concerns is for those views and concerns to be: submitted in writing; limited to the specific issues arising in the appeals to the extent that it affects their personal interests; submitted as a single set of views and concerns in respect of all three appeals by the legal representatives and submitted within a modest time frame.⁹⁷

85. The OPCD submit that the Appeals Chamber should 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.”⁹⁸

86. In addition, the OPCD submits that in setting a time limit for the victims to file their views and concerns, the Appeals Chamber should take into account the need for an expeditious resolution of these important issues.

C. The Determination of the Appeals Chamber

87. Article 68 (3) of the Statute provides, in relevant part:

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

⁹⁶ ICC-01/04-484, paragraph 26.

⁹⁷ ICC-01/04-488, paragraphs 34 to 36.

⁹⁸ ICC-01/04-484, paragraph 67.

88. The Appeals Chamber recalls that it has previously considered the import of article 68 (3) of the Statute in its Judgement of 13 February 2007⁹⁹ and in its Decision of 13 June 2007¹⁰⁰ in which it held, *inter alia*, that “the Appeals Chamber, pursuant to article 68 (3) is required to determine whether the participation of victims in relation to that particular appeal is appropriate. It cannot automatically be bound by the previous determination of the Pre-Trial Chamber that it was appropriate for the victims to participate before the court of first instance.”¹⁰¹ Participation of victims in interlocutory appeals can, in principle, be permitted if it can be shown that their personal interests are affected by the issues on appeal and if the Appeals Chamber deems such participation to be appropriate. It is for the Appeals Chamber to ensure that their participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁰²

89. The Appeals Chamber is aware that the abovementioned determinations were made in relation to interlocutory appeals arising in the case of Mr Thomas Lubanga Dyilo. In determining victim participation in interlocutory appeals arising in the situation phase of the proceedings before the Pre-Trial Chamber, article 68 (3) as interpreted by the Appeals Chamber in the case of Mr Lubanga should also be made applicable to interlocutory appeals in the situation phase of proceedings.

90. The Appeals Chamber will now proceed to examine the applications for participation in these appeals in light of its interpretation of article 68 (3) of the Statute for granting participation, namely, (i) whether the individuals seeking participation are victims in the situation phase of the proceedings, (ii) whether they have personal interests that are affected by the issues on appeal, (iii) whether their participation is appropriate and lastly,

⁹⁹ “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 OA7).

¹⁰⁰ “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).

¹⁰¹ 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 OA7) at paragraph 43.

¹⁰² *Ibid.* Paragraph 44.

(iv) that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

91. The Appeals Chamber is mindful that in the situation phase of the proceedings a suspect or group of suspects has yet to be identified by the Prosecutor. The application therefore of criteria (iv) above, namely, “that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial” will be with a view to safeguarding the rights of future suspects.

1. The first criteria: whether the individuals seeking participation are victims in the situation phase of the proceedings

92. The Appeals Chamber recalls that in its Judgement of 13 February 2007¹⁰³ at paragraph 45, it decided that in circumstances in which victims have already been granted leave to participate in the proceedings before the Pre-Trial Chamber, it would not enquire into their victim status but will proceed to the next stage of its enquiry, namely, the question of whether their personal interests are affected by the interlocutory appeal.

93. The applications to participate in the appeals are filed on behalf of:

- a. Sixty applicants, namely, VPRS 1 to VPRS 6, a/0071/06; a/0105/06; 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, a/0209/06; 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, and a/0228/06 whose status as victims in the situation DRC has been established by the Single Judge of Pre-Trial Chamber I by virtue of her Decision of 24 December 2007. The Appeals Chamber accepts that they are victims and meet the first criteria under article 68 (3) of the Statute for participation in the appeals.

¹⁰³ Ibid.

b. Sixty applicants, namely, 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, a/0240/06; a/0163/06 to a/0183/06, a/0185/06 to a/0187/06, whose status as victims has not been determined by the Single Judge of Pre-Trial Chamber I nor established before the Appeals Chamber. Sequentially, they do not meet the first criterion under article 68 (3) of the Statute. In the circumstances, their applications for participation in these appeals are denied pursuant to Rule 89 (2) of the Rules of Procedure and Evidence and the Appeals Chamber will not examine whether they satisfy the remaining three criteria.

2. *The second criteria: whether they have personal interests which are affected by the issues on appeal*

94. Collectively, the submissions of the respective legal representatives indicate that the sixty victims would, if the Appeals Chamber grants the interlocutory appeals, be deprived of all procedural rights arising from their status as victims which they presently hold. Any changes to the application process will have repercussions for them.

95. Both the Prosecutor and the OPCD are unopposed to the participation of these victims but point out that the requirement is a demonstration of personal and not general interests.

96. The issues on appeal encompass interpretations of rule 89 of the Rules of Procedure and Evidence and regulation 86 of the Regulations of the Court which regulate the application process for participation of victims; and whether a procedural status of victim can be granted independent of procedural rights.

97. The Appeals Chamber accepts that the sixty victims have demonstrated that they would be personally affected since they stand to lose rights that they have gained in the Decision of 24 December 2007. Any change to the application process will affect them personally in the event that a re-application for victim participation on their part becomes necessary. Sequentially, they fulfil the second criteria for participation.

3. *The third criteria: whether their participation is appropriate*

98. The Appeals Chamber is persuaded that participation by these sixty victims in the appeals at hand is appropriate given the subject-matter of the current appeals and the desirability for the views of victims in appeals of this nature to be heard.

4. *The fourth criteria: that the manner in which victims present their views and concerns is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.*

99. In its judgment of 13 February 2007 at paragraph 55, the Appeals Chamber stated that it is for the Chamber to ensure that the manner in which victims present their views and concerns is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

100. As noted above the Prosecutor and the OPCD do not object to the participation of these victims and acknowledge that aspects of these appeals may affect the personal interests of victims and that their participation may be appropriate and not inconsistent with the rights of the Defence or a fair and impartial trial.

101. Accordingly, in ordering the manner of participation of victims to comply with the rights of future suspects or a fair and impartial trial, the Appeals Chamber will limit the victims to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal. Observations to be received by the victims must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings.

102. In light of the similarities, the number and the complexities of the issues on appeal the legal representatives of the relevant victims are each directed to file a consolidated document pertaining to their views and concerns in respect of all three appeals. The page limits of the documents are accordingly extended by 10 pages pursuant to regulation 37 (1) of the Regulations. Similarly, the responses of the Prosecutor and the OPCD to the views and concerns of the victims are extended by 10 pages.

103. For these reasons the applications for participation by victims in these appeals is granted for victims:

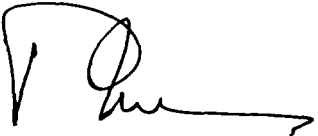
VPRS 1 to VPRS 6, a/0071/06; a/0105/06; a/0007/06, a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06, a/0209/06; a/0016/06, a/0018/06, a/0021/06, 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, and a/0228/06;

And rejected in respect of applicants:

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, a/0240/06; a/0163/06 to a/0183/06, a/0185/06 to a/0187/06.

104. Judge Song appends his reasons for his dissenting opinion on the Decision and Order of 13 February 2008 and the Orders of 29 February 2008 of the Appeals Chamber and his partially dissenting opinion to this Decision.

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



Judge Philippe Kirsch
On behalf of the Presiding Judge

Dated this 30th day of June 2008

At The Hague, The Netherlands

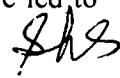
Partly dissenting opinion of Judge Sang-Hyun Song and reasons for dissent from the decision and orders of the Appeals Chamber of 14 February 2008 and of 29 February 2008

1. I partly dissent from today's decision of the Appeals Chamber and dissented from 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 and on the date of filing of the responses thereto by the OPCD and the Prosecutor" of 14 February 2008 (ICC-01/04-450; hereinafter: "Decision and Order of 14 February 2008") as well as from the two identical orders entitled "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" of 29 February 2008 (ICC-01/04-480 and ICC-01/04-481) because I do not share the view of the majority of the Appeals Chamber in respect of the scheme of participation for victims in appeals brought under article 82 (1) (d) of the Statute.

2. As I have explained recently in my partly dissenting opinion to the "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007" of 18 June 2008 (ICC-02/05-138, pp. 23 to 25; hereinafter: "Partly Dissenting Opinion of 18 June 2008"), victims who have participated in the proceedings before a Pre-Trial Chamber that give rise to an appeal under article 82 (1) (d) of the Statute must be considered participants in the meaning of regulations 65 (5) and 64 (4) of the Regulations of the Court. Therefore, they have a right to file a response to the document in support of the appeal.

3. In the present case, and for the reasons stated below, I agree that the victims listed in operative paragraph c. of today's decision should be allowed to participate in the appeals. I dissent from the decision of the majority to disallow the participation of the applicants for victim status listed in operative paragraph d. of today's decision.

4. The applications filed with the Pre-Trial Chamber of the victims mentioned in operative paragraph c of today's decision, save victims VPRS 1 to VPRS 6, have led to



the “Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by 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 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06” of 24 December 2007 (ICC-01/04-423-Corr; hereinafter: “Decision of 24 December 2007”), which is the object of the present appeals.¹ Hence, all of these victims, save victims VPRS 1 to VPRS 6, are participants in the meaning of regulations 64 (4) and 65 (5) of the Regulations of the Court and therefore may file responses to the documents in support of the appeal.

5. The same holds true for the applicants for victim status listed in operative paragraph d. of today’s decision. Their applications for participation gave rise to either the Decision of 24 December 2007² or to 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” of 7 December 2007 (ICC-01/04-417; hereinafter: “Decision of 7 December 2007”), which also is the object of the present appeals.³ As I have explained at paragraph 4 of my Partly Dissenting Opinion of 18 June 2008, in such circumstances the fact that the Pre-Trial Chamber has not yet disposed of their applications for participation does not mean that they are not participants in the meaning of regulations 65 (5) and 64 (4) of the Regulations of the Court.

6. As regards the victims VPRS 1 to VPRS 6, the circumstances are different. Pre-Trial Chamber granted their applications for victim status already on 17 January 2006 (ICC-01/04-101). These victims did not participate in the concrete proceedings that gave rise to the present appeals, which related to applications for participation of other victims. Therefore, VPRS 1 to VPRS 6 cannot be considered participants under regulations 65 (5) and 64 (4) of the Regulations of the Court in relation to these proceedings. Nevertheless,

¹ See Decision of 24 December 2007, pp. 3 to 5.

² See Decision of 24 December 2007, pp. 3 to 5.

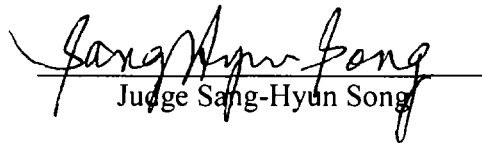
³ See Decision of 7 December 2007, p. 2.

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given that the issues on appeal may affect the procedural rights and status of victims during the investigation more generally, it is appropriate to seek the views of VPRS 1 to VPRS 6 under the second sentence of rule 93 of the Rules of Procedure and Evidence.

7. I was in agreement with the Decision and Order of 14 February 2008 to the extent that it rejected the request of the OPCV for clarification and the request for an extension of the time limit for the reasons expressed in today's decision of the Appeals Chamber.

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



Judge Sang-Hyun Song

Dated this 30th day of June 2008

At The Hague, The Netherlands