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**PRE-TRIAL CHAMBER I**

**Before: Judge Anita Ušacka, Single Judge**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO**

**Public Document**

**OPCD's Observations on the 3 July 2008 Pre-Trial Chamber I Decision entitled "Decision Authorizing the submission of Observations Pursuant to rule 89(1) of the Rules on Applications a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08"**

**Source: Office of Public Counsel for the Defence**

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## 1. Introduction

1. In its decision of the 17<sup>th</sup> August 2007, Pre Trial Chamber I ordered the Registry to transmit non-redacted applications to participate as victims in the situation phase to the Office of Public Counsel for the Defence (OPCD), and granted the OPCD the right to file observations in relation to these applications.<sup>1</sup>
2. On 3<sup>rd</sup> July 2008, the Honourable Single Judge, pursuant to the above mentioned decision, granted the OPCD until 16h00 on 18<sup>th</sup> July 2008 to file observations in relation to the 8 applications of a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08.<sup>2</sup> All 8 of these applications have been denied the procedural status of victim in the case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* but remain to be considered at the stage of the investigation in the situation of the DRC.<sup>3</sup>

## 2. Preliminary observations

2.1 *The issue of the modalities and parameters of victim participation is currently under appeal.*

3. On 6 February 2008, Honourable Judge Steiner issued the decision on the request for leave to appeal,<sup>4</sup> granting the OTP 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

<sup>1</sup>'Decision on the Requests of the Legal Representatives of Applicants on application for victims' participation and legal representation.' ICC-01/04-374, 20 August 2007, at p. 23.

<sup>2</sup>'Decision Authorizing the Submission of Observations Pursuant to rule 89(1) of the Rules on Applications a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08', ICC-01/04-504, 3 July 2008.

<sup>3</sup> 'Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08', ICC-01/04-01/07-357, 2 April 2008, at p. 9: "CONSIDERING nevertheless that Applicants a/0332/07, a/0334/07, a/0335/07, a/0336/07, a/0337/07 and a/0001/08 indicate that the harm that they allegedly suffered occurred either in January 2003 or in May 2003; that therefore their Applications for the granting of the procedural status of victim at the pre-trial stage of the present case must be rejected because the harm that they allege did not take place during the alleged joint FRPI/FNI attack on the village of Bogoro on or about 24 February 2003; and that their Applications shall be examined by the Chamber, in due course, for the purpose of granting them the procedural status of victims at the stage of the investigation into the situation in the Democratic Republic of the Congo ("the DRC")."

<sup>4</sup>'Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation,' ICC-01/04-444.

definition of the personal interests, or following the steps required by the Appeals Chamber's jurisprudence;

in addition to granting the OPCD leave to appeal in relation to two issues;

- (i) whether it is possible to grant victims a general right to participate or whether victims participation is conditioned upon a determination concerning the impact of specific proceedings on the applicants' personal interests, 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.
4. The Honourable Single Judge noted in the decision of 3<sup>rd</sup> July 2008<sup>5</sup> that the appeals on these decisions were still pending before the Appeals Chamber and indicated that there may be a need for modification in the future of her decision on the modalities and parameters of participation dependent upon the Appeal's Chamber judgment. The OPCD would respectfully request that the Honourable Single Judge adopts the same approach with regard to future re-consideration *vis à vis* the applications currently under assessment.
  5. In this regard, the OPCD reiterates its previous arguments submitted within the '*Observations du Bureau du Conseil Public pour la Défense sur les 28 demandes de participation en qualité de victims du 12 Mai 2008*'<sup>6</sup> concerning the requirement that the right to participate is triggered by a finding that a concrete judicial activity impacts on the personal interests of the applicants, as opposed to the phase in its entirety.
  6. The OPCD remains concerned about the fact that the applications generally refer to events which are alleged to have been perpetrated by [redacted];<sup>7</sup> [redacted]. The OPCD reiterates that by issuing factual determinations outside of the scope of the

<sup>5</sup> 'Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, 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', ICC-01/04-505, 3 July 2008, at para. 4.

<sup>6</sup> 'Observations du Bureau du Conseil Public pour la Défense sur les 28 demandes de participation en qualité de victimes du 12 Mai 2008' ICC-01/04-500 Conf, 12 June 2008, at paras 9 and 10.

<sup>7</sup> *Ibid.* Please refer to arguments previously raised by the OPCD at para. 10

prosecution charges, the Chamber is exposing itself to prejudicial and potentially incriminating evidence which the defendant does not have notice of, nor the opportunity to rebut.<sup>8</sup> It is for this reason that the *ad hoc* Tribunals prohibit the tendering of incriminating evidence (or the elicitation of testimony) which falls outside of the scope of the charges.<sup>9</sup> Such factual determinations in the situation phase could also create the appearance of predetermination concerning further potential applications for an amendment of the charges against these defendants in relation to the alleged crime bases set out in the victim applications.<sup>10</sup>

## 2.2 *Issues relating to the integrity of the procedure for filling out the forms*

7. The OPCD invites the Honourable Single Judge to refer to the OPCD's previous submissions<sup>11</sup> in relation to the integrity of the procedure for filling out the victim participation forms and observes that within the 8 applications currently under assessment, there are similar concerns as previously raised with regard to the illiteracy of applicants<sup>12</sup>, the presence of witnesses or other people during the completion of the forms<sup>13</sup> and the similarity of some applications compared with other applications completed with the assistance of the same third party.<sup>14</sup>

## 2.3 *Issues relating to the lack of intrinsic coherence and transparency*

### *(a) Date of the alleged crimes:*

8. The OPCD observes that most of the applications refer to an alleged attack on [redacted], however there are various dates and even differing months given for the

<sup>8</sup> The OPCD is aware that in rendering a determination as to whether the applicant has a right to participate during the situation phase, it is not necessary for the Chamber to determine the identity of the perpetrator of the alleged offences. Nonetheless, the OPCD is aware that a previous decision issued in the situation phase has publicly identified the groups, whom the applicants deemed responsible for these alleged offences. [Redacted].

<sup>9</sup> Prosecutor v Bizimungu et al., Case No ICTR-99-50-AR73.2, Decision on Prosecution's Interlocutory Appeals Against Decision of the Trial Chamber on Exclusion of Evidence, 25 June 2004;

<sup>10</sup> It is for this reason that the European Court of Human Rights has held that there was a violation of the right to a fair trial under circumstances in which the Trial Judge as previously involved in the case as an investigating judge; the two functions of investigating culpability and adjudicating impartially being mutually incompatible. De Cubber v Belgium, 26 October 1984, Series A no. 86, (1985) EHHR 236.

<sup>11</sup> *Ibid* footnote 6. Paras 11-24

<sup>12</sup> *Ibid* footnote 6. Para 17. Of the current applications, a/0332/07, a/0334/07 and a/0001/08 are unable to read.

<sup>13</sup> *Ibid* footnote 6. Para 18-24. Of the current applications, a/0332/07 (a minor), a/0334/07 and a/0335/07 are all signed without a witness present. Only 3 of the 8 applications were able to converse and understand French, however none of the remaining 5 – a/0332/07, a/0334/07, a/0030/08, a/0031/08 and a/0001/08 were assisted by an interpreter.

<sup>14</sup> Applicants a/0030/08 and a/0031/08 use similar descriptions and attach remarkably similar hand-drawn maps.

attacks. a/0332/07, a/0334/07 and a/0335/07 refer to the fact that the alleged crimes occurred in the context of fighting between two militia ([redacted]) in [redacted] 2003, whereas some applicants refer to the fact that the village and area surrounding [redacted] had been attacked and left deserted by the [redacted] population as early as [redacted] 2003.<sup>15</sup>

9. The OPCD has been unable to find any external corroboration for these allegations. [Redacted].
10. [Redacted]. In case of the latter scenario, in light of the fact that there have been no prosecution arrest applications in connection with this time period, it is not possible to ascertain *in abstracto* whether the threshold elements for offences under the Rome Statute have been met; namely the existence of an armed conflict, or a widespread or systematic attack directed against a civilian population.<sup>16</sup>
11. Whilst the Pre-Trial Chamber has held that such corroboration is not *stricto sensu* necessary for a prima facie determination, the OPCD nonetheless notes that if the Chamber were to confirm these factual allegations, it would be issuing a decision which in fact contradicts other decisions of this Pre-Trial Chamber.
12. In light of the mandate of the ICC to establish the truth, the OPCD respectfully submits that it would be highly inappropriate for the Court to issue factual determinations concerning alleged offences under the Rome Statute, which either did not occur, or did not occur in the manner alleged. In this regard, even if the alleged events occurred at a later/earlier date, or in a different location, the OPCD is extremely concerned regarding the underlying reasons for specifically attributing responsibility in the majority of the applications to [redacted], particularly as all the applications were submitted after [redacted]. This opens the possibility that the contents of the

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<sup>15</sup> a/0001/08 states that there was an attack on [redacted] where many people were killed in [redacted] 2003.

<sup>16</sup> Threshold elements are considered as intrinsic elements of the alleged offence, and as such, must be established in the same manner as other elements of the offence, and must also be subject to the same safeguard against reversals of the onus of proof. The OPCD refers to the findings of the ICTY Appeals Chamber that “the existence of an armed conflict or its character has to be regarded, in accordance with the principle of *in dubio pro reo*, as ordinary elements of a crime under customary international law when applying Articles 2 and 3 of the Statute to the conduct at issue in this case. Again, this result is rooted in the inalienable principle of individual guilt.” Appeals Judgement, Prosecutor v. Martinovic and Naletilic, 5 May 2006, at para 120.

applications may have been influenced by publicly available information concerning [redacted].<sup>17</sup>

13. The OPCD thus submits that participation of persons who have utilised false information for the purpose of facilitating their participation in an actual case would be contrary to the need to preserve the integrity of the proceedings.

(b) *Allegations Concerning Falsification of victim application*

14. The aforementioned concerns of the OPCD are strongly buttressed by the existence of allegations concerning the application process for victim participation before the ICC, which are set out in a Human Rights Watch Report titled ‘Court History: the Landmark International Court’s First Years’, dated 11 July 2008. The sections addressing victim participation before the ICC include the following allegations:

*In Bunia, sources that we interviewed conveyed the rumor that NGOs were being paid to find victims and would fabricate victims if necessary to get funding from the court or international NGOs.<sup>18</sup>*

*[...]*

*For example, one source in the DRC told Human Rights Watch researchers that he thought that it was necessary to “make a little gesture”—meaning providing gifts—to encourage victims to participate.<sup>19</sup> Such actions can feed the perception that the ICC is trying to “buy” victims in affected communities.*

15. The OPCD repeats firstly, that the mandate of the ICC is to promote the truth, and secondly, that victim participation should not be conducted in a manner which is prejudicial to or inconsistent with a fair and impartial trial. It is not possible to ‘guarantee lasting respect for and enforcement of international justice’ or sustain fair and impartial proceedings in the situation phase under circumstances in which applications may either be fabricated or procured through ‘gifts’. The credibility of any factual determinations concerning these allegations, which have been issued by the Pre-Trial Chamber thus far, must be considered as fatally undermined. Of further

<sup>17</sup> The OPCD refers to its submissions below at paragraph 29 concerning a/0335/07.

<sup>18</sup> Citing Human Rights Watch group interview with representatives of Hema community, and separate interview with representative of Hema community, Bunia, May 2 and 8, 2007. Section VII(2) of the Report.

<sup>19</sup> Citing Human Rights Watch interview with representative of local nongovernmental organization, Lira, March 12, 2007.

concern for the OPCD is the possibility that such applicants may either subsequently testify as witnesses, or be permitted, on the basis of the allegations set out in their application form, to tender evidence or submit observations concerning the alleged guilt of a defendant, given the lack of any procedural sanctions which would apply to a person who is neither a party nor a witness.<sup>20</sup>

16. In order to assess the specific impact of these allegations on the applicants which have already been granted a right to participate, and those applicants which are pending, it is necessary to obtain further information concerning the identity of the NGOs who allegedly fabricated victims, and the identity of the intermediary who confessed to Human Rights Watch that he or she provides present to applicants to encourage their participation.
17. The OPCD has no investigative role in this regard, and therefore respectfully requests the Honourable Single Judge to consider inviting the Prosecutor to investigate these allegations, in line with the Prosecutor's general mandate under article 54(1)(a), and rule 165(1). In light of impact of participation on the investigative phase (the stated purpose of victim participation at this phase has been described by this Pre-Trial Chamber as to "clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered"),<sup>21</sup> the OPCD further respectfully submits that it would be in the interests of justice to suspend the participation of any applicants who have been granted the procedural status of victim, and the Single Judge's consideration of pending applications, until the finalisation of such an investigation.

### **3. Observations on Specific Applications**

*Applicant a/0332/07*

18. As a preliminary matter, the OPCD observes that the necessary criteria to satisfy a complete application have not been fulfilled with regards to this applicant. The proof

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<sup>20</sup> Article 70(1) only penalizes the false testimony of a witness, and the presentation of false evidence by a party. The absence of any power to sanction participating victims for offences against the administration of justice or misconduct amply underscores the absolute necessity of implementing adequate procedural safeguards during the application process.

<sup>21</sup> 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-Corr, 17 January 2006 at para. 63.

of identification is not satisfactory,<sup>22</sup> the date of the alleged attack on [redacted] is not supported by external sources and most importantly the applicant has no standing to complete the form as a minor. Such failures to meet the essential requirements, as explained in the decision of the Pre-Trial Chamber,<sup>23</sup> either result in the application being dismissed or result in the need for further enquiries to be made for clarification.

19. The applicant is a minor, being 15 years of age at the time of submitting his application and 11 years old at the time of the alleged incidents. The application purports to have been submitted by the applicant himself, rather than by a legal guardian on his behalf (despite the fact that the applicant states he lives with and is cared for by an aunt). Nonetheless, the language employed throughout the application is quite sophisticated and clearly not the personal responses of a boy with just a few years of schooling. The OPCD submits in this regard that there is a clear distinction between being assisted with the transcription of the applicant's account, and having the account both formulated and drafted for the applicant. The latter scenario is regulated by rule 89(3) of the Rules of Procedure and Evidence, which stipulates that such an application can only be made by a person acting with the consent of the alleged victim, or a person acting on their behalf.

20. This raises clear questions as to whether applicant a/0332/07 actually consented, and was in a legal position to consent to the contents of the application form. In the submission of the OPCD, an independent representative of a minor is an essential pre-

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<sup>22</sup> There are evidential problems with the student card submitted with the application – it would appear that the photograph has been affixed on top of the stamp of authenticity, which clearly suggests that the photograph was not part of the original authenticated card, but was subsequently attached.

External research has shown that such identity cards are easily falsified, can be purchased in public places and are also frequently used by foreign students.;

Les enjeux électoraux en République Démocratique du Congo et les perspectives Journée de réflexion de la société civile; Jeudi 13 Octobre 2005 [...]: « -Carte d'élève :Elle se vent sur la place public (wenze,marchés par les enseignants) Elle est aussi détenue par des enfants des étrangers qui étudient dans notre pays. Comment alors une telle pièce peut-elle être une pièce de référence autorisée par la loi? N'est-ce pas de la légèrè? »<http://www.societecivile.cd/node/2541>

République démocratique du Congo (RDC): information sur la fréquence des documents d'identité, administratifs et judiciaires frauduleux et la possibilité de s'en procurer (février 2006). Direction des recherches, Commission de l'immigration et du statut de réfugié du Canada, Ottawa : « [...]il est l'ouvre notamment des ateliers du Quartier de Kalamu (Kinshasa). En effet, lors d'une visite dans le quartier précité, les participants à la mission ont pu voir à proximité de l'entrée du poste de police un atelier de fabrication de cartes d'identité (et autres documents) en pleine rue, ce à quelques mètres de l'atelier du photographe, qui tire des portraits plastifiés prêts à être fixés sur la carte... »

<http://www.irb-cisr.gc.ca/fr/recherche/rdi/?action=record.viewrec&gotorec=449842>

<sup>23</sup> Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation ICC 01/04-374, 17 August 2007 at paras. 12-15

requisite in the completion of an application to protect against suggestion and provide impartiality from an NGO worker specifically geared up for the submissions of such applications (as in this case, where the applicant was assisted by [redacted]).<sup>24</sup> The applicant is illiterate and does not speak French, [redacted] is said to have conversed with the applicant in Swahili but there is no signature nor date of completion of the form by him, neither is there a declaration from [redacted] to state that the translation is truthful and accurate. It is not clear whether the handwriting on the form belongs to [redacted] or to the legal representative of Mr. Keta. It would appear that the addendum purported to have been completed on the same day as the main sections of the form was in fact not finalised in the presence of the applicant nor the translator as they have not signed those pages; rather, it is the legal representative, Mr. Keta who has completed the facts in his own handwriting and has signed and dated as such. The latter aspect is particularly important to issues concerning the professional impartiality of the legal representative.

21. In terms of the intrinsic coherence of the application, the OPCD submits that there are several important inconsistencies and contradictions between the text of the addendum and the main sections of the form; the date of the attacks (the applicant was initially unable to recall a date but refers to the [redacted] attack which he incorrectly states occurred in [redacted] 2003), the location of his forcible recruitment (the applicant states that he was recruited from [redacted] in the main form and then from [redacted] in the addendum), and the length of time during which he was enrolled with the [redacted] (approximately 6 months in the main form but no more than three months in the addendum). Such inconsistencies go to the very heart of the application and if not viewed as fatal in terms of the application, defeat the purpose of having criteria as listed in the 17<sup>th</sup> August 2007 decision.<sup>25</sup> These inconsistencies also raise concerns as to the true author of the addendum and the source of the information.

22. The OPCD respectfully submits that in the absence of any confirmation that firstly the contents of the statement and the addendum were read back to the applicant in a clear

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<sup>24</sup> The OPCD refers to the Transcript of 12 March 2008, in the Prosecutor v. Lubanga, in which the proposal of the Presiding Judge concerning the provision of key information to the legal guardian of minors, who have been accorded the dual status of victim and witness, was not disputed by any of the participants. Transcript at page 75. The OPCD further refers to the UNICEF 'Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe' concerning the role of a minor's legal guardian in advising the minor as to whether it is in the best interests to participate in criminal proceedings (Chapter 13, page 107 [http://www.unicef.org/ceecis/UNICEF\\_Child\\_Trafficking108-113.pdf](http://www.unicef.org/ceecis/UNICEF_Child_Trafficking108-113.pdf)).

<sup>25</sup> *Ibid.*

and comprehensive manner in a language which he understood, secondly, that the person who provided assistance in translation is qualified as such in the necessary languages (Swahili and French), thirdly, that the application process had been conducted in the presence of a legal guardian, and fourthly, the power of attorney provided to Mr. Keta had been signed by the applicant in the presence of his legal guardian, it is not possible to accept the signature of the applicant as a legitimate endorsement of the contents of the application.

*Applicant a/0334/07*

23. The OPCD observes that the supporting documentation provided as proof of identification of this applicant is illegible. This applicant is a 51 year old male who supports his application with an electoral card. It is not possible to read the attached identification due to the quality and size of the copy, therefore no corroboration can be given as to birth date and address etc. The application is therefore deemed incomplete in view of these problems.<sup>26</sup>
24. The OPCD finds that there are further serious internal flaws with the application; namely that the date of and/or the location of the crime is erroneous and not corroborated by external sources. The OPCD would submit that this application should be dismissed for these reasons alone, even without considering the intrinsic incoherence of the information provided. The applicant states that the village of [redacted] had been the site of fighting between two militia ([redacted]) in [redacted] and [redacted] 2003. He explains that the [redacted] managed to gain control of the village for [redacted] prior to the incident as a result of which the applicant states he is a victim. In early [redacted] 2003, he states that [redacted] was attacked by the [redacted] forces in the early morning causing him to flee to [redacted], where at one part of his application he states he is still resident. [Redacted] itself is the site of reported attacks in [redacted] and [redacted] 2003,<sup>27</sup> and yet the applicant is silent about these matters. The OPCD also notes that initially the applicant states he is

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<sup>26</sup> The Honourable Single Judge has confirmed in her previous decision of 2<sup>nd</sup> April 2008 (ICC-01/04/01/07-357 at page 7 of 14) with reference to establishing the birth place of an applicant, that where there is no justification as to the reasons for any inconsistency within the application, the application will not be considered until additional explanatory information is provided.

<sup>27</sup>[Redacted].

resident in [redacted],<sup>28</sup> but later states that he resides in [redacted] where he has been since his escape from [redacted]. The account can not be classed as intrinsically coherent.

25. In addition, the account given by the applicant does not appear to be based on personal experiences but instead is punctuated with facts of which the applicant could have not had knowledge, unless he was himself a combatant. For example, the applicant mentions that the [redacted] were training their militia in camps in [redacted] and [redacted] and had attacked other villages such as [redacted] between [redacted] 2003 and [redacted] 2003, notwithstanding the fact that he was apparently resident in [redacted] during this time period. The inclusion of such material raises questions as to the author of the application form and the reasons for its submission.
26. The applicant is unable to speak or read French and has been assisted with the completion of the form in Swahili by [redacted] but there is no signature, date or declaration of accuracy and truthfulness from [redacted]. The addendum raises further concerns as to its legitimacy and accuracy as it is dated 2 days after the main sections of the form and has been handwritten by the legal representative, Mr. Keta. The applicant has signed the addendum declaring the truthfulness of its contents but at this stage it is apparent that there was no interpreter present despite the questions and statement being written in a language in which the applicant is not familiar. In contrast with applicant a 0332/07, there is not even the allocated space for the signature of the translator/witness on the addendum.
27. The applicant states that he has suffered moral harm as a result of the death of his wife. There are no supporting documents to confirm the identification of his wife or their marriage. The applicant himself was not present when the alleged attack on his wife took place and his account is reliant upon neighbours who were allegedly witness thereto. The OPCD therefore invites the Chamber to conclude that in the absence of direct testimony, coupled with the absence of supporting material concerning either the alleged offence, the alleged harm and the relationship between the applicant and the primary victim, this application should be dismissed.

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<sup>28</sup>[Redacted].

28. The applicant further states that his house was pillaged and all his belongings taken by the [redacted] militia, but he has no knowledge of such events. He was not present at the time; he does not state that he has been informed of such and finally he has not returned to [redacted] since the alleged attack. The physical harm which the applicant claims to have suffered as a result of the crime ([redacted]) is not causally connected to the alleged attack either. For the above reasons, the OPCD respectfully submits that the applicant does not meet either the evidential or legal criteria to be admitted as a victim.

*Applicant a/0335/07*

29. The OPCD submits in line with the previous applicants, the date of the alleged attack in [redacted] is not supported by external sources. In this application it is said with precision to be the [redacted] 2003. The applicant is now resident in [redacted], which as noted with a/0334/07 has been documented to have been the site of fighting in [redacted] and [redacted] 2003.<sup>29</sup> If the account is to be *prima facie* accepted, the applicant would have escaped from [redacted] to [redacted] to find himself at the site of an alleged attack at the end of [redacted] 2003. The submission of the OPCD is therefore again that the details of the application may have been altered to allow participation in the specific case of [redacted] and are not accurate.

30. The applicant does not provide any supporting documentation to prove the identity of the deceased father or son, or his relationship to them. It is also apparent from his account that he was not witness to the attack and has been informed by his neighbours that his son and father were killed. The reason he gives for their deaths is supposition and hearsay. It is not credible or possible for him to be able to state with certainty who the attackers were having accepted at the beginning of his account that there were armed militia on both sides of the attack. Further, the statement that the militia confused his family to be of [redacted] must also be supposition.

31. In connection with the material loss which the applicant claims, the applicant states that he 'lost' all his possessions on account of leaving them behind, rather than them having been pillaged or destroyed. He does not state whether he has returned to

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<sup>29</sup> *Ibid.*

[redacted] since the attack and provides no documentation to support his ownership of any goods.

32. The physical problems which the applicant suffers from are not causally linked to the alleged crime suffered; he states that he suffers from [redacted] as a result of his loss.
33. The OPCD respectfully observes that the language used throughout the application is very closely linked to the language used in [redacted], for example, he states that it was [redacted]. This is information which the applicant is not capable of having personal knowledge of and raises serious and legitimate doubts as to the authenticity and accuracy of the author of the document.

*Applicant a/0336/07*

34. The identity card used to corroborate and prove the applicant's identity is illegible as the photocopy is too dark. It is impossible to see the photograph, and as a result the OPCD would submit that the application is incomplete at this stage.
35. With regards to the account of the alleged murder of her aunt, it is not clear whether the applicant is claiming that she herself has suffered harm as a result of such an incident. She did not witness the alleged murder herself and it would appear that she has been informed indirectly from a third person of such an incident. The body of her aunt was never recovered; it is therefore not possible to say whether any crime took place. The OPCD would submit that the relationship between niece and aunt is not sufficiently proximate, notwithstanding the absence of proof of kinship and presence at death, to qualify as a victim in relation to emotional harm.

*Applicant a/0337/07*

36. The OPCD observes that there are fundamental problems concerning the basic and essential criteria for an application to be deemed complete. The identity card provided is again too dark to be read properly. It would appear that there are inconsistencies with the information given on the form as the name of the applicant's mother is

different. At this stage, the OPCD would submit that an explanation must be given as to these inconsistencies.<sup>30</sup>

37. The OPCD submits further that the applicant is claiming for the emotional harm she has suffered as a result of the alleged death of her husband. Her testimony is not direct; the applicant was not witness to any harm occurring to her husband or the friend. It is not clear how the applicant was informed of her husband's death or whether it is plain supposition. In these circumstances, it is impossible to verify that his death occurred in connection with an offence under the Rome Statute. This is particularly the case as the applicant has not specified whether her husband and the friend were civilians or not and whether they were armed at the time when they were allegedly taken to a camp.

38. In relation to the account of material loss, there is no supporting documentation to assert ownership of the property, nor is it possible to say whether any crime was committed under the Rome Statute at this stage as the items listed (sewing machines and bicycles) could well fall under the exceptions to pillage for reasons of military necessity. In this regard, the OPCD further observes that military necessity is a fundamental element of these offences,<sup>31</sup> which is assessed from the perspective of the defendant and not the alleged victim.<sup>32</sup> It is therefore either not feasible to render a determination that such offences have occurred in the context of the situation phase, or highly prejudicial to the putative defendant to render such a pre-determination.

39. The OPCD observes that the physical harm ([redacted]) which is alleged to have been caused by the events of the incident is not causally linked and further there are no supporting documents to confirm the existence of such a condition.

*Applicant a/0030/08*

40. The OPCD submits that at this stage the application is incomplete due to the impossibility of reading the photocopy of the attached identity card. There are

<sup>30</sup> See *ibid* footnote 27.

<sup>31</sup> Oral rule 98*bis* decision, Prosecutor v. Oric, "Our position on military necessity. The Trial Chamber notes that the absence of military necessity is explicitly mentioned in the actus reus of wanton destruction pursuant to article 3(B) of the Statute; hence, it must be considered a negative element of the crime. As like for other elements of the crime, it is for the Prosecution to prove beyond reasonable doubt that this requirement has been met." Transcript of 8 June 2005, Page 9009 lines 16-21. <http://www.un.org/icty/transe68/050608IT.htm>

<sup>32</sup> *Ibid* at page 9011, lines 10-14.

legitimate concerns which have been frequently raised by the OPCD with regards to the integrity of the procedure of filling out the application forms which abound in this application. The applicant did not receive the benefit of an interpreter, although only conversant in Swahili. The applicant was assisted by a third party, who also helped in the application of a/0031/08, which shares remarkable likenesses in terms of both the form and content of the allegations.

41. The applicant seeks to assert that he has suffered emotional harm in the form of ‘worries’ as a result of his aunt and two brothers allegedly being killed in an attack. The OPCD would submit that the account does not satisfy the requisite threshold even on a *prima facie* basis because he was not witness to the attack, he has not provided any supporting documentation to show the identity of these deceased family members, they are not named and it has not been specified whether they were civilians or combatants nor whether they were armed.
42. This applicant seeks to assert further that he has been the victim of pillage which has caused him material and emotional harm. He gives an indirect account of the pillage of livestock (which may well fall into the category of exception to pillage as a military necessity).<sup>33</sup> The applicant has not provided any supporting documentation or testimony concerning the alleged pillage, his ownership of the house, possessions and livestock and therefore in the submission of the OPCD does not fulfil either the evidential or legal criteria for participation.

*Applicant a/0031/08*

43. The OPCD repeats that where the supporting documentation is illegible, the application should be deemed incomplete.
44. This applicant does not provide any description or testimony as to what allegedly happened to him or his family but merely provides the result, which is the ‘physical disappearance’ of his two unnamed cousins, an injured sister (in relation to whom no information is provided as to whether she was armed or a civilian at the time) and loss of livestock and possessions. The OPCD would submit that in terms of the cousins,

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<sup>33</sup> The OPCD refers to its submissions at paragraph 34.

not only is the applicant unclear as to whether a crime has taken place, but further that the relationship is too remote in any case to enable an applicant to participate. In regard of the sister and her injuries, the applicant is not claiming on her behalf but seeks to be considered as a victim due to his proximity in relationship. The applicant has not adduced proof of their relationship, and was not witness to the injuries received and therefore does not satisfy the threshold required to be able to participate as a result.

45. The OPCD invites the Honourable Single Judge to take into consideration the similarities of the previous applicant with this applicant, with regards to the fact that neither were assisted by an interpreter despite the fact that they are both only conversant in Swahili, both were assisted by the same researcher, both applicants have fathers with the same name, both applicants have similar signatures, both provide almost identical hand-drawn maps of the area in which the alleged attack took place with identical road markings and location distances, both state that exactly the same number of livestock was pillaged, although neither witnessed the attack having both left the area prior to the alleged attack. The OPCD respectfully raises the legitimate question of whether the applications were completed together or whether there has been some influence asserted over the applications by the researcher. In such a scenario, the OPCD respectfully requests for the applicants to complete new applications with an independent and impartial interpreter providing the necessary documentation where needed.

*Applicant a/0001/08*

46. The OPCD harbours concerns with regards to this application as it concerns an illiterate applicant, conversant only in Swahili, who has not been assisted by an interpreter and yet has put her thumb print to every page of the application without there being a declaration to state that the applicant has understood and agreed to the contents of the application.
47. The OPCD questions the accuracy of the account given; the applicant states that she has suffered harm (both emotional and material) as a result of leaving behind 10,000 cows when escaping the [redacted] in [redacted] 2003 in [redacted]. Firstly, as

previously raised in these observations, there is no external support for attacks in [redacted] 2003, secondly, the applicant does not give an account of pillage or destruction but merely states that she left her possessions behind and thirdly, [redacted] is reported to be a village with a maximum human population of [redacted]<sup>34</sup> and therefore such a significant herd would be inconceivable. The OPCD would therefore submit in relation to the material loss, that it has not been shown prima facie that a crime under the Rome Statute has been committed.

48. Concerning the emotional harm that the applicant claims to have suffered, it is conceded by the applicant that there has been no requirement for medical or psychological treatment. Mere sorrow and grief concerning the general situation in the DRC does not suffice to allow participation in this capacity in the investigation of a situation before the ICC.

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<sup>34</sup> [Redacted]

#### 4. Relief Sought

49. For the reasons set out above, the OPCD respectfully requests the Honourable Single Judge to:

- suspend the application process pending an outcome of an investigation into the allegations concerning the submission of false applications, and the provision of bribes to potential applicants; or
- in the alternative, decide that applicants a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08 do not meet the criteria under article 68(3) for participation in the proceedings.



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Xavier-Jean Keita  
Principal Counsel of OPCD

Dated this Friday, 18 July 2008

At The Hague, The Netherlands