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Date: **13 August 2013**

**THE APPEALS CHAMBER**

**Before:** Judge Sanji Mmasenono Monageng, Presiding Judge  
Judge Sang-Hyun Song  
Judge Akua Kuenyehia  
Judge Erkki Kourula  
Judge Anita Ušacka

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE**

**IN THE CASE OF  
*THE PROSECUTOR v. LAURENT GBAGBO***

**Public Document**

**Application to Participate in the Interlocutory Appeal Filed by the Prosecution  
against the "Decision adjourning the hearing on the confirmation of charges  
pursuant to article 61(7)(c)(i) of the Rome Statute" of 3 June 2013**

**Source:** Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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## I. PROCEDURAL BACKGROUND

1. On 23 November 2011, Pre-Trial Chamber III issued an arrest warrant for Mr Laurent Gbagbo,<sup>1</sup> who was surrendered to the Court on 30 November 2011. During the first appearance of Mr. Gbagbo, on 5 December 2011, the Chamber scheduled the commencement of the confirmation of charges hearing for 18 June 2012.<sup>2</sup>

2. On 4 June 2012, the Single Judge of Pre-Trial Chamber I (the “Single Judge”) issued a “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings”<sup>3</sup> by which she granted 139 victims the right to participate at the confirmation of charges hearing and in related proceedings.<sup>4</sup> Furthermore, the Single Judge appointed a counsel from the Office of Public Counsel for Victims as the common legal representative of all the victims admitted to participate in the proceedings (the “Common Legal Representative”).<sup>5</sup>

3. On 12 June 2012, the Single Judge decided to postpone the confirmation of charges hearing to 13 August 2012.<sup>6</sup>

4. On 3 August 2012, the Single Judge decided that the “*commencement of the confirmation of charges hearing is postponed until the issue of Mr Gbagbo’s fitness to take part in the proceedings against him is resolved*”.<sup>7</sup>

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<sup>1</sup> See the “Warrant Of Arrest For Laurent Gbagbo” (Pre-Trial Chamber III), No. ICC-02/11-01/11-1, 23 November 2011.

<sup>2</sup> See the transcripts of the hearing of 5 December 2011, No. ICC-02/11-01/11-T-1-ENG, p. 8.

<sup>3</sup> See the “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012.

<sup>4</sup> *Idem*, p. 25.

<sup>5</sup> *Ibid.*, p. 26.

<sup>6</sup> See the “Decision on the ‘Requête de la Défense en report de l’audience de confirmation des charges prévue le 18 juin 2012’” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-152-Red, 12 June 2012.

<sup>7</sup> See the “Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-201, 3 August 2012 (dated 2 August 2012), p. 8.

5. On 17 December 2012, Pre-Trial Chamber I (the “Chamber”) issued the “Decision on the date of the confirmation of charges hearing and proceedings leading thereto” deciding that the confirmation of charges hearing would commence on 19 February 2013.<sup>8</sup>

6. On 6 February 2013, the Single Judge issued the “Second decision on victims’ participation at the confirmation of charges hearing and in the related proceedings”<sup>9</sup> by which she granted to other 60 victims the right to participate at the confirmation of charges hearing and in related proceedings.<sup>10</sup>

7. From 19 until 28 February 2013, the Chamber held the confirmation of charges hearing in the present case.<sup>11</sup>

8. On 3 June 2013, the Chamber issued a “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (the “Impugned Decision”),<sup>12</sup> wherein it decided by majority, with Judge Fernández de Gurmendi dissenting,<sup>13</sup> to adjourn the confirmation of charges hearing and to request the Prosecutor to consider providing further evidence or conducting further investigation with respect to all charges.<sup>14</sup>

<sup>8</sup> See the “Decision on the date of the confirmation of charges hearing and proceedings leading thereto” (Pre-Trial Chamber I), No. ICC-02/11-01/11-325, 17 December 2012 (dated 14 December 2012).

<sup>9</sup> See the “Corrigendum to the Second decision on victims’ participation at the confirmation of charges hearing and in the related proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-384-Corr, 8 February 2013.

<sup>10</sup> *Idem*, pp. 22-23.

<sup>11</sup> See the transcripts of the hearings of 19 February 2013, No. ICC-02/11-01/11-T-14-ENG; 20 February 2013, No. ICC-02/11-01/11-T-15-Red-ENG; 21 February 2013, No. ICC-02/11-01/11-T-16-Red-ENG; 22 February 2013, No. ICC-02/11-01/11-T-17-Red-ENG; 25 February 2013, No. ICC-02/11-01/11-T-18-Red-ENG; 26 February 2013, No. ICC-02/11-01/11-T-19-Red-ENG; 27 February 2013, No. ICC-02/11-01/11-T-20-Red-ENG; and 28 February 2013, No. ICC-02/11-01/11-T-21-ENG.

<sup>12</sup> See the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (Pre-Trial Chamber I), No. ICC-02/11-01/11-432, 3 June 2013 (the “Impugned Decision”).

<sup>13</sup> See the “Corrigendum - Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute - Dissenting opinion of Judge Silvia Fernández de Gurmendi”, No. ICC-02/11-01/11-432-Anx-Corr, 6 June 2013.

<sup>14</sup> See the Impugned Decision, *supra* note 12, p. 22.

9. On 10 June 2013, the Prosecution submitted a request for leave to appeal the Impugned Decision (the “Prosecution’s Request”).<sup>15</sup> The Defence requested leave to appeal said decision on 25 June 2013 (the “Defence’s Request”).<sup>16</sup> The Common Legal Representative filed a response to both requests on 17 June 2013 and 1 July 2013, respectively.<sup>17</sup>

10. On 31 July 2013, the Chamber by majority, with Judge Fernández de Gurmendi dissenting,<sup>18</sup> rejected the Defence’s Request and granted the Prosecution’s Request only with respect to one issue reformulated as follows:

*“Whether the Pre-Trial Chamber erred in holding that, when the Prosecutor alleges that an “attack against any civilian population” consists of multiple smaller incidents, none of which alone rises to the level of the minimum requirements of article 7 of the Statute and which allegedly took place at different times and places, a sufficient number of these incidents must be proved to the requisite standard, meaning that each of these incidents must be supported with sufficient evidence before the Chamber can take them into consideration to determine whether those incidents, taken together, indicate that there are substantial grounds to believe that an ‘attack’ took place”.*<sup>19</sup>

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<sup>15</sup> See the “Prosecution’s application for leave to appeal the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”, No. ICC-02/11-01/11-435, 10 June 2013 (the “Prosecution’s Request”).

<sup>16</sup> See the “Demande d’autorisation d’interjeter appel de la « décision d’ajournement de l’audience de confirmation des charges conformément à l’article 67-7-c-i du Statut » (ICC-02/11-01/11-432-tFRA) du 3 juin 2013”, No. ICC-02/11-01/11-439, 25 June 2013 (the “Defence’s Request”).

<sup>17</sup> See the “Response of the Common Legal Representative to the ‘Prosecution’s application for leave to appeal the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute””, No. ICC-02/11-01/11-437, 17 June 2013; and the “Réponse du Représentant légal commun des victimes à la « Demande d’autorisation d’interjeter appel de la « décision d’ajournement de l’audience de confirmation des charges conformément à l’article 67-7-c-i du Statut » (ICC-02/11-01/11-432-tFRA) du 3 juin 2013 » déposée par la Défense le 25 juin 2013”, No. ICC-02/11-01/11-442, 1 July 2013.

<sup>18</sup> See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges - Dissenting opinion of Judge Silvia Fernández de Gurmendi”, No. ICC-02/11-01/11-464-Anx, 31 July 2013.

<sup>19</sup> See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, p. 33.

11. On 12 August 2013, the Prosecution submitted a “Prosecution’s appeal against the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”” (the “Prosecution’s Appeal”).<sup>20</sup>

## II. REQUEST FOR PARTICIPATION IN THE INTERLOCUTORY APPEAL

12. The Common Legal Representative shares the views of Judge Song and Judge Van den Wyngaert that victims who have been permitted to participate in proceedings giving rise to an appeal are participants in said appeal pursuant to regulation 65(5) of the Regulations of the Court.<sup>21</sup> However, the Common Legal Representative is also aware of the Appeals Chamber’s jurisprudence pursuant to which victims are not granted an automatic right to participate in appellate proceedings.<sup>22</sup> Consequently, the Common Legal Representative respectfully

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<sup>20</sup> See the “Prosecution’s appeal against the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute””, No. ICC-02/11-01/11-474, 12 August 2013 (the “Prosecution’s Appeal”).

<sup>21</sup> See the “Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims”, No. ICC-01/04-01/06-824 OA 7, 13 February 2007, paras. 2-8; the “Separate and partly dissenting opinion of Judge Sang-Hyun Song and reasons for dissent from the order of the Appeals Chamber of 20 March 2008”, No. ICC-01/04-01/06-1335 OA 9 OA 10, 16 May 2008, paras. 3-7; the “Partly dissenting opinion of Judge Sang-Hyun Song and reasons for dissent from the decision and orders of the Appeals Chamber of 29 February 2008”, No. ICC-02/05-138 OA 2 OA 3, 18 June 2008, par. 3; the “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”, No. ICC-01/04-503 OA 4 OA 5 OA 6, 30 June 2008, paras. 1-2; the “Separate opinion of Judge Sang-Hyun Song and Judge Christine Van den Wyngaert with respect to the ‘Decision on the participation of victims in the appeals’ issued on 20 October 2009”, No. ICC-01/04-01/06-2205 OA 15 OA 16, 8 December 2009, p. 42; the “Separate Opinion of Judge Sang-Hyun Song”, No. ICC-01/04-01/07-2124 OA 11, 24 May 2010, p. 8; the “Separate Opinion of Judge Song”, No. ICC-01/04-01/10-509 OA 4, 2 April 2012, p. 9; and the “Separate Opinion of Judge Sang-Hyun Song”, No. ICC-01/04-01/07-3346 OA 13, 17 January 2013, p. 8.

<sup>22</sup> See *inter alia* the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’” (Appeals Chamber), No. ICC-01/04-01/06-824 OA 7, 13 February 2007, par. 40; the “Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against the Trial Chamber I’s Decision entitled ‘Decision on Victims’ Participation’” (Appeals Chamber), No. ICC-01/04-01/06-1335 OA 9 OA 10, 16 May 2008, paras. 12-13; 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 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” (Appeals Chamber), No. ICC-01/04-503 OA 4 OA 5 OA 6, 30 June 2008; the “Reasons for the ‘Decision on the Participation of Victims in the Appeal Against the ‘Decision on the Interim Release of Jean-Pierre Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic

requests the Appeals Chamber to allow the victims she represents to participate in the Prosecution appeal against the Impugned Decision pursuant to article 68(3) of the Rome Statute since (i) they have been authorised to participate in the proceedings by Pre-Trial Chamber I; (ii) their personal interests are affected; (iii) their participation is appropriate; and (iv) the manner of their participation is neither prejudicial to nor inconsistent with the rights of the suspect and a fair and impartial trial.

### **1. The individuals seeking participation are victims in the case**

13. The Common Legal Representative informs the Appeals Chamber that the 199 victims applying for participation in this interlocutory appeal have been granted victim status in the case against Mr. Gbagbo by Pre-Trial Chamber I.<sup>23</sup>

### **2. The victims' personal interests are affected**

14. The Appeals Chamber has consistently found in the past that the participation of victims in interlocutory appeals can be permitted *"if it can be shown that their personal interests are affected by the issues on appeal"*,<sup>24</sup> carrying out such analysis on a

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of Germany, the Italian Republic, and the Republic of South Africa"" (Appeals Chamber), No. ICC-01/05-01/08-566 OA 2, 20 October 2009; the "Decision on the Participation of Victims in the Appeal against Trial Chamber I's Oral Decision of 15 July 2010 to Release Thomas Lubanga Dyilo"(Appeals chamber), No. ICC-01/04-01/06-2555 OA 17, 17 August 2010; the "Decision on the Participation of Victims in the Appeal against the 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence' of Trial Chamber III" (Appeals Chamber), No. ICC-01/05-01/08-857 OA 4, 18 August 2010; and the "Decision on the 'Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)"" (Appeals Chamber), No. ICC-01/04-01/10-509 OA 4, 2 April 2012.

<sup>23</sup> See *supra* notes 3 and 9.

<sup>24</sup> See the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", *supra* note 22, par. 43; the "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against the Trial Chamber I's Decision entitled 'Decision on Victims' Participation'", *supra* note 22, par. 35; the "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in

case-by-case basis.<sup>25</sup> Pursuant to this approach, the Appeals Chamber has found that decisions whereby a Chamber stays the proceedings or decides not to confirm the charges brought by the Prosecution affect the victims' personal interests, since a decision of this nature "*impacts the victims' ability to present their views and concerns [in the course of a trial] and could ultimately preclude them from the opportunity to claim reparations [before this Court]*".<sup>26</sup>

15. The Common Legal Representative submits that a similar conclusion can be reached regarding a decision to request the Prosecutor to consider providing further evidence or conducting further investigation with respect to particular charges pursuant to article 61(7)(c)(i) of the Statute. The underlying issue on appeal is whether the suspect will stand trial, an issue which clearly affects the victims' personal interests. If the trial in respect of Mr. Gbagbo does not eventually take

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accordance with Regulation 55(2) of the Regulations of the Court" (Appeals Chamber), No. ICC-01/04-01/06-2205 OA 15 OA 16, 8 December 2009, par. 34; the "Decision on the Participation of Victims in the Appeal of Mr Katanga Against the 'Decision on the Modalities of Victim Participation at Trial'" (Appeals Chamber), No. ICC-01/04-01/07-2124 OA 11, 24 May 2010, par. 5; the "Decision on the 'Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)'" , *supra* note 22, par. 6; the "Decision on the application of victims to participate in the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court" (Appeals Chamber), No. ICC-01/04-01/07-3346 OA 13, 17 January 2013, par. 6; and the "Decision on the participation of victims in the appeal" (Appeals Chamber), No. ICC-02/05-03/09-470 OA 4, 6 May 2013, par. 11.

<sup>25</sup> See the "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007" (Appeals Chamber), No. ICC-01/04-01/06-925 OA 8, 13 June 2007, par. 28; the "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'" , *supra* note 24, par. 35; the "Decision on the Participation of Victims in the Appeal of Mr Katanga Against the 'Decision on the Modalities of Victim Participation at Trial'" , *supra* note 24, par. 7; the "Decision on the 'Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)'" , *supra* note 22, par. 9; and the "Decision on the application of victims to participate in the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court" , *supra* note 24, par. 9.

<sup>26</sup> See the "Decision on the participation of victims in the appeal" (Appeals Chamber), No. ICC-01/04-01/06-1453 OA 13, 6 August 2008, par. 9; the "Decision on the Participation of Victims in the Appeal against Trial Chamber I's Decision to Stay the Proceedings" (Appeals Chamber), No. ICC-01/04-01/06-2556 OA 18, 18 August 2010, par. 9; and the "Decision on the 'Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)'" , *supra* note 22, par. 10.



place, the victims will not have an opportunity to present their views and concerns in the course of that trial and will be unable to present a claim for reparations against him, should he be convicted. Consequently, although the Impugned Decision does not result in the immediate termination of the prosecution nor directly precludes the victims from seeking compensation,<sup>27</sup> the issue on appeal seriously impact the victims' personal interests.<sup>28</sup>

16. Moreover, the Common Legal Representative submits that victims have been granted significant substantive and procedural rights in the proceedings leading to the Impugned Decision that they risk losing in the event of certain outcomes on appeal.<sup>29</sup> In particular, the extension of the standard of proof to the "incidents" underlying the contextual elements will affect the likelihood of having the charges confirmed and thereby have a direct impact on the possibility for the victims to continue participating in the proceedings and to eventually get reparations for the damage, loss and injury they suffered as a consequence of the crimes alleged by the Prosecutor against Mr. Gbagbo.

### **3. Victims' participation is appropriate**

17. The Common Legal Representative submits that the participation of victims in the appeal at hand is appropriate given the subject-matter of the appeal and the consequences that the outcome of the appeal may have on the personal interests of the victims.<sup>30</sup> In particular, the views of the victims must be heard in this appeal

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<sup>27</sup> See for instance the "Decision on the participation of victims in the appeal", *supra* note 26, par. 9.

<sup>28</sup> For a similar reasoning, see the "Decision on the Participation of Victims in the Appeal against Trial Chamber I's Decision to Stay the Proceedings", *supra* note 26, par. 9.

<sup>29</sup> For a similar scenario, see the "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against the Trial Chamber I's Decision entitled 'Decision on Victims' Participation'", *supra* note 22, par. 43; and the "Decision on the 'Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)'"', *supra* note 22, par. 10.

<sup>30</sup> See the "Decision on the 'Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)'"', *supra* note 22, par. 11. See also the "Decision on the participation of victims in the appeal" (Appeals

because their interests are considerably affected by the eventual outcome of the appeal, as explained above.<sup>31</sup>

18. Furthermore, the Common Legal Representative is of the view that victims granted leave to participate in proceedings having given rise to a decision which has been appealed must be entitled *a fortiori* to participate in the interlocutory appeal in question, all the more so where, as in the present case, the interlocutory appeal involves an issue which, as explained above, directly affects their interests.<sup>32</sup>

19. Moreover, victims' participation in the interlocutory appeal filed by the Prosecution is appropriate, since it accords with the requirements regarding the right for victims to be heard as set out in article 68(3) of the Rome Statute. In fact, an analysis of the articles and rules governing victims' participation in the proceedings before the Court clearly shows that victims' participation is not restricted to specific stages of the proceedings and is therefore possible at all procedural stages, including interlocutory appeals.<sup>33</sup>

20. Victims' participation in this interlocutory appeal also responds to the need to maintain the fairness of the proceedings. As indicated above, the victims' personal interests are undeniably affected by the outcome of this appeal.<sup>34</sup> Consequently, victim participation will allow the victims' views and concerns to be taken into consideration in a thorough and objective manner on appeal.

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Chamber), No. ICC-02/04-01/05-324 OA 2, 27 October 2008, par. 14; and the "Decision on the Participation of Victims in the Appeal against the 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence' of Trial Chamber III", *supra* note 22, par. 11.

<sup>31</sup> See *supra* paras. 14-16.

<sup>32</sup> *Idem*.

<sup>33</sup> See also the Proposal by France, UN doc. PCNICC/1999/DP.2, 1 February 1999, p. 7; the Proposal by Costa Rica concerning the Rules of Procedure and Evidence, UN doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999, p. 1; and the Proposal by Colombia, UN doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999, pp. 2-3. For a review of the preparatory works, see BITTI (G.) and FRIMAN (H.), "Participation of Victims in the Proceedings", in LEE (R.S.) (ed.), *The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, New York, 2001, pp. 456-474.

<sup>34</sup> See *supra* paras. 15-15.

21. Finally, the Common Legal Representative submits that the appropriate character of the victims' participation in this interlocutory appeal is guaranteed by the limits set by the legal framework of the Court. In this regard, regulation 24(1) of the Regulations of the Court provides the Prosecution and the Defence with the possibility to respond to "*any document filed by any participant in the case in accordance with the Statute, the Rules, these Regulations and any order of the Chamber*".

**4. Victims' participation is not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial**

22. The Common Legal Representative is of the view that protecting the rights of the suspect/accused is a fundamental principle without which the integrity of criminal proceedings could not be safeguarded and justice would not be done.

23. Moreover, the Common Legal Representative notes that victims' participation in the proceedings before the Court is not, in itself, liable to affect the rights of the Defence. As Judge Blattmann pointed out:

*"[B]oth the rights of victims and that of the accused are amply protected under the Statute. Further, many major legal systems are able to incorporate victims' participation into their proceedings while ensuring the rights of the accused to both a fair and expeditious proceeding".<sup>35</sup>*

24. In this regard, the Common Legal Representative also notes that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations on 29 November 1985 lays down the principle of access to justice for victims and the right to fair treatment.<sup>36</sup>

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<sup>35</sup> See the Separate and Dissenting Opinion of Judge René Blattmann appended to the "Decision on victims' participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, par. 26.

<sup>36</sup> See United Nations General Assembly Resolution 40/34 of 29 November 1985 available at: <http://www.un.org/documents/ga/res/40/a40r034.htm>, principles 4 to 7.

25. The Common Legal Representative further points out that the role of the victims must not be confused with that of the Prosecution.<sup>37</sup> The purpose of victims' participation in the interlocutory appeal in question is thus simply to ensure that the rights afforded to them under the Rome Statute are effectively implemented, and hence has no impact on the rights of the Defence.

26. Moreover, victims' participation in the present interlocutory appeal cannot be prejudicial to or inconsistent with the rights of the Defence because the victims request authorisation to present their views and concerns regarding their personal interests solely to the issue raised on appeal. Moreover, rule 91(2) of the Rules of Procedure and Evidence and regulation 24(1) of the Regulations of the Court allow the Defence to respond to any document submitted by the victims as a result of such participation.<sup>38</sup>

27. The Common Legal Representative further submits that victims' participation constitutes an integral part of the concept of fair and impartial proceedings, since it is expressly provided for in the legal texts of the Court. It follows that the balance of the proceedings before the Court cannot be affected by the participation of victims. On the contrary, taking victims' interests into consideration is one of the factors that help to balance the proceedings, particularly when it is the violation of the fundamental rights of the victims themselves that is involved. Thus, the

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<sup>37</sup> See the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", *supra* note 22, par. 55. See also in this sense DONAT-CATTIN (D.), "Article 68", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2<sup>nd</sup> edition, Verlag C.H. Beck, Hart Publishing and Nomos, 2008, pp. 1296 and 1297, par. 39: "*victims (or her/his representative) are 'guardians' of the fairness of the proceedings with respect to their personal interests, and not 'agents' in search of retribution. The possibility of intervention in the most crucial stages of the proceedings may represent an important step in the 'rehabilitation' of the victims*".

<sup>38</sup> See *supra* par. 21. See also the "Decision on the participation of victims in the appeal", *supra* note 30, par. 14; and the "Decision on the 'Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)\"", *supra* note 22, par. 12.

participation by victims in this interlocutory appeal cannot prejudice the interests of the Defence.<sup>39</sup>

**FOR THE FOREGOING REASONS**, the Common Legal Representative respectfully requests the Appeals Chamber:

- **to RULE** that the personal interests of the 199 victims authorised to participate in the proceedings by Pre-Trial Chamber I are affected by this interlocutory appeal, that the presentation of their views and concerns is appropriate at this stage, and that their participation is neither prejudicial to nor inconsistent with the rights of the Defence and a fair and impartial trial; and
- **to GRANT** leave to the victims to file a response to the document to be submitted in support of the appeals, within a time limit to be set by the Appeals Chamber, and, more generally, to authorise the Common Legal Representative to submit written observations on any issue affecting the interests of the victims raised by the Prosecution or the Defence during the appellate proceedings, in accordance with the procedure laid down by the Appeals Chamber.



**Paolina Massidda**  
**Principal Counsel**

Dated this 13<sup>th</sup> day of August 2013

At The Hague, The Netherlands

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<sup>39</sup> See DONAT-CATTIN (D.), "Article 68", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Nomos, 1999, pp. 876-877: "The victims' genuine wish is that the truth be established and the case solved. [...] The second [concept of due process for defendant] is fair trial, which is comprehensive of, but not limited to, the respect for all the rights of the suspect/accused; it means equitable justice for defendants, victims and international society as such, the foundation of all procedural norms of the Statute".