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PRE-TRIAL CHAMBER I

Before: Judge Anita Ušacka, Single judge

Registrar: Mr Bruno Cathala

SITUATION IN DARFUR, SUDAN

Public Document

Public Redacted Version of Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e)

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor
Adebowale Omofade, Trial Lawyer

Office of Public Counsel for Defence

Mr. Xavier-Jean Keïta

Legal Representatives of the Applicants

Ms. Wanda Akin
Mr. Raymond Brown

1. Introduction

1. On 23 July 2007, the Honourable Single Judge issued a Decision authorising the filing of observations on applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for participation in the proceedings,¹ in which the Single Judge ordered the Registry to transmit the applications to participate as victims to the Office of Public Counsel for the Defence (OPCD), and granted the OPCD the right to file observations in relation to these applications within 30 days of notification of the applications.
2. On 24 July 2007, the applications were transmitted to the OPCD.
3. On 3 August 2007, the OPCD wrote a letter² to the legal representatives of the applicants, to request the following information:
 - i. Whether the applicants had previously obtained damages through any domestic legislation or were in the process of doing so;
 - ii. If the applicants had participated in such proceedings or were in the process of doing so, whether it would be possible to obtain details of the legal proceedings in question, and a copy of any written observations or oral testimony that the applicants may have deposed in the proceedings;
 - iii. If the applicants had not filed such an action the applicants have indicated whether, by virtue of filing their application before the ICC, the applicants would be willing to waive their entitlement to seek damages before any other jurisdiction?
 - iv. The circumstances under which the applicants were informed firstly, of their right to apply to participate as victims before the ICC, and secondly, the fact that they could seek the services of Ms. Akin and Mr. Brown as persons named on the list of counsel qualified to appear before the ICC;
 - v. In terms of the presence of an interpreter during the application requests, confirmation as to whether the persons named in the application forms as an interpreter are licensed/certified court interpreters;
 - vi. For those applicants which have been granted asylum, information concerning the terms of their residence: the current expected length of residence, the conditions of residence, and any social, financial, or employment benefits which may be attached to this status;

¹ ICC-02/05-85

² Confidential Annex A

- vii. In the event that the applicants had provided statements to the relevant asylum/immigration authorities concerning the events in Sudan, a copy of any such statements which might be in their possession;
 - viii. With respect to the persons listed as witnesses in the application forms, the OPCD informed the representatives that as there were no identification documents attached in relation to these persons, it was not possible to verify their signature.
4. On 8 August 2007, the legal representatives responded to these inquiries,³ arguing that they were under no obligation to directly disclose any of the aforementioned information to either the Prosecution or the Defence, and that if the OPCD required any further information in order to prepare its observations, then the OPCD should address its requests to Pre-Trial Chamber 1.
 5. Pursuant to Regulation 86(7) of the Regulations of the Court, the OPCD hereby files a request to the Honourable Pre-Trial Chamber to order the legal representatives to respond to the aforementioned inquiries, and to disclose the requested material. In the alternative, should such information not be forthcoming, the OPCD submits that pursuant to Rule 89(2) of the Rules of Procedure and Evidence, the applications should be dismissed *in limine* due to their non-compliance with Regulation 86(2) of the Regulations of the Court.

2. Submissions

2.1 Legal Basis for the Request

6. Regulation 86 (2) of the Regulations of the Court stipulates that in completing the applications forms, applicants to participate as victims shall, to the extent possible, provide “any relevant supporting documentation”.
7. The OPCD respectfully submits that if the Chamber or the parties identify a particular cadre of information as being relevant, the phrase “shall contain, to the extent possible” clearly places an onus on the applicants to provide such documentation, or to provide an explanation as to why they are not in a position to provide the information in question.
8. In this regard, the Honourable Single Judge in Pre-Trial Chamber II recently stated in the context of the Uganda situation that whilst it may be difficult to

³ Confidential Annex B

require applicants residing in countries ravaged by conflict, with communication difficulties to obtain certain documentation, nonetheless, “given the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings, it would be equally inappropriate not to require that some kind of proof meeting a few basic requirements be submitted”.⁴

9. The OPCD further notes that the victim application process is a voluntary process and that potential applicants are expressly advised that they may be required to submit confidential documentation to both the Chambers and the parties.⁵
10. As such, the applicants who have freely chosen to participate as victims must necessarily accept any legal obligations which flow from such participation, or waive the right to participate. Alternatively, if applicants do not wish to comport with the documentary requirements of participating in the proceedings, they can participate as a potential witness, and vest the appropriate party (Defence or Prosecution) with the responsibility for executing disclosure obligations and producing corroborating documents.
11. In this connection, the OPCD notes that domestic systems for victim claims also provide for a ‘discovery procedure’. In the United States of America, plaintiffs filing a claim under the Alien Torts Act can request that their identity and documentation be withheld from the public (John Doe procedure). Nonetheless, if the defendant chooses to contest the claim, the “the defendant’s lawyers would still have the right to ask [...] questions (in a proceeding known as a “deposition”) and to ask [the plaintiff] to provide documents in [the plaintiff’s] possession that relate to the case.”⁶
12. In France, “Les parties peuvent, au cours de l’information, saisir le juge d’instruction d’une demande écrite et motivée tendant à ce qu’il soit procédé à leur audition ou à leur interrogatoire, à l’audition d’un témoin, à une confrontation ou à un transport sur les lieux, à ce qu’il soit ordonné la production par l’une d’entre elles d’une pièce utile à l’information, ou à ce

⁴ Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101 at para 16.

⁵ Victims Before the International Criminal Court: A Guide for the Participation of victims in the Proceedings of the Court, at page 21. http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf

⁶ ‘Becoming a Plaintiff Without Revealing Your Identity’, prepared by the Center for Justice and Accountability, <http://www.cja.org/cases/BeingADoe.pdf>

qu'il soit procédé à tous autres actes qui leur paraissent nécessaires à la manifestation de la vérité.”⁷

13. In terms of the documentary requirements of the respective regional human rights mechanisms, the Inter-American Court of Human Rights has concluded that documents submitted in the proceedings will not be taken into consideration if “they lack authentication, present defects and do not comply with the minimum formal requirements for admissibility as it is impossible to precisely establish their source, and also the procedure by which they were obtained.”⁸
14. Moreover, such procedural requirements are not waived, even if the consequence of non-compliance would be the dismissal of the actual application. In this connection, the Court has stated that it “must preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism. In the instant case, to continue with a proceeding aimed at ensuring the protection of the interests of alleged victims in the face of manifest violations of the procedural norms established by the Convention itself would result in a loss of authority and credibility that are indispensable to organs charged with administering the system for the protection of human rights”.⁹
15. With respect to the European Court of Human Rights, Rule 44A of the Rules of the Court stipulates that “the parties to a case before the Court have a duty to cooperate fully in the conduct of the proceedings, and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice”.¹⁰
16. Notably, Rule 44C further states that “where a party fails to adduce evidence or provide information requested by the Court or to divulge relevant important information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate”.

⁷ Article 82-1 alinea 1 du Code de procédure pénale (Loi n° 2000-516 du 15 juin 2000 art. 21 Journal Officiel du 16 juin 2000 en vigueur le 1er janvier 2001)(Loi n° 2000-1354 du 30 décembre 2000 art. 24 Journal Officiel du 31 décembre 2000 en vigueur le 1er janvier 2001)

⁸ *Bámaca Velásquez Case*, Judgment of November 25, 2000, Inter-Am Ct. H.R. (Ser. C) No. 70 (2000) at para. 105. <http://www1.umn.edu/humanrts/iachr/C/70-ing.html>

⁹ *Cayara Case v. Peru*, Preliminary Objections, Judgment of 3 February 1993 Series C No. 14 at para 63.

¹⁰ Rules of Court, as amended July 2006, <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf>

17. Finally, as regards international criminal law, the OPCD observes that the ICTY Appeals Chamber has held that in light of the complexity and multi-faceted nature of international criminal proceedings, the right to equality of arms and fair trial implies that “the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.”¹¹
18. The application form, as currently drafted, does not require the applicants to specify the time and address where the application form was signed, or to provide an exhaustive list of all persons who were present during the application process.¹² The application process is not videotaped, transcribed, or conducted in the presence of judicial officers. Neither the applicant, the person assisting the applicant, the witness, or the interpreter are officers of the Court, and as such, are not bound by the Staff Rules or the Code of Professional Conduct for Counsel. Indeed, the status of such persons is so amorphous, that is not clear as to whether they would fall under the relevant categories of persons who are subject to article 70 of the Rome Statute (offences against the administration of justice).
19. [Redacted]
20. In any case, the application form does not caution the applicants that there may be legal consequences should they intentionally falsify their application form. The only reference to false or fraudulent applications is page 26 of the ICC guide for victim participation, which states that “[m]any safeguards are in place to prevent false or fraudulent application [sic] from being submitted. In order to avoid false applications the ICC requires from the applicant a certain form of proof of identity, signature and other information”(emphasis added).¹³
21. It is for this reason that, in the absence of any express financial or punitive sanctions for false or fraudulent applications, the power of the Chamber to request the applicants to submit all relevant supporting documentation is of paramount importance.
22. The OPCD further submits that a need for strict procedural safeguards further stems from the fact that the Court is relying on a written application

¹¹ Prosecutor v. Tadic, Judgment of 15 July 1999, at para 52

<http://www.un.org/icty/tadic/appeal/judgement/index.htm>

¹² http://www.icc-cpi.int/library/victims/Form-Participation-1_en.pdf

¹³ Victims Before the International Criminal Court: A Guide for the Participation of victims in the Proceedings of the Court http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf

procedure, as opposed to in-court testimony, in contravention of the principle of orality.

23. In this regard, whilst international criminal tribunals and regional human rights courts have generally adopted a relatively unrestricted approach to their assessment of evidence, they have nonetheless cautioned against the use of written, out-of-court statements,¹⁴ or, in light of the unreliability of such statements, implemented procedural safeguards or promulgated strict criteria as to when out of court testimony can be accepted,¹⁵ and the format to which such testimony must adhere.¹⁶

24. As stated by the ICTY Appeals Chamber, the need for such safeguards derives from article 21 of the Statute “which grants to every accused person appearing before the Tribunal as one of the “minimum guarantees, in full equality”, the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”¹⁷ The rights set out in

¹⁴ In the case of *Bámaca Velásquez*, Judgment, 25 November 2000, Inter-Am Ct. H.R. (Ser. C) No. 70 (2000), the Court held at para. 103: “*In this respect, the Court considers that the videotape with the testimony of Nery Angel Urizar Garcia, contributed by the Commission as documentary evidence, lacks autonomous value, and the testimony that it contains cannot be admitted as it has not complied with the requirements for validity, such as the appearance of the witness before Court, his identification, swearing in, monitoring by the State and the possibility of questioning by the judge.*” <http://www1.umn.edu/humanrts/iachr/C/70-ing.html>

¹⁵ See ICTY Prosecutor v. Tadić, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link 25 June 1996, at para 19. “*It cannot be stressed too strongly that the general rule is that a witness must physically be present at the seat of the International Tribunal. The Trial Chamber will, therefore, only allow video-link testimony if certain criteria are met, namely that the testimony of a witness is shown to be sufficiently important to make it unfair to proceed without it and that the witness is unable or unwilling to come to the International Tribunal.*”

¹⁶ See for example, the ICTY Practice Directive for the Implementation of Rule 92bis(B) of the Rules of Procedure and Evidence, IT/192, 20 July 2001, <http://www.un.org/icty/legal/doc-e/index.htm>, which provides that in order to be tendered into court pursuant to Rule 92bis, written statements must be (inter alia):

- accompanied by a declaration by the witness that the contents are true to the best of their belief (which can only be signed after the witness has been cautioned about the consequences of false testimony);
- in a language which the witness understands;
- certified by a Presiding Officer of the Court or relevant national authority, who has verified the ID of the witness and noted the time, date, and venue of the procedure, and listed all persons who are present and the reason for their presence.

¹⁷ ICTY Appeals Decision On Appeal By Dragan Papic Against Ruling To Proceed By Deposition, Prosecutor v. Kupreskic, 15 July 1999, at para. 18:

“In considering the issues raised by this ground of the appeal, the Appeals Chamber deems it necessary to recall one of the fundamental principles governing the giving of evidence before the Trial Chambers, namely the principle that witnesses shall as a general rule be heard directly by the Judges of the Trial Chambers. This principle is laid down in Article 21(4) of the Statute which grants to every accused person appearing before the Tribunal as one of the “minimum guarantees, in full equality”, the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. Sub-rule 90(A) embodies that same principle and specifically prescribes that witnesses shall in principle be heard directly by the Chambers. Furthermore, this principle is a predominant feature in the criminal procedure of national legal systems, underpinned as it is by the compelling reason of facilitating the determination of the charges against an accused person. One of the consequences of this

Article 21 of the ICTY Statute are mirrored in article 67(1) of the ICC Statute.

25. In light of the above, the OPCD respectfully submits that if the information in question is within the possession of the applicants or the applicants are in a position to obtain it, they are put on notice that it is relevant, and they refuse nonetheless to disclose it, the Chamber should draw adverse inferences regarding the *bona fides* of the applicants, and the credibility of their allegations.
26. Moreover, if failure to obtain the information in question impedes the ability of the parties to properly assess the assertions contained within a particular document, or the application as a whole, then the Chamber should exclude either that particular document, or pursuant to Rule 89(2), dismiss the application *in limine*.

2.2 Relevance of the Materials requested

27. The OPCD submits that for the purposes of establishing that a category of documents is relevant, and hence, pursuant to regulation 86(2)(3) of the Regulations of the Court, should have been filed as supporting material for an application to participate as a victim, it is sufficient for a party “to describe the documents sought by their general nature as clearly as possible even though it cannot describe them in detail, and [...] show that such access is likely to assist his case materially”.¹⁸

2.2.1 Information concerning domestic proceedings or complaints filed before other human rights mechanisms

28. The OPCD respectfully submits that it is highly relevant to its preparation of observations as to whether it is appropriate for the applicants to participate as victims in the Sudan situation at this stage of the proceedings to know firstly, whether the applicants have attempted to communicate their complaints to relevant authorities in Sudan; and secondly, whether the applicants (or

principle is the advantage that all three Judges of a Trial Chamber shall have of observing the demeanour of the witness in person while he or she is being examined by the parties, apart from their ability to put questions to the witness under solemn circumstances in order to best ascertain the truth in respect of the crimes with which an accused is being charged.”

¹⁸ Decision On Appeal From Refusal To Grant Access To Confidential Material In Another Case, Prosecutor v. Hadzihasnovic et al, 23 April 2002, page 3.

persons on their behalf) have filed complaints before other jurisdictions seeking remedies for the events in question.

29. In terms of its query as to whether the applicants have seised domestic authorities of the issues at hand, the OPCD submits that in order for the ICC to fulfil its role as a “Court of last resort”, which encourages the development of national rule of law mechanisms, it is incumbent on the Court to either stipulate that applicants must attempt to exhaust domestic remedies, or, require applicants to explain why they were not in a position to utilise such remedies.
30. The rule concerning exhaustion of domestic remedies is predicated on the following: firstly, before seising an international body with a complaint, the State concerned should first be provided with the opportunity to remedy matters through its own judicial mechanisms;¹⁹ and secondly, the primary responsibility for rectifying human rights violations lies with the State concerned.
31. The OPCD submits that this underlying rationale of exhaustion of domestic remedies finds resonance in the Rome Statute. As stated by the preamble to the Rome Statute, “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. To that end, the jurisdiction of the ICC is complementary to national criminal jurisdictions.²⁰
32. In the particular context of victim applications, if applicants were permitted to file complaints directly before the ICC, the relevant national authorities would not be informed of the alleged violation, and would thus be deprived of the opportunity of investigating the complaint, and providing the victims with an appropriate remedy. Rather than operating as a self-described “court of last resort”,²¹ the ICC would obtain *de facto* primacy by virtue of the fact that the national authorities would not have had the necessary means (the information contained within the applications) to commence domestic investigations.
33. The principle of complementarity would thus be frustrated if the Court did not require applicants to establish that they have genuinely attempted to

¹⁹ Dawda Jawara v. The Gambia, African Commission on Human and Peoples' Rights, Comm. Nos. 147/95 and 149/96 (2000) < <http://www1.umn.edu/humanrts/africa/comcases/147-95.html> > (13 June 2007); IACHR, 1996 Annual Report, Report N° 39/96 (Case 11.673 – Santiago Marzióni), Argentina, October 15, 1996, para. 49, p. 85.

²⁰ Article 1 of the Rome Statute.

²¹ ‘ICC at a Glance’ <http://www.icc-cpi.int/about.html>

exhaust all appropriate domestic remedies, or in the alternative, demonstrate why they are not in a position to do so.²²

34. Alternatively, if the applicants have filed complaints before national authorities, then it may be necessary for the Court to be apprised of this fact in order to notify the State in question for the purposes of an article 17(1) admissibility evaluation and to assess potential *ne bis in idem* claims. The latter question clearly raises issues concerning the rights of the defence, and is thus of material relevance to the OPCD's preparation of its observations.
35. In terms of the OPCD's inquiry as to whether the applicants (or persons on their behalf) had filed complaints before regional or international human rights mechanisms, the OPCD observes that international and regional human rights mechanisms stipulate as a condition of admissibility that the applicants must not have submitted the same claim to another treaty body or regional mechanism, "the aim being to avoid unnecessary duplication at the international level."²³ Applicants are therefore required to describe any claims they have made, the body to which they have applied, and the outcome of the complaint.
36. The OPCD respectfully submits that the ICC should both respect and uphold this principle concerning duplication of procedures - to hold otherwise would be contrary to the Relationship Agreement between the ICC and the United Nations,²⁴ would generally frustrate the procedures of other regional organisations, would risk inconsistent factual findings, and could result in the accused being penalised twice if awards for damages for the same acts are issued by different courts. The same logic applies to complaints filed before domestic courts, based on the same facts, which have not been dismissed by domestic authorities for lack of jurisdiction.
37. Apart from the issue of double damages, it would be necessary for the OPCD to be apprised of such proceedings in order to attempt to obtain copies of

²² "The initial burden is with the complainant to prove that he or she has exhausted or genuinely attempted to exhaust all appropriate domestic remedies. The complainant must substantiate any claim that certain remedies are unavailable, ineffective, futile or unreasonably long. Subsequently, the burden shifts to the State party" http://www.omct.org/pdf/UNTb/2006/handbook_series/vol4/eng/handbook4_eng_02_part2.pdf

At page 71. See also *See R.T. v. France* (262/87) and *Kaaber v. Iceland* (674/95).

²³ Fact Sheet No.7/Rev.1, Complaints Procedure, Office of the Human Commissioner of Human Rights, http://www.ohchr.org/english/about/publications/docs/fs7.htm#_ftn6#_ftn6. See also article 33 of the Rules of Procedure of the Inter-American Commission on Human Rights <http://www.cidh.oas.org/Basicos/English/Basic18.Rules%20of%20Procedure%20of%20the%20Commission.htm>, and article 56(7) of the African Charter of Human and Peoples' Rights.

²⁴ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1, Entry into Force 4 October 2004, Article 2(3) *inter alia*.

prior statements or any other information which could be exculpatory for the defence, or impact on the credibility of the applicants themselves or their allegations.

38. In this connection, the OPCD notes that in the Uganda situation, the Honourable Single Judge found that in the absence of direct evidence, it would be necessary to evaluate the application “first and foremost on the merits of its intrinsic coherence”.²⁵ The intrinsic coherence of the assertions contained therein is highly dependent on the consistency with which the application has adhered to these assertions, and could be impugned by the existence of inconsistent statements.
39. Even if the applicants did not file the complaint themselves, it is possible that the complaint may have been filed by relatives of the applicants, on whose behalf the applicants are now seeking reparations, and could contain contrary allegations or factual details.
40. For example, in the case of *Toğcu v. Turkey*, the European Court of Human Rights dismissed a complaint because of the fact that the applicant and his family had provided inconsistent statements.²⁶

2.2.2 *The qualification of the persons who provided interpretation services during the application process.*

41. The OPCD respectfully submits that in order to ensure a modicum of reliability and credibility for the application process, at the very least, it is

²⁵ Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-01/05-252 at para 15.

²⁶ The Court observed that various members of the applicants family had provided conflicting versions of the event at different times, including in statements given to human rights organisations, and furthermore, noted “that the applicant – who was legally represented in the present proceedings – has not provided any explanation for these serious discrepancies” (at para 93). The Court found that such inconsistencies “detract from the credibility of his account to the extent that, on the basis of his submissions, the Court is unable to draw a clear picture of the events of 29 November 1994 and it cannot, therefore, find it established that Ender was taken into custody by security forces” (at para 94).

Although the Court “the difficulties for an applicant to obtain the necessary evidence in support of his or her allegations which is in the hands of the respondent Government in cases where that Government fail to submit relevant documentation”, it nonetheless emphasised that “to shift the burden of proof onto the Government in such circumstances requires, by implication, that the applicant has already made out a *prima facie* case” (at para 95). The Court therefore held that “[i]n the light of the contradictory versions of events put forward by the applicant in the present case, the Court cannot but conclude that he has failed to make out his case to the extent necessary for the burden to shift onto the Government to explain that the custody records withheld by them contained no relevant information concerning Ender” (at para 96). Case of *Toğcu v. Turkey* (Application No. 27601/95) Judgment 31 May 2005.

necessary to evaluate the identity, background, and qualifications of all persons involved in the application process.

42. In this regard, the OPCD has noted that whilst the applications have been filed in English, several applicants stated in their application form that they either do not understand English, or that they only have a minimal command of English.
43. Whilst the application forms state that an interpreter was present, the forms do not require the applicant to state whether the contents were read to them in a language which they understood.
44. In addition, the legal representatives have refused to provide any information to the OPCD concerning whether these persons are qualified interpreters.
45. The OPCD submits that the fact that the applicants have signed their statements has no evidentiary value if it cannot be reliably ascertained that they understood and approved the contents of the statement. The OPCD therefore submits that it is necessary to verify the accuracy of the translation and the qualifications of the interpreters.²⁷
46. In terms of the accuracy of the translation, the OPCD has observed that there is a high degree of similarity of phrases and descriptions between applications which have been translated by the same person,²⁸ which suggests that the information provided in the application form might not be the verbatim response of the applicants, and as such, is completely devoid of credibility.
47. In this regard, the OPCD submits that the following statement of the Trial Chamber of the Special Panels for Serious Crimes in East Timor is particularly relevant:²⁹

“the Court expresses its concern that two of the statements (the statement of Laurinda Oki and Maria Lafu Ulan, both dated 20 march 2002) are identical. Other than the name, age and time of the interview, the text of the statements are identical – even the spacing and the punctuation marks are replicated. The first five paragraphs of

²⁷ Indeed, the OPCD respectfully submits that the importance of accurate translations to procedural fairness is self-evident. As stated by Hermann Göring during the Nuremberg proceedings, “Of course I want counsel. But it is even more important to have a good interpreter.” (Francesca Gaiba, *The Origins of Simultaneous Translation: The Nuremberg Trial* (1998) at 110).

²⁸ See Confidential Annex C

²⁹ Judgment of the Special Panels in East Timor, Prosecutor v. Carlos Ena and Umberto Ena, 23 March 2004, at page 12 <http://socrates.berkeley.edu/~warcrime/ET-Docs/CE-SPSC%20Final%20Decisions/2002/05-2002%20Umbertos%20Ena%20and%20Carlos%20Ena%20Judgment.pdf>

the statement of Terezinha Punef (also taken on 20 March 2002) are identical to these two statements, while the remaining paragraphs of the statement display striking similarities in terms of words, phrasing and contents. In addition, the statement of Olinda Cono (taken on 22 March 2002) shows striking similarities in terms of words, phrases and contents to these statements. Given the irregular nature of these statements, the Court is highly reluctant to accord this evidence much weight”.

48. The implication of this analysis was that “the investigator may have prepared statements to be signed by the witnesses”.³⁰
49. Concerning the qualifications of the persons listed as interpreters, the OPCD submits that the credentials of the interpreters should lie in the field of interpretation: “it is a popular misconception that any bilingual person would make an adequate interpreter”.³¹
50. [Redacted]
51. [Redacted]
52. The OPCD have no information concerning the background or qualifications of the interpreter of applicants a/0021/07, a/0023/07, a/0024/07, a/0025/07, a/0026/07, and a/0027/07.³²
53. The OPCD would also like to express a general concern regarding the utility and accuracy of submitting applications in a language not understood by the applicant. In terms of the experience of the ad hoc Tribunals, during many early investigative interviews at the ICTY, a language assistant would translate what the witness was stating from Bosnian/Croatian/Serbian (B/C/S) into English, the investigator contemporaneously transcribed what the witness said in English, and the witness eventually signed the English version. It was a common occurrence for a witness to subsequently deny the accuracy of these statements when confronted with a B/C/S interpretation of

³⁰ D. Cohen, ‘Indifferent and Accountability; the United Nations and the Politics of International Justice in East Timor’ June 2006 (East-West Institute Report) at page 67

<http://www.eastwestcenter.org/fileadmin/stored/misc/SR00905Part3.pdf>

³¹ J. Karton, Lost in Translation: International Criminal Courts and the Legal Implications of Interpreted Testimony 40 Vand. J. Transnat'l L. at page 19 http://works.bepress.com/joshua_karton/1/

³² [Redacted]

the statement in court, or B/C/S translation during the Rule 92 *bis* (use of written statements in lieu of oral testimony) process.³³

54. The OPCD understands that it might be costly for applicants to procure qualified interpretation services. Nonetheless, in such a scenario, the Victims Guide Book advises prospective applicants, who are unable to submit the form in one of the working languages, that they may contact the Court or its field offices.³⁴ Accordingly, the OPCD respectfully submits that in light of the effect that mistranslation or undue influence could have on the fairness of the proceedings, it would be preferable for the applicants to resubmit their applications, signed in a language which they are able to understand, and for the Court to subsequently prepare translations into one of the working languages.

2.2.3 The conditions of asylum and prior statements which have been provided to national immigration authorities

55. In light of the fact that the applicants have been granted residency within the [redacted], it can be assumed that they have provided accounts of the events in Sudan to the national immigration authorities. As has been held by the ICTR Appeals Chamber,³⁵ information provided by a witness to immigration authorities can at the very least, be of material relevance to the preparation of the Defence if it contains information which affects the credibility of the witness.³⁶ The OPCD is of the view that in the present circumstances, such statements could either be exculpatory, if they contain inconsistent information concerning the details or timing of the events, or be of material relevance to the defence if they impact on the credibility of the applicants.
56. In terms of the latter, in the event that the applicants were granted their protected status and working visa as a result of their account of the events, it

³³ See Transcripts of Status Conference on this issue in Prosecutor v. Brdjanin and Talic, 18 May 2001, in particular at page 281, <http://www.un.org/icty/transe36/010518SC.htm>

³⁴ ICC Guidebook at page 26.

³⁵ Prosecutor v. Bagasora, Decision On Interlocutory Appeal Relating To Disclosure Under Rule 66(B) Of The Tribunal's Rules Of Procedure And Evidence, 25 September 2006, [Http://69.94.11.53/Default.Htm](http://69.94.11.53/Default.Htm)

³⁶ The Chamber noted at footnote 32 that “even under United States Federal Rule of Criminal Procedure 16, which is limited to disclosure on matters material to the preparation of the defence against the prosecutor’s case-in-chief, evidence is material “as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.” See *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998) (emphasis added). Further, it also extends to some extent to information which might dissuade a defendant from pursuing an unmeritorious defence. *Id.*”.

could constitute a financial inducement, which would impact on their credibility.

57. Thus, in the Prosecutor v. Martić,³⁷ witness MM-079 “testified that after his lawyer had suggested that he contact the Tribunal to seek assistance with his asylum, he was interviewed by the Prosecution, and that he was subsequently informed that the Prosecution had written a letter to the authorities of the state where he currently lives to ask that he be allowed to stay there until he finishes testifying at the Tribunal”.³⁸ The Prosecution “acknowledged that the evidence of Witness MM-079 should be “scrutinized with care” since “he said that he hoped to receive the assistance of the OTP to remain in the country where he is relocated.””³⁹ The Chamber ultimately concluded that in light of the assistance provided to witness MM-079 and another Prosecution witness, “there is significant doubt as to the credibility of both witnesses”. The Chamber therefore gave “weight only to the parts of their respective evidence which are corroborated by other evidence”.⁴⁰
58. In particular, the OPCD notes that the immigration/asylum conditions of [redacted] expressly preclude applicants who have, *inter alia*, committed non-political offences outside [redacted], have persecuted other persons or represent a danger to the security of [redacted].⁴¹
59. Objectively, this restriction provides any applicants for asylum with a powerful incentive to downplay or omit any association that they may have had with rebel groups, and their possible participation in offences.
60. The OPCD therefore respectfully requests the Chamber to firstly, order the applicants to inform the Court as to whether they have provided prior statements concerning the events set out in their applications forms to any national authorities, and if so, to disclose copies of these statements, or explain to the Court why they are not in a position to do so. Secondly, the OPCD requests the Chamber to order the applicants to disclose the terms and conditions of their residence in [redacted].

³⁷ Trial Judgment of 12 June 2007, <http://www.un.org/icty/martic/trialc/judgement/mar-tcjud070612e.pdf>. See Also Prosecutor v. Zigiranyirazo, Scheduling Order – In Camera Hearing On Prosecutor’s Motion To Permit Limited Disclosure Of Information Regarding Payments And Benefits Provided To Witness Ade And His Family *Rules 66(C) And 68(D) Of The Rules Of Procedure And Evidence*, 19 January 2006, <http://69.94.11.53/default.htm>

³⁸ At para 37.

³⁹ At para. 37.

⁴⁰ At para. 38.

⁴¹ [redacted]

2.2.4 The identity and status of the persons named as a witness in the application forms

61. The application forms were witnessed by various individuals, who have not provided any identifying documentation which would enable the OPCD to verify whether the witness's signature on the application form corresponds to the named person.
62. In addition, the application forms do not provide any information as to the capacity in which the named persons witnessed the application procedure, for example, whether, in that particular jurisdiction, they have any authority to act as a witness to court documents as a court official, magistrate, notary, or justice of the peace.
63. In this connection, the OPCD submits that for a witness to have any legal credibility and to avoid conflicts of interest, there are certain conditions to which the witness must comport: they may not have a financial and familial ties with the applicant, and they must not derive a possible financial benefit from the outcome of the application procedure.
64. The OPCD further submits that the *raison d'être* of requiring the presence of a witness is to ensure that the person in question can, if necessary, testify before the court in relation to the procedure followed during the application process. As such, the witness may be compelled to testify against the applicant, in the event that the applicant has not complied with the appropriate procedure or has engaged in fraudulent activities.
65. [Redacted]
66. Finally, there is no information concerning the nature of the witnessing act. In contradistinction to the ICTR and ICTY Rule 92 *bis* procedure, the application form does not require the witness to sign a declaration that the application process was conducted in accordance with any particular procedure. For example, there is no requirement that the 'witness' lists all the persons present (which is particularly important if other prospective applicants are present), or certifies that there was no undue influence or coercion during the application process.
67. The OPCD therefore submits that in light of the lack of documentation concerning the identity and role of the witnesses, and the potential conflict of

interest concerning those witnesses which are [redacted], the applications as currently drafted should be dismissed.

3. Relief Sought

68. For the reasons set out above, the OPCD respectfully requests the Honourable Single Judge to order that the legal representatives:

- i. inform the Chamber and the parties as to whether the applicants or their relatives have filed any complaints in relation to the events set out in their applications forms before national, regional or international judicial entities other than the ICC;
- ii. in the event that the applicants or their relatives have provided prior statements (written or oral testimony) in relation to the events set out in their applications to national, regional or international judicial entities, or immigration/asylum authorities, provide copies of such statements to the Chamber and the parties;
- iii. disclose to the Chamber and the parties the conditions under which the applicants have been granted residence/asylum in [redacted];
- iv. disclose to the Chamber and the parties the interpretation qualifications of the persons identified as interpreters in the application forms;
- v. if the persons listed as interpreters do not possess any relevant qualifications in this field, request that the applicants resubmit their applications to the Court in a language which the applicants understand;
- vi. if the applicants are illiterate, request that the applicants resubmit their applications with a declaration that the contents of the application have been read to them in a language which they understand;
- vii. disclose to the Chamber and the parties documentation concerning the identity and role of the persons listed as witnesses during the application process; and
- viii. if the persons listed as witness have a potential conflict of interest in light of [redacted], request that the applicants resubmit their applications, witnessed by another person who has no potential conflict of interest.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this 21st day of August, 2007

At Sarlat-la-Canéda, France