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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single judge

Registrar: Mr Bruno Cathala

SITUATION IN DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Request for leave to appeal the "Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor"

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1. Introduction

1. On 17 July 2007, the Honourable Single Judge issued a Decision authorising the filing of observations on applications a/0163/06 to a/0187/06 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 28 August 2007, the OPCD filed a request for the Single Judge to order the Prosecutor to disclose exculpatory materials pursuant to article 67(2) of the Rome Statute (“the Statute”).²
3. In the alternative, the OPCD argued that if the Chamber rejected this request, the application to participate in the situation phase should be dismissed *in limine*, in light of the prejudice to the rights of the Defence and the principle of equality of arms.
4. On 31 August 2007, the OPCD filed a confidential request for the Single Judge to order the Legal Representative to provide supporting documentation concerning a number of matters.³
5. On 4 October 2007, the OPCD filed its confidential observations in relation to applications a/0163/06 to a/0187/06.⁴
6. On 7 December 2007, the Honourable Single Judge issued the ‘Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor’ (“the Decision”), which dismissed the requests of the OPCD.⁵
7. The Honourable Single Judge predicated the decision on the following findings.
8. The Chamber recalled prior jurisprudence in relation to the participation of victims in the situation to the effect that the personal interests of victims are in general, affected by the situation phase; that an assessment of the personal interests of the victims in relation to specific proceedings in this phase will only be conducted “for the determination of the specific set of procedural rights attached to the procedural status of victims”;⁶ and that the obligation of the Chamber to ensure that victim participation

¹ ICC-01/04-358.

² ICC-01/04-378 + ICC-01/04-378-Conf-Exp-AnxA and AnxB.

³ ICC-01/04-381-Conf + ICC-01/04-381-Conf-AnxA, AnxB and AnxC.

⁴ ICC-01/04-404-Conf.

⁵ ICC-01/04-417.

⁶ At para. 3 of the Decision.

does not prejudice the rights of the Defence or a fair and impartial trial only pertains to the modalities of participation.

9. The Single Judge therefore concluded that the application process was a distinct proceeding, unrelated to the criminal proceedings before the Court, which is not *per se* prejudicial to the Defence. The Chamber therefore limited the scope of applicable law to rule 89 of the Rules, Regulation 86 of the Regulations, and prior decisions of the Chamber concerning the application process;⁷ thus, by inference, excluding articles 21 and 67 of the Statute *inter alia*.

10. Concerning the OPCD request of 28 August 2007, the Honourable Single Judge held that the application process is not related to questions pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witness. Hence, article 67(2) of the Statute is not applicable in the context of the application process. The Single Judge re-emphasizes that “the role of Applicants in the application process can by no means be confused with that of witness in criminal proceedings.”⁸

11. The Single Judge also held that the Prosecution’s obligation under rule 77 of the Rules is limited to permitting the Defence to inspect only those books, documents, photographs and tangible objects (a) on which the Prosecution intends to rely at the confirmation hearing or trial; (b) which are material to the preparation of the Defence for the purpose of the confirmation hearing or the trial; or (c) which have been obtained from or belonged to the suspect or accused person. The Single Judge considered that this rule is also not applicable in the context of the application process.⁹

12. Concerning the OPCD request of 31 August 2007, the Honourable Single Judge considered that the limited object and purpose of the application process explains why (a) regulation 86(2)(e) of the Regulations only requires that the applicants use standard forms and that their Applications contain the enumerated items, including any relevant supporting documentation, “to the extent possible”; and (b) that the Chamber’s “only obligation under rule 89(1) of the Rules is to order the Registry to provide the Prosecution and the Defence with copies of the Applications, such that they may make observations on the Applications within a time limit set by the Chamber.”¹⁰

13. The Honourable Single Judge held that rule 89 of the Rules does not require the Chamber to provide, or to order the applicants to provide, to the Prosecution or the

⁷ Para. 7 of the Decision.

⁸ At para. 11 of the Decision.

⁹ At para. 12 of the Decision.

¹⁰ Para. 15 of the Decision.

Defence, for the purpose of submitting their observations, information extrinsic to the applications themselves. The Single Judge stated that is consistent with the fact that the role of the OPCD in the application process is confined by rule 89(1) of the Rules to the submission of observations on the applications.¹¹

14. Finally, the Honourable Single Judge dismissed both the OPCD requests of 28 August 2007 and 31 August 2007 without addressing the alternative submission mentioned in the OPCD request of 28 August 2007; namely, whether, in light of the fact that the Defence did not have investigative resources or the facility to request relevant documentation from the OTP, it was appropriate for the applicants to participate in the situation phase in light of the prejudice to the rights of the Defence and the principle of equality of arms.

15. In accordance with article 82(1)(d) of the Statute, the OPCD hereby submits its request for leave to appeal.

2. Legal basis for the appeal

16. The OPCD observes firstly that article 82(1) of the Statute provides that “either party may appeal any of the following decisions [...]”. It is thus a precondition that in order to file an appeal or a request for leave to appeal, it is necessary to be a party to the proceedings.

17. Whilst the OPCD is not, in general, a party to the proceedings, the OPCD respectfully submits that with respect to those specific proceedings for which it has been expressly tasked to represent the interests of the Defence, it can be considered as a party to that proceeding.

18. In addition, the OPCD notes that the Prosecution has previously filed requests for leave to appeal decisions of Pre-Trial Chamber I and II pertaining to victim participation in the situation phase. Whilst some of these requests have been dismissed on the merits, the respective Chambers have not dismissed the appeals *in limine*, or declared that it is not possible for a party to appeal a decision pertaining to the application process, which is issued during the situation phase.

19. The OPCD therefore submits that in accordance with the principle of equality of arms, if requests for leave to appeal filed by the Prosecution are receivable, requests filed on behalf of the Defence¹² are also receivable.

¹¹ Para. 16 of the Decision.

¹² Whether the appropriate entity for filing the appeal is *ad hoc* counsel for the Defence or the OPCD will necessarily depend on the specific proceeding, and whether the Chamber has tasked an external counsel or the OPCD with representing the interests of the Defence in connection with that proceeding.

20. In terms of the threshold for appealing a decision pursuant to article 81(1)(d), the OPCD observes that the Appeals Chamber has determined that the moving party must firstly identify an appealable issue, which is a subject or topic, the resolution of which has been necessary for the judicial determination in question (the impugned decision).¹³

21. In setting out the appealable issues, it is not necessary for the party seeking leave to address the merits of the appeal, nor indeed, is it feasible to do so within the limited time frame for filing a request for leave to appeal.

22. The OPCD respectfully submits that the decision of the Honourable Single Judge raises the following appealable issues:

- whether the application process is a distinct procedure, unrelated to the modalities of participation or the criminal proceedings before the Court, which is not *per se* prejudicial to the Defence; and
- whether the Chamber is only obliged to provide the Prosecution and the Defence with copies of the applications, and is thus not obliged to provide or order the applicants to provide information extrinsic to the applications themselves.

23. In view of the fact that the decision of the Honourable Single Judge did not address the alternative submission of the OPCD concerning the impact of the OPCD's lack of investigative resources or the facility to request relevant documentation from the OTP on the determination as to whether it is appropriate to participate in the situation phase, the OPCD respectfully submits that it is not possible for the OPCD to address the first component of its request concerning disclosure from the Prosecution in isolation. As such, any appeal on this issue can only be raised in connection with the Single's Judge's ultimate decision concerning whether it is appropriate and non-prejudicial for the applicants to participate as victims in the situation phase.

24. The Defence respectfully submits that the issues delineated above significantly affect the fair and expeditious conduct of the proceedings, and in addition, an immediate resolution of the issues by the Appeals Chamber would materially advance the proceedings.

3. Issue 1: Whether the application process is a distinct procedure, unrelated to the modalities of participation or the criminal proceedings before the Court, and thus, not *per se* prejudicial to the Defence

¹³ Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC/01/04-168 at para. 9.

3.1 Existence of an appealable issue

25. The OPCD respectfully submits that the Honourable Single Judge's finding that the application process was a distinct process, which is separate from modalities of participation and the criminal proceedings before the ICC, allowed the Single Judge to conclude firstly, that the process of recognising applicants as victims is not *per se* prejudicial to the Defence; and secondly, that the legal regime governing the application process was limited to rule 89 of the Rules of Procedure and Evidence, regulation 86 of the Regulations of the Court, and prior decisions of the Chamber concerning the application process.¹⁴

26. The Honourable Single Judge's finding was thus central to the Single Judge's ultimate determination that the OPCD was not entitled to the requested material. As such, the OPCD respectfully submits that the issue as to whether the application process is a distinct procedure, unrelated to the modalities of participation or the criminal proceedings before the Court, is an appealable issue for the purposes of article 82(1)(d) of the Statute.

3.2 Impact on the fairness of the proceedings

27. The OPCD respectfully submits that in contravention of the express caveat in rule 89(1) that the transmission of applications to the parties is subject to the provisions of the Statute, the Single Judge's finding concerning the legal regime which governs the application process effectively places this process outside of the realm of key provisions of the Statute, which govern the fairness of the proceedings, such as article 21¹⁵ and article 67(1),¹⁶ and the general principle of *in dubio pro reo*.¹⁷ As such, since the appealable issue impacts on the ability of the parties to trigger judicial provisions

¹⁴ At para. 7.

¹⁵ It is submitted that article 21 of the Statute provides a key safeguard in relation to the fairness and integrity of the proceedings by establishing defined sources of law, which thereby limits judicial discretion and protects the principle of legality, and ensuring that the law applied by the ICC is consistent with fundamental human rights standards.

¹⁶ The OPCD also submits that such an approach would be contrary to the decision of the Appeals Chamber, which expressly stated that article 21 governs regulation 86, and that regulation 86 is accordingly subordinate to article 68(3) of the Statute: Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo" ICC-01/04-01/06-824 at para. 43.

¹⁷ "When there is a legality deficit in a criminal regime, you can assume this deficit exists to serve the interests of the Prosecution. There is little doubt that a pro-Prosecution mentality pervades the Rome Statute from the Preamble, stressing the suffering of the victims, to the abolition of the statute of limitations (Article 29). Typically, a criminal statute provides for a strict rule of interpretation in order to protect the interests of the accused. [...] The interpretation should therefore favour the accused. It should reflect the principle *in dubio pro reo* [...]": G. P. Fletcher and J. D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 Journal of International Criminal Justice 539, at 552.

which regulate the fairness of the proceedings and protect the rights of the Defence, the issue impacts on the fairness of the proceedings.

28. Whilst the Honourable Single Judge justified this stance on the basis that the application process is not *per se* prejudicial to the Defence, this conclusion derived from the Judge's initial finding concerning the scope of the application process (the appealable issue). The OPCD underscores that in determining the impact of the appealable issue on the fairness of the proceedings, the Chamber is precluded from examining the merits of the issue. The OPCD therefore respectfully submits that it would therefore be entirely circular to state that since the Single Judge found, as a consequence of impugned finding, that the application process is not *per se* prejudicial to the Defence, the impugned issue itself does not impact on the fairness of the process. Thus, in the Prosecutor v. Bagosora *et al*, the Chamber based its assessment as to whether the impugned decision could impact on the fairness of the proceedings by assessing the consequences which could ensue if the Chamber's decision was in fact, incorrect.¹⁸

29. Viewed through this lens, if the Honourable Single Judge's finding that recognition of applications as victims is not *per se* prejudicial is indeed incorrect, it is clear that putting the application process outside the protection of the Statutory provisions which regulate fairness would impact on the fairness of the proceedings.

30. The OPCD further submits that defining the application process as a distinct procedure, has the effect of divorcing the obligation of the Chamber to ensure that victim participation is implemented in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, from the actual application process. Again, irrespective of the merits of the underpinning reasoning of the Single Judge,¹⁹ since it eliminates the obligation of the Chamber to actively ensure that the application process is implemented in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, it is a result which impacts on the fairness of the proceedings.

¹⁸ Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005 at para. 9: "The point of contention is whether those consequences will actually ensue. In its decision, the Chamber considered the dangers raised by the Defence to be remote ... [However] If the Chamber's interpretation of the witness protection orders is incorrect, then the effect on the Defence would be profound. In these circumstances, the Chamber finds that its decision involves an issue that 'would significantly affect the fair and expeditious conduct of the proceedings'".

¹⁹ In this connection, the OPCD respectfully submits that in accordance with the clear wording of Rule 89(1), the application process is intrinsically linked to participation ("in order to present their views and concerns, victims shall make written application to the Registrar"); its purpose is to facilitate the implementation of article 68(3), and as such, does not exist as an end in itself.

31. The OPCD observes in this regard that the United Nations Human Rights Committee has concluded that if certain procedural safeguards are necessary to secure an ultimate right, then the human rights protections applicable to the result, apply to the procedure itself.²⁰ The OPCD submits that since the Honourable Pre-Trial Chamber has held that the underlying rationale of victim participation at the situation phase is to “clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered”,²¹ it is necessary to impose strict procedural safeguards in relation to the determination as to whether the applicants meet the requisite criteria to participate as victims, in order to ensure that the stated objectives of victim participation are not jeopardised by abusive, fraudulent, or false claims.²² As such, it follows that the fairness protections, which regulate the modalities of protection, should also apply to the adjudicative procedure which triggers the right to participate.

32. Although the Statute permits the Pre-Trial Chamber to issue judicial findings concerning the existence of alleged offences, this power is subject to the following procedural safeguards. Firstly, the Chamber may only base such a determination upon evidence presented by the Prosecutor: this in itself is an important safeguard as the Prosecutor is a Minister of Justice, bound by strict ethical obligations, who may only present a case before the Chamber after investigating “all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute, and in so doing, [investigating] incriminating and exculpatory circumstances equally”.²³

²⁰ General Comment 29 on States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 31 August 2001 at para. 15.

²¹ Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public redacted version - 22.03.2006) ICC-01/04-101, 17 January 2006, at para. 63.

²² In this regard, Pre-Trial Chamber II observed that “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” (para. 16). The Pre-Trial Chamber consequently held that the level of reliable proof as to whether the person could be considered a victim for the purpose of rule 75 is directly linked to their right to participate: “This kind of document can therefore not be taken into account for participation purposes” (para. 18). 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.

The OPCD further observes that the Inter-American Court of Human Rights 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”: *Cayara Case v. Peru*, Preliminary Objections, Judgment of 3 February 1993 Series C No. 14 at para. 63.

²³ Article 54(1) of the Statute. For this reason, the OPCD respectfully submits that the provisions of the criminal codes cited by the Single Judge at footnote 23 are not directly applicable to the current procedure, since in these countries, the applications are considered by the investigating judge. Whereas the ICC Pre-Trial Chamber does not have the power to actively investigate, the investigating judge has the duty to search for incriminating and

Secondly, following a determination by the Pre-Trial Chamber that there are reasonable grounds to believe that a person committed a crime within the jurisdiction of the Court, the person has the right to challenge that evidential determination in connection with a request for release,²⁴ and has an automatic right to appeal such a decision.²⁵ Thirdly, in order to ensure that the public's perception of this evidential finding is not confused with the Trial Chamber's ultimate determination of guilt or innocence, the Statute requires the Chamber to employ distinct legal terminology, which corresponds to the different evidential thresholds.

33. These safeguards do not exist in the current circumstances. The applicants are under no ethical duty to address all relevant matters in their applications, and indeed, cannot be sanctioned for false statements. Unlike case-related applications, the Chamber cannot verify the existence of the alleged events by reference to the evidence adduced by the Prosecutor. The members of the respective groups have no ability during the situation phase, and indeed, might never have a judicial avenue to contest these public, judicial findings. In this connection, judicial findings attributing criminal acts to groups, which were issued in connection with the control council law 10 proceedings, were heavily criticised as being unfair, on the basis that they contravened the principle of legality and the prohibition against collective responsibility, and effectively shifted the burden of proof by creating judicial presumptions, which impact on the strategy of future defendants, who may be members of these organisations.²⁶

34. In terms of the public perception of the Single Judge's findings, the legal nomenclature employed ("victim") does not differentiate between a *prima facie* finding based on grounds to believe, and an ultimate determination based on beyond

exculpatory material. Accordingly, in rendering a decision on the application of the civil party, the investigating judge can ascertain whether it is corroborated by the evidence in the dossier. Thus in France, during the investigation phase, to declare admissible the constitution partie civile, it is not sufficient for the claimant to simply allege the existence of an offence, the judge must assess the circumstances on which the claim is based in order to permit the judge to verify the possible existence of harm and its relation to the offence, "*s'il suffit au regard de l'article 85 du Code de procédure pénale pour que la constitution de partie civile soit recevable, lors de l'instruction préalable, que les circonstances sur lesquelles elle s'appuie, permettent au juge d'admettre comme possible l'existence d'un préjudice et sa relation avec l'infraction à la loi pénale, le plaignant ne saurait se borner à alléguer avoir été lésé par l'infraction dénoncée*" (Cour de Cassation, Chambre Criminelle, 9 février 1961, Bull. Crim. n°83; Cass Crim, 11 décembre 1990, pourvoi n°89-83516) (<http://www.legifrance.gouv.fr/WAspad/Visu?cid=156953&indice=1&table=INCA&ligneDeb=1>).

²⁴ See article 58(1) of the Statute, and article 60(2) of the Statute.

²⁵ Article 82(1)(b) of the Statute.

²⁶ "Although the Nuremberg Tribunal, by requiring awareness of the criminal intentions and voluntary access, mitigated its harshest effects, the construction remains a suspicious example of collective criminal responsibility [...]" Van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations', (2007) 5 Journal of International Criminal Justice 91, at 94-95; See also Bassiouni, Crimes Against Humanity in International Criminal Law (Kluwer 1999), at 383.

reasonable doubt.²⁷ In this regard, Pre-Trial Chamber I has expressly recognised that the use of a legal term, which corresponds to a higher degree of proof, can impact upon the fairness and impartiality of the proceedings.²⁸ The OPCD also observes that the ICTY has held that a non case-specific statement of the Court that a crime base occurred could impact on the potential fairness of the proceedings against a defendant who may wish to challenge the existence of that crime base as part of their defence strategy.²⁹

35. Finally, the OPCD observes that the designation of the applicants as victims may impact on their future ability to testify as either Prosecution or Defence witnesses. Whilst the applicants might willingly waive the possibility of testifying as a witness in order to secure their right to participate in an independent manner, it cannot be taken for granted that the applicants would waive this possibility simply to obtain the status of victim. As such, the creation of a separate procedure could impact on the rights of the applicants, and thus the fairness of the proceedings *vis à vis* the applicants.

3.3 *The criterion of expeditiousness*

36. With respect to the impact of the issue on the expeditiousness of the proceedings, the OPCD submits that rule 89(1) has a purposive element – the participation of victims:³⁰ to divorce it from its purpose is to create a potentially unnecessary tier of judicial activity.³¹ For example, if there are no appropriate mechanisms in which the

²⁷ “Indeed, in the common law adversarial systems, the presumption of innocence usually prevents the party injured by the criminal action from being referred to as a “victim” until a verdict had been entered.” The Unfinished Triangle: The Criminal Justice System, The Victim, and the Offender, a Comparative Review of Victim Treatment in Some Criminal Justice Systems presented at the C.I.A.J. 1995 Annual Conference Public Perceptions of the Administration of Justice OCT. 11-15, 1995 Banff, Alberta, presented by Justice F.B. William Kelly, at 4. <http://www.icclr.law.ubc.ca/Publications/Reports/Triangle.PDF>

²⁸ In response to a complaint by the Defence that the ICC newsletter explaining the confirmation process referred to an accused persons, the Chamber decided that “It is clearly inadmissible that in a newsletter, a publication of the Court, that Thomas Lubanga Dyilo be referred to as an “accused person”. [The Registrar’s] distinction between media and internal documents strikes me as a very weak argument. Mr Thomas Lubanga Dyilo is presumed innocent and he is here in this courtroom today to hear whether the Prosecutor is able to bring proof to substantiate what he asserts.” Transcript of 9 November 2006, page 19, lines 7-14.

²⁹ Prosecutor v. Popovic *et al*, Transcript of 26 March 2007 pages 9461-9465, <http://www.un.org/icty/transe88/070326ED.htm>

³⁰ The OPCD refers to the separate opinion of Judge Pikis, in which he notes that whereas the definition of victim could embrace all persons who are victims of crimes within the jurisdiction of the Court, “Participating victims’ views and concerns are referable to the cause that legitimizes their participation, the cause that distinguishes them from other victims, namely their personal interests to the extent they are affected by the proceedings.” Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, ICC-01/04-01/06-925, 13 June 2007.

³¹ As noted by Judge Pikis, the “prerequisite to victims’ participation is the existence of viable proceedings and the effect they may have on their personal interests. If the proceedings (the appeal) are inadmissible, as they are in the present case, no right to participate could arise. Inevitably, the application must be dismissed.” Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the

victims may participate at that stage of the proceedings, granting the applicants the status of victims would serve no judicial or remedial purpose since the applicants would have to resubmit their applications for the pre-confirmation phase, in order to demonstrate that they meet the higher standard of proof which applies to this stage.

3.4 Criterion of materially advance the proceedings

37. The OPCD observes that the issue as to whether the process for granting applicants the status of victims is a separate and distinct procedure, has implications for all future victim applications, at all stages of the proceedings. In this connection, the OPCD observes that the Honourable Single Judge has previously held that in light of the fact that several applications for protective measures were pending, an immediate decision by the Appeals Chamber in relation to the procedure and criteria for protective measures would materially advance the proceedings.³² The ICTR has also held that the enumeration of a legal principle, which is likely to be applied through the proceedings, constitutes an issue the resolution of which would materially advance the proceedings.³³

38. As such, the OPCD respectfully submits that an immediate resolution of this issue would ensure that all future victim applications are processed and adjudicated in accordance with the correct legal principles, and would eliminate the necessity of revising the status of victims, if they have been incorrectly accorded this status. In this connection, the OPCD notes that the power of the Chamber to modify the status of victims pursuant to rule 91 would not constitute an effective remedy if victims, who had been wrongly granted this status, had in the interim been granted access to confidential materials, or if their views had been taken into consideration by the Chamber as the basis for a judicial finding. It also would not remedy the damage to the public reputation of the groups cited by the applicants as being responsible for crimes under the Statute.

4. Issue 2: Whether the Chamber is only obliged to provide the Prosecution and the Defence with copies of the applications, and is thus not obliged to provide or order the applicants to provide information extrinsic to the applications themselves

“Directions and Decision of the Appeals Chamber” of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925 at para. 22.

³² Decision on Second Defence Motion for Leave to Appeal, 28 September 2006, ICC-01/04-01/06-489 at page 13.

³³ Decision on Joseph Nzirorera’s Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, Prosecutor v. Nzirorera, 9 October 2007.

4.1 *The existence of an appealable issue*

39. Following the Single Judge's finding that the application process was a separate and distinct regime, which is only governed by rule 89, regulation 86, and prior judicial determinations on the application process, the Single Judge held that these provisions do not impose an obligation that the Chamber provide, or order the applicants to provide information extrinsic to the actual applications. In particular, the Honourable Single Judge noted that the grounds to believe test only required "that the applicants demonstrate that the elements established by rule 85 of the Rules are met *prima facie*".³⁴ This finding resulted in the Single Judge's ultimate decision to dismiss the request of the OPCD for supporting documentation under regulation 86(2).

40. The OPCD therefore submits that the issue as to whether the Chamber is only obliged to provide the Prosecution and the Defence with copies of the applications, and is thus not obliged to provide or order the applicants to provide information extrinsic to the applications themselves, is an appealable issue for the purpose of article 82(1)(d).

4.2 *The criterion of fairness*

41. In reaching these conclusions, the Single Judge adopted a strict interpretation of rule 89, such that the reference to the obligation of the Registrar to transmit a copy of the application to the parties, only applies to the application form *stricto sensu*, and not extrinsic materials.

42. The OPCD submits that this approach appears to be predicated on the idea that the establishment of a *prima facie* case does not require corroboration nor does it permit inquires into the credibility of the applicants' assertions; it is thus, according to the Honourable Single Judge, unnecessary for the OPCD to be granted access to extrinsic documents nor is it relevant for the OPCD to refer to external documents which could impact on the credibility of the applicant's assertions.

43. The Honourable Single Judge buttressed this conclusion with an extract from the 17 January 2006 decision to the effect that in analysing the applications, the Chamber's analysis "will not consist in assessing the credibility of the [applicants'] statement[s] or engaging in a process of corroboration *stricto sensu*";³⁵ and an extract from the decision issued by Pre-Trial Chamber II in the Uganda situation and Kony et al case to the effect that "[s]imilarly to the method followed by Pre-Trial Chamber I,

³⁴ Para. 8 of the Decision.

³⁵ At para. 8 of the Decision.

the Single Judge will therefore assess each statement by applicant victims first and foremost on the merits of its intrinsic coherence, as well as on the basis of information otherwise available to the Chamber”.³⁶

44. The OPCD respectfully submits that in fact, the approach of the Honourable Single Judge departs from prior finding of Honourable Pre-Trial Chamber II, to the effect that with respect to the situation phase, the Chamber held that “the statements made by the applicants in support of their claim need to be corroborated by sufficient information from other sources (particularly, but not exclusively, U.N. and NGO reports), confirming at least to a high degree of probability the occurrence of the incidents related by the applicants, both in temporal and territorial terms.”³⁷ Honourable Pre-Trial Chamber I also stated that whilst the Chamber would not engage in a process of corroboration *stricto sensu*, the Chamber would verify whether the accounts of the applicants were consistent with extrinsic reports.³⁸ Finally, Pre-Trial Chamber II has authorised the Office of Public Counsel for Victims to have access to confidential materials, which were extrinsic to the applications, for the purpose of facilitating their assigned mandate concerning the application process.³⁹

45. The OPCD observes in this regard that in applying principles of law interpreted in previous decisions, the relevant inquiry should be whether the principles of law set out in previous decisions are persuasive, in the sense that they properly embody the sources of law enumerated in article 21. Accordingly, the OPCD respectfully submits that decisions issued by Pre-Trial Chamber I in the DRC situation have the same weight as decisions issued by Pre-Trial Chamber II in the Uganda situation. To hold otherwise, without justifying the Chamber’s preference by reference to other compelling sources of law in article 21, could result in an arbitrary application of the law, which in itself, impacts on the fairness and impartiality of the proceedings. The OPCD therefore submits that to the extent that the Single Judge’s finding appears to be predicated on an inconsistent application of the prior jurisprudence of the Court on

³⁶ At para. 98 of the Decision.

³⁷ At para 106.

³⁸ Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public redacted version - 22.03.2006) ICC-01/04-101, 17 January 2006, at para. 101.

³⁹ “CONSIDERING that, for the purpose of the tasks entrusted to the OPCV in the Decision, it appears indeed necessary for the OPCV to have access to the unredacted version of the Warrants, in particular with a view to it being apprised of the specific scope and the factual features of the charges brought against the persons whose arrest is sought by the Court”; Decision on “Request to access documents and material”, and to hold a hearing *in camera* and *ex parte*, 7 February 2007, ICC-02/04-01/05-152 at page 3.

this issue, or, on the application of legal conclusions outside of their original context,⁴⁰ the issue impacts on the fairness of the proceedings.

46. Moreover, the OPCD respectfully submits that a '*prima facie*' examination of the applications does not exclude considerations of extrinsic documents or credibility.⁴¹

Even the standard of "intrinsic coherence", which was utilised by Pre-Trial Chamber II in connection with case-related applications, imports considerations of credibility.⁴²

⁴⁰ The conclusion by Pre-Trial Chamber II that it is sufficient to examine the intrinsic coherence of the applications was made in the context of applications filed in the case file, and not the situation. The Chamber employed a different standard for applications filed in the situation: "At the same time, the Single Judge wishes to point out that, with respect to incidents that are not included in the warrants of arrest issued in the Case, the Chamber has to be satisfied that the applicants have suffered harm "as a result of a crime within the jurisdiction of the Court, such crime having allegedly been committed within the temporal and territorial limits of the relevant situation". Accordingly, the statements made by the applicants in support of their claim need to be corroborated by sufficient information from other sources (particularly, but not exclusively, U.N. and NGO reports), confirming at least to a high degree of probability the occurrence of the incidents related by the applicants, both in temporal and territorial terms." 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, ICC-02/04-101, 10 August 2007, at para. 106.

⁴¹ "A *prima facie* case on any particular charge exists in this situation where the material facts pleaded in the indictment constitute a credible case which would (if not contradicted by the accused) be a sufficient basis to convict him of that charge." Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No. 10, Doc. A/49/10, Yearbook of the International Law Commission 1994, Vol II(2), at 48. Document available at http://untreaty.un.org/ilc/documentation/english/A_49_10.pdf

In the 1999 indictment decision against Milosevic, the confirming judge expressly stated that a *prima facie* case would require the Judge to assess the credibility of the material facts pleaded in the indictment, by reference to supporting materials: "I am satisfied that a *prima facie* case has been established by the Prosecutor, I am to confirm the indictment. Rule 47(E) requires me, for the purpose of confirming the indictment, to examine also any supporting material which the Prosecutor may forward pursuant to Rule 47(B). The purpose of Rule 47(E) is not to permit the supporting material to fill in any gaps which may exist in the material facts pleaded in the indictment¹. It is to ensure that there is evidence to support the material facts so pleaded, so that the confirming judge is acting, in effect, as a grand jury (or a committing magistrate) in the common law system or as a *juge d'instruction* in some civil law systems." Prosecutor v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic & Vlatko Stojiljkovic, IT-02-54, Decision on review of indictment and application for consequential orders, 24 May 1999, at para. 2 <http://www.un.org/icty/milosevic/trialc/decision-e/052499rev.htm#4>

In proceedings to amend an indictment, which are also subject to the *prima facie* test, the Defence have been granted access to the supporting material in order to assist them to prepare their submissions as to whether the *prima facie* test has been met: Prosecutor v. Stanisic and Simatovic, Decision On Defence Motions For Access To *Ex Parte* Supporting Materials Related To The Prosecution Motion For Leave To Amend The Amended Indictment 15 June 2005, <http://www.un.org/icty/simatovic/trialc/decision-e/050615.htm>

The OPCD further observes that in domestic preliminary hearings, which involve defence participation, the *prima facie* standard does not preclude the Defence from being able to challenge evidence, cross-examine witnesses, and call defence witnesses: see articles 542 and 543 of Pennsylvania Rules Of Criminal Procedure, Purdon's Pennsylvania Statutes and Consolidated Statutes - current with amendments received through October 11, 2007 (Available through Westlaw).

⁴² The OPCD observes that the term 'intrinsic' has been employed in connection with victim participation in the following manner: "the accounts of injured persons must above all else contain certain 'intrinsic' elements (completeness, coherence, congruity, sobriety) and, in addition be accompanied (if possible) by some form of 'independent verification' supporting their reliability": Ralph Henham and Grazia Mannozi "Victim Participation and Sentencing in England and Italy: A Legal and Policy Analysis" European Journal of Crime, Criminal Law and Criminal Justice, Volume 11, Number 3, 2003, pp. 278-317(40), at pages 289-290.

However, the strict interpretation of the application procedure adopted by the Honourable Single Judge does not provide any flexibility for the Chamber to decide, on a case by case basis, whether the information requested by the party is relevant to such inquiries, and whether it would assist that party to fulfil its mandate to file observations on the applications, and thus assist the Chamber to render a fair adjudication of the matter.⁴³

47. In terms of the impact that this interpretation has on the fairness of the proceedings, the OPCD observes that in its decision of 31 March 2006, the Chamber held that the principle of a fair trial applies not only to the case phase, but also the situation phase, and that fairness was predicated on *inter alia* the principle of adversarial proceedings.⁴⁴ In the same decision, the Chamber noted that victim participation would not impact on the fairness of the proceedings *vis à vis* the Prosecutor as the “Prosecutor will be notified of any documents or material presented by the Victims, and will have all necessary latitude to respond”.⁴⁵ In this regard, the ability of the Prosecutor to respond, with the necessary latitude, is facilitated by the fact that the Prosecutor has investigative facilities, language assistants, and a degree of familiarity with the context of the allegations.

48. Accordingly, the OPCD respectfully submits that in order to ensure that the OPCD is in the same procedural position as the Prosecutor, the principle of adversarial proceedings, even at the situation phase, requires that the Chambers grant the OPCD any assistance it may require to formulate its observations, and to raise any relevant

The terms of the definition of ‘coherence’, it has been described as “logically or aesthetically consistent: logically or aesthetically consistent and holding together as a harmonious or credible whole” (Encarta Encyclopaedia Dictionary, <http://encarta.msn.com/dictionary/coherence.html>)

⁴³ The test employed by Pre-Trial Chamber II seems to have been the following: “there is a need for the Single Judge to determine, on the basis of additional information on the Request, to what extent access by the OPCV to such documents would be instrumental to the tasks entrusted to the Office by the Decision at this stage”. Decision on “Request to access documents and material”, and to hold a hearing *in camera* and *ex parte*, 7 February 2007, ICC-02/04-01/05-152, page 4.

The OPCD further observes that in assessing whether the Chamber should assist the Defence by granting access to documents outside of their case file, the ICTY has not required the Defence to demonstrate that such access would definitely assist their case or definitely impact on the judicial proceedings. It suffices for the party to show “that such access would be likely to assist his case materially, or that there is at least a good chance that it will give that assistance”. Prosecutor v. Hadzihasanovic, Decision On Motion By Mario Cerkez For Access To Confidential Supporting Material, 11 October 2001, para. 11. <http://www.un.org/icty/hadzihas/trialc/decision-e/11010AC216586.htm>

⁴⁴ The Chamber cited with approval the decision of ECHR to the effect that the right to adversarial proceedings “means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision”: *Morel v. France* (fn 52 page 13): *Décision relative à la requête du Procureur sollicitant l’autorisation d’interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6*, 31 March 2006, ICC-01/04-135

⁴⁵ Decision of 31 March 2006 at para. 45.

arguments which may impact on the Chamber's assessment as to whether the standard of proof has been met.⁴⁶ In this connection, it has been stated that "a party is always entitled to seek material from *any* source to assist him in his case."⁴⁷ The ICTY Appeals Chamber has also held that in accordance with the principle of equality of arms, "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".⁴⁸

49. The OPCD further observes that in addition to the context of criminal proceedings, the principle of *audi alteram partem*, applies equally to administrative fact-finding inquiries, and entails a right to be informed of the allegation, "notice in reasonable detail of the nature of the material upon which the contemplated action is to be based, and [...] the opportunity to respond to that material."⁴⁹

50. In this connection, the ICTY Appeals Chamber has held that "the fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. The Rules must be read on this basis, that is to say, that they include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber. The availability of this right to the Prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber: the latter could

⁴⁶ The OPCD observes that in rejecting the Prosecution's contention that the participation of victims at the situation phase would impact on equality of arms and the presumption of innocence, the Honourable Pre-Trial Chamber referred to the fact that "the Chamber has appointed an *ad hoc* Counsel for the Defence whose responsibility is to promote the rights of the Defence when any issue having direct repercussions on the fairness of the proceedings arises" (Decision of 31 March 2006 at para. 54). The OPCD notes that its submissions of January 2007 concerning the limited mandate of the Office were specifically addressing the role of the OPCD in proceedings in which the accused was already represented by a counsel of his or her choice, and thus – absent the consent of the accused or his or her counsel – any intervention by the OPCD in sensitive aspects of the proceedings (such as protection measures for defence exhibits and witness statements) could impact on the litigation strategy of the Defence. (see paras 8 and 14, Observations of the Office of Public Counsel for the Defence on the Decision of Pre-Trial Chamber I entitled "Decision on the Defence request for extension of time" ICC-01/04-01/06-823, 12 February 2007).

⁴⁷ Prosecutor v. Hadzihasanovic, Decision On Motion By Mario Cerkez For Access To Confidential Supporting Material, 10 October 2001, <http://www.un.org/icty/hadzihas/trialc/decision-e/11010AC216586.htm>

⁴⁸ Prosecutor v. Tadic, Appeal Judgement, 15 July 1999 at para. 52 <http://www.un.org/icty/tadic/appeal/judgement/index.htm>

⁴⁹ Decision On Review Of Registrar's Decision To Withdraw Legal Aid From Zoran Žigić, Decision of the Appeals Chamber dated 7 February 2003, at para. 39.

benefit in substantial ways from the analysis of the evidence made by the Prosecution and from its argument on the applicable law.”⁵⁰

51. The OPCD also notes that in the context of a request for leave to amend an indictment, the ICTY rejected Prosecution arguments that the Defence’s right to be heard was limited to filing submissions on the procedural consequences which would result if the amendment was granted, and as such, it was not necessary for the Defence to have access to the supporting materials submitted by the Prosecution to meet the *prima facie* threshold for the amendment. The Chamber held that “to give therefore efficacy to the right of the Defence to be heard under Rule 50(A)(i)(c) by enabling it to consider whether the proposed amendment might cause unfair prejudice to the Accused, it must be furnished with all the material supporting the proposed amendment”.⁵¹

52. Accordingly, if the Chamber itself may *proprio motu* request extrinsic documents for the purposes of its decision, it also follows firstly, that the OPCD should be granted access to these extrinsic documents in order to be apprised and comment on the foundation of the Chamber’s decision, and secondly, that the OPCD should also have the ability to request and refer to extrinsic documents, to the extent that they may reflect further light on whether the assertions set out in the applications meet the requisite threshold and criteria, and thus assist the OPCD to perform its mandate of filing observations on the applications. Whether the Chamber should in fact grant the OPCD’s request should be determined on a case by case basis, taking into consideration the relevance of the information sought, and the likelihood that

⁵⁰ Prosecutor v. Jelusic Appeals judgement of 5 July 2001 at para. 27: <http://www.un.org/icty/jelusic/appeal/judgement/index.htm>

See also the opinion of ad hoc Judge Barwick in the Nuclear Tests (Australia v. France), ICJ Reports 1974, p. 442 “It is of course for the Court to resolve all questions which come before it: the Court is not bound by the views of one of the parties. But is this a sufficient or any reason for not notifying the parties of an additional question which the Court proposes to consider and for not affording the parties an opportunity to put before the Court their views as to how the Court should decide the question, whether it be one of fact or one of law? The Court’s procedure is built on the basis that the parties will be heard in connection with matters that are before it for decision and that the Court will follow what is commonly called the “adversary procedure” in its consideration of such matters. See, e.g., Articles 42, 43, 46, 48 and 54 of the Statute of the Court. The Rules of Court *passim* are redolent of that fact. Whilst it is true that it is for the Court to determine what the fact is and what the law is, there is to my mind, to say the least, a degree of judicial novelty in the proposition that, in deciding matters of fact, the Court can properly spurn the participation of the parties. Even as to matters of law, a claim to judicial omniscience which can derive no assistance from the submissions of learned counsel would be to my mind an unfamiliar, indeed, a quaint but unconvincing affectation.”

⁵¹ Prosecutor v. Stanisic and Simatovic, Decision On Defence Motions For Access To *Ex Parte* Supporting Materials Related To The Prosecution Motion For Leave To Amend The Amended Indictment 15 June 2005, <http://www.un.org/icty/simatovic/trialc/decision-e/050615.htm>

obtaining the information would assist the OPCD to formulate its observations.⁵² In light of the fact that the decision of the Single Judge imposes a rigid bar against permitting the OPCD to receive the assistance of the Chamber, and limits the right of the OPCD to comment on extrinsic materials which might be directly relevant to the allegations set out in the applications, the OPCD respectfully submits that the appealable issue impacts on the adversarial nature, and thus, the fairness of the proceedings.⁵³

4.3 The criterion of expeditiousness

53. In terms of the impact of this issue on the expeditiousness of the proceedings, the Honourable Single Judge in the Thomas Lubanga Dyilo case has held that an issue related to the regime under which the Defence “can get notice and participate as far as possible in the decision-making process” concerning Prosecution applications for protective measures, is “directly related to the expeditious conduct of the proceedings”.⁵⁴ In line with this reasoning, the OPCD submits that in light of the fact that the decision limits the right of the OPCD to access, and thus be heard on extrinsic materials, it impacts on the expeditious conduct of the proceedings.

54. The OPCD further submits that access to extrinsic materials would expedite the ability of the parties to formulate their observations, by eliminating ambiguities within the applications, or providing additional context which may be necessary to assess the information within the applications (such as place names).

4.4 Materially advance the proceedings

55. The OPCD respectfully submits that its submissions concerning why an immediate resolution of the first issue would materially advance the proceedings, are also directly applicable to this issue.

⁵² In the Thomas Lubanga Dyilo case, the Trial Chamber noted that disclosure of documents other than the applications themselves “is not a once-and-for-all event but rather is something that will be kept under review during the entirety of the proceedings” and that “one of the functions of the Trial Chamber will be to ensure that should any particular fact or matter emerge relevant to the reports that the Chamber considers justifies disclosure”, the Chamber would take appropriate measures. Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5), 9 November 2007, ICC-01/04-01/06-1022.

⁵³ The OPCD also notes that the Honourable Single Judge recognised in the Thomas Lubanga Dyilo case that the issue of the right of the Defence to receive relevant information which may assist it to challenge Prosecution evidence, impacts on the fairness of the proceedings, and thus meets this criterion of article 82(1)(d) of the Statute: Decision on Second Defence Motion for Leave to Appeal, ICC-01/04-01/06-489, 28 September 2006, at page 12; and Decision on the Prosecution motion for reconsideration and, in the alternative, leave to appeal, 23 June 2006, ICC-01/04-01/06-166 at para. 32.

⁵⁴ Decision of 23 June 2006 at para. 56.

5. Relief Sought:

56. For the reasons set out above, the OPCD respectfully requests the Honourable Single Judge to grant leave to appeal:

- i. the issue as to whether the application process is a distinct procedure, unrelated to the modalities of participation or the criminal proceedings before the Court, and thus, not *per se* prejudicial to the Defence; and
- ii. the issue as to whether the Chamber is only obliged to provide the Prosecution and the Defence with copies of the applications, and is thus not obliged to provide or order the applicants to provide information extrinsic to the applications themselves



Mr Xavier-Jean Keïta
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Dated this Thursday 13 December 2007

At The Hague, The Netherlands