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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single judge

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

Public Document

Request for leave to appeal the "Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06"

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1. Procedural History

1. On 22 and 29 September 2006, the Honourable Pre-Trial Chamber issued decisions,¹ in which the *ad hoc* Counsel for the Defence, Maître Joseph Tshimanga, was authorised to file observations in connection with the applications of 0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06 to participate in the situation of the Democratic Republic of Congo (DRC).
2. On 23 May 2007, the Honourable Single Judge issued the ‘Decision authorising the filing of observations on applications for participation in the proceedings’,² in which the Single Judge authorised the Registry to transmit a copy of applications a/0107/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06, a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06, to the Office of the Prosecutor (OTP) and the Office of Public Counsel for the Defence (OPCD), and granted them leave to file observations concerning these applications to participate as victims in the DRC situation.
3. On 25 June 2007, the OPCD filed its confidential ‘Observations du Bureau du Conseil Public pour la Défense sur les demandes de participation à la procédure en qualité des Victimes’.³
4. On 24 August 2007, the Honourable Single Judge issued an ‘Order concerning the transmission of further information on victims’ applications’,⁴ in which the Single Judge referred firstly to the fact that the Victims Participation and Reparation Section (VPRS) had transmitted to the Chamber additional information pertaining to applicants a/0009/06, a/0018/06, a/0026/06, a/0027/06, a/0038/06, a/0144/06, a/0145/06, a/0148/06, a/0203/06, a/0214/06, a/0220/06, a/0221/06, a/0224/06, a/0227/06, a/0228/06, a/0229/06, a/0230/06, a/0231/06, a/0232/06, a/0233/06, a/0234/06, a/0235/06, a/0237/06, a/0238/06, a/0242/06, a/0243/06, a/0244/06, a/0245/06, a/0246/06, a/0247/06, a/0248/06, a/0249/06, and a/0250/06, and secondly, that this information had not been transmitted to the Prosecution, *ad hoc* Counsel for the Defence, or the Office of Public Counsel for the Defence (OPCD).

¹ Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06' ICC-01/04-228, and 'Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06' ICC-01/04-241

² ICC-01/04-329

³ ICC-01/04-347

⁴ ICC-01/04-376

The Honourable Single Judge therefore ordered VPRS to extract this information from the *ex parte* Reports submitted to the Chamber, and transmit it to the OTP and the OPCD, together with a copy of the applications concerned.

5. On 25 September 2007, the OPCD filed its observations concerning the additional information submitted in connection with applicants a/0009/06, a/0018/06, a/0026/06, and a/0038/06.⁵
6. On 24 December 2007, the Honourable Single Judge issued an omnibus decision, in which the Single Judge accorded the quality of victim, entitled to participate in the investigation stage of the DRC situation, to the following applications: a/0016/06, a/0018/06, a/0021/06, a/0022/06, a/0023/06, a/0024/06, a/0025/06, a/0026/06, a/0028/06, a/0030/06, a/0031/06, a/0032/06, a/0033/06, a/0034/06, a/0040/06, a/0041/06, a/0042/06, a/0044/06, a/0045/06, a/0046/06, a/0053/06, a/0055/06, a/0056/06, a/0057/06, a/0058/06, a/0060/06, a/0061/06, a/0062/06, a/0063/06, a/0071/06, a/0072/06, a/0105/06, a/0106/06, a/0107/06, a/0108/06, a/0109/06, a/0128/06, a/0129/06, a/0132/06, a/0133/06, a/0134/06, a/0135/06, a/0140/06, a/0141/06, a/0142/06, a/0145/06, a/0146/06, a/0147/06, a/0148/06, a/0149/06, a/0150/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06, a/0199/06, a/0209/06 and a/0228/06 and “ainsi qu'aux demandeurs ayant introduit les demandes de participation a/0007/06 et a/0008/06; a/0130/06, a/0131/06 et a/0136/06 ; et a/0137/06, a/0138/06 et a/0139/06” (Decision of 24 December 2007). On the same day, Single Judge issued an ancillary decision to the effect that in light of the occurrence of several public holidays during this period, the deadline for filing a request for leave to appeal would commence to run on 31 December 2007.⁶

2. Subject matter of the appeal

7. In order to constitute an appealable issue for the purposes of article 82(1)(d) of the Statute, it is necessary to identify a subject or topic, the resolution of which has been necessary for the judicial determination in question (the impugned decision).⁷
8. The OPCD notes that the Honourable Single Judge did not render an assessment as to whether and how the personal interests of the applicants were affected by specific proceedings within the situation phase. The Single Judge justified this approach by recalling “que le stade de l'enquête concernant une situation et le stade préliminaire

⁵ ICC-01/04-398-Conf

⁶ Decision on the Starting date of the Timelimit provided for in Rule 155 of the Rules in relation to the Decision Issued on 24th December 2007, ICC-01/04-424

⁷ 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.

d'une affaire sont des stades de la procédure appropriés pour la participation des victimes, telle que prévue à l'article 68-3 du Statut; et b) qu'il est donc possible d'avoir la qualité de victime autorisée à participer aux procédures liées aux situations et affaires portées devant la Chambre préliminaire.”⁸

9. Whilst the assessment of the personal interests of the applicant and the question as to whether it is appropriate for the applicants to participate in the particular stage of the proceedings are separate inquiries, the OPCD submits that they are linked to the same issue: namely, whether it is possible to grant a general right to participate during the investigations stage, or whether such a right would render the requirements of the appropriateness of participation and the impact of the proceedings on the personal interests of the applicant, nugatory.⁹

10. With respect to the procedural objections of the OPCD concerning the format of the additional information submitted by the Registry,¹⁰ the Honourable Single Judge rejected the argument of the OPCD to the effect that any supplementary information submitted by the applicants should be submitted in a signed format, which would allow the parties to verify that the new information or corrigenda has emanated from the applicants themselves, that they affirm its accuracy, and thereby consent to it being filed before the Court.¹¹

11. The Honourable Single Judge noted in this regard that the supplementary information had been transmitted to the VPRS in a written or oral format by either the applicants, their legal representatives, or intermediaries who had assisted the applicants, and subsequently incorporated into the Report of the Registry transmitted to the Chamber in accordance with regulation 86(5) of the Regulations of the Court.¹²

The Single Judge further emphasised that VPRS had utilised this method due to

⁸ At paragraph 5.

⁹ According to article 31 of the Vienna Convention on the Law of Treaties, a legal provision must primarily be interpreted in accordance with its ordinary meaning. It is also a fundamental canon of statutory construction that courts must give effect to every word in a statute, not disregard them: *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1127 (D.C. Cir. 2004).

The OPCD further observes that in the Appeals Chamber's decision of 13 June 2007, the Appeals Chamber held that “[e]ven when the personal interests of victims are affected within the meaning of article 68 (3) of the Statute, the Court is still required, by the express terms of that article, to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings and to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” 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

¹⁰ Applications a/0009/06, a/0018/06, a/0026/06, a/0027/06, a/0038/06, a/0144/06, a/0145/06, a/0148/06, a/0203/06, a/0214/06, a/0220/06, a/0221/06, a/0224/06, a/0227/06, a/0228/06, a/0229/06, a/0230/06, a/0231/06, a/0232/06, a/0233/06, a/0234/06, a/0235/06, a/0237/06, a/0238/06, a/0242/06, a/0243/06, a/0244/06, a/0245/06, a/0246/06, a/0247/06, a/0248/06, a/0249/06, and a/0250/06

¹¹ At paragraphs 9-12.

¹² At paragraph 12.

reasons of security within the DRC.¹³ As such, the Honourable Single Judge held that the supplementary information was admissible for the purpose of verifying whether the applicants met the requisite criteria to be recognised as victims.

12. This finding was directly linked to the Single Judge's ultimate determination that a/0018/06, a/0026/06, a/0145/06, a/0148/06, and a/0228/06 had adduced sufficient indicia to establish that they met the criteria to be recognised as victim for the purpose of participation during the investigation stage of the proceedings.¹⁴

13. In terms of the analysis of the applications, the Single Judge prefaced the substantive components of the decision with the observation that "La Chambre d'appel a par ailleurs précisé que lorsqu'elle rend une décision, la Chambre ne doit pas nécessairement énumérer un à un les éléments d'appréciation qui lui sont soumis mais doit « préciser les faits qu'elle a jugés pertinents pour tirer sa conclusion »".¹⁵ The Single Judge also concluded that "la Chambre a l'obligation de veiller à la rapidité des procédures et qu'en application de la règle 89-4, elle peut examiner les demandes de participation d'une manière propre à assurer l'efficacité des procédures et rendre une décision unique."¹⁶

14. Accordingly, the factual findings of the Single Judge are framed as conclusions, rather than as an analysis of the observations of the parties. In terms of the Honourable Single Judge's reference to the observations of the OPCD as to whether the applicants met the legal and factual criteria to be recognised as victims, the procedural history component of the decision cites the ultimate conclusions set out in the OPCD's observations, but the substantive sections of the decision do not refer to or elaborate on the factual and legal submissions underpinning these conclusions.¹⁷

¹³ At paragraph 12.

¹⁴ The OPCD further respectfully submits that this finding did not derive from the Honourable Pre-Trial Chamber's decision of 17 August 2007, which delineated the procedural guidelines governing the application process. At paragraph 6 of this decision, the Honourable Pre-Trial Chamber stated that "In carrying out such an assessment, the Chamber must receive from the applicants all of the necessary information referred to in the standard forms pursuant to regulation 86(2) of the Regulations. The Chamber will then be in a position to thoroughly assess the applications once they are complete." The OPCD submits that this statement seems to imply that further information requested by the Registry in order to complete the applications should be received in the standard forms referred to in regulation 86(2) of the Regulations of the Court. In addition, at paragraph 10 of the decision, the Honourable Pre-Trial Chamber clearly suggests that additional information would be received directly from the applicants, and that it would be in a written format: "With respect to incomplete applications, pursuant to regulation 86(7) of the Regulations, the Registry would automatically request the missing relevant information from the applicants. Only after receiving the requested information may the Registry submit to the Chamber the additional information attached to each application together with the Report." Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, ICC-01/04-374

¹⁵ At paragraph 3.

¹⁶ At paragraph 21.

¹⁷ For example, the OPCD submitted detailed observations concerning the directness of the harm, and the legal principles which should apply to scenarios in which the applicant is claiming moral harm (OPCD Observations

15. Regarding the standing of the applicants, the Honourable Single Judge concludes that in accordance with rules 85(a) and 89(3) of the Rules of Procedure and Evidence, it is not possible to submit an application on behalf of a deceased person.¹⁸ The person submitting the application may nonetheless base their standing on the moral harm that they have personally suffered as a result of the harm which befell another person. Rather than requesting the applicant to resubmit the application in order to reflect this standing, the Single Judge simply requested the Registry to utilise the application number which had previously been designated to the alleged victim who was the subject of the initial application form, for the person who submitted the application form.¹⁹

16. In so doing, the Single Judge did not require the person who initially submitted the application on behalf of someone else to submit a new application in their own name. Nor did the Honourable Single Judge put the parties on notice that this approach might be adopted, thereby depriving the parties of the opportunity to submit observations concerning whether the re-characterised applications met the requisite criteria to be recognised as a victim for the purpose of participation during this phase.

17. In terms of the information required to substantiate a claim based on moral harm, notwithstanding the fact that the Single Judge found that applicant a/0130/06 was precluded from submitting a complaint on behalf a/0131/06 due to lack of documentation concerning the identity of a/0131/06,²⁰ the Honourable Single Judge nonetheless permitted the father to submit a claim in his own right, based on the moral harm which he had suffered as a result of the events which had befallen his son.²¹ Accordingly, whereas the Single Judge required applicants participating on behalf of another person to adduce proof of identity of the victim and the nature of the familial

dated 25 June 2007 at paragraphs 68-74). Despite the fact that these arguments are directly relevant to the assessment as to whether the applicants met the requisite criteria to be admitted as victims, the Decision of the Single Judge does not address these issues.

In terms of factual arguments, the OPCD observes that the Decision of the Honourable Single Judge appears to refer to factual elements which were not clearly apparent from the version of the applications submitted to the parties. For example, with respect to applicant a/0109/06, the OPCD submitted that as the applicant was not physically present during the alleged attack, and in the absence of an information concerning the nature or cause of the trauma, it was not possible to assess whether the applicant had suffered any physical harm, as opposed to moral harm. Notwithstanding these submissions, the Honourable Single Judge declared that the applicant had suffered physical harm (in addition to moral and material harm). The factual source for this conclusion is not apparent from the decision, nor does the decision clearly demarcate the legal boundaries between physical harm and moral harm.

¹⁸ At paragraph 24.

¹⁹ At paragraph 136.

²⁰ At paragraph 32.

²¹ Decision of 24 December 2007 at paragraphs 115 and 116.

relationship, these requirements were not applied to applications based on moral harm ensuing from events which befell other persons.²²

18. The OPCD therefore submits that the decision raises the following appealable issues:

- i. Whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation;
- ii. Whether supplementary information or corrigenda submitted in connection with the applications should be submitted in a written format, which is either signed by the applicants themselves or by a legal representative with a valid power of attorney;
- iii. Whether the decision lacks sufficient reasoning concerning whether the applicants meet the requisite factual and legal criteria to be admitted as victims;
- iv. Whether the Chamber may *proprio motu* re-characterise the legal/procedural basis for the application, without first requiring the consent of the applicants and subsequently according the parties a right to be heard; and
- v. Whether, in order to establish moral harm on the basis of harm suffered by a second person, it is necessary to adduce some level of proof concerning the identity of the second person and the applicant's relationship with this person.

3. Standing for the appeal

19. Applications a/0016/06, a/0021/06, a/0022/06, a/0023/06, a/0024/06, a/0025/06, a/0028/06, a/0030/06, a/0031/06, a/0032/06, a/0033/06, a/0034/06, a/0040/06, a/0041/06, a/0042/06, a/0044/06, a/0045/06, a/0046/06, a/0053/06, a/0055/06, a/0056/06, a/0057/06, a/0058/06, a/0060/06, a/0061/06, a/0062/06, a/0063/06, a/0071/06, a/0072/06, a/0105/06 fall solely within the mandate of the *ad hoc* Counsel for the Defence, and as such, the OPCD has no standing to file an appeal as regards these applications.

20. Nonetheless, the OPCD respectfully submits that the first and third appealable issues are of general applicability to all applications. In addition, the fourth and fifth issues are based on arguments concerning general legal principles, as opposed to application specific issues. The OPCD therefore submits that if the Honourable Single

²² For example, applications a/0106/06, a/0107/06, a/0108/06, a/0130/06, a/0133/06, a/0136/06, a/0137/06, a/0138/06, a/0139/06, a/0145/06, a/0148/06, a/0151/06, a/0209/06 were admitted on this basis, notwithstanding the absence of any documentary evidence concerning the identity of the person who was physically harmed, and their relationship to the applicant.

Judge grants the OPCD leave to appeal with respect to these issues, in order to ensure fairness and equality between applicants, the ultimate findings of the Appeals Chamber should be applied to all applications which are the subject of this decision.

21. With respect to the second appealable issue, whilst this relates to two applications²³ that were first transmitted to the *ad hoc* Counsel for the Defence for analysis, the issue itself - namely the status and format of the additional information – pertains solely to the mandate of the OPCD which arose from the decision of 24 August 2007. As such, the OPCD respectfully submits that it has standing to file an appeal in relation to this issue.

3. Appellate Issues

3.1 Whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of a specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation.

3.1.1 Impact on the fairness of the proceedings

22. The OPCD respectfully submits that the clear terms of article 68(3) require the Chamber to issue a reasoned determination firstly, as to whether there are specific proceedings within the investigations phase which impact on the personal interests of the applicants, and secondly, whether it would be appropriate for the victims to participate in such proceedings.

23. Rule 89(2) further underscores these requirements by stating that the Chamber may reject an application to present views and concerns if the Chamber determines that the “person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled” (emphasis added).

24. The OPCD further submits that the jurisprudence of the Appeals Chamber appears to confirm that an assessment as to the right of victims to participate in the proceedings cannot be made in the abstract,²⁴ but must be tailored to the specific factual circumstances and legal regime applicable to the DRC situation.

²³ a/0018/06 and a/0026/06

²⁴ The Appeals Chamber has held, within the context of an interlocutory appeal, that “[i]t is apparent that the requirement under article 68 (3) that victim participation shall be permitted “at stages of the proceedings determined to be appropriate by the Court” mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration.” Decision of 13 February 2007 at para. 40.

The Appeals Chamber also noted that in granting the applicants the right to participate in the pre-confirmation phase proceedings, “the subject matter and nature of any interlocutory appeal would, at that stage, have been unknown. Hence it would be impossible for the Pre-Trial Chamber, in effect, to deem it to be appropriate for victims to participate in that stage of the proceedings or to determine that their interests would be affected by that particular interlocutory appeal” (at para 43).

25. Thus, in the Thomas Lubanga Dyilo case, Honourable Judge Pikis stated that 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.”²⁵

26. The OPCD therefore respectfully submits that this issue impacts on the fairness of the proceedings, as the promulgation of seemingly inconsistent jurisprudence of the Court impacts upon the certainty of the proceedings, and thus, the principle of legality.

27. The OPCD further submits that the term ‘appropriate’, if given its plain meaning,²⁶ requires a situation and proceeding specific assessment as to whether it would be right, in the sense of fair,²⁷ to permit their participation in light of the particular circumstances at hand. To render an abstract determination on the propriety of participation thus denies the parties the right to present concrete submissions concerning the particular factual and legal aspects of the DRC situation.

28. In this regard, in connection with its observations on the applications, the OPCD raised concerns concerning *inter alia*, the lack of viable mechanisms for participation in the DRC situation, and the limited ability of the OPCD or *ad hoc* Counsel for the Defence to challenge the applications during the situation phase.²⁸ The OPCD respectfully submits that these concerns were directly linked to the integrity of the

Finally, the Appeals Chamber stated that in order to assist the Court to render its determination, the applicants are required to “include a statement [...] in relation to whether and how their personal interests are affected [...] as well as why it is “appropriate” for the Appeals Chamber to permit their views and concerns to be presented. (at para. 40). Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo” ICC-01/04-01/06-824, 13 February 2007.

This finding was upheld in a later appellate decision: 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, 13 June 2007, ICC-01/04-01/06-925 at para. 23.

²⁵ 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, 13 June 2007, ICC-01/04-01/06-925 at paragraph 22.

²⁶ Suitability or rightness

²⁷ In a separate, concurring appellate opinion, Judge Pikis stated that the rights of the accused and the need to ensure a fair and impartial trial, are also elements to be considered in connection with the Chamber’s determination as to whether participation would be appropriate: “The manner of presentation of victims’ views and concerns is subject to an important proviso. It must not be inconsistent with a) the rights of the accused and b) a fair and impartial trial. This is also a consideration relevant to the determination of the appropriateness of the stage at which such views and concerns may be presented.” (at paragraph 17)

“The stage at which the views and concerns of victims may be presented must be at an interval of the proceedings that would be appropriate, regard being had to the norms of a fair and impartial trial and the rights of the accused evaluated within the context of the Statute.” (at paragraph 20).

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, 13 February 2007

²⁸ See OPCD Observations of 25 June 2007 at paragraphs 23-31.

proceedings, and the principle of equality of arms and the right to adversarial proceedings.

29. Irrespective of the Single Judge's ultimate determination of the merits of these submissions, the OPCD respectfully submits that in deciding whether victim participation in the DRC situation was appropriate, it was necessary to address these issues. As such, by adopting the generic conclusion that victim participation at the situation stage was appropriate, the criterion of appropriateness was effectively denuded of meaning, which thereby decreased (and thus significantly impacted on) the fairness protections for the parties.

3.1.2 Impact on the expeditiousness of the proceedings

30. In the Thomas Lubanga Dyilo case, in a separate opinion, Honourable Judge Song noted that the question as to whether it was appropriate to participate also encompasses a specific consideration of the impact of participation on the expeditiousness of the proceedings.²⁹

31. Accordingly, the OPCD respectfully submits that issuing a generic determination that it is appropriate to participate at this stage, abrogates the duty of the Chamber to factor the impact of participation on the expeditiousness of the proceedings.

32. The OPCD further observes that in assessing the impact of an issue on the proceedings, it is necessary to consider the proceedings before the Court *in toto*.³⁰ As such, the OPCD also respectfully submits that if there are no viable proceedings in which the applicants may participate, or which require a formal determination of applicants' status, issuing a general decision, which may never be implemented in practice, impacts on the expeditiousness of proceedings as it diverts the time and resources of the Court from focussing on other proceedings, in particular, the concrete rights of victims in specific case-related proceedings. It might also divert the time and resources of the Office of the Prosecutor from assessing victim complaints which are submitted to the Prosecution *via* articles 15 and 53 of the Statute, rather than through the channels of article 68(3) applications.

²⁹ "If the Victims now were allowed to make submissions on the admissibility, it is likely that the proceedings would be further delayed, in particular in view of the fact that the Appellant still is not represented by counsel. As both the Appellant and the Prosecutor have made extensive submissions on the admissibility of the appeal, which seem to cover all angles of the question, further submissions by the Victims are not likely to add substantially to it. On balance, the participation of the Victims at this stage of the proceedings therefore would be inappropriate." 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, 13 June 2007, ICC-01/04-01/06-925, Separate Opinion of Judge Song at paragraph 23.

³⁰ "The term "proceedings" as encountered in the first part of article 82(1)(d) is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto": Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 at paragraph 12.

3.2 Whether supplementary information or corrigenda submitted in connection with the applications should be submitted in a written format, which is either signed by the applicants themselves or by a legal representative with a valid power of attorney

3.2.1 Impact on the fairness of the proceedings

33. The OPCD submits that the issue as to whether supplementary information or corrigenda filed in connection with the applications should adhere to fundamental procedural requirements is directly related to the integrity and fairness of the proceedings.³¹

34. Rule 89(1) of the Rules of Procedure and Evidence stipulates that “[i]n order to present their views and concerns, victims shall make written application to the Registrar”. Moreover, in a decision issued on 17 August 2007, the Honourable Pre-Trial Chamber held that in order to comprise a complete application, the application documentation submitted by the applicants must include “a signature or thumb-print of the Applicant on the document, at the very least, on the last page of the application.”³²

35. Whilst the Honourable Pre-Trial Chamber did not elaborate on the underlying rationale for this requirement, the OPCD submits that the underlying rationale of requiring that, at a minimum, the applicant must have signed section J of the application form, is to ensure that they have adopted and approved the contents of the application form in its entirety.

36. This requirement reflects the position adopted by human rights entities, such as the European Court of Human Rights and the United Nations human rights mechanisms, that in order to ensure the accuracy and reliability of human rights complaints, all communications must be in writing, and signed by the applicant or their legal representative.³³

³¹ In terms of the Honourable Single Judge’s reference to the security situation of the DRC, the OPCD submits that this reasoning pertains to merits of the issue - namely whether the approach of the Single Judge was justified - and as such, should not be taken into consideration for the purpose of inquiring as to whether the issue itself significantly impacts on the fairness of the proceedings.

³² At paragraph 12.

³³ European Court of Human Rights: Rule 45(1) of the Rules of Court “Any application [...] shall be submitted in writing and shall be signed by the applicant or by the applicant’s representative.”

Rule 45(3) “Where applicants are represented in accordance with rule 36 (covering representation of applicants), a power of attorney or written authority to act shall be supplied by their representative [...]” <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf> For United Nations requirements (“should be in writing and signed”) see Fact Sheet No.7/Rev.1, Complaint Procedures, <http://www.unhchr.ch/html/menu6/2/fs7.htm>

This requirement extends to corrigenda and supplementary information: In the decision of the United Nations Human Rights Committee, *Nqalula Mpandanjila et al. v. Zaire*, Communication No. 138/1983, U.N. Doc. Supp. No. 40 (A/41/40) at 121 (1986), the thirteen applicants commenced their applications whilst detained in various

37. The OPCD submits that in light of the fact that the additional information is utilised by the Single Judge to form the foundation of the decision as to whether the applicants meet the requisite criteria, the rationale for requiring the applicant to submit the application in a signed and written format applies equally to the additional information. The OPCD notes in this regard that the Honourable Single Judge rejected the OPCD's argument that information submitted at a later stage in the proceedings should be accorded less weight than the information contained within the initial application form. Given this ruling, the OPCD submits that there is no legal justification for differentiating between the procedural standards applicable to information submitted at different times.

38. The OPCD therefore submits that this issue impacts on whether there is a balanced and consistent procedural regime for different applications. For example, if the Chamber issues a ruling that the application – as it stands - does not meet the criteria to participate as a victim, Rule 89(2) requires that in order to trigger reconsideration of the application, the applicant must file a “new application”. Similarly, an applicant who diligently submits a detailed application form is subject to higher procedural standards than an applicant who does not provide information in key fields of the application forms, but is provided with a later opportunity to orally supplement their application.

39. The OPCD also observes that intermediaries are not bound by the Code of Conduct for Counsel, nor is there any indication that they have signed any agreements on confidentiality or to comply with any orders or decisions of the Court. Accordingly, if these intermediaries were to unintentionally or intentionally misrepresent the supplementary information of the applicants, neither the Court nor the applicants themselves would have any recourse against these intermediaries.

40. In the decision of 17 August 2007, the Honourable Pre-Trial Chamber implicitly recognised the importance of receiving in the court record signed, and written information concerning the legal representation of the applicants in order to protect the

prisons and therefore unable to present the cases themselves. On their release, the Commission requested subsequent confirmation as to whether the applicants wished to continue with the complaint. Their lawyers noted that 'they had received no instructions' from four of the applicants, and that 'although they had not been able to contact the petitioners directly, they understood from their friends and families that it was their intention to pursue the matter' (para. 4.1).

Based on this, the Human Rights Committee decided that the four applicants referred to were 'no longer deemed to be parties to the communication' (para. 4.2). The paragraphs quoted indicate the necessity that instructions relating to a communication must originate from the individual concerned and not from intermediaries such as family or friends.

interests of the applicants and the integrity of the proceedings.³⁴ In addition, the Appeals Chamber has further confirmed that a document filed within the court record will have no legal validity unless it is signed by a person who is in a position to approve the contents of the document.³⁵

41. The OPCD therefore submits that the presence (or absence) of the applicants' signatures or that of their mandated legal representative significantly impacts on the transparency of the proceedings, and the accountability of the persons involved in the proceedings.

3.2.2 Impact on the Expeditionness of the Proceedings

42. Either during the investigation stage or during subsequent case-related proceedings, disputes might arise concerning the accuracy of the information transmitted by VPRS or intermediaries. For example, if the application is rejected on the basis that the event occurred before the entry into the Rome Statute, the applicant might argue that the intermediary communicated the wrong date. In this connection it has been observed that "[t]he significance of the signature as adoption of the signed document's contents is of primary concern. Its corollary is that the signature binds the author of the document not to repudiate its contents where these contents are legally effective."³⁶

43. In circumstances in which there is no signed written record to verify that the transmitted information accurately reflects the wishes and recollections of the applicant, either the application may be rejected, or it would be necessary to require the applicant to resubmit their application form and trigger the process anew pursuant to Rule 89(2).

44. The OPCD observes in this regard that short term expediency does not necessarily equate to expeditious proceedings, and can indeed severely frustrate the expeditiousness of the overall proceedings before the Court. The OPCD therefore

³⁴The Chamber ordered "the Registrar to systematically verify the applicants' statements regarding their legal representation, in particular when reference is made to a legal representative in the absence of any document signed by that person; ORDERS the Registrar, when an applicant has no legal representation or in the absence of any document signed by that person, to automatically appoint the OPCV as his or her legal representative to provide support and assistance to the applicant until such time as the applicant has been granted victim status and a legal representative is chosen by him or her or appointed by the Court" at page 24. The Pre-Trial Chamber thus refused to rely on the Registry's assertions concerning the existence of a legal representation agreement

³⁵ "The document filed does not bear the insignia of counsel. It is not signed by counsel and, as the Appeals Chamber is informed in the body of the document, it does not emanate from him nor does it have his approval. For that reason, the document must be rejected."Reasons for the "Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007" issued on 16 February 2007, 21 February 2007, ICC-01/04-01/06-834 at paragraph 6.

³⁶ Tan Yock Lin, 'Writing and Signature in the Constitution and Proof of Contracts', 2003 *Sing. J. Legal Stud.* 333 at 342-343.

submits that the issue as to whether additional information should be submitted in a written format which is either signed by the applicants or their legal representatives directly impacts on the expeditiousness of the proceedings.

3.3 Whether the decision lacks sufficient reasoning concerning whether the applicant's meet the requisite factual and legal criteria to be admitted as victims

3.3.1 Impact on fairness

45. As noted above, the submissions of the OPCD on the applications raised several specific observations, which were directly relevant to the Chamber's assessment as to whether the applicants met the criteria to be considered as victims. In concluding that notwithstanding these observations, the applicants suffered harm as the result of offences under the jurisdiction of the Court, it is not clear from the decision as to whether the Single Judge found the arguments of the OPCD to be irrelevant or unfounded, or whether the Honourable Single Judge based her findings on other information, which was not provided to the parties, which explained the inconsistencies in the applications.

46. Whilst the Single Judge need not address each and every argument, there is an obligation to indicate "with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion."³⁷ Moreover, a "decision must set out which of the relevant facts and legal arguments that were before the Pre-Trial Chamber were found to be persuasive for the determination it reached."³⁸ In reaching a factual determination, the decision should also "indicate which of the facts before [the Chamber] led it to reach such a conclusion".³⁹

47. The OPCD also notes that in its decision of 14 December 2006,⁴⁰ the Appeals Chamber also cited with approval a decision of the ICTY Appeals Chamber to the

³⁷ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" ICC-01/04-01/06-773 at paragraph 20.

³⁸ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" ICC-01/04-01/06-774, 14 December 2006, at paragraph 33.

³⁹ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" ICC-01/04-01/06-773 at paragraph 21.

⁴⁰ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" ICC-01/04-01/06-773 14 December 2006, at paragraph 20.

effect that “as a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision”.⁴¹

48. In this regard, the OPCD submits that the fact that the Honourable Single Judge ordered that the Reports of the Registrar should not be transmitted to the parties, does not obviate the obligation of the Single Judge to indicate whether the factual conclusions are based on information contained within these Reports or other extrinsic materials which were not communicated to the parties. As concluded by the Appeals Chamber, “the *ex parte* character of the proceedings itself did not reduce the need for the Impugned Decision to be properly reasoned, but made the provision of proper reasoning more necessary because the appellant could not rely on the context in which the Impugned Decision was made to determine how the Pre-Trial Chamber reached its decision.”⁴²

49. Whilst the degree of reasoning depends on the proceedings in question, the OPCD respectfully submits that in light of the novelty and complexity of victim participation at the ICC, the decisions concerning participation should set out with clarity and a higher degree of elaboration the reasons underpinning why certain applicants have been recognised as applicants, whereas others have been denied.

50. In this regard, in a previous decision issued in the DRC situation, the Honourable Single Judge explicitly acknowledged the utility, and the fairness entailed by providing reasoning to the applicants: “[w]hile the absence of notification of rule 89 (1) observations will prevent applicants from knowing the specific challenges made in the parties’ observations, the Chamber’s decision on their applications will indicate any further information required or the reasons for which the applications were rejected. Hence, notification of the Chamber’s decision will place applicants in a position to re-apply under rule 89(2) of the Rules to correct any deficiencies.”⁴³

51. Sufficiency of reasons also promotes the transparency of the proceedings, and in particular, the right of the Defence to fair, impartial, and public proceedings. To the extent that it is not presently apparent from the decision as to the specific source of

⁴¹ “Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic’s Provisional Release” of 1 November 2005 in the case of Prosecutor v. Milutinovic et al (Case No. IT-05-87-AR65.1) at paragraph 11.

⁴² Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” ICC-01/04-01/06-773 at paragraph 22.

⁴³ Decision on the Requests of the OPCV, ICC-01/04-418 10 December 2007 at paragraph 17.

information on which the Honourable Single Judge based the conclusions, sufficiency of reasons also impacts on the right of to be heard.⁴⁴

52. In this connection, the OPCD further observes that the OPCD was ordered by the Honourable Single Judge to file its observations on a confidential basis, and that its request, to subsequently file public, redacted versions of its observations, was rejected.⁴⁵ In contrast, the Prosecution has filed a public version of its observations.⁴⁶

53. The OPCD therefore submits that in circumstances, in which the public have not had access to potential counter-arguments concerning whether the applicants should be granted victim status (in redacted format), it is necessary for the decision to address the key, relevant submissions of the OPCD to ensure that justice is not only done, but that it is patently seen to be done.

3.3.2 Impact on the Expeditionousness of the Proceedings

54. The OPCD respectfully submits that the inclusion of a greater degree of factual and legal reasoning would facilitate the ability of the parties to prepare future observations in a focussed and efficient manner, would assist potential applicants to complete their applications in an expeditious manner, and would in itself, act as a screen against completely unfounded applications, which delay the proceedings.

55. The OPCD further observes that the Honourable Single Judge, in the Thomas Lubanga Dyilo case, has previously held that the issue as to whether a decision lacks factual reasoning in light of the particularities of the process can constitute an issue which impacts on the fair and expeditious proceedings.⁴⁷

3.4 Whether the Chamber may *proprio motu* re-characterise the legal/procedural basis for the application, without first requiring the consent of the applicants, and subsequently according the parties a right to be heard

3.4.1 Impact on the fairness:

56. The OPCD respectfully submits that this issue significantly impacts on the right of the parties to be heard, which is a fundamental component on the fairness of the

⁴⁴ The OPCD observes that the Honourable Single Judge in the Thomas Lubanga Dyilo case concluded that the right to be heard on a matter before the Chamber in which the party has an interest affects both the fairness and expeditiousness of the proceedings. Decision on Second Defence Motion for Leave to Appeal, ICC-01/04-01/06-489, 28 September 2006, at pages 11 and 12.

⁴⁵ The OPCD requested the authorisation of the Chamber to file a public, redacted version of its observations, which had been previously been vetted by either the Victims and Witnesses unit, or the Chamber itself: 'Response to 'Demande du représentant légal des victimes a/0231/06 à a/0233/06 et a/0242/06 à a/0250/06, ICC-01/04-330' ICC-01/04-336, 12 June 2007. This request was not granted: Decision on matters of confidentiality and the Request for extension of the page limit, ICC-01/04-342, 19 June 2007.

⁴⁶ Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 in the Situation in Darfur, the Sudan, 8 June 2007, ICC-02/05-81

⁴⁷ Decision on Second Defence Motion for Leave to Appeal, 28 September 2006, ICC-01/04-01/06-489, 28 September 2006, at page 12.

proceedings. In this regard, 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.⁴⁸ 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”.⁴⁹ The Chamber thereby recognised that the fairness of the proceedings would be impacted if the parties were not provided the necessary information in advance, or accorded the right to respond.

3.4.2 The criterion of expeditiousness

57. 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”.⁵⁰ In line with this reasoning, the OPCD submits that in light of the fact that the decision deprives the parties of the right to be heard on the re-characterisation of the applications, it impacts on the expeditious conduct of the proceedings.

58. The OPCD further submits that any potential short term delays could be eliminated if, rather than requiring the applicants to resubmit their applications, the Chamber notified the parties in advance of the change of the procedural basis for the demand to participate. Such early notice would also expedite the ability of the parties to prepare relevant and focussed observations.

3.5 Whether, in order to establish moral harm on the basis of harm suffered by another person, it is necessary to adduce some level of proof concerning the identity of this person, and the applicant’s relationship with this person

3.5.1 Impact on the fairness of the proceedings

⁴⁸ 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

⁴⁹ Decision of 31 March 2006 at paragraph 45.

⁵⁰ Decision of 23 June 2006 at paragraph 56.

59. The OPCD respectfully submits that this issue significantly impacts on the reliability and credibility of the basis for the application. As matters currently stand, neither the Chamber nor the parties have any means of verifying firstly, whether the person who suffered physical harm actually existed, and secondly, whether they were in fact related to the applicant.

60. In this connection, Pre-Trial Chamber II has observed in the Uganda situation 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”.⁵¹ The Honourable Pre-Trial Chamber further held in connection with applications filed on behalf of another person that “[a]s regards applications submitted on behalf of a child (i.e., an individual not having attained 18 years of age), the Single Judge would request VPRS to submit a report indicating from what age the Ugandan legal and administrative system allows documents meeting the three conditions indicated above to be issued to individuals. This report should also provide information about the existence and obtainability, in the Ugandan legal or administrative system, of documents establishing the link between a child and a member of his or her family, such as birth certificates or other types of documents. However, if the person is no longer a child, a document pertaining to the applicant is required.”⁵²

61. The OPCD respectfully submits that in the same manner, the fairness of the proceedings would be jeopardised if applicants, filing on behalf of another person who suffered harm, were not required to provide any documentation concerning the identity of the person who suffered harm and their relationship to them, the integrity of the proceedings would also be jeopardised if the applicants were not required to do so in order to predicate their claim on moral harm ensuing from exactly the same events.

62. The OPCD recognises that in some circumstances, it may be difficult for the applicant to adduce documentation concerning the identity of a deceased person. However, as recognised by Pre-Trial Chamber II, such practical issues should be addressed on a case by case basis depending on the circumstances of the respective applicants. In any case, practical issues concerning the implementation of an issue

⁵¹ 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 paragraph 16.

⁵² 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 paragraph 20.

relate to the merits of the issue, and not the assessment as to whether the issue itself impacts on the fairness of the proceedings.

3.5.2 Impact on the expeditiousness of the proceedings

63. The OPCD submits that whilst the evidential threshold for victim participation varies throughout the proceedings, in order to assess either grounds to believe or reasonable grounds to believe, there must be some mechanism for verifying the fundamental elements of the complaint - the most fundamental element being whether the victim actually existed. As such, the existence of identification documents and proof of familial relationship are likely to be key contested issues throughout the proceedings. The OPCD therefore respectfully submits that the decision of the Honourable Single Judge not to require such documentation at this stage simply postpones the resolution of this issue, and makes it more likely that delays associated with obtaining this documentation will occur in subsequent case-related proceedings. Since the right of the person to an expeditious trial is of paramount importance in case-related proceedings, it would enhance the overall expeditiousness of the proceedings before the ICC to address this issue at this present juncture.

4. An immediate resolution of issues 1-5 would materially advance the proceedings

64. The OPCD observes that the above issues have 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.⁵³ 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.⁵⁴

65. As such, the OPCD respectfully submits that an immediate resolution of these 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 or prematurely accorded this status.

⁵³Decision on Second Defence Motion for Leave to Appeal, 28 September 2006, ICC-01/04-01/06-489 at page 13.

⁵⁴Decision 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.

5. Relief sought

66. For the reasons outlined above, the OPCD respectfully requests the Honourable Single Judge to grant leave, pursuant to article 82(1)(d) of the Statute, to appeal:

- i. Whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of a specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation;
- ii. Whether supplementary information or corrigenda submitted in connection with the applications should be submitted in a written format, which is either signed by the applicants themselves or by a legal representative with a valid power of attorney;
- iii. Whether the decision lacks sufficient reasoning concerning whether the applicant's meet the requisite factual and legal criteria to be admitted as victims
- iv. Whether the Chamber may *proprio motu* re-characterise the legal/procedural basis for the application, without first requiring the consent of the applicants and subsequently according the parties a right to be heard; and
- v. Whether, in order to establish moral harm on the basis of harm suffered by a second person, it is necessary to adduce some level of proof concerning the identity of the second person and the applicant's relationship with this person.



Xavier-Jean Keïta
Principal Counsel of OPCD

Dated this Monday, the 7th of January 2008

At The Hague, The Netherlands