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THE APPEALS CHAMBER

Before: Judge Philippe Kirsch, Presiding Judge
Judge Georgios M. Pikis
Judge Navi Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

**Request from the OPCV Acting as Legal Representative for Clarifications on
Victim Participation in the Interlocutory Appeal filed by the OPCD under article
81(2) of the *Rome Statute***

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I. BACKGROUND

1. On 17 August 2007, Pre-Trial Chamber I rendered the *Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation*,¹ pursuant to which, on 24 August and 13 September 2007, the Registrar appointed the Principal Counsel of the Office of Public Counsel for Victims ("the OPCV" or "the Office") to act as legal representative for all unrepresented applicants. These letters were filed in the record of the situation on 31 August and 27 September 2007, respectively.²

2. In its observations submitted pursuant to rule 89 of the *Rules of Procedure and Evidence*, on 28 and 31 August 2007, the Office of Public Counsel for the Defence (the "OPCD") filed two requests asking for the notification of certain documents.³

3. On 7 December 2007, the Single Judge of Pre-Trial Chamber I rendered 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* by which she rejected the said requests.⁴

4. On 13 December 2007, the OPCD filed the "Request for leave to appeal the "Decision on the request of the OPCD on the Production of Relevant Supporting

¹ See *Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation*, (Pre-Trial Chamber I), No. ICC-01/04-374, 17 August 2007.

² See "Enregistrement d'un courrier du représentant légal retirant sa demande d'anonymat et d'autres documents relatifs à la représentation légale de demandeurs aux fins de participation", No. ICC-01/04-380, 31 August 2007. See also "Registration of appointment of the OPCV and amendment to appointment", No. ICC-01/04-401-Conf, 27 September 2007.

³ See "Request for Single Judge to order the Prosecutor to disclose exculpatory materials", No. ICC-01/04-378 and No. ICC-01/04-378-Conf-Exp-AnxA and AnxB, 28 August 2007 and the "Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e)", No. ICC-01/04-381-Conf and No. ICC-01/04-381-Conf-AnxA, AnxB and AnxC, 31 August 2007.

⁴ See *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* (Pre-Trial Chamber I), No. ICC-01/04-417, 7 December 2007.

Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor""⁵.

5. On 24 December 2007, the Single Judge of Pre-Trial Chamber I issued 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/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 à a/0241/06 à a/0250/06*,⁶ by which it granted the status of victim participating in the proceedings in the situation in the Democratic Republic of the Congo to, *inter alia*, a/0007/06, a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06 and a/0209/06 and ordered the Registrar to appoint the OPCV [TRANSLATION:] "as legal representative for the purpose of providing help and assistance to the persons who have been granted victim status until these persons choose a legal representative or the Court assigns one".⁷

6. On 8 January 2008, the Head of the Division of Victims and Counsel, on behalf of the Registrar and pursuant to the order of the Single Judge, appointed the Principal Counsel of the OPCV as legal representative of victims authorised to

⁵ See "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" ", No. ICC-01/04-419, 13 December 2007.

⁶ See *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/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 à a/0241/06 à a/0250/06* (Pre-Trial Chamber I), No. ICC-01/04-423, 24 December 2007. See also the corrigendum to this decision, No. ICC-01/04-423-Corr, 31 January 2008.

⁷ *Ibid.*, p. 58.

participate, but who had no legal representation. The said letter of appointment was filed in the record of the situation on 8 January 2008.⁸

7. On 23 January 2008, the Single Judge of Pre-Trial Chamber I issued the *Decision on Request for leave to appeal 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"*,⁹ by which she granted the OPCD leave to appeal the Decision of 7 December 2007 on the following issue:

*[W]hether article 68(3) of the Statute can be interpreted as providing for a 'procedural status of victim' at the investigation stage of a situation and the pre-trial stage of a case; and (i) if so, whether rule 89 of the Rules and regulation 86 of the Regulations provide for an application process which only aims to grant the procedural status of victim and is thus distinct and separate from the determination of the procedural rights attached to such status; and what are the specific procedural features of the application process? or (ii) if not, how applications for participation at the investigation stage of a situation and the pre-trial stage of a case must be dealt with.*¹⁰

8. On 4 February 2008, the OPCD filed the "OPCD appeal brief on 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'".¹¹

9. As legal representative of the victims authorised to participate in the proceedings in the situation in the Democratic Republic of the Congo a/0007/06,

⁸ See "Enregistrement de la désignation du Bureau du conseil public pour les victimes en qualité de représentant légal conformément à la décision de la Chambre préliminaire I en date du 24 décembre 2007", No. ICC-01/04-431, 8 January 2008. The appointment pertains to victims a/0007/06, a/0008/06, a/0022/06, a/ 0023/06, a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06, a/0209/06.

⁹ See *Decision on Request for leave to appeal 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"*, (Pre-Trial Chamber I), ICC-01/04-438, 23 January 2008 ("the Decision").

¹⁰ *Ibid.*, p. 8.

¹¹ See "OPCD appeal brief on 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'", ICC-01/04-440, 4 February 2008.

a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06 and a/0209/06 and applicants a/0004/06 to a/0006/06, a/0019/06, a/0020/06, a/0027/06, a/0035/06, a/0036/06, a/0039/06, a/0043/06, a/0047/06 to a/0052/06, a/0073/06 to a/0080/06, a/0144/06, a/0153/06 to a/0157/06, a/0159/06, a/0160/06, a/0184/06, a/0203/06, a/0222/06 and a/0240/06, the Principal Counsel of the OPCV respectfully submits the following observations to the Appeals Chamber.

II. OBSERVATIONS ON THE PARTICIPATION OF THE VICTIMS AUTHORISED TO PARTICIPATE AND THE APPLICANTS IN THE INTERLOCUTORY APPEAL BY THE OPCD

10. The personal interests of the victims authorised to participate in the proceedings in the situation in the Democratic Republic of the Congo pursuant to the decision of the Single Judge of 24 December 2007 are directly affected by the appealable issue as defined in the decision of 23 January 2008¹² pursuant to article 68(3) of the *Rome Statute*. Indeed, the appeal proceedings will have a direct impact on the status of the said victims, especially since the scope of the appealable issue as defined by the Single Judge in her decision of 23 January 2008 is distinctly broader than the one contained in the OPCD's request of 13 December 2007.¹³

11. Accordingly, the OPCV is of the opinion that the participation in the interlocutory appeal of the victims authorised to participate in the situation in the Democratic Republic of the Congo is appropriate, insofar as they are directly affected by the outcome of the proceedings.

¹² See Decision, *supra*, footnote 9, p. 8.

¹³ See *supra*, footnote 5, para. 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."

12. Consequently, in view of regulation 24(2) of the *Regulations of the Court*, which provides that “[v]ictims or their legal representatives may file a response to any document when they are permitted to participate in the proceedings in accordance with article 68, paragraph 3, and rule 89, sub-rule 1, subject to any order of the Chamber”, the Principal Counsel is of the view that the victims represented by the OPCV may respond to the document in support of the appeal filed by the OPCD on 4 February 2008.

13. In its *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”*, the Appeals Chamber held that “in order for victims to participate in an appeal under article 82(1)(b) of the Statute, an application seeking leave to participate in the appeal must be filed”, even though the victims had been authorised to participate in the proceedings which led to the interlocutory appeal of the Defence.¹⁴ This obligation placed on the victims was reiterated by the Appeals Chamber in its decision dated 13 June 2007¹⁵ and also concerned an appeal lodged under article 82(1)(b) of the *Rome Statute*.

14. However, the OPCV notes that the appeal in question here is lodged under article 82(1)(d) of the *Rome Statute* and accordingly does not fall within the scope of the judgment of 13 February 2007 or the decision of 13 June 2007. The OPCV also notes that, to date, the Appeals Chamber has never had occasion to rule on applications brought under article 82(1)(d) of the *Rome Statute* since such applications were all rejected by Pre-Trial Chambers I and II at an earlier stage.¹⁶

¹⁴ See *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”*, (Appeals Chamber), ICC-01/04-01/06-824, 13 February 2007, para. 38.

¹⁵ See *Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007*, (Appeals Chamber), ICC-01/04-01/06-925, 13 June 2007, para. 23.

¹⁶ See, *inter alia*, *Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges*, (Pre-Trial Chamber I), No. ICC-01/04-01/06-915, 24 May 2007 and, more generally, the applications for leave to appeal the decisions of Pre-Trial Chambers I and II granting victim status in a situation.

15. The OPCV considers that the interpretation of the relevant provisions of the texts of the Court allows victims who had been authorised to participate in the situation in the Democratic Republic of the Congo to also participate in the interlocutory appeal lodged by the OPCD.

16. The OPCV also notes that the issue to be resolved on appeal also affects the personal interests of the applicants whose status is pending before the relevant Chambers.¹⁷ Indeed, the said issue also relates to how the applications for participation should be dealt with in the event that the Appeals Chamber were to decide that article 68(3) of the *Rome Statute* cannot be interpreted as providing for the procedural status of victim at the investigation stage of a situation and at the pre-trial stage of a case.

17. Article 68(3) of the *Rome Statute* explicitly grants victims of crimes within the jurisdiction of the Court the right to submit observations and to present their views and concerns where their personal interests are affected. Furthermore, an analysis of the numerous articles and rules governing victim participation in the proceedings before the Court reveals that victim participation is not limited to certain stages of the proceedings.¹⁸ Article 68(3) of the *Rome Statute* for example does not differentiate between applicants and victims authorised to participate in the proceedings before the Court, thus covering these two categories of persons insofar as their personal interests may be affected.

¹⁷ Applicants a/0004/06 to a/0006/06, a/0019/06, a/0020/06, a/0027/06, a/0035/06, a/0036/06, a/0039/06, a/0043/06, a/0047/06 to a/0052/06, a/0073/06 to a/0080/06, a/0144/06, a/0153/06 to a/0157/06, a/0159/06, a/0160/06, a/0203/06, a/0222/06, a/0240/06 represented by the OPCV have not yet been authorised to participate in the proceedings, since the assessment of their applications has been deferred by the competent Chambers. The application for participation submitted by applicant a/0184/06 is still pending before Pre-Trial Chamber I.

¹⁸ See UN Doc. PCNICC/1999/DP.2, 1 February 1999, p. 7. See also the remarks by Costa Rica, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999 and by Colombia, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999. For a review of the *travaux préparatoires*, see BITTI (G.) and FRIMAN (H.), "Participation of Victims in the Proceedings", in LEE (R.S.) (ed.), *The International Criminal Court, The Making of the Rome Statute Issues, Negotiations, Results*, Kluwer Law International, 1999, pp. 456-474.

18. This interpretation is also supported by the broad definition given to the term victim in rule 85 of the *Rules of Procedure and Evidence*. This rule contains no restriction regarding participation, only linking the term “victim” to the commission of any crime within the jurisdiction of the Court.

19. Accordingly, the OPCV considers that as the applicants’ personal interests are directly affected by the issue considered to be appealable, they should also have the opportunity to present their views and concerns to the Appeals Chamber pursuant to article 68(3) of the *Rome Statute*. The OPCV considers that the participation of the applicants in the interlocutory appeal is appropriate insofar as that they are directly affected by the outcome of the proceedings.

For the above reasons,

If the Appeals Chamber’s interpretation of the relevant provisions of the texts of the Court were to differ from the OPCV’s interpretation, the Principal Counsel respectfully requests the Appeals Chamber to specify the procedure by which victims already authorised to participate in the situation in the Democratic Republic of the Congo would participate in the appeal lodged by the OPCD against the decision of the Single Judge of Pre-Trial Chamber I of 7 December 2007.

In addition, the Principal Counsel respectfully requests the Appeals Chamber to authorise those applicants whose applications are pending before the Pre-Trial Chamber to file observations on the issue to be resolved on appeal within such time as the Chamber considers appropriate. If the Appeals Chamber were to consider that the applicants must file an application for participation in the interlocutory appeal taken by the OPCD against the decision of the Single Judge of Pre-Trial Chamber I of 7 December 2007, the Principal Counsel respectfully requests the Chamber to specify the participation procedure to be followed.

**Paolina Massidda
Principal Counsel
Office of Public Counsel for Victims**

Dated this 6 February 2008

At Dakar

Senegal