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No.: ICC-01/04
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THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Application of the Legal Representative of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 and Applicants a/0163/06 to a/0183/06, and a/0185/06 to a/0187/06 for Leave to Participate in the Appeal filed by the OPCD on 13 December 2007 and Authorised by Pre-Trial Chamber I on 23 January 2008

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1. Noting 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/0233/06a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06*” dated 24 December 2007, as corrected by the Corrigendum of 31 January 2008, whereby the Single Judge of Pre-Trial Chamber I granted victim status in the Situation in the Democratic Republic of Congo to, *inter alia*, a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 (hereinafter “the Victims”);

2. Noting OPCD’s “*Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e)*” dated 31 August 2007, which followed *inter alia* the Pre-Trial Chamber I’s “*Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure*” of 17 July 2007 concerning applicants a/0163/06 à a/0187/06 (hereinafter “the Applicants”).

3. Noting 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*”, dated 7 December 2007¹ (“the Decision of 7 December 2007”), by which the Single Judge denied the requests of the OPCD dated 28 August 2007 and 31 August 2007;

4. Noting the “Request for leave to appeal the “Decision on the Requests of 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

¹ ICC-01/04-417.

Exculpatory Materials by the Prosecutor” (“the OPCD’s request”), filed by OPCD on 13 December 2007;²

5. Noting the “Prosecutor’s Response to OPCD’s 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” (“the Prosecutor’s response”), filed by the Prosecutor on 17 December 2007;³

6. Noting the decision of Pre-Trial Chamber I (“the Chamber”) of the International Criminal Court (“the Court”) dated 23 January 2008 which granted the OPCD’s request of 13 December 2007 on the following points:

[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;

7. Noting 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” dated 4 February 2008.

² ICC-01/04-419.

³ ICC-01/04-421.

8. Noting the decision of the Appeals Chamber dated 12 December 2006;⁴

9. Noting the judgment issued by the Appeals Chamber on 13 February 2007 on the appeal of Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber 1 entitled *Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*, which sets out the conditions for participation of victims in interlocutory appeals under article 82(1)(b) of the *Rome Statute*;

10. Noting articles 68 and 82(1)(e) of the *Rome Statute* ("the Statute"), rules 89 and 155 of the *Rules of Procedure and Evidence*, and regulations 24, 65 and 86 of the *Regulations of the Court*;

11. The Legal Representative of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 and Applicants a/0163/06 to a/0183/06 and a/0185/06 to a/0187/06 hereby request that the Appeals Chamber grant them leave to participate in the appeal lodged by the OPCD on 13 December 2007 and authorised by Pre-Trial Chamber I on 23 January 2008.

12. The Legal Representative is of the view that Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 and Applicants a/0163/06 to a/0183/06 and a/0185/06 to a/0187/06 satisfy the requirements resulting from the jurisprudence of the Court to obtain leave to participate in the appeal.

⁴ ICC-01/04-01/06-769.

A. The personal interests of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 are affected by the particular interlocutory appeal and their participation in the interlocutory appeal is appropriate

13. It is respectfully submitted that the personal interests of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 who have been authorised to participate in the situation pursuant to the decision of the single judge dated 24 December 2007, as corrected by the Corrigendum of 31 January 2008 are directly affected by the appealable issue as defined in the decision of 23 Jan 2008 pursuant to Art 68(3) of the *Rome Statute*.

14. As Pre-Trial Chamber I recalled in its *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"* dated 23 January 2008,⁵ "[t]he personal interests of victims are affected at the investigation stage of a situation and the pre-trial stage of a case; that these are appropriate stages of the proceedings for victims' participation; and that accordingly, victims have a procedural status in proceedings concerning the investigation of a situation and the pre-trial stage of a case."

15. The appeal proceedings will have a direct impact on the said victims, given that the determination of the appealable issue will impact upon their procedural

⁵ ICC-01/04-438.

status in the situation and consequently will influence their ability to present their views and concerns in accordance with Article 68(3) of the Rome Statute.

16. To the extent that the appealable issue relates to an interpretation of rule 89 of the Rules and regulation 86 of the Regulations, the determination of same, insofar as it could potentially require the Victims to present new applications to participate in any specific procedural activity in a situation or case proceedings, will directly impact upon the capacity of the Victims to present in a timely manner their views and concerns in those instances when their personal interests are affected.

17. To the extent that the appealable issue will determine whether the procedural safeguards that apply in criminal proceedings before the Court apply during the application process, and in this respect, the extent of the material the Chamber is obliged to provide to the Prosecution and the Defence, including material extrinsic to the applications themselves, the determination of same, insofar as it could potentially expose the Victims to risks to their personal security and safety and to the extent that it affects their privacy, impacts upon the Victims' personal interests.

18. In view of the nature of the issues raised by the appeals proceedings, which pertains to the Victims' inherent essential rights, it is respectfully submitted that the Appeals Chamber can only observe that the personal interests of the Victims are directly affected and that their participation is entirely appropriate at this stage in the proceedings.

B. The personal interests of Applicants a/0163/06 to a/0183/06 and a/0185/06 to a/0187/06 are affected by the particular interlocutory appeal and their participation in the interlocutory appeal is appropriate

19. It is respectfully submitted that the personal interests of Applicants a/0163/06 to a/0183/06 and a/0185/06 to a/0187/06 are not excluded by the “Order of the Appeals Chamber on the Date of filing of Applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor” issued 13 February 2008.

20. It is respectfully submitted that the Applicants a/0163/06 to a/0183/06 and a/0185/06 to a/0187/06 whose applications to participate in the situation of the Democratic Republic of Congo are still pending, are victims within the meaning of rule 85(1) of the Rules of Procedure and Evidence. While their status as such has not yet been formally recognised by the Pre-Trial Chamber, it is submitted that the Appeals Chamber should be mindful of the Pre-Trial Chamber’s earlier ruling allowing the Legal Representative of the Applicants to be heard on matters related to the protection and safety of the applicants on case by case basis when appropriate.⁶

21. The Applicants are not requesting to submit their views and concerns on their status, nor the quality of their applications, but are nonetheless seeking to have their views represented in the Appeal given that they are directly and primarily affected by the issues under examination in this particular appeal. Their participation in the interlocutory appeal is appropriate on the following grounds:

- i. These are the Applicants from who the OPCD has requested the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e);
- ii. The protection and security issues previously raised by Applicants residing in the same localities in the “Demande du représentant légale des victimes a/0107/06 à a/0109/06, a/0128/06 à a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06 à a/0214/06, a/0220/06 à a/0222/06, a/0224/06 à a/0230/06 et a/0234/06 à

⁶ It is submitted that in the instant case, the Legal Representative of Applicants x, y and z ‘ application to be heard should be granted, as it bears directly on the Applicants’ protection and safety.

a/0241/06”⁷ dated 5 June 2007 and “Demande du représentant légale des victimes [EXPURGE]”⁸ dated 20 July 2007, and noted by the Single Judge on February 2007 « [...] *the situation in the Democratic Republic of Congo still appears volatile* [...]»⁹ continue to be a live issue that poses risks to victims, and that the provision of the requested Supporting Documentation may create unnecessary risks for the victims concerned;

- iii. The arguments presented by the OPCD concern the application process and thus the rights of victims to access justice as provided for in Article 68(3) of the Rome Statute.

22. Thus, in view of the nature of the issues raised by the appeals proceedings, which pertains to the Applicants rights, it is respectfully submitted that the Appeals Chamber can only observe that the personal interests of the Applicants are directly affected and that their participation is entirely appropriate at this stage in the proceedings.

C. The participation of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 and the Applicants a/0163/06 to a/0183/06 and a/0185/06 to a/0187/06 in the interlocutory appeal is not prejudicial to the rights of the accused and a fair and impartial trial

23. It is submitted that the participation of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06, and the Applicants

⁷ ICC-01/04-332.

⁸ ICC-01/04-361.

⁹ See the « Review of the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo », n° ICC-01/04-01/06-826, 14 février 2007, p. 6 .

a/0163/06 to a/0183/06 and a/0185/06 to a/0187/06 in the Appeal filed by the OPCD on 13 December 2007 and authorised by Pre-Trial Chamber 1 on 23 January 2008 is not prejudicial to the rights of the accused and a fair and impartial trial.

24. In considering whether the participation of Victims and Applicants would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, it is submitted that the Pre-Trial Chamber should be mindful that the views and concerns of the Victims and Applicants relating to this interlocutory appeal do not relate to questions pertaining to the guilt or innocence of any suspect or accused person or to the credibility of Prosecution witnesses. Any possibility of prejudice is entirely context and case specific, based upon the particular charges and evidence tendered. Provided that submissions do not expressly or impliedly point to the particular guilt of an accused in respect of actual charges, it is difficult to see how any prejudice might arise.

25. Indeed, the views and concerns that the Legal Representative wishes to be presented will, on the contrary, ensure that the principle of contradictor is satisfied, facilitating the presentation of contradicting views to ensure a binding and considered ruling on the issues under examination, which have been considered to be significant for the fair and expeditious conduct of the proceedings or the outcome of the trial; and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

26. Accordingly, the Legal Representative respectfully requests the Appeals Chamber to grant leave to Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 and Applicants a/0163/06 to

a/0183/06 and a/0185/06 to a/0187/06 to participate in the interlocutory appeal at issue.

Me Joseph KETA



Dated this 21 February 2008

At London / Bunia