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No.: ICC-01/04
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THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

Public Document

OPCD Response to the submissions of the Legal Representatives

The Office of the Prosecutor

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1. Procedural history

1. On 7 December 2007 the Honourable Single Judge issued the “Decision on the Request of the OPCD on the Production of Relevant supporting documentation pursuant to Regulation 86(2)(e) of the Regulation of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”.¹
2. On 23 January 2008 the Single Judge granted the Office of Public Counsel for Defence (OPCD) leave to appeal the decision on the following grounds:

*“whether 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.”*²

3. On 4 February 2008, OPCD filed its “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.’”³
4. On 6 February 2008, the Office of Public Counsel for Victims (OPCV) filed the “Request from the OPCV Acting as Legal Representative for Clarification on Victim Participation in the Interlocutory Appeal filed by the OPCD under article 81(2) of the Rome Statute”.⁴
5. On 8 February 2008, the Legal Representatives of Victims filed “Application from the Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6

¹ ICC-01/04-417

² ICC-01/04-438, at page 8.

³ ICC-01/04-440

⁴ ICC-01/04-442

- and a/0071/06 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”.⁵
6. On 11 February 2008, the Legal Representative of Victim a/105/06 filed the “Request of the Legal Representative of Victim a/0105/06 for authorisation to participate in the appeal filed by the OPCD on 13/12/2007 and authorised by the Pre-Trial Chamber on 23/1/2008”.⁶
 7. On 13 February 2008, the Appeals Chamber issued the “Decision of the Appeals Chamber on the OPCV’s request for clarification and the legal representative’s request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the response thereto by the OPCD and the Prosecutor”⁷ in which it dismissed OPCV’s request for clarifications, ordered that applications for participation in the appeal were to be filed by 21 February 2008, further, that OPCD and Prosecutor could file, by 4 March 2008, a consolidated response to all applications received which could include “submissions with regard to the right of victims to participate in this appeal, and the modalities for such participation”.
 8. On 14 February 2008, the Legal Representatives filed the “Observations du Représentant légal de VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, VPRS6 et a/0071/06 suite à l’OPCD appeal brief on 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”.⁸
 9. On 21 February 2008, OPCV filed the “Requête du BCPV en tant que représentant légal des victimes autorisées à participer aux procédures dans le cadre de la situation en République démocratique du Congo aux fins de participation à l’appel interlocutoire déposé par le BCPD le 4 février 2008”⁹ and also “Requête du BCPV en tant que représentant légal des demandeurs dans le cadre de la situation en République démocratique du Congo aux fins de participation à l’appel interlocutoire déposé par le BCPD le 4 février 2008”.¹⁰
 10. On 21 February 2008, the Legal Representatives filed the “Application of the Legal Representative of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06,

⁵ ICC-01/04-446

⁶ ICC-01/04-448

⁷ ICC-01/04-450

⁸ ICC-01/04-451

⁹ ICC-01/04-466

¹⁰ ICC-01/04-467

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”.¹¹

11. The OPCD hereby files its consolidated response to the victims’ filings. In order to further assist the Appeals Chamber, the OPCD also attaches as an annex a table setting out the standing of the OPCD vis-à-vis the different applicants and alleged victims.

2. Submissions

12. In applying the criteria established by Article 68(3), the Appeals Chamber has held that that “[i]n order to allow for a proper determination of the issue by the Appeals Chamber pursuant to article 68 (3) of the Statute, an application should include a statement from the victims in relation to whether and how their personal interests are affected by the particular interlocutory appeal, as well as why it is ‘appropriate’ for the Appeals Chamber to permit their views and concerns to be presented. Furthermore, it is for the Appeals Chamber to ensure that any views and concerns of victims must be presented ‘in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’”.¹² This test was previously applied by the Appeals Chamber in relation to the interlocutory appeal concerning Thomas Lubanga Dyilo’s application for release.¹³ The criteria are to be applied cumulatively, as is apparent from Article 68(3) and the judgement of the Appeals Chamber.
13. The first part of this response will address the respective issues of (i) personal interests (ii) appropriateness and (iii) prejudice to the defence. The second part will refer to the modalities of participation, should leave to participate be granted. The OPCD would also like to respectfully request the Appeals Chamber to consider the OPCD’s recognition that the personal interests of certain alleged victims might be affected for the purposes of this specific interlocutory appeal, to be without prejudice to the merits

¹¹ ICC-01/04-468

¹² “Decision of the Appeals Chamber on the OPCV’s request for clarification and the legal representatives’ request for extension of time and 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,” ICC-01/04-450, 13 February 2008.

¹³ The Prosecutor v Thomas Lubanga Dyilo, “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, at para. 44.

of the OPCD's submissions concerning whether the personal interests of alleged victims are affected by proceedings during the situation phase.

2.1 Personal Interests

14. In addressing the alleged victims' personal interests the OPCD notes that the procedure established by the Appeals Chamber requires that "an application should include a statement from the victims in relation to whether and how their personal interests are affected by the particular interlocutory appeal"¹⁴ and that, specifically, the alleged victims are required to make "explicit link[s] between their submissions and the specific issues raised on appeal".¹⁵
15. Relevant personal interests that have been previously recognised by the Appeals Chamber include such tangible issues as the potential for continuation of crimes, or further hostility¹⁶ as well as "when their [the alleged victims'] protection is in issue and in relation to proceedings for reparations".¹⁷
16. The OPCD also endorses the views of Judge Pikis who, in a separate opinion, offers further examples of relevant personal interests such as "the elicitation of evidence revealing the injury inflicted upon victims by the crime"¹⁸ (this being the subject matter of the relevant proceedings) and "protection and support in the proceedings".¹⁹ Judge Pikis further opines that "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",²⁰ thereby emphasising the particularity of each alleged victim's personal interests and the need for those interests to be tied inimitably to the relevant proceedings.

¹⁴ The Prosecutor v Thomas Lubanga Dyilo, Appeals Chamber Judgement of 13 February 2007, ICC-01/04-01/06-824, at para. 44.

¹⁵ The Prosecutor v Thomas Lubanga Dyilo, Appeals Chamber Judgement of 13 February 2007, at para. 44.

¹⁶ The Prosecutor v. Thomas Lubanga Dyilo: 'Observations of victims a/0001/06, a/0002/06 and a/0003/06 in respect of the application for release filed by the Defence', ICC-01/04-01/06-530-tEN, 9th October 2006, at paras 11-15; confirmed by Appeals Chamber, decision of 13 February 2007, ICC-01/04-01/06-824, at para. 54.

¹⁷ The Prosecutor v Thomas Lubanga Dyilo, "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, at para. 28.

¹⁸ Separate Opinion of Judge Pikis, Appeals Chamber Judgement of 13 June 2007, ICC-01/04-01/06-925 at para. 14.

¹⁹ Para. 16.

²⁰ Para. 16.

17. The OPCD therefore submits that the concept of personal interests should continue to be interpreted so as to follow this established trend of tangible and particularised interests.²¹

18. In the context of the present appeal, the OPCD is of the view that the following (non-exhaustive) list of issues could conceivably impact on the personal interests of the alleged victims:

- whether generic presumptions concerning the personal interests of alleged victims during the situation phase facilitate or frustrate the right of alleged victims to express their personal views and concerns in relation to particular proceedings;
- whether, before subjecting the applicants to the scrutiny of the application process, the Chamber should first identify viable proceedings during the situation phase in which they could potentially participate;
- the advantages and/or disadvantages – from the perspective of the alleged victim – of being requested to identify the impact of specific proceedings on their personal interests, for example, in terms of the expenditure of their time and resources that such a requirement might entail, or in terms of whether such a requirement would ensure that their right to have their views and concerns considered would be implemented in an effective and meaningful manner;
- the impact, on the alleged victims, of confining the scope of participation under article 68(3) to persons who have suffered harm as a result of alleged crimes, which are being actively investigated or prosecuted by the Prosecutor;
- whether an automatic system of notification of court proceedings – which is not contingent on being formally granted the procedural ‘status of victim’ – would assist the alleged victim to choose when and how to submit a request for participation in a specific proceedings;
- the impact of being requested by the Chamber to either supplement their applications forms with additional supporting documentation, or to provide an explanation as to why they are not in a position to do so;²² and
- whether issuing a decision on the basis of *ex parte* information concerning the applicants, which has not been transmitted to either the applicants themselves

²¹ This course of action is also condoned by the Prosecutor who states, at Para. 17 of the OTP’s response, that “relevant personal interests for the purposes of Article 68(3) must be tangible - a ‘judicially recognisable personal interest’”; see also E. Haslam, “Victim Participation at the ICC”, in McGoldrick, Rowe and Donnelly (eds.): *The Permanent International Criminal Court* (2004) at p. 326.

²² Appeal Brief at paragraph 65.

or the parties, impacts on the right of the applicant to be heard, and to be treated with respect and dignity.²³

19. Due to the importance and uniqueness of the appeal, the OPCD would not in principle oppose the Appeals Chamber authorising the legal representatives of alleged victims, who were the subject of the Single Judge's decisions of 7 and 13 December 2007, to submit views and concerns in relation to how their personal interests are directly affected by issues such as the aforementioned, notwithstanding the fact that their legal representatives might not have clearly articulated how the personal interests of the alleged victims are affected by the appeal.
20. In terms of the particular personal interests cited by the legal representatives, the OPCD submits the following observations.

VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 and a/0071/06,

21. The OPCD observes that the personal interests listed by the legal representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 and a/0071/06, namely the "status and the rights conferred upon them at the situation stage and at the pre-trial stage of the case"²⁴ are generic in nature and not congruent with the requirement that they identify an 'explicit link' with the issues raised. The OPCD cites Judge Pikis in this regard, in submitting that "no grounds are put forward establishing personal interests of the Applicants being at stake or apt to be affected by the determination of the appealability of the *sub judice* decision. And none can be directly or inferentially identified."²⁵
22. The OPCD further observes that VPRS 1-6 are subject to the legal regime set out in the Pre-Trial Chamber's decision of 17 January 2006, in particular, the requirement that participation in specific proceedings could be subject to a further assessment by the Chamber as to whether the specific proceedings impact on their personal interests.²⁶ As such, it is not apparent from the legal representative's filing as to how

²³ Appeal Brief at paragraph 64.

²⁴ "Application from the Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 and a/0071/06 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", ICC-01/04-446-tENG, 8th February 2008, at para. 18.

²⁵ Separate Opinion of Judge Pikis in *Prosecutor v Thomas Lubanga Dyilo*, 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, at para. 22.

²⁶ See paragraphs 64, 73 and 74.

the Appeals Chamber's resolution of the first appellate issue would impact on the rights previously conferred upon them by the 17 January 2006 decision.

23. In terms of the second component of the appeal concerning the application process, the OPCD firstly notes that none of these alleged victims were the subject of the OPCD's requests for additional information and/or documentation. The OPCD is also not in a position to assess further what their personal interests could be in light of the fact that the OPCD has never been disclosed their identities and application forms. The OPCD is therefore not able to conclude one way or the other whether changes in the application process could impact on their ability to apply to participate in pre-trial proceedings.

a/0105/06

24. The OPCD observes that whilst the application by the legal representative of *a/0105/06* is unclear as to what specific personal interests are affected, instead stating in overly broad terms that "the personal interests of *a/0105/06* are directly affected by the issues raised by the OPCD, which essentially concern the rights and privileges accorded to victims",²⁷ the statement that "the advantage of having *a/0105/06* participate at this stage would be to discover which of his or her personal interests are affected by these issues and perhaps understand how his or her interests are different from those of the other victims",²⁸ suggests that the personal interests of *a/0105/06* are directly affected by the issue as to whether the 'personal interests' of an applicant or participating applicant can be defined in a generic sense.

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

25. The OPCD readily acknowledges that the application by the legal representative of *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

²⁷ 'Request of the Legal Representative of Victim *a/0105/06* for authorisation to participate in the appeal filed by the OPCD on 13/12/2007 and authorised by the Pre-Trial Chamber on 23/1/2008', ICC-01/04-448-tENG 11th February 2008, at para. 15.

²⁸ Section 2.

a/0185/06 to a/0187/06, filed on 21 February 2008,²⁹ offers more concrete examples of personal interests that may be affected, such as the obligation on victims “to present new applications to participate in any specific procedural activity in a situation or case proceedings” and the assertion that this “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”.³⁰

26. The OPCD disagrees, however, that the appellate issue concerning whether the Chamber is obliged to provide the parties with information which is extrinsic to the applications forms would impact on the safety or privacy of the alleged victims. As set out in the OPCD Appeal brief, in light of the fact that the OPCD has already been provided with the names and addresses of the applicants (as set out in the application form), the provision of additional information (for example, the *ex parte* analysis set out in the Report of the Registry) would cause no additional safety risk or loss of privacy to the alleged victims.

27. In any case, the Appeals Chamber is seised of the legal issue as to whether the Single Judge fettered her discretion concerning the OPCD’s requests for additional information. Should the Appeals Chamber uphold the OPCD’s appeal, the Single Judge would be directed to consider these requests anew, in which case, the applicants would have the right to present any concerns regarding their security or protection to the Single Judge. The decision of the Appeals Chamber will not in itself directly affect the security or safety of the applicants.³¹

a/0163/06 to a/0183/06, and a/0185/06 to a/0187/06

²⁹ “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,” ICC-01/04-468, 21 February 2008.

³⁰ Para. 16.

³¹ The OPCD refers to its submissions at paragraphs 20-22 of its Appeal Brief of 18 February 2008, to the effect that the alleged victims are required to demonstrate that their personal interests are directly affected by the issues being considered on appeal, as opposed to the ultimate outcome of the appeal. This approach is consistent with the conclusions of the Appeals Chamber, as set out in the 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 OA8, 13 June 2007 at paras 25-26.

28. The OPCD notes that the legal representative also advocates for the participation of alleged victims who have not yet been granted permission to participate in the situation.³²
29. As a preliminary observation, the OPCD refers to the findings of the Honourable Single Judge that “due to the specific object and purpose of the application process, applicants “are neither entitled to reply to the observations of the Prosecution and the Defence nor to request leave to appeal the decision of the Chamber on the merits of their applications””.³³
30. The OPCD further refers to the following statement of Judge Pikis:
- “Of which victims (of those coming within the definition) the personal interests are at stake in any given proceedings? The inevitable answer is of victims who suffered harm from the crime or crimes, the subject-matter of investigation, confirmation, the trial, appeal, revision (article 84 of the Statute), and reduction of sentence (article 110 of the Statute and rule 224 of the Rules of Procedure and Evidence).”³⁴
31. Absent a finding that the applicants have suffered harm from an alleged crime, which is the subject-matter of investigation, confirmation, *et cetera*, the applicants do not fall within the scope of article 68(3). The OPCD therefore submits that in light of their limited procedural stature, the personal interests of applicants are not affected by the interlocutory appeal.
32. In any case, in terms of the first appellate issue (whether the Chamber can grant a procedural status of victim), the OPCD finds the submissions of the representative to be untenable, as these applicants do not presently possess personal interests capable of being affected by this aspect of the appeal; the applicants’ status will remain unchanged by the appeal irrespective as to whether it is granted or denied and, consequently, their personal interests will remain wholly unaffected.
33. With respect to the second aspect of the appeal (the application process), in relation to the representative’s claim 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”, the OPCD notes that that the Legal Representative has failed to identify a specific issue, which directly concerns the safety and protection of

³² Paragraphs 20-21.

³³“Decision on the Application for Leave to Appeal the Decision on the Requests of the OPCV”, ICC-01/04-437, 18 January 2008, citing “Decision on the Requests of the OPCV”, ICC-01/04-418, 10 December 2007, at para. 16.

³⁴ 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 2006, Separate Opinion of Judge Pikis at paragraph 13.

these particular applicants. The OPCD refers to its observations at paragraphs 26 to 27 concerning this aspect of the appeal.

a/0007/06, a/0008/06, a/0022/06, 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 and a/0209/06

34. At paragraph 15 of this filing, the Office of Public Counsel for Victims (OPCV) contends that by proposing alternative mechanisms to secure the rights of alleged victims during the situation phase, the OPCD clearly wishes to deny the applicants the right to participate at this stage. The OPCD notes that the relevant test for participation is not whether the alleged victim agrees or disagrees with the legal submissions put forth by a party, it is whether their personal interests are directly impacted by this issue.
35. Nonetheless, the submission of the OPCV could indicate that the personal interests of the alleged victims are impacted by the issue as to whether the mechanisms referred to by the OPCD (submission of a complaint to the OTP, establishment of an effective notification system, submission of observations in accordance with rule 50(1) and (3)) would adequately protect the judicially recognised interests of the applicants during the situation, or whether they can envisage concrete examples concerning these particular alleged victims in which recourse to article 68(3) would be necessary during the situation phase.
36. The OPCV further avers that if the applicants were deprived of the procedural status of victim, they would also be deprived of the right to present their views and preoccupations or to tender documents in relation to the ongoing investigation *et cetera*. The OPCD notes in this connection that in its decision of 7 December 2007, the Honourable Single Judge neither granted any applicants the procedural status of victim, nor attached any participatory rights to this status. Indeed, in light of the fact that the Appeal of 4 February 2008 is not at all concerned with the modalities of participation, it is difficult to understand how the issues set out therein directly impact on the purported right of the alleged victims to present their views and preoccupations or to tender documents *et cetera*.

a/0047/06 to a/0052/06

37. In the same filing, the OPCV also requests the right to participate on behalf of applicants a/0047/06 to a/0052/06, who have not yet been granted the right to participate in the situation. In the decision of 24 December 2007, the Honourable Single Judge noted that these applications had been submitted in the case file of the Thomas Lubanga Dyilo case, and therefore decided that it would be appropriate to defer her consideration of these applications pending the decision of the Trial Chamber.³⁵
38. Since the Honourable Single Judge has not granted these applicants the procedural status of victim, the resolution of the first appellate issue will have no impact on their current position, and thus their personal interests. Moreover, if the applicants are indeed granted reciprocal rights to participate in the situation by virtue of their status in the trial proceedings, the suggested modalities for the application process during the situation and pre-trial phases will not apply to them. As such, the applicants' interests can only be said to be affected on a purely hypothetical basis.
39. Finally, the OPCD observes that a/0047/06 to a/0052/06 were never the subject of an OPCD request for additional information or disclosure.

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/0110/06, a/0144/06, a/0153/06 to a/0157/06, a/0159/06, a/0160/06, a/0203/06, a/0220/06, a/0222/06 and a/0240/06

40. The OPCD refers to its observations at paragraph concerning the general position of applicants as regards interlocutory appeals. The OPCD further notes that the OPCV has not adduced any additional considerations as to the impact of these appellate issues on the personal interests of the applicants. The OPCD further notes that the OPCD has at no point in time requested additional information/disclosure concerning 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.

3.2 Appropriateness

³⁵ At paragraph 142.

41. OPCD observes that Article 68(3) requires a “specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration”.³⁶ In this regard the OPCD endorses the opinions expressed by Judge Pikis, namely that “[t]he 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”.³⁷
42. The OPCD would also endorse the views of Judge Song, who attaches the notion of appropriateness to that of expediency, such that permitting the airing of alleged victims’ views and concerns in situations or modes that may substantially delay the proceedings would not satisfy this criterion.³⁸
43. In light of the fact that the current appellate proceedings represent the first occasion in which several key issues concerning article 68(3) and the application process will be considered at the appellate level, the OPCD submits that it would be in the interests of justice to ensure that the views and concerns of alleged victims are taken into consideration as it would ensure that the Appeals Chamber has the benefit of considering the appellate issues through the lens of those directly affected by these issues.
44. Their participation could also facilitate the ability of the parties to consider, and proactively devise potential responses to any legitimate concerns proffered by the legal representatives on behalf of the alleged victims. This would ensure an immediate and expeditious resolution from the Appeals Chamber in relation to these concerns. In contrast, if these views and concerns were deferred for consideration to future proceedings in the situation phase, this might result in a need for future appellate intervention, and unnecessary re-litigation of these issues.
45. The OPCD therefore respectfully submits that it does not oppose the Appeals Chamber finding that it is appropriate for the alleged victims to present their views and concerns in relation to this appeal, notwithstanding the fact that their legal representatives might not have satisfactorily demonstrated the propriety of their clients’ participation.

³⁶ The Prosecutor v Thomas Lubanga Dyilo, Appeals Chamber Judgement of 13 February 2007, ICC-01/04-01/06-824, para. 40.

³⁷ Separate Opinion of Judge Pikis, Appeals Chamber Judgement of 13 June 2007, ICC-01/04-01/06-925, at para. 20. See also D. Donat-Cattin, ‘Article 68 Protection of the Victims and their participation in the proceedings’ in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* at p. 886.

³⁸ Separate Opinion of Judge Song in the Prosecutor v Thomas Lubanga Dyilo, 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, at para. 23.

46. Against this background the legal representatives of VPRS 1 - 6 and a/0071/06³⁹ submit only that the victims “are directly affected and that their participation is entirely appropriate at this stage in the proceedings”; no further reasoning is offered, rendering it difficult to analyse this criterion thoroughly in this instance. The OPCD submits that by asserting that participation is appropriate by virtue of not being inappropriate the legal representatives fail to discharge the requirements of Article 68(3) and the standard set by the Appeals Chamber.⁴⁰
47. The legal representative of victim a/0105/06 states, in a similar manner, that their participation “is indeed appropriate at this stage and may be of great benefit to the proceedings”. The OPCD submits that the reasoning put forward again falls short of the standard required of Article 68(3) and the decisions of the Appeals Chamber.
48. The legal representatives of 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 also mention merely that “their participation is entirely appropriate at this stage in the proceedings,” following a similar trend to those set above.
49. The two filings of the OPCV also assume that the appropriateness criterion is met by virtue of the fact that the appeal impacts on the personal interests of the alleged victims,⁴¹ and mainly focus on the argument that since participation at the situation phase is in general appropriate, participation in interlocutory appeals during the situation phase is also appropriate. These submissions also fail to meet the positive obligation to describe how this criterion is met.

3.3 “Not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”

50. The OPCD notes that, pursuant to Article 68(3) and the findings of the Appeals Chamber, “it is for the Appeals Chamber to ensure that any views and concerns of victims must be presented ‘in a manner which is not prejudicial to or inconsistent with

³⁹ ICC-01/04-446.

⁴⁰ The “Decision of the Appeals Chamber on the OPCV’s request for clarification and the legal representatives’ request for extension of time and 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” (ICC-01/04-450, 14 February 2008) provides that alleged victims must indicate “why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings”.

⁴¹ As set out in the OPCD Appeal Brief of 4 February 2008, the criterion of appropriate must be construed in a separate and distinct manner from the criterion of personal interests.

the rights of the accused and a fair and impartial trial’”.⁴² The Appeals Chamber has previously held that this criterion could be fulfilled by virtue of the observations received by the alleged victims being “limited and ... specifically relevant to the issues arising in the appeal rather than more generally”,⁴³ and by according other parties the right to respond.⁴⁴

51. Judge Pikis has held that the application of this criterion includes a consideration of all aspects of Article 67 of the Statute,⁴⁵ and the necessary exclusion of a ‘second accuser’ in line with the principle of equality of arms.⁴⁶ Judge Song, in a separate opinion within the same judgement, cites excessive delay as another point to take into consideration.⁴⁷

Legal representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPPRS 5, VPRS 6 and a/0071/06

52. The legal representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPPRS 5, VPRS 6 and a/0071/06⁴⁸ observe that “the OPCD fails to show how participation of the victims in the ongoing proceedings would be inconsistent with the rights of the accused in such a way as to significantly affect the progress of the trial”.⁴⁹ This line of argument is adopted seemingly without regard to the decision of the Appeals Chamber that alleged victims’ applications “shall include a statement in relation to why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence”⁵⁰ thereby placing a positive burden on the alleged victims to establish that this criterion is met.
53. The legal representatives, in support of participation, further state that the alleged victims’ participation “is neither prejudicial to nor inconsistent with the rights of the accused insofar as it has no effect on the Defence’s procedural rights. Indeed, the Prosecution and Defence have the opportunity to respond to any presentation of the victims’ views and concerns. Accordingly, the participation of the victims in the particular interlocutory appeals proceedings does not violate the principle of fairness

⁴² The Prosecutor v Thomas Lubanaga Dyilo, Appeals Chamber Judgement of 13 February 2007, ICC-01/04-01/06-824, para. 44.

⁴³ The Prosecutor v Thomas Lubanaga Dyilo, Appeals Chamber Judgement of 13 February 2007, para. 55.

⁴⁴ Para. 55.

⁴⁵ Separate Opinion of Judge Pikis, Appeals Chamber Judgement, 13 June 2007, ICC-01/04-01/06-925, para 18.

⁴⁶ Para. 19.

⁴⁷ Separate Opinion of Judge Song, Appeals Chamber Judgement of 13 June 2007, ICC-01/04-01/06-925, at para. 27.

⁴⁸ ICC-01/04-446

⁴⁹ Para. 21.

⁵⁰ Appeal Chamber, Decision of 13 February 2007, at para. 44.

of the proceedings.” Whilst the legal representatives proceed to address why it would be fair for the alleged victims’ to participate,⁵¹ they fail to touch, essentially, on the flipside of this argument, relating to the rights of the Defence.

54. In this regard, the OPCD observes that the OPCD has never been disclosed either the identities or the application forms of VPRS 1-6. As such, the OPCD is in a highly disadvantaged position vis-à-vis its ability to ascertain the pertinence of the legal representatives’ submissions concerning the existence of a personal interest, and its ability to ascertain the relevance and accuracy of the substantive views and concerns of these completely anonymous and unfamiliar persons.
55. In this connection, the OPCD respectfully submits that the right to respond, which is necessary to ameliorate potential prejudice to the defence, must be interpreted in an effective manner. As such, the participation of these particular alleged victims would be prejudicial to the OPCD.
56. The OPCD also notes that the 14 February filing submitted by the legal representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 and a/0071/06⁵² addresses substantive arguments concerning the appeal, notwithstanding the absence of prior authorisation from the Appeals Chamber to address such issues. In this regard, the Appeals Chamber has, in similar cases, met the practice of addressing substance before being granted leave to do so with disapproval and has stated that such a practice may result in the Appeals Chamber rejecting both the request and the filing.⁵³ Moreover, such a practice is not compatible with Article 68(3), which establishes the need for fairness and impartiality. In addressing substantive issues on a pre-emptive basis, the legal representative has sought to predetermine the scope of their participation. Such a practice is prejudicial to the OPCD, and negatively affects the expeditiousness of the proceedings, by unnecessarily convoluting the filings which the parties must consider and respond to.

Legal Representative of a/0105/06

⁵¹ Para. 25.

⁵² ‘Observations du Représentant légal de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 et a/0071/06 suite à l’ “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-01/04-451, 14 February 2008.

⁵³ The Prosecutor v Thomas Lubanaga Dyilo, Appeals Chamber Judgement of 13 February 2007, ICC-01/04-01/06-824, at para. 68: ‘The Appeals Chamber disapproves of a practice of the filing of a substantive reply prior to leave being granted by the Appeals Chamber, which in and of itself may also give rise to the rejection of an application for leave’; the finding was in relation to a filing by the Prosecution.

57. The Legal Representative of a/0105/06 states that “participation ...at this stage of the proceedings does not prejudice the rights of the Defence or the requirements of a fair trial. By presenting views and observations, the Defence and the Prosecution will have an opportunity to respond to this [...]. They will thereby have an opportunity to demonstrate how the views and observations of a/0105/06 do not comply with the law on the issues raised by the OPCD.”⁵⁴
58. In light of the fact that the OPCD has also not been provided with the application form or identity of a/0105/06, the OPCD respectfully submits that these arguments also fail to satisfy the requirements of Article 68(3) and the test expounded by the Appeals Chamber, failing to specify concretely how prejudice to the OPCD will be prevented.

The Legal Representative of 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

59. The legal representative of 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 opines 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.”⁵⁵ However, as the OPCD has noted above, prejudice need not only result from proceedings where the guilt of the accused is directly in question but can, rather, derive from a multitude of issues such as expeditiousness of the proceedings, the procedural equality of the parties, and the impartiality of the process.
60. The issue of permitting the participation of alleged victims who have yet to be granted permission to participate in the proceeding may also militate against the fairness and

⁵⁴ ICC-01/04-448, Section II.

⁵⁵ ICC-01/04-468, para. 24.

impartiality of the process, in that it may leave the appeal open to alleged victims with a tenuous, if any at all, link to the proceedings.

61. To permit these applicants to participate in the present appeal could also unnecessarily enlarge the scope of the submissions presented to the Chamber, and thus impact on the right of the OPCD to have adequate time and facilities to effectively respond to these submissions.
62. The OPCD further notes that the legal representative of 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, Me Joseph Keta, has, unusually, filed his motion stating the location as “London / Bunia”, and in English. The OPCD respectfully submits that if Me Keta is in receipt of assistance, from an NGO or second counsel, this should be declared, in pursuance of transparency and equality of arms. To enable the representative to collaborate with one or more external parties could unduly tip the balance of procedural equality and, moreover, if an NGO is involved, could permit the introduction of an *amicus* brief into the appeal proceedings through the back door, rather than through the proper channels (namely Rule 103). Disclosure of such assistance, if indeed it exists, would be of great benefit to all in the proceedings given the potentially substantial connotations it may have for the fairness of proceedings, and for issues of confidentiality.⁵⁶
63. The submissions of the OPCV focus on whether participation in general is prejudicial to the defence, and does not include any concrete observations which are pertinent to this particular interlocutory appeal, apart from the reference to the fact that the parties would have the right to respond to any filings submitted by the alleged victims and the applicants.
64. In this connection, the OPCD also notes that it has never received the application form, or the identity of the following: a/0004/06, a/0005/06, a/0006/06, a/0007/06, a/0008/06, a/0019/06, a/0020/06, a/0022/06 to a/0024/06, a/0026/06, a/0027/06, a/0030/06, a/0033/06, a/0035/06, a/0036/07, a/0039/06, a/0040/06, a/0041/06, a/0046/06, a/0043/06, a/0047/06 to a/0052/06, a/0072/06, a/0073/06 to a/0080/06. It therefore refers to its aforementioned observations concerning the impact of the

⁵⁶ The OPCD has thus far refrained from addressing confidential factual matters in its briefs in order to promote the publicity of the proceedings. It is however possible that it might be necessary to discuss matters pertaining to the confidential applications in its response to any alleged victims, who might be granted the right to participate in the appeal.

participation of such applicants/alleged victims on the right of the OPCD to effectively respond to their views and concerns.

65. Finally, the OPCD reiterates its concerns regarding the impact that participation of applicants, who have not been granted the right to participate, on the fairness and impartiality of the proceedings. The integrity of the proceedings would be particularly impacted upon by the participation of applicants who have yet to submit any reliable form of identification to the Court,⁵⁷ or persons acting on behalf of alleged victims, who have yet to adduce proof that the alleged victim consent to them so acting.⁵⁸

3. Modalities of Participation

66. The OPCD respectfully submits that view and concerns should be just that – views and concerns. The purpose of participation under article 68(3) is to enable the alleged victims to voice their personal concerns through their legal representatives; it is not intended to transform the process before the ICC into tripartite proceedings.
67. In this regard, the OPCD has noted the perceptible similarity between the filings of the different legal representatives,⁵⁹ and the general emphasis on legal and procedural arguments. The OPCD accepts the possibility that this may be coincidence or may indicate a concurrence of shared views and concerns between the many applicants and alleged victims. The OPCD nonetheless respectfully requests the Honourable Appeals Chamber to direct the legal representatives to focus their observations on the particular views and concerns expressed to them by their respective clients and the manner in which these interests are linked to the appellate issues, as opposed to the general legal views of the legal representatives themselves.
68. In setting the time-limit for the alleged victims' filings, it is submitted that the Appeals Chamber should take into account the need for an expeditious resolution of these important issues. The Appeals Chamber should also bear in mind the date of OPCD's appeal (4 February) and the time that the legal representatives have had thus far to brief their clients, and to consult with them regarding their views and concerns as related to the issues set out in the brief. Finally, the OPCD requests the Honourable Appeals Chamber to consider either setting a total page limit for the combined

⁵⁷ For example, a/0005/06, a/0019/06, a/0027/06, a/0038/06, a/0143/06, a/0153/06, a/0155/06, a/0156/06, a/0157/06, a/0159/06, a/0203/06, a/0220/06, a/0224/06, a/0227/06, a/0229/06, a/0230/06, a/0234/06, a/0236/06, a/0240/06, a/0036/06 (see paras 17-18 of Decision of 24 December 2007, ICC-01/04-423).

⁵⁸ For example, a/0004/06, a/0073/06 to a/0080/06 and a/0110/06 (see paras 19-22 of Decision of 24 December 2007, ICC-01/04-423).

⁵⁹ For example between paragraph 19 in the 8 February filing (ICC-01/04-446), paragraph 15 in the 11 February filing (ICC-01/04-448) and paragraph 18 in the February 21 filing (ICC-01/04-468).

observations of the respective legal representatives, or to adjust the corresponding page limit for the parties' consolidated response. The OPCD notes that the first option would be more conducive to focussed and expeditious proceedings.

4. Relief Sought

69. As stated above, the OPCD is not, in general terms, opposed to the participation of alleged victims in the present interlocutory appeal; however it submits that alleged victims should only be permitted to participate insofar as they satisfy the guidelines delineated above, in accordance with the Rome Statute and the decisions of the Appeals Chamber.

70. The OPCD therefore respectfully requests the Honourable Appeals Chamber

- i. to reject the applications for participation of alleged victims who have not yet been accepted to participate at the situation phase; and
- ii. to admit the participation of the alleged victims whose personal interests are directly (as opposed to hypothetically or indirectly) affected by the issues set out in the Appeal Brief of 4 February 2008 *insofar* as they fulfil the criteria outlined by the OPCD, and in accordance with the modalities of participation proposed by the OPCD.



Mr Xavier-Jean Keïta
Principal Counsel of OPCD

Dated this Tuesday, the 4th of March 2008

At The Hague, the Netherlands