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Date: 18 March 2008

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 THE CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO**

Public Document

**Request of the OPCV Acting as Legal Representative of the Applicants in the
Lubanga Case for Participation in the Interlocutory Appeals Against Trial
Chamber I's Decision dated 18 January 2008**

The Office of the Prosecutor

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I. PROCEDURAL BACKGROUND

1. On 5 September 2007, Trial Chamber I issued the "Order setting out schedule for submissions and hearings regarding the subjects that require early determination"¹ providing the timetable for the filing of submissions and for hearings on several matters including *"the role of victims in the proceedings leading up to, and during, the trial."*²

2. On 28 September 2007, the legal representatives of victims a/0001/06 to a/0003/06 and a/0105/06 allowed to participate in the case filed a joint written submission on the above mentioned issues.³ The Defence filed its submissions on 18 October 2007⁴ and the Prosecution on 19 October 2007.⁵

3. On 18 January 2008, Trial Chamber I issued its "Decision on victims' participation" (the "Decision of 18 January 2008").⁶

4. On 28 January 2008, the Prosecution and the Defence sought leave to appeal the Decision of 18 January 2008.⁷

¹ See the "Order setting out schedule for submissions and hearings regarding the subjects that require early determination", No. ICC-01/04-01/06-947, 5 September 2007.

² *Ibid.*, point E, p. 2.

³ See the "Conclusions conjointes des Représentants légaux des victimes a/0001/06 à a/0003/06 et a/0105/06 relatives aux modalités de participation des victimes dans le cadre des procédures précédant le procès et lors du procès", No. ICC-01/04-01/06-964, 28 September 2007.

⁴ See the "Argumentation de la Défense sur des questions devant être tranchées à un stade précoce de la procédure : le rôle des victimes avant et pendant le procès, les procédures adoptées aux fins de donner des instructions aux témoins experts et la préparation des témoins aux audiences", No. ICC-01/04-01/06-991, 18 October 2007.

⁵ See the "'Prosecution's submissions on the role of victims in the proceedings leading up to, and during, the trial", 19 October 2007, ICC-01/04-01/06-993-Conf., 19 October 2007. See also the "Prosecution's public filing of the "Prosecution's submissions of the role of victims in the proceedings leading up to, and during, the trial and Annex", No. ICC-01/04-01/06-996, 23 October 2007.

⁶ See the "Decision on victim's participation", No. ICC-01/04-01/06-1119, 18 January 2008.

⁷ See the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008", No. ICC-01/04-01/06-1134, 28 January 2008 and the "Application for Leave to Appeal Trial Chamber I's 18 January 2008 Decision on Victims' Participation", No. ICC-01/04-01/06-1136, 28 January 2008.

5. On 31 January 2008, the legal representatives of victims a/0001/06 to a/0003/06 filed their response to both the Defense and the Prosecution's requests, asking Trial Chamber I to reject their requests for leave to appeal.⁸

6. On 4 February 2008, the legal representative of victim a/0105/06 filed her response to both the Defense and the Prosecution's requests. This response was not taken in consideration by Trial Chamber I since it was filed out of time.⁹

7. On 26 February 2008, the Trial Chamber granted in part the Defence and the Prosecution's requests for leave to appeal on the following issues:¹⁰

- a) Whether the notion of victim necessarily implies the existence of personal and direct harm.
- b) Whether the harm alleged by a victim and the concept of "personal interests" under Article 68 of the Statute must be linked with the charges against the accused.
- c) Whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence.

8. On 6 March 2008, Trial Chamber I issued its "Decision on the role of the Office of Public Counsel for Victims and its request to access documents" in which the Chamber decided that the Office of Public Counsel for Victims (the "Office" or the "OPCV") *"shall continue to represent the victim applicants it currently represents."*¹¹

⁸ See the "Corrigendum de la Réponse des Représentants légaux des victimes a/0001/06 à a/0003/06 aux requêtes de la Défense et du procureur sollicitant l'autorisation d'interjeter appel de la décision du 18 janvier 2008", No. ICC-01/04-01/06-1147-Corr, 1st February 2008.

⁹ See the "Réponse du représentant légal de a/0105/06 au[x] requête[s] de la défense et de l'accusation sollicitant autorisation d'aller en appel contre la décision du 18 janvier 2008, portant sur mode participation des victimes", No. ICC-01/04-01/06-1154, 4 February 2008.

¹⁰ See the "Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' participation of 18 January 2008", No. ICC-01/04-01/06-1191, 26 February 2008, par. 54, p. 21.

¹¹ See the "Decision on the role of the Office of Public Counsel for Victims and its request for access to documents", No. ICC-01/04-01/06-1211, 6 February 2008, par. 41, p. 17.. See the "Decision on the

9. On 10 March 2008, both the Prosecution and the Defense filed their documents in Support of the appeal against Trial Chamber I's Decision.¹²

10. On 11 March 2008, the legal representatives of victims a/0001/06 to a/003/06 filed the "Demande des victimes a/0001/06, a/0002/06, a/0003/06 à participer à la procédure relative aux appels du Procureur et de la défense contre la décision du 18 janvier 2008 de la Chambre de Première Instance I sur la participation des victimes."¹³

II. LEGAL BASIS FOR THE REQUEST

11. 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"¹⁴ (the "Decision of 13 February 2008"), in which it indicated that victims may seek to participate in an appeal lodged

Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation" (Pre-Trial Chamber I), ICC-01/04-374, 17 August 2007 and the "Registration of a Letter from the Legal Representative Withdrawing his Request for Anonymity and of Other Documents Relating to the Legal Representation of the Applicants for the Purposes of Participation", ICC-01/04-380-tENG, 31 August 2007 and the "Registration of appointment of the OPCV and amendment to appointment", ICC-01/04-401-Conf, 27 September 2007.

¹² See the "Prosecution's Document in Support of Appeal against Trial Chamber I's 18 January 2008 Decision on Victims' Participation", No. ICC-01/04-01/06-1219, 10 March 2008 and the "Acte d'appel de la Défense relativement à la Décision du 18 janvier 2008 de la Chambre de première instance I concernant la participation des victimes", No. ICC-01/04-01/06-1220, 10 March 2008.

¹³ See the "Demande des victimes a/0001/06, a/0002/06, a/0003/06 à participer à la procédure relative aux appels du Procureur et de la défense contre la décision du 18 janvier 2008 de la Chambre de Première Instance I sur la participation des victimes", No. ICC-01/04-01/06-1222, 11 March 2008.

¹⁴ See 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" (Appeals Chamber), No. ICC-01/04-450, 13 February 2008 (the "Decision of 13 February 2008"). See also the "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", No. ICC-01/04-442-tENG, 6 February 2008.

under article 82(1)(d) of the Rome Statute, through an application for participation including a statement specifying how the personal interests of the victims would be affected by the said appeal, explaining why the presentation of their views and concerns would be appropriate at that stage and showing that such participation would not be inconsistent with or prejudicial to the rights of the Defence.¹⁵

12. The Office notes that the Decision of 13 February 2008 is consistent with previous decisions of the Appeals Chamber, since the same conditions were required on 13 February 2007 in respect of victims' participation in an interlocutory appeal lodged under article 82(1)(b) of the Rome Statute¹⁶ and were reiterated in the decision of the Appeals Chamber of 13 June 2007.¹⁷

13. The Office submits that the Decision of 13 February 2008 does not specify from whom the applications for participation in the interlocutory appeal may originate. Therefore, it seems that the decision pertains not only to those victims already authorised to participate in the *Lubanga* case, but also covers those applicants seeking victim status in the said case. Accordingly, the Principal Counsel, as legal representative of the applicants in the *Lubanga* case, respectfully submits to the Appeals Chamber a request for the said applicants to participate in the appeals lodged against the Decision of 18 January 2008.

14. Lastly, the Office notes that the appeals lodged by the Prosecution, on the one hand, and the Defence, on the other, appear to give rise to two separate proceedings.¹⁸ However, with the Trial Chamber, one cannot but observe that the

¹⁵ *Ibid.*

¹⁶ See the "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), No. ICC-01/04-01/06-824, 13 February 2007.

¹⁷ See 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", (Appeals Chamber), No. ICC-01/04-01/06-925, 13 June 2007.

¹⁸ In this respect, see the "Decision on the Presiding Judge of the Appeals Chamber in the appeal of the Prosecutor pursuant to the decision of Trial Chamber I of 26 February 2008" (Appeals Chamber),

issues raised in the said appeals are intrinsically related and could have similar legal implications.¹⁹ Accordingly, in this request, the Office will cover the relevant aspects relating to the two above-mentioned appeals.

II. SUBMISSIONS FOR PARTICIPATION IN THE APPEALS AGAINST TRIAL CHAMBER I'S DECISION OF 18 JANUARY 2008

15. Pursuant to the previous decisions of the Appeals Chamber in this respect, the Office responds successively to the following questions: (1) how are the personal interests of the applicants affected by that appeal? (2) why is the presentation of their views and concerns appropriate at this stage? and (3) why is such participation not inconsistent with or prejudicial to the rights of the Defence?

1. The personal interests of the applicants are affected by the appeals

16. The Office submits that the issues on which leave to appeal has been granted (the "Issues under Appeal") affect the personal interests of the applicants whose status is pending before Trial Chamber I. Indeed, the Appeals Chamber's decision in the instant case could have an impact on how applications for participation will be dealt with, as well as on the granting of the status of victim itself. Their interests are all the more affected that both the Prosecution and the Defense applied for suspensive effect of the appeals in accordance with article 82(3) of the Rome Statute and rule 156(5) of the Rules of Procedure and Evidence.²⁰

17. Indeed, 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

No. ICC-01/04-01/06-1225, 14 March 2008 and the "Decision on the Presiding Judge of the Appeals Chamber in the appeal of the Mr. Thomas Lubanga Dyilo pursuant to the decision of Trial Chamber I of 26 February 2008" (Appeals Chamber), No. ICC-01/04-01/06-1226, 14 March 2008.

¹⁹ See the "Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' participation of 18 January 2008", *supra* note 10.

²⁰ See the "Prosecution's Document in Support of Appeal against Trial Chamber I's 18 January 2008 Decision on Victims' Participation", *supra* note 12, par. 8, p. 5. See also the "Acte d'appel de la Défense relativement à la Décision du 18 janvier 2008 de la Chambre de première instance I concernant la participation des victimes", *supra* note 12, par. 52, p. 14.

their views and concerns when their personal interests are affected. Hence, it does not differentiate between applicants and victims authorised to participate in proceedings before the Court, and thus covers these two categories of persons when their personal interests are affected. This interpretation is supported by the broad definition of the term "victim" as contained in rule 85 of the Rules of Procedure and Evidence. Indeed, this definition does not contain any restriction on participation and only associates the term "victim" with the commission of a crime within the jurisdiction of the Court.

18. The Issues under appeal relate in general to the interpretation of article 68(3) of the Rome Statute, together with that of rule 89 of the Rules of Procedure and Evidence. The Office submits that, since these provisions directly concern the applicants, they should therefore be able to express their views and concerns on the matter.

19. Moreover, the Office submits that the applicants' interest in participating in the said interlocutory appeals is obvious to the extent that the appeals lodged by the Prosecution and the Defence clearly seek to restrict, in a substantial way, the possibility for Trial Chamber I to grant the status of victims to applicants which is not purported in the least by the founding texts of the Court. Moreover, if the Appeals Chamber were to allow the Prosecution's and the Defence's appeals, the applicants would, as a result, be deprived of very significant procedural rights flowing from the status which could be granted to them.

20. Lastly, the Office draws the Appeals Chamber's attention to rule 93 of the Rules of Procedure and Evidence, under which it may "*seek the views of other victims* [on any issue]." In light of the very broad formulation of this rule, the Office submits that the Chamber may invite any victim, within the broad meaning of this term as used in article 68(3) of the Rome Statute, to express his or her views on the Issues under Appeal.

2. The participation of the applicants in the appeals is appropriate

21. The Office submits that the participation of the applicants in the interlocutory appeals lodged by the Prosecution and the Defence is appropriate insofar as the outcome of this proceeding is likely to directly affect the handling of their applications for participation in the proceedings before the Court, as well as the procedural rights attached to the status of victim.

22. The participation of the applicants in the interlocutory appeals lodged by the Prosecution and the Defence is also appropriate insofar as it gives effect to the rights under article 68(3) of the Rome Statute. Moreover, this participation fits precisely the requirements of a fair trial, insofar as it would enable the interests of the applicants – the persons primarily affected by the outcome of these appeals – to be taken into account objectively and in depth.

23. Furthermore, the Office recalls the possibility for the Prosecutor and the Defence to file a response “to any document filed by any participant in the case” pursuant to regulation 24(1) of the Regulations of the Court. Hence, the appropriateness of the participation of the applicants in the said interlocutory appeals would, *de facto*, be guaranteed by the limits eventually established by a ruling of the Chamber.

3. The participation of the applicants in the appeals is not inconsistent with or prejudicial to the rights of the Defence

24. As the Office has already noted, the term “victim” must be given a broad meaning.²¹

25. Firstly, the Office is of the opinion that the protection of the rights of the Defence is a fundamental principle, without which the integrity of criminal

²¹ See *supra*, para. 17.

proceedings could not be safeguarded and justice could not be done.

26. The Office notes that the participation of victims in proceedings before the Court is not, in itself, liable to affect the rights of the Defence. Indeed, as put forward by the Single Judge of Pre-Trial Chamber I,

*"the fact that one or several natural or legal persons may be entitled to the procedural status of victim is not, per se, prejudicial to the Defence."*²²

27. Moreover, Judge Blattmann emphasised that:

*"[B]oth the rights of victims and that of the accused are amply protected under the Statute. Further, many major legal systems are able to incorporate victims' participation into their proceedings while ensuring the rights of the accused to both a fair and expeditious proceeding."*²³

28. In this respect, the Office also notes that the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted by the United Nations General Assembly on 29 November 1985 spells out the principle of victims' access to justice and their right to fair treatment.²⁴

29. As already stated, the participation of the applicants in the said interlocutory appeals would be neither inconsistent with nor prejudicial to the rights of the Defence, since under regulation 24(1) of the Regulations of the Court the Defence may respond to any document that would be filed by the applicants as a result of their participation in the proceedings.²⁵

²² See 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), No. ICC-02/05-110, 3 December 2007, par. 4, p. 6.

²³ See the "Separate and Dissenting Opinion of Judge René Blattmann in the Decision on victims' participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, para. 26, p. 58. See also *ibid.*, footnote 127.

²⁴ See the United Nations General Assembly resolution 40/34 of 29 November 1985, available at: <http://www2.ohchr.org/english/law/victims.htm>, principles 4 to 7.

²⁵ See *supra*, para. 23.

30. Moreover, the Office submits that the participation of victims is an integral part of the concept of a fair and impartial trial, since it is expressly embodied in the founding texts of the Court. Furthermore, this right granted to victims is consistent with international human rights law and is recognised in many national systems. As a consequence, the equilibrium within criminal trials would not be affected by the participation of applicants. On the contrary, taking their interests into account constitutes one of the contributory factors in balancing these proceedings, especially because the proceedings concern a restriction of the fundamental rights of the applicants themselves.²⁶ Hence, the participation of the applicants in the interlocutory appeals would not prejudice the interests of the Defence.²⁷

Consequently, the Office submits that the personal interests of the applicants are affected by the interlocutory appeals to which this request relates, that the presentation of their views and concerns appears appropriate at this stage, and that such participation is neither inconsistent with nor prejudicial to the rights of the Defence.

Accordingly, the Principal Counsel of the Office respectfully requests the Appeals Chamber to allow the applicants she represents to participate in the interlocutory appeals lodged by the Prosecution and the Defence against the Decision of 18 January 2008.

The Principal Counsel also requests the Appeals Chamber to set a time limit for the

²⁶ See the "Response of the Legal Representatives of Victims to the Prosecution's Application and the OPCD's Request for Leave to Appeal the 'Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0027/07 to a/003/07 and a/0035/07 to a/0038/07'", ICC-02/05-116, 17 December 2007, para. 30, pp. 9-10.

²⁷ See DONAT-CATTIN (D.), "Article 68", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Nomos Verl. Ges., Baden-Baden, 1999, pp. 876-877: "The victims' genuine wish is that the truth be established and the case solved. [...] The second [concept of due process for defendant] is fair trial, which is comprehensive of, but not limited to, the respect for all the rights of the suspect/accused; it means equitable justice for defendants, victims and international society as such, the foundation of all procedural norms of the Statute."

filing of the response to the documents in support of the appeals filed by the Prosecution and the Defence on 10 March 2008, and to grant her leave to participate in the hearings, if any, that will be held by the Chamber to consider the said appeals.

Last but not least, the Principal Counsel, respectfully ask the Appeals Chamber to be heard on the requests for suspensive effect of the appeals put forward by both the Prosecution and the Defence.²⁸ Indeed, these requests have a direct impact on the personal interests of the applicants represented.



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Office of Public Counsel for the Victims

Dated this 18th day of March 2008

At The Hague

The Netherlands

²⁸ See *supra* note 20.