

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/04**

Date: **28 February 2008**

THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Request of the Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and a/0071/06 for Leave to Participate in the Appeal Taken by the OPCD and the Prosecutor on 7 January 2008 and Authorised by Pre-Trial Chamber I on 6 February 2008

Counsel for the Victims

Emmanuel Daoud

Patrick Baudoin

1. Noting the *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*¹ of 17 January 2006 by which Pre-Trial Chamber I of the International Criminal Court (“the Court”) granted victim status to Applicants VPRS 1 to VPRS 6 in the situation in the Democratic Republic of the Congo (“DRC”);
2. Noting the decision entitled *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/0250/06² of 24 December 2007, by which the Single Judge granted victim status to Applicant a/0071/06 in the situation in the DRC (“the Decision”);
3. Noting the “Prosecution’s Application for Leave to Appeal the Single Judge’s 24 December 2007 ‘Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo’” (“the Prosecution’s application for leave to appeal”), filed by the Prosecutor on 7 January 2008;³
4. Noting the “Request for Leave to Appeal the ‘Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/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,

¹ ICC-01/04-101.

² ICC-01/04-423.

³ ICC-01/04-428.

a/0237/06 à a/0239/06 à a/0241/06 à a/0250/06''' ("the OPCD's application for leave to appeal"), filed by the Office of Public Counsel for the Defence (OPCD) on 7 January 2008;⁴

5. Noting the observations entitled "*Observations des représentants légaux de a/0071/06 suite à la requête du Procureur et de l'OPCD sollicitant l'autorisation d'interjeter appel de la décision de la chambre préliminaire I sur les demandes de participation à la procédure en République Démocratique du Congo de a/0071/06*,"⁵ filed by the Legal Representatives of Victim a/0071/06 on 11 January 2008;

6. Noting the *Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation*⁶ issued by Pre-Trial Chamber I ("the Chamber") on 6 February 2008 granting the Prosecutor's application of 7 January 2008 on the following point:

whether a 'procedural status of victim', within the terms of the Decision, can be granted independent of any finding by the Chamber that the requirements of article 68(3) and rule 89 are satisfied, and without addressing and providing for a definition of the personal interests, or following the steps required by the Appeals Chamber's jurisprudence.

and the OPCD's request on the following points:

- (i) whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation;
- (ii) whether, in order to establish moral harm on the basis of harm suffered by a second person, it is necessary to adduce some level of proof concerning the identity of the second person and the applicant's relationship with this person;

⁴ ICC-01/04-429.

⁵ ICC-01/04-436.

⁶ ICC-01/04-444.

7. Noting the observations of the OPCD, “OPCD Appeal Brief on 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,*”⁷ dated 18 February 2008;

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

9. Noting the judgment rendered by the Appeals Chamber on 13 February 2007 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*”⁹ setting forth the conditions for the participation of victims in interlocutory appeals under article 82(1)(b) of the *Rome Statute*;

10. Noting the Appeals Chamber’s “*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*” of 13 February 2008;¹⁰

11. Noting the “Request of the OPCV Acting as Legal Representative of the Victims Authorised to Participate in the Proceedings in the Situation in the Democratic Republic of the Congo for Participation in the Interlocutory Appeal Filed by the OPCD on

⁷ ICC-01/04-455.

⁸ ICC-01/04-01/06-769.

⁹ ICC-01/04-01/06-824.

¹⁰ ICC-01/04-450.

4 February 2008,"¹¹ dated 21 February 2008;

12. Considering 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*;

13. **Considering that the Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and a/0071/06 ("the Victims") consider that the victims fulfil the criteria arising from the jurisprudence of the Court to obtain leave to participate in the appeal because their personal interests are affected by this appeal, their participation is appropriate, and their participation at this stage is not prejudicial to the rights of the Defence or to a fair and impartial trial;**

14. **That accordingly, the Legal Representatives of Victims VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and a/0071/06 hereby wish to seek from the Appeals Chamber leave to participate in the appeal taken by the Prosecutor and the OPCD on 7 January 2008, and authorised by Pre-Trial Chamber I on 6 February 2008.**

15. As a preliminary matter, it is appropriate to recall the conditions set forth by the Appeals Chamber in its above-mentioned decisions of 13 February 2007 and 13 February 2008 on the admissibility of applications for participation of victims in appeals taken before the said Chamber.

a) The need to submit an application

Pursuant to article 68(3) of the Statute,

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings

¹¹ ICC-01/04-466.

determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

The Appeals Chamber noted that the requirement under article 68(3) that victim participation shall be permitted "at stages of the proceedings determined to be appropriate by the Court" mandates the Appeals Chamber to determine whether the participation of victims in a particular interlocutory appeal is appropriate.¹²

Thus, the Appeals Chamber held that in order for victims to participate in a particular interlocutory appeal, they must file an application seeking leave to this end with the Appeals Chamber,¹³ which will determine whether their personal interests are affected by the interlocutory appeal and whether it is appropriate for them to participate at that stage of the proceedings.¹⁴

b) The substance of the application

The Chamber pointed out 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**, as well as why it is "appropriate" for the Appeals Chamber to permit their views and concerns to be presented. Furthermore, while 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", any submissions from victims on these important rights would necessarily be considered by the Appeals Chamber in making its

¹² ICC-01/04-01/06-824, paras. 40 and 43.

¹³ ICC-01/04-01/06-824, para. 38.

¹⁴ ICC-01/04-01/06-824, para. 45.

determination.”¹⁵

These requirements as to the substance of victims’ applications for participation in interlocutory appeals were reiterated by the Appeals Chamber in its decision of 13 February 2008:

Such applications shall include a statement in relation to whether and how the personal interests of the victims concerned are affected by this appeal, indicating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings and why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence.¹⁶

However, if the Pre-Trial Chamber has granted victim status to victims, the application for participation in an interlocutory appeal need not specifically address whether or not the person participating is “a victim” within the meaning of rule 85 of the *Rules of Procedure and Evidence* in the absence of any appeal relating to that matter.¹⁷

The Appeals Chamber merely determines whether their interests are affected by the interlocutory appeal, whether their participation at this stage of the proceedings is appropriate, and whether a presentation of their views and concerns is prejudicial to or inconsistent with the rights of the Defence.

16. With this background, it would be appropriate at this juncture to state how the application for participation in the appeals proceedings filed by VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and a/0071/06 fulfils the criteria reiterated by the Appeals Chamber in its above-mentioned decisions of 13 February 2007 and 13 February 2008.

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¹⁵ ICC-01/04-01/06-824, para. 44.

¹⁶ ICC-01/04-450, p. 3.

¹⁷ ICC-01/04-01/06-824, para. 45.

I. The personal interests of Victims VPRS 1 to 6 and a/0071/06 are affected by the particular interlocutory appeal

17. 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 2008:¹⁸

the 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;.

18. In the instant case, the appeal taken by the Prosecutor relates to:

whether a 'procedural status of victim', within the terms of the Decision, can be granted independent of any finding by the Chamber that the requirements of article 68(3) and rule 89 are satisfied, and without addressing and providing for a definition of the personal interests, or following the steps required by the Appeals Chamber's jurisprudence;

19. Furthermore, the appeal taken by the OPCD relates to:

- (i) whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation;
- (ii) whether, in order to establish moral harm on the basis of harm suffered by a second person, it is necessary to adduce some level of proof concerning the identity of the second person and the applicant's relationship with this person;

20. The Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and a/0071/06 are of the opinion that the issues raised by the Prosecutor and the OPCD directly affect the personal interests of the victims which they represent insofar as the determination of the Appeals Chamber could affect their status and the rights granted

¹⁸ ICC-01/04-438.

to them at the situation stage and the pre-trial stages of the case.

21. In light of the nature of the issues raised by the appeal proceedings, which affect the fundamental prerogatives of the victims' rights, the Appeals Chamber cannot but find that the personal interests of Victims VPRS 1 to 6 and a/0071/06 are directly affected.

II. The participation of Victims VPRS 1 to 6 and a/0071/06 is appropriate

22. The participation of Victims VPRS 1 to 6 and a/0071/06 in the appeal taken by the OPCD and the Prosecutor against Pre-Trial Chamber I's decision of 24 December 2007 would enable them to defend their interests and exercise their rights at a stage in the proceedings that is likely to affect the rights and benefits of their status as victims at the situation stage in the DRC, which status was granted by the decisions of the Pre-Trial Chamber of 17 January 2006 and 24 December 2007.

23. In accordance with the jurisprudence of the Court, and in particular Pre-Trial Chamber I's decision of 3 December 2007, "*the stage of investigation into a situation ... [is an] appropriate stage of the proceedings for victim participation as provided for in article 68(3) of the Statute.*"¹⁹

24. As the OPCV argued in its brief of 21 February 2008, the Legal Representatives of Victims VPRS 1 to 6 and a/0071/06 consider that "the participation of victims in any interlocutory appeal against decisions made at the investigation stage must also be considered to be appropriate. Indeed, the Victims should, *a fortiori*, be authorised to participate in an interlocutory appeal arising from a decision rendered by the Pre-Trial Chamber in connection with the same situation, especially because the instant

¹⁹ ICC-01/04-417, para. 2

interlocutory appeal concerns an issue which directly affects their interests.”²⁰

25. As already pointed out, Pre-Trial Chamber I granted victim status to Victims VPRS 1 to 6 and a/0071/06 at the stage of the situation in the DRC in its decisions of 17 January 2006 and 24 December 2007.

26. Accordingly, the Appeals Chamber cannot but find that the participation of Victims VPRS 1 to 6 and a/0071/06 is wholly appropriate at this stage of the proceedings.

III. The participation of the victims in the interlocutory appeal is not prejudicial to the rights of the Defence or to a fair and impartial trial

27. The third criterion established by the jurisprudence of the Court, and in particular, the Appeals Chamber’s judgment of 13 February 2007, is to determine whether the participation of victims in the particular interlocutory appeal will not be prejudicial to the rights of the Defence or to a fair and impartial trial.

28. In its decision ICC-02/05 of 3 December 2007²¹ in the situation in Darfur, Pre-Trial Chamber I had already had occasion to rule on the matter, holding that:

Pursuant to rule 86(2)(e) of the *Regulations of the Court*:

in situation and case proceedings before the Pre-Trial Chamber (...), 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 Defense.

29. Furthermore, it is worth noting that the application for participation of Victims VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and a/0071/06 in the interlocutory

²⁰ ICC-01/04-466, para. 20.

²¹ *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.*

appeal does not address matters pertaining to the guilt or innocence of a suspect or accused person, or to the credibility of prosecution witnesses.

30. Accordingly, Pre-Trial Chamber I cannot but find that the victims' application for participation is not prejudicial to the rights of the Defence.

31. Furthermore, the Appeals Chamber held that:

Once an application to participate [in appeals proceedings] has been received, the Prosecutor and the Defence will thereafter be entitled to reply to the application within a time limit to be set by the Appeals Chamber, in line with the provisions of rule 89(1) of the *Rules of Procedure and Evidence*.²²

32. In the instant case, the participation of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and a/0071/06 in the particular interlocutory appeal proceedings is neither prejudicial to nor inconsistent with the rights of the Defence, insofar as they do not affect the procedural rights granted to the Defence. Indeed, the Prosecution and the Defence have the opportunity to file a response to any submission of views and concerns by the victims. Accordingly, the participation of the victims in the particular interlocutory appeal proceedings cannot offend the principle of fairness of the proceedings.

33. The opportunity for victims to submit observations – which will then be subject to adversarial proceedings – especially on a point whose determination directly affects their personal interests, is, on the contrary, simply an accurate expression of the fair trial rules enshrined in the Statute of the Court.

34. Accordingly, the Legal Representatives of the victims request the Appeals Chamber to grant leave to VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and

²² ICC-01/04-01/06-821, para. 47.

a/0071/06 to participate in the appeals proceedings at issue.

Emmanuel Daoud

/signed/

Patrick Baudoin

/signed/

Dated this 28 February 2008

Paris