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Date: **14 April 2008**

THE PRESIDENCY

Before: **Judge Philippe Kirsch, President**
Judge Akua Kuenyehia, First Vice-President
Judge René Blattmann, Second Vice-President

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Request for Review of the Registrar's Decision of 28 March 2008 on the Application for Legal Assistance Paid by the Court Filed by Mr Keta on behalf 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* under Regulation 85(3) of the *Regulations of the Court*

Source: **Mr Joseph KETA, Legal Representative of Victims**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
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Ms Fatou Bensouda, Deputy Prosecutor

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Legal Representatives of Victims
Mr Joseph KETA

The Office of Public Counsel for Victims
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Registrar
Mr Bruno Cathala

Victims Participation and Reparations Section
Ms Fiona Mckay

I. PROCEDURAL BACKGROUND

1. On 24 December 2007, Pre-Trial Chamber I rendered its *Decision on the Applications for Participation in the proceedings Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06,*[1] granting the status of victims authorised to participate in the proceedings at the investigation stage of the situation in the DRC to, *inter alia,* Applicants 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 ("the Applicants").

2. On 7 January 2008, the Victims Participation and Reparations Section sent a letter entitled "*Processus, étendue et fonctionnement de l'aide judiciaire devant la Cour*" ["Process, scope and functioning of legal assistance before the Court"],[2] in which it explained that "[TRANSLATION] since the Court has not yet produced a standard application form for legal assistance specific to victims, it is possible […] to submit to the Registry […] all information which would enable the Registry to establish indigence".[3]

3. On 31 January 2008, the Legal Representative submitted a "*Déclaration d'indigence et demande d'aide judiciaire*" ["Statement of indigence and application for legal assistance"], in which he explained that "[TRANSLATION] the situation in Ituri makes it completely impossible to provide the information required in the 'Applicants' Financial Information Form'"; however, he provided relevant information concerning the 17 applicants, and drew the Registry's attention to the

[1] ICC-01/04-423-tENG, ICC-01/04-423-Corr-tENG.
[2] Reference VPRS-LA-2007-031.
[3] *Ibid.* The letter provides a list of headings.

fact that "[TRANSLATION] [i]t is unnecessary to remind you of the current situation in Ituri, where all of the victims concerned reside. The acts of violence perpetrated there and the ensuing destruction of the social, economic and family fabric have resulted in the population living in extreme material destitution. The region has been the scene of massive population displacement, making living conditions highly insecure, and many victims have seen their homes destroyed and their belongings pillaged. Furthermore, according to figures from various international organisations, the DRC remains one of the countries worst hit by poverty. Thus, the World Bank estimated that in 2006 the average per capita income in the DRC was 130 US dollars per annum, in other words, well below an average of 1 dollar per person per day. Such poverty has an even greater impact on the residents of regions which suffered acts of violence."

4. On 26 March 2008, the Registrar issued his *Decision on the Indigence 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*,[4] in which he decided that the Applicants be provisionally deemed to be wholly indigent under regulation 85(1) of the *Regulations of the Court*, pending the outcome of the investigation into their property and assets.

5. On 28 March 2008, the Registrar issued his *Registrar's Decision on the application for legal assistance paid by the Court filed by Mr Joseph Keta on behalf 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*, in which he indicated that legal assistance is provisional and subject to the Registry having received:

- a statement signed by the Applicants certifying on their honour the correctness of the information provided, irrevocably authorising the Registrar of the International Criminal Court to take any action required

[4] ICC-01/04-490-tENG.

without having to consult them and undertaking to inform the Registrar of any change in their financial situation; and

- additional information concerning the Applicants' current financial situation.

6. The Decision of 28 March 2008 concerns an application for legal assistance paid by the Court pursuant to regulation 133, but imposes unmotivated requirements for the assessment of Applicants' means and determination of their indigence pursuant to regulations 113 and 132; assessment and determination of Applicants' indigence were addressed in the Decision of 26 March 2008. Although the Decision of 26 March 2008 does give partial reasons for the two above-mentioned requirements, these are not included in the Decision's Disposition.

7. In his Decision of 28 March 2008, the Registrar informed the Legal Representative that he could seek review of his Decision by the Presidency within 15 days of its notification, in accordance with regulation 85(3) of the *Regulations of the Court*.

8. In this request, the Legal Representative seeks to submit the Registrar's Decision of 28 March 2008 to review, with a view to having the requirements imposed by the Decision revoked. The Legal Representative proposes that such review should consider the implications of maintaining such requirements, and the possibility of interpreting regulations 113 and 130 to 136 by applying a presumption of indigence in the victims' favour. This request proposes that the entire application procedure for legal assistance be reviewed, including the interpretation of the regulations governing the determination of indigence, in view of the possible repercussions of the Disposition of the Decision of 28 March 2008 on the procedure as a whole.

II. SUBMISSIONS ON THE DETERMINATION OF INDIGENCE AND LEGAL ASSISTANCE

9. Regulation 132 of the *Regulations of the Registry* provides that the means of applicants for legal assistance may be investigated, and that forms are to be approved and used for this purpose. While a form for suspects and accused persons does exist, no form specific to victims has been established.[5]

10. It is respectfully submitted that an interpretation of this provision based on the presumption of indigence would assist the Court in effectively administering legal assistance, and would also constitute a constructive interpretation of the measures for victims provided for under article 68(1) of the *Rome Statute,* which states: "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. […] These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

11. Currently, the Court applies a quasi-presumption of indigence. Victims who have been granted the procedural status of victim by the Court must provide additional information on their means, either by completing the 12-page "Financial Information Form" or by submitting information on a number of specific items, accompanied by a statement certifying on their honour the correctness thereof. On the basis of the Financial Information Form or the information provided, the Registrar provisionally decides whether or not a victim shall be considered indigent pending the outcome of a financial investigation by the Court, thus applying a quasi-presumption.

[5] For recommendations for a possible form, see: http://www.vrwg.org/Publications/01/VRWG%20paper%20on%20indigence%20forms%20FINAL.pdf.

12. From my clients' point of view, it should be perfectly possible to raise a presumption of indigence from the information already provided in the "Standard Application Form to Participate in Proceedings before the International Criminal Court", on the basis of which they were granted victim status.

13. In this respect, the Legal Representative submits that there are a number of arguments to support the principle of a full and comprehensive application by the Court of a presumption of indigence in favour of victims applying for legal assistance:

a. The cut-off point for the calculation of indigence set by the Court is such that victims would have to be exceptionally rich not to be deemed indigent;

b. Recourse to a principle of presumption by other courts and mass claims bodies has facilitated the management of applications submitted thereto, while also helping the victims;

c. Studies of the situation of victims of mass crimes show that the humanitarian context in which they live *de facto* implies indigence; similarly, those studies highlight an individual process of impoverishment on account of the harm they have suffered, irrespective of their immediate environment;

d. Recourse to a presumption of indigence is neither prejudicial to nor inconsistent with the rights of the accused and a fair and impartial trial.

a) The cut-off point for the calculation of indigence set by the Court is such that victims would have to be exceptionally rich not to be deemed indigent

14. According to the *Report on the principles and criteria for the determination of indigence for the purposes of legal aid*,[6] drafted at the Sixth Session of the Assembly of States Parties, it would seem that, for victims not to be considered indigent, they

[6] ICC-ASP/6/INF.1 (31 May 2007).

would already need to have very significant and comfortable means at their disposal, whether in terms of assets or of expenditure.

15. The assets and expenditure which may be excluded from the calculation of indigence include the person's residence and furnishings and a motor vehicle, as well as a substantial daily allowance for each dependant of the person claiming indigence; these allowances are based on the Daily Subsistence Allowance (DSA) at the rate set by the United Nations for each country/city.

16. In the case of the Democratic Republic of the Congo, the DSA set by the ICC is approximately $135 *per day*. The UNDP has calculated the average *annual* income in the DRC to be $714.[7] Thus, if victims are able to deduct $135 per day for each dependant while still being deemed indigent, that would mean that they would have at least, and be able to spend *each day* for each dependant, a fifth of the current average *annual* income in the DRC.

17. Considering the current cut-off point for the calculation of indigence, it is highly improbable that a victim who has been affected by a situation of conflict and suffered from crimes committed in the context of that conflict would possess such assets and income.

b) Recourse to presumptions by other courts and mass claims bodies has facilitated the management of applications, while also helping victims

Mass claims bodies

18. Use of the principle of presumption in mass reparation claims proceedings has helped the various legal and administrative entities to overcome two major challenges in the management of claims; namely, the lack of physical evidence

[7] UNDP, 2007-8 Report, GDP per capita: http://hdr.undp.org/en/media/hdr_20072008_tables.pdf.

concerning victims' assets or the losses they have suffered, and the large volume of information to be processed.[8] The ICC is now also facing these same challenges.

19. Organisations handling applications for reparations, such as the International Commission on Holocaust Era Insurance Claims, the German Forced Labour Compensation Programme,[9] the Claims Resolution Tribunal for Dormant Accounts, in Zurich, Switzerland (CRT I & II)[10] or indeed the United Nations Claims Commission (UNCC),[11] have all established and applied principles of presumption in order to fill the void created by the lack of evidence.

20. For example, the Property Loss Programme of the German Forced Labour Compensation Programme[12] required a causal link to be established between the loss of property and the involvement of a German company. The property claims commission established a principle of presumption in relation to the causal link in the form of a geographical and temporal framework: if a loss was incurred in a particular time period on territory occupied by the Reich, it was then presumed to result from the involvement of a German company.

[8] Niebergall, Hieke (2007), "How to overcome evidential weaknesses in reparations processes, in Reparations for victims of genocide, crimes against humanity and war crimes: Systems in place and systems in the making", 2007.
http://www.redress.org/reports/ReparationsVictimsGenocideSept07.pdf.

[9] The German Forced Labour Compensation Programme was administered by the International Organisation for Migration (IOM); see: http://www.compensation-for-forced-labour.org/.

[10] For more information about the structure and proceedings of the Tribunal, see S. Wade, "Mass Claims Arbitration: The Experience of the Claims Resolution Tribunal for Dormant Accounts in Switzerland", *Mealey's International Arbitration Report*, vol. 14, No.11.

[11] The United Nations Compensation Commission (UNCC) was created as a subsidiary organ of the UN Security Council to process claims and pay compensation for losses and damage suffered as a result of Iraq's invasion and occupation of Kuwait in August 1990; see Report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687, 2 May 1991, UN Doc. S/22559, available at: http://www2.unog.ch/uncc/resolutio/res22559.pdf; for general information about the UNCC, see Veijo Heiskanen, *Commission d'indemnisation des Nations Unies, Recueil des Cours*, Vol. 296, 2002, p. 259; Mojtaba Kazazi, "An Overview of Evidence before the United Nations Compensation Commission", in: *International Law Forum* 1999, p. 219; N. Wühler, "The United Nations Compensation Commission", in: Albrecht Randelzhofer, Christian Tomuschat (eds.), *State responsibility and the individual: reparation in instances of grave violations of human rights*, The Hague et. al. 1999, p. 213.

[12] See: http://www.compensation-for-forced-labour.org/.

21. The principle of presumption was also applied to "small departure claims" at the UNCC. Applicants were merely required to provide documentation concerning the damage and the date of their departure from Iraq or Kuwait, and over a particular period a causal link was presumed between their departure and the occupation of Kuwait.

Use of the principle of presumption in cases of ill-treatment or torture

22. While the previous examples involve the use of presumptions to facilitate management of applications for damages or compensation, a presumption principle has also been used to help victims of serious crimes to establish criminal responsibility.

23. The European Court of Human Rights (ECHR), for example, has established a rebuttable presumption of ill-treatment in cases where detainees have suffered injuries or lesions, and makes it incumbent on the State to provide a "plausible explanation" for such injuries.[13]

24. The Commission on Illegal Detention and Torture in Chile has taken an innovative approach to the problem of evidence. For example, it is presumed that persons who have been detained in specific detention centres for a given amount of time have been tortured.[14] Such a pro-active approach has prevented victims from suffering further humiliation and double victimization due to the slowness, complexity and costs associated with proceedings, and has also helped bodies to manage the information received.

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[13] *Yilmaz v. Turkey* [2007] ECHR 17721/02 (5 June 2007). Following this decision, Cyprus amended its Torture, Cruel, Inhuman or Degrading Treatment or Punishment (Ratification) Law, providing for the presumption of ill-treatment if it is ascertained by medical examination that the person detained bears external injuries which were not present at the time of arrest. See: Conclusions and Recommendations of the Committee Against Torture, Cyprus, 29th Session, 18 December 2002, CAT/C/CR/29/1.

[14] Comisión Nacional sobre Prisión Política y Tortura. "Prisión Política y Tortura, Período a Período, Informe de la Comisión Nacional sobre Prisión Política y Tortura (Informe Valech), Santiago, Chile (28 November, 2004): 225-251. Available at (4-20-2005): http://www.gobiernodechile.cl/upload_archivos/capitulo4.pdf

The presumption that applicants cannot afford legal fees

25. In some jurisdictions, Norway in particular, the victims of serious crimes may participate in proceedings and are allocated a public legal representative. Eligibility for a public legal representative depends on the nature of the crime and not on the victim's means, since it is presumed that the applicant cannot afford the fees associated with legal proceedings.[15]

c) Studies of the situation of victims of mass crimes show that the humanitarian context in which they live *de facto* implies indigence; similarly, those studies highlight an individual process of impoverishment on account of the harm they have suffered, irrespective of their immediate environment

26. Victims of genocide, crimes against humanity and war crimes are usually to be found living in the context of a serious humanitarian situation caused by violence. This humanitarian context is notably marked by population displacement and destruction of homes, stocks of provisions and livestock. Acts of violence and insecurity hinder the development of income-generating activities, and opportunities for people to find the means to support themselves are therefore limited. Moreover, the frequent use of mines during conflict generally makes it impossible for rural populations to cultivate the land, even though this activity is their main source of income. Similarly, commercial activity in both urban and rural environments is substantially reduced as a result of asset and income loss and the collapse of markets.

27. The humanitarian context is also characterised by the vulnerability of the population as a result of poor health conditions and the emergence of diseases which are specific to emergency situations. Medical and other personal facilities have usually been destroyed during the conflict and access to humanitarian agencies is restricted.[16]

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[15] Norway Criminal Procedure Act, 22 May 1981, No. 25 (as amended).

[16] According to USAID, an estimated 5.4 million have died in the DRC since 1998. The majority of these deaths are related to the indirect consequences of fighting such as disease, malnutrition,

28. In addition to the general deterioration in living conditions in areas affected by violence, victims of serious crimes also suffer the personal effects of victimisation. According to numerous studies on the situation of victims of crimes against humanity and torture, such persons are particularly affected by difficult living conditions as a result of the harm suffered, even when they are not in an emergency situation, as is demonstrated by the case of torture victims in Chile.

29. The causes of impoverishment include physical effects such as disfigurement and sight loss as a result of head injuries, amputations, mutilations, back problems, functional problems with organs such as the kidneys and genitals, severe headaches and other physical disabilities as a result of mutilation; all of which constitute an obstacle to gainful employment.[17] In the African context, AIDS and genital fistulae as a consequence of sexual violence are also present. As a result of the crimes suffered and their consequences, victims are often rejected by their communities and marginalised. The disabilities from which they suffer often result in social exclusion and make it impossible for them to find jobs.[18]

30. Moreover, in addition to the physical effects, the victims also suffer from psychological trauma, which plays an even more significant part in relation to their reintegration into the community. They suffer *inter alia* from severe depression, post-traumatic stress disorders, panic attacks, flashbacks, nightmares, insomnia, headaches, schizophrenia, etc. These forms of trauma are common among victims of

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pregnancy complications caused by the cumulative effects of population displacement and difficulties in accessing health services, water and appropriate sanitation.
http://www.reliefweb.int/rw/RWB.NSF/db900SID/EDIS-7DJQG6?OpenDocument

[17] Op.cit. Chapter 8, National Report of the Commission on Political Imprisonment and Torture, Chile, on the impact of detention and torture on victims of Chile.
http://www.gobiernodechile.cl/upload_archivos/capitulo8.pdf

[18] See *inter alia*, the 2004 USAID report, "Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of Congo" and the 2005 Human Rights Watch report, "Seeking Justice for Sexual Violence in Congo".

serious crimes and are real obstacles to their reintegration into society, and especially to their becoming economically active again.[19]

31. Lastly, the community's perception of the victims is also a powerful factor in their exclusion and impoverishment. In addition to personal problems, the victims of certain categories of crimes such as torture or rape are often marginalised, making it even harder for them to find work. Victims of torture in Chile, for example, speak of their despair at not being able to return to employment as a result of being marginalised by society. They explain how this problem has not only affected their own lives but also those of their children and families.[20] The stigmatisation and exclusion suffered particularly by victims of sexual violence and former child soldiers is well documented.

32. It is accordingly submitted that, if one of these consequences is present, a presumption of indigence may be inferred. The harm suffered by the victims and its impact can be readily identified from the Form of Application for Participation, in which the victims have already stated their profession, the loss they have suffered and the physical and psychological consequences of their victimisation. Other factors may be considered in light of their place of residence, statements in the Form such as "no medical certificate of injury due to lack of money", or even the fact that the person has signed by placing a thumbprint on the form, showing that he or she is illiterate.

33. It is thus suggested that it would be more appropriate and effective to deal with victims' needs in a manner entirely different from those of accused persons, and to infer a presumption of indigence in favour of victims based on the information they have already provided in their Forms of Application for Participation.

[19] Op.cit. Chapter 8, National Report of the Commission on Political Imprisonment and Torture, Chile, on the impact of detention and torture on victims of Chile.
[20] Ibid.

d) Recourse to a presumption of indigence is neither prejudicial to nor inconsistent with the rights of the accused and a fair and impartial trial

34. The Legal Representative accepts that the protection of the rights of the defence is a fundamental principle, in the absence of which the integrity of criminal proceedings cannot be guaranteed and justice rendered.

35. However, it is submitted that a full and comprehensive application of the presumption of indigence in favour of the victims would be neither prejudicial to nor inconsistent with the rights of the defence or the requirements of a fair and impartial trial, since a principle of quasi-presumption is already applied, and a full interpretation would lighten the procedure and the administrative burden with respect to the management of requests for legal assistance, a process in which the Defence plays no part.

36. It is moreover submitted that, under regulation 24(1) of the *Regulations of the Court*, the Defence may file a response to this submission, thus ensuring that the rights of the Defence receive full consideration.

III. IMPACT ON THE APPLICANTS OF THE DECISIONS FOR WHICH REVIEW IS SOUGHT

37. The Registrar's Decision of 28 March 2008, which makes the determination of victims' indigence, as well as the processing and monitoring of applications for legal assistance, contingent on the submission of a statement signed by applicants on their honour, and on the provision of additional information on their financial situation, has the effect of delaying their effective representation for the following reasons.

38. The submission of statements and additional information necessitates a special mission, the cost of which currently remains prohibitive in the absence of legal assistance.

39. During the Legal Representative's most recent mission in February, it was impossible, for various reasons, to reach the distant and relatively inaccessible Territory where this group of victims lives. Although a further mission is being planned, the conditions on the ground mean that it cannot be known with any certainty when it will be possible to reach the Territory.

40. The safety of the victims, of the Legal Representative and of intermediaries in the field is vital, and any planned mission is contingent on periodic assessments of the security situation. Various sections of the Registry have sought on several occasions to travel to the areas north of Bunia, and to date all planned missions have had to be cancelled as result of the prevailing insecurity. From simply reading the weekly reports of the UN Office for the Coordination of Humanitarian Affairs (UN-OCHA) on the humanitarian situation in Orientale Province it is apparent that the situation in Ituri remains volatile. The most recent OCHA reports, particularly that of 25 to 31 March 2008, report that "[TRANSLATION] [v]iolence is paralysing the town of Bunia: high tension currently prevails in Bunia following two separate incidents…" and that outside the town "[TRANSLATION] [a] new armed group is being formed in Djugu Territory ". MONUC reports that, according to FARDC sources, a certain Mr Masiya, one of Peter Karim's former commanders, is reportedly recruiting dissident militia members from the FNI to form a new militia in the area surrounding Libi in Djugu Territory…"[21]

41. It should furthermore be noted that the Office of the Prosecutor and the Registry have rightly put into practice a strict policy on contact with victims in order to ensure the latter's safety. The principle developed and implemented by the Victims and Witnesses Division is to restrict contact with victims to what is strictly necessary, by taking certain precautions, especially in regard to meetings with individuals who are "strangers" to the local community, which could provoke

[21] http://www.reliefweb.int/rw/RWB.NSF/db900SID/LSGZ-7DBD7V?OpenDocument .

comments or arouse suspicion.[22] However, the Registry's decision of 28 March 2008 means that the Legal Representative will have to organise a mission, given the limited capacities of local intermediaries, and to undertake "direct" contacts with the victims, even though it is not "strictly necessary" at this stage in the proceedings, since, for the reasons put forward in this request, each of the applicants can be readily presumed indigent.

42. For these reasons, the Legal Representative seeks to have the Decision reviewed, and requests that the determination of indigence and the granting of legal assistance should not be contingent on the requirements imposed by the Registrar.

IV. REQUEST FOR REVIEW OF THE REGISTRY'S DECISION

43. The Legal Representative respectfully requests the Presidency to review the Registry's Decision of 28 March 2008 on indigence and legal assistance by setting aside the Registrar's requirements, in particular the fact that the decisions are contingent on the submission of:

- a statement signed by the applicants certifying on their honour the correctness of the information provided, irrevocably authorising the Registrar of the International Criminal Court to take any action required without having to consult them, and undertaking to inform the Registrar of any change in their financial situation;

- additional information on the applicants' current financial situation.

44. Lastly, in the interests of the victims, in the spirit of articles 68(1) and 68(3) of the *Rome Statute*, and in the interests of judicial efficiency, it is respectfully requested that the Presidency order the Registry to develop procedures for the implementation of regulation 132 of the *Regulations of the Registry* which are efficient and effective, by

[22] Bi-annual NGO-ICC/Registry meetings, September 2007 – Presentation on "best practices" by Mr Simo Vaatainen (Head of Division) and Mr Iwan Waltenburg.

applying a full interpretation of the presumption of indigence in favour of the victims.

Mr Joseph KETA
[signed]
The Legal Representative of the Victim, Mr Joseph KETA

Dated this 14 April 2008

At Brussels, Belgium