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No.: **ICC-01/04**
Date: **8 July 2008**

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Observations of the Legal Representative of Victims a/0016/06, a/0018/06, /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 the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007

Source: Me Joseph Keta, Legal Representative

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RELEVANT PROCEDURAL HISTORY

1. Noting the “*Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo ...*” dated 24 December 2007¹, whereby the Single Judge granted victim status in the Situation to, inter alia, a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, and a/0228/06 (“the Victims”).

2. Noting the “*Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation ...*” dated 7 December 2007,² by which the Single Judge denied the 28 and 31 August 2007 requests of the OPCD, and the Request for leave to appeal filed by OPCD on 13 December 2007;³ and noting the decision of Pre-Trial Chamber I (PTC I) dated 23 January 2008 which granted the OPCD’s request of 13 December 2007 on three issues.⁴

3. Noting the applications of OTP⁵ and OPCD⁶ for leave to appeal the Decision of 24 December 2007, and the decision of the Single Judge of 6 February 2008 granting leave on three issues.⁷

4. Noting the “*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*

¹ ICC-01/04-423-Corr-tENG.

² ICC-01/04-417.

³ ICC-01/04-419.

⁴ ICC-01/04-438.

⁵ ICC-01/04-428.

⁶ ICC-01/04-429.

⁷ ICC-01/04-444.

PTC I on 23 January 2008,”⁸ on 21 February 2008 and noting the “Application of the Legal Representatives of Victims a/0016/06, /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 for Leave to Participate in the Appeal filed by the OPCD and the OTP against the 24 December 2007 Decision” filed on 10 March 2008.⁹

5. Noting the “Decision on Victim Participation in the appeal of the OPCD against PTC I’s Decision of 7 December 2007 and in the appeals of the OTP and OPCD against PTC I’s Decision of 24 December 2007”, issued by the Appeal’s Chamber on 30th June 2008,¹⁰ in which, *inter alia*, the 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 and a/0228/06 were granted the right to participate in these appeals for the purpose of presenting their (consolidated) views and concerns respecting their personal interests in the issues raised on appeal.

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

7. Accordingly, the Victims hereby present the following views and concerns:

A. Preliminary observation: discretion and standard of review in appeal

8. Article 68(3) grants discretion to the relevant Chamber to determine the stages of proceedings which are appropriate for a victim to participate.¹¹

⁸ ICC-01/04-468.

⁹ ICC-01/04-486.

¹⁰ ICC-01/04-503 OA4 OA5 OA6.

¹¹ E.g., “determined to be appropriate by the Court” and “where the Court considers it appropriate”.

9. If the Chamber errs in a discretionary matter, this would not necessarily invalidate its decision, if there has been no prejudice to the Defence.¹² The test for determining whether the Chamber erred in the exercise of discretion is whether it “misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion”.¹³ The question is whether the exercise of the discretion was “reasonably open” to the Chamber,¹⁴ whether it “abused its discretion”,¹⁵ “erred and exceeded its discretion”,¹⁶ committed a “discernible error” in the exercise of its discretion,¹⁷ or whether the Chamber’s decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Chamber must have failed to exercise its discretion properly.¹⁸

10. In this case, the PTC had discretion to decide whether it was appropriate to grant victims the right to participate in the investigation. For the reasons set out below, it is submitted that the Single Judge did not abuse or exceed her discretion and, in any case, that there was no prejudice to the Defence. Consequently, it is submitted that the impugned decisions should not be overturned.

¹² Prosecutor v. Delalic, Mucic, Delic and Esad Landzo (Čelebići, case), Case No. IT-96-21-A, Appeal Judgment, 20 February 2001, paras. 630–639; Prosecutor v. Krstić, Case No. IT-98-33-A, Appeal Judgment, 19 April 2004, paras. 187–188.

¹³ Prosecutor v. Norman, Fofana and Kondewa, SCSL 04-14-T-688, Decision on interlocutory appeals against Trial Chamber decision refusing to subpoena the President of Sierra Leone, 11 September 2006, para. 6; Prosecutor v. Milošević, Case IT-02-54-AR73, Reasons For Refusal of Leave to Appeal for decision to impose time limit, 16 May 2002, para. 5; Prosecutor v. Karemera, Case No. ICTR-98-44-AR73, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 9.

¹⁴ Čelebići, case, *supra.*, paras. 274–275 (see also para. 292, finding that the decision of the Trial Chamber not to exercise its discretion to grant an application was “open” to the Trial Chamber).

¹⁵ *Ibid.*, para. 533.

¹⁶ *Ibid.*, para. 533.

¹⁷ Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-A, Appeal Judgment, 3 May 2006, paras. 257–259; Prosecutor v. Međaković, Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Appeal against Decision on Referral under Rule 11bis, para. 10.

¹⁸ Compare Međaković, *ibid.*, para. 10.

B. Consolidated observations on the issues raised in the appeals

I. Article 68(3) 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. [Issue 1 on Appeal, decision dated 23rd January 2008]

11. The Single Judge determined correctly, it is submitted, that a “stage of proceeding” could include the investigation or pre-trial stage. PTC I¹⁹ already held that the Statute provides for victims participation at the investigation stage and at pre-trial stage, in conformity with the rules of interpretation of the Vienna Convention on Treaties,²⁰ and using terminological, contextual and teleological arguments.²¹

12. This interpretation is consistent with international standards, which acknowledge the relevance of victim participation throughout proceedings,²² and with the jurisprudence of regional courts. The Inter-American Court held that fair

¹⁹ ICC-01/04-101 of 17 January 2006, application for leave to appeal denied.

²⁰ Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, United Nations, *Treaty Series*, vol. 1155, p. 331.

²¹ ICC-01/04-101, paras 23-54.

²² The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires that “the views and concerns of victims be presented and considered at appropriate stages of the proceedings where their personal interests are affected.” [General Assembly resolution 40/34 of 29 November 1985, para 6(b)] whereas the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, recognise that victims’ right to a remedy and reparations include, *inter alia* “equal and effective access to justice [Adopted by General Assembly resolution 60/147 of 16 December 2005 at para. 11(a)]. Other treaties and standards referring specifically to victims’ right to participate in proceedings include: Art. 6(2)(b) of the *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children*, which provides that victims shall be assisted in presenting their views and concerns to be considered at “appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence;” the *Resolution on Children as victims and perpetrators*, Adopted by the 9th UN Congress on the Prevention of Crime and the Treatment of Offenders [U.N. Doc. A/CONF.169/16, 12 May 1995], which recommends that “8. ... States, in a manner consistent with the procedural rules of national law and the administration of justice, with regard to children, should enable children to participate, as appropriate, in criminal justice proceedings, including the investigative stage and throughout the trial and post-trial process period, to be heard and given information about their status and any proceedings that might subsequently take place;” the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; G.A. Res. 9842, U.N. GAOR, 55th Sess., Annex, Agenda Item 114(c), U.N. Doc. A/RES/55/89 (2000), which prescribes that victims and their legal representatives have rights to be informed of and to have access to any hearing and to any relevant information about the investigation, including the right to present other evidence; and the *European Union Council Framework Decision to improve victims’ standing in criminal proceedings*, which urges Member States to ensure that victims have a real and appropriate role in its criminal legal system; safeguard the possibility for victims to be heard during the proceedings and to supply evidence; afford victims, who have the status of parties or witnesses, reimbursement of expenses incurred in their participation, R(2000)19 (2000).

trial includes victims' relatives' right to judicial guarantees, and an investigation for the purpose of identifying and, when appropriate, prosecuting and punishing those responsible.²³ The European Court of Human Rights held that "there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. In all cases, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."²⁴ It held that fair trial "includes the right of the parties to the trial to submit any observations that they consider relevant..., this right can only be seen to be effective if the observations are actually "heard".²⁵

13. This interpretation is consistent with national law. Countries that allow civil party participation enable participation throughout the proceedings.²⁶ Even without such a system, common law states regularly recognise victims' right to a review to challenge the decision not to prosecute or to dismiss a case, initiate criminal proceedings when the state refuses to prosecute, or participate as private or subsidiary prosecutors during the investigation and trial. Also, some jurisdictions recognise the right of victims to be notified of the defendant's release and to be present and testify at detention hearings.²⁷

14. Recently, a Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia recognised the right of victims who had civil party status to participate in the proceedings, including at investigation stage.²⁸

15. This interpretation does not contradict the jurisprudence of the Appeals Chamber, which has never found that the investigation or pre-trial are not stages of proceedings.

²³ Blake, Case No. 36, Inter-Am. C.H.R., paras 96–97 (1998).

²⁴ Hugh Jordan, 1020 Eur. Ct. H.R., para. 109; McKerr, 34 Eur. H.R. Rep., para. 115; Kelly, 2004 Eur. Ct. H.R., para. 98; Shanaghan, 1814 Eur. Ct. H.R., para. 92.

²⁵ Perez v France *Application no. 47287/99*, 12 February 2004, para. 80.

²⁶ See Stahn et al., *supra* at pp. 219, 220 and 229, fn 43; C. Jorda and J. Hemptinne, "The Status and Role of the Victim" in A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court*, 2002.

²⁷ See, for example, s. 518(1)(d.2) of the Canadian Criminal Code.

²⁸ Prosecutor v. Chea Nuon, Case No 002/19-09-2007-ECCC/OCIJ (PTC01), 20 March 2008, para. 36.

II. It is possible to grant victims a general right to participate; victim participation is not 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 [Issue 2 on Appeal, decision dated 6th February 2008]

16. Article 68(3) requires there to be an examination of the victims' personal interests, and of appropriateness,²⁹ before a decision granting the right to participate, and it is submitted that the Single Judge made such an assessment.

17. The Single Judge correctly found that this assessment could be made in relation to the investigation or pre-trial stage, as opposed to for each and every act of proceeding.³⁰ This is consistent with Article 68(3) which refers to "stages of proceedings," and, it is submitted, with the Appeals Chamber jurisprudence.³¹ This personal interest has also been taken into consideration by the Single Judge when determining the set of procedural rights.³²

18. In her decision of 7 December 2007, the Single Judge, found that

"the right [of victims] to present their views and concerns .. stems from the fact that the victims' personal interest are affected because it is at this stage that the persons allegedly responsible for the crimes from which they suffered must be identified as a first step towards their indictment."³³

19. Consequently, she only recognised a personal interest to participate in the investigation to those victims who suffered harm as a result of crimes committed *"dans les paramètres temporels, géographiques et le cas échéant, personnels définissant la*

²⁹ The question of the appropriateness is addressed below at paras 21-27.

³⁰ ICC-01/04-444, p. 8.

³¹ ICC-01/04-01/06-925, para. 27.

³² ICC-01/04-417, para. 3 (b) : « The assessment of the personal interest of the victims in *specific* proceedings carried out during these two stages of proceedings *is only to be conducted* for the determination of the specific set of procedural rights attached to the procedural status of victims."; ICC-01/04-101-tEng-Corr, para. 64 (emphasis added).

³³ ICC01/04-417, para. 3, fn 18. See also, ICC-01704-423, para. 5, particular fn 96.

situation concernée”,³⁴ and not to all victims within the meaning of Rule 85 as suggested by the Appellants.

20. Judge Song recognised that the Statute acknowledges victims’ personal interests to receive reparations and that justice is done.³⁵ Consequently, the Victims submit that the Single Judge did not err in law on this point, and correctly examined in each application, whether the victims’ personal interests were affected, in examining, notably, if the crimes for which the victim allegedly suffered, were committed within the situation in question.³⁶

III. 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 [Issue 2 on Appeal, decision 23rd January 2008; Issue 1 on Appeal, decision of 6th February 2008]³⁷

21. The Single Judge did not err or exceed her discretion in holding that it was appropriate to grant the right to participate generally during the investigation.³⁸ Indeed “victims interests may differ from the interest of the Prosecutor and the interest of states in proceedings...It is important for the balance of proceedings that the views of victims are properly taken into consideration from an early stage.”³⁹

22. The impugned decisions conform to Article 68 (3), Rules 89(1)⁴⁰ and 89(4) and Regulation 86. Examining participation in relation to each act of procedure would be

³⁴ ICC-01/04-423, para. 4. This has been recognised by the OTP : ICC-01/04-454, para. 27, fn 43.

³⁵ ICC-01/04/706-925, para. 12. Judge Song notes that “the interest that justice is done...also qualifies as a personal interest in the meaning of Article 68(3) of the Statute. The victim of a crime has a particular interest that the person allegedly responsible for his or her suffering is brought to justice, this interest goes beyond the general interest that any member of society may have in seeing offenders held accountable” ICC-01/04-01/06-925, paras. 13, 14-16.

³⁶ See in particular ICC-01/04-423; see also ICC-01/04-101-tEN-corr, para. 64.

³⁷ The section below also answers the first issue raised by the Prosecution for which leave to appeal was granted in the 6 February Decision, ICC-01/04-444.

³⁸ ICC-01/04-423, para. 16; ICC-01/04-101-tEN-Corr, paras 56-60.

³⁹ Stahn et al., *supra.*, at pp. 221, quoting W.A. Shabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2004), pp. 172-173.

⁴⁰ The two-steps approach can be inferred and is not excluded from last sentence “...the Chamber shall then specify and the proceedings *and* the manner in which participation is considered appropriate...” (emphasis

so cumbersome that it would delay the proceedings in a manner which cannot have been envisaged by the drafters.

23. The Court must interpret the rights in the ICC Statute in a practical and effective manner, not theoretical or illusory.⁴¹ Victims may wish to provide views or concerns at various times during the investigation, pre-trial and other phases. Their participation rights would be rendered nugatory if each time they wished to participate, their procedural status and rights linked to that status would be considered afresh. Given that victims are primarily located in rural areas far from legal representatives, it would be difficult, time-consuming and raise security concerns for the latter to consult personally with victims in advance of each time they sought to submit views or concerns.

24. Also, it would be unworkable to consult with victims within the set time for filings, making it impossible for such filings to be considered. If Chambers extended deadlines to enable legal representatives to consult with clients prior to each filing, this would reduce judicial economy and contribute to delays in proceedings.

25. In its 17 January 2006 decision, PTC I held that, “participation of victims during the stage of investigation of a situation does not *per se* jeopardise the appearance of integrity and objectivity of the investigation, nor is it inherently inconsistent with basic considerations of efficiency and security.”⁴² It held: “the core consideration, when it comes to determining the adverse impact on the investigation alleged by the Office of the Prosecutor, is the extent of the victim’s participation and not his or her participation as such.”⁴³ When a Chamber allows victim participation

added). In any case, Rules are subordinate to the provisions of the Statute, unlike Prosecutor contends at ICC-01/04-454, para. 44.

⁴¹ See, the European Court in *Artico v Italy*, (1981) 3 EHRR 1.

⁴² ICC-01-04-101, para.57.

⁴³ ICC-01-04-101, para.58; See also para. 59 “giving persons with the status of victims the right to present in general terms their views and concerns regarding the investigation of a situation and to submit material to the Pre-Trial Chamber cannot have an adverse impact on the investigation.”

in specific activities, “it will take such measures as are necessary...to preserve the integrity of the proceedings”.⁴⁴

26. Furthermore, victims participation does not contradict defence rights. The European and Inter-American Courts confirmed this,⁴⁵ and recognise the right of victim participation during investigations.⁴⁶ The arguments on this point,⁴⁷ especially by OPCD, are based on a misunderstanding of the role of victims in criminal proceedings. Information given by victims in their application cannot prove guilt,⁴⁸ as it is not evidence. If a participating victim sought to present evidence of guilt, the Chamber would consider this specifically. Consequently, the rules on disclosure of exculpatory evidence are irrelevant to victim applications and rules on witnesses cannot be transposed to participating victims. The contrary would illegally put victims at risk.

27. The use by the Pre-trial Chamber of a phase-based determination as to the criteria of personal interests and appropriateness is therefore correct, in light of the Statute, Rules and Regulations, and given the need to make victim participation practical and effective.⁴⁹ Finally, it does not adversely impact on the rights of the accused or a fair and impartial trial, as it has no impact upon the presumption of innocence or the culpability of the accused.

⁴⁴ ICC-01-04-101, para. 60.

⁴⁵ E.g. *Perez v France Application no. 47287/99*, 12 February 2004, ¶ 68.

⁴⁶ See Jurisprudence quoted above fn 23-25.

⁴⁷ ICC-01/04-440, paras 23, 41-48; ICC-01/04-455, paras. 35, 37, 43; ICC-01/04-452, para. 22.

⁴⁸ ICC-01/04-417, para. 6.

⁴⁹ ICC-01/04-438, p. 6.

IV. To establish moral harm on the basis of harm suffered by a second person, its not necessary to adduce a higher level of proof concerning the identity of the second person and the applicant's relationship with the person [Issue 3 on Appeal, decision of 6 Feb. 2008]

28. It is submitted that, the standard of proof applied by the Single Judge to the applications is correct.⁵⁰ The PTC, in its decision of 7th December 2007 determined that rule 89 does not require the Chamber to provide, or to order the applicants to provide, information extrinsic to the applications themselves.⁵¹ On a clear reading of Rule 89, the Defence is limited to replying to the written application made by the Applicants; requesting extrinsic information beyond what is required in Rule 89 and Regulation 86 goes beyond what is provided for in Rule 89.⁵²

29. When a person applies to participate on the basis of his/her own moral harm based on the death of a second person, he/she is applying as a 'victim' and not on behalf of a victim as, for example, a guardian would on behalf of a child. As has been held for applications to participate during the situation phase, it is sufficient for victims to supply:

(i) the identity of the applicant; (ii) the date of the crime(s); (iii) the location of the crime(s); (iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court; (v) proof of identity; (vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim; (vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship; (viii) a signature or thumb-print of the Applicant on the document⁵³

30. Given the context of crimes in the Situation, it may be impossible for applicants to provide proof such as death certificates to evidence harm against the primary victim. The Court should consider the reality of what victims can

⁵⁰ ICC-01/04-417 at para. 16; ICC-01/04-101-tEn-Corr, para. 99.

⁵¹ Ibid.

⁵² ICC-01/04-374, para. 35. See also ICC-02/05-110, para. 14.

⁵³ ICC-01/04-374, para. 12. See also ICC-02/05-110, para. 16.

realistically provide, in the affected areas. Requiring additional proof would be infeasible and impractical in the circumstances, given the lack of evidence at applicants' disposition.

31. Should the Appeals' Chamber nonetheless consider that additional evidence of the primary victim's identity and/or his or her relationship to the secondary victim is required, it is respectfully submitted that in the circumstances, the Appeal's Chamber could require the written testimony of two witnesses.

32. In light of the above and the provisions of the Statute and the Rules of Procedure and evidence, the Victims respectfully request the Appeals Chamber to reject the appeals here at stake and to confirm the impugned decisions.

All of which is respectfully submitted.

Me Joseph KETA



Dated this 8 July 2008

At London/Brussels