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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 OPCV as Legal Representative of Victims a/0007/06, a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06 and a/0209/06 in Response to the Interlocutory Appeals Filed by the Prosecution and the OPCD against the Decisions of 7 and 24 December 2007

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL BACKGROUND

1. On 7 December 2007, the Single Judge of Pre-Trial Chamber I rendered a *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*¹ (“the Decision of 7 December 2007”), whereby she rejected two requests of the Office of Public Counsel for the Defence (“the OPCD”) filed on 28 and 31 August 2007 which sought to obtain notification of certain documents.²
2. On 13 December 2007, the OPCD filed a “Request for leave to appeal the “Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor””.³
3. On 24 December 2007, the Single Judge of Pre-Trial Chamber I rendered a *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*⁴ (“The Decision of 24 December 2007”), whereby she granted the

¹ 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-01/04-417, 7 December 2007.

² See the “Request for Single Judge to order the Prosecutor to disclose exculpatory materials”, No. ICC-01/04-378 and No. ICC-01/04-378-Conf-Exp-AnxA and AnxB, 28 August 2007; and the “Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e)”, No. ICC-01/04-381-Conf and No. ICC-01/04-381-Conf-AnxA, AnxB and AnxC, 31 August 2007.

³ See the “Request for leave to appeal the “Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor””, No. ICC-01/04-419, 13 December 2007.

⁴ See *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,*

status of victim participating in the proceedings in the situation in the Democratic Republic of the Congo (“the DRC”) to, *inter alia*, a/0007/06, a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06 and a/0209/06 and ordered the Registrar to appoint the Office of Public Counsel for Victims (“the OPCV” or “the Office”) “as legal representative for the purpose of providing help and assistance to those persons who have been granted victim status until they choose a legal representative or the Court assigns one”.⁵

4. On 7 January 2008, the Prosecution and the OPCD submitted applications for leave to appeal against the Decision of 24 December 2007.⁶
5. On 23 January 2008, the Single Judge of Pre-Trial Chamber I rendered a *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”*⁷ (“the Decision of 23 January 2008”), whereby she granted the OPCD leave to appeal the Decision of 7 December 2007 in relation to the following issue (“the First Issue Under Appeal”):

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 (Pre-Trial Chamber I), No. ICC-01/04-423, 24 December 2007. See also the Corrigendum to that Decision (Pre-Trial Chamber I), No. ICC-01/04-423-Corr-tENG, 31 January 2008.

⁵ *Ibid.*, p. 58.

⁶ See 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*””, No. ICC-01/04-428 and No. ICC-01/04-428-Anx1, 7 January 2008; and 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, a/0237/06 à a/0239/06 à a/0241/06 à a/0250/06*””, No. ICC-01/04-429, 7 January 2008.

⁷ See the *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”* (Pre-Trial Chamber I), No. ICC-01/04-438, 23 January 2008.

*“whether article 68(3) of the Statute can be interpreted as providing for a ‘procedural status of victim’ at the investigation stage of a situation and the pre-trial stage of a case; and (i) if so, whether rule 89 of the Rules and regulation 86 of the Regulations provide for an application process which only aims to grant the procedural status of victim and is thus distinct and separate from the determination of the procedural rights attached to such status; and what are the specific procedural features of the application process? or (ii) if not, how applications for participation at the investigation stage of a situation and the pre-trial stage of a case must be dealt with”.*⁸

6. On 4 February 2008, the OPCD filed an “OPCD appeal brief on the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor””.⁹
7. On 6 February 2008, the Single Judge of Pre-Trial Chamber I rendered her decision on the requests for leave to appeal the Decision of 24 December 2007¹⁰ (“the Decision of 6 February 2008 »), whereby she granted the Prosecution leave to appeal the Decision of 24 December 2007 in relation to the following issue (“the Second Issue Under Appeal”):

*“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.”*¹¹

⁸ *Ibid.*, p. 8.

⁹ See the “OPCD appeal brief on the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”” dated 7 December 2007, No. ICC-01/04-440, 4 February 2008.

¹⁰ See 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” (Pre-Trial Chamber I), No. ICC-01/04-444, 6 February 2008.

¹¹ *Ibid.*, p. 6.

8. By this same decision, the Single Judge also granted the OPCD leave to appeal the Decision of 24 December 2007 in relation to the two following issues:

*“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”*¹² (“The Third Issue Under Appeal”); and

*“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”*¹³ (“The Fourth Issue Under Appeal”).

9. On 13 February 2008, the Appeals Chamber issued a *Decision of the Appeals Chamber on the OPCV’s request for clarification and the legal representatives’ request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor*,¹⁴ whereby it ordered, *inter alia*, that the applications for participation in the OPCD appeal against the Decision of 7 December 2007 be filed no later than 21 February 2008.¹⁵
10. On 15 February 2008, the Prosecution filed the “Prosecution’s Response to OPCD’s Appeal Brief on the ‘Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor’”.¹⁶

¹² *Ibid.*, pp. 6 and 15.

¹³ *Ibid.*, pp. 7 and 15.

¹⁴ See the *Decision of the Appeals Chamber on the OPCV’s request for clarification and the legal representatives’ request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor* (Appeals Chamber), No. ICC-01/04-450, 13 February 2008.

¹⁵ *Ibid.*, p. 3.

¹⁶ See the “Prosecution’s Response to OPCD’s Appeal Brief on the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor””, No. ICC-01/04-452, 15 February 2008.

11. On 18 February 2008, the Prosecution¹⁷ and the OPCD¹⁸ filed their documents in support of the appeal against the Decision of 24 December 2007.
12. On 21 February 2008, the Office filed two requests for participation in the OPCD appeal against the Decision of 7 December 2007; one as the legal representative of the applicants in relation to the situation in the DRC,¹⁹ and the other as the legal representative of the victims authorized to participate in the proceedings relating to the situation in the DRC.²⁰
13. On 28 February 2008, the Office filed two requests for participation in the Prosecution and OPCD appeals against the Decision of 24 December 2007; one as the legal representative of the applicants in the situation in the DRC,²¹ and the other as the legal representative of the victims authorized to participate in the proceedings concerning the situation in the DRC.²²

¹⁷ See the "Prosecution's Document in Support of Appeal against the 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings", No. ICC-01/04-454, 18 février 2008.

¹⁸ See the "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""", No. ICC-01/04-455, 18 February 2008.

¹⁹ See the "Request of the OPCV Acting as Legal Representative of the Applicants in the Situation in the Democratic Republic of the Congo for Participation in the Interlocutory Appeal Filed by the OPCD on 4 February 2008", No. ICC-01/04-467-tENG, 21 February 2008.

²⁰ See 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 4 February 2008", No. ICC-01/04-466-tENG, 21 February 2008.

²¹ See the "Request of the OPCV Acting as Legal Representative of the Applicants in the Situation in the Democratic Republic of the Congo for Participation in the Interlocutory Appeals Filed by the Prosecution and the OPCD against the Decision of 24 December 2007", No. ICC-01/04-477-tENG, 28 February 2008.

²² See 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 Appeals Filed by the Prosecution and the OPCD against the Decision of 24 December 2007", No. ICC-01/04-476-tENG, 28 February 2008.

14. On 29 February 2008, the Prosecution²³ on the one hand, and the OPCD²⁴ on the other, each filed observations in response to their respective documents filed in support of their appeals.
15. On 30 June 2008, the Appeals Chamber rendered its decision on the victims' participation in the OPCD appeal against the Decision of 7 December 2007 and in the Prosecution and OPCD appeals against the Decision of 24 December 2007²⁵ ("the Decision of 30 June 2008"), *inter alia* granting the right to participate in the said appeals to victims a/0007/06, a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06 and a/0209/06 and inviting their legal representatives to submit, no later than 8 July 2008, observations on the issues under appeal.²⁶ It further decided that the observations on the three issues in question should be submitted in a consolidated document for which the number of pages was extended by 10 pages more than that usually authorized.²⁷
16. The Principal Counsel of the Office, as legal representative of victims a/0007/06, a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06 and a/0209/06, who are authorized to participate in the OPCD appeal against the Decision of 7 December 2007 and in the Prosecution and OPCD appeals against the Decision of 24 December 2007, respectfully submits to the Appeals Chamber its observations in response to the said appeals.

²³ See the "Prosecution's Response to OPCD Appeal against the 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings", No. ICC-01/04-482, 29 February 2008.

²⁴ See the "OPCD Response to Prosecution's Document in Support of Appeal against the 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings", No. ICC-01/04-479, 29 February 2008.

²⁵ See the "Decision on Victim Participation 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" (Appeals Chamber), No. ICC-01/04-503, 30 June 2008.

²⁶ *Ibid.*, p. 4.

²⁷ *Ibid.*, para. 102, p. 32.

II. PRELIMINARY OBJECTIONS

1. Compliance with the *non ultra petita* rule

17. By way of preliminary point, the Office submits that the First Issue Under Appeal as formulated by the Single Judge in her decision of 23 January 2008 is distinctly broader than that contained in the OPCD application of 13 December 2007.²⁸ Thus the OPCD confined its question as to whether there were two distinct procedures concerning, on the one hand, applications for participation *per se* and on the other, determination of the modalities for participation at the different stages of the proceedings.²⁹ The Single Judge rephrased this issue by expanding on it and extending it to the question of the existence of a procedural status of victim (at the investigation stage in a situation and at the pre-trial stage of a case) and of the existence of separate objectives as between applications for participation and the procedural rights associated with victim status.³⁰

18. According to the general legal rule of *non ultra petita*, as interpreted by doctrine and supported by international jurisprudence, a court does not in principle have the power to decide on or to provide a remedy for the determination of issues which were not brought before it by the parties; a breach of this rule constitutes a sufficient ground for the reversal of the relevant court decision.³¹ The *non ultra*

²⁸ See *supra* footnote 3, para. 22: "The OPCD respectfully submits that the decision of the Honourable Single Judge raises the following issue under the appeal: - whether the application process is a distinct procedure, unrelated to the modalities of participation or the criminal proceedings before the Court, which is not *per se* prejudicial to the Defence; and - whether the Chamber is only obliged to provide the Prosecution and the Defence with copies of the applications, and is thus not obliged to provide or order the applicants to provide information extrinsic to the applications themselves".

²⁹ *Ibid.*, paras. 22, 25-38 and 56.

³⁰ See *supra* footnote 7, p. 8.

³¹ In this respect, see *Boulais v. Hamel* [1968] B.R. 561, 567 (C.A.Q.); *Doyle v. Sparling*, [1987], R.J.Q. 307 (C.A.Q.). According to *Black's Law Dictionary*, "a judgment or decision is said to be '*ultra petita*' when it awards more than was sought or sued for in the petition or summons; and the same thing is said of a sentence when it [does] not conform to its grounds warrants. This affords a good ground for the reversal or reduction of such a decree" (emphasis added). According to doctrine, the concept of *ultra petita* sets out the following rule: "[n]o outside right to bring action", see WAGENBAUR (R.), "How

petita rule was, in particular, developed in the jurisprudence of the Permanent Court of International Justice and the International Court of Justice.³²

19. The Office submits that neither article 82 of the *Rome Statute*, nor any other statutory provision, confers upon the Pre-Trial or Trial Chamber the power to reformulate, expand on or extend *proprio motu* the issue under appeal as raised by the appellant. Having, in her Decision of 23 January 2008, at her own discretion reformulated and expanded on the First Issue Under Appeal as raised by the OPCD the Single Judge of Pre-Trial Chamber I therefore acted *ultra vires* under article 82 of the *Rome Statute* and additionally breached the general legal rule of *non ultra petita*. Furthermore, the Single Judge did not put forward any argument in support of her decision to rephrase the issue raised.
20. Given that the OPCD interlocutory appeal against the Decision of 7 December 2007 is based only on the First Issue Under Appeal, the Office respectfully requests the Appeals Chamber to dismiss this appeal in its entirety as inadmissible. In the alternative, however, the Office will set out below its

to Improve Compliance with European Community Legislation and the Judgments of the European Court of Justice", *Fordham International Law Journal*, February 1996, Fordham University School of Law, p. 6, footnote 41. The concept of *non ultra petita* expresses the following rule: "The Court [is under] duty to properly deal with submissions that are presented to it". In this respect see ORAKHELASHVILI (A.), "The International Court and 'its freedom to select the ground upon which it will base its judgment'", *International and Comparative Law Quarterly*, Vol. 56, January 2007, p. 179.

³² According to the Permanent Court of International Justice ("the PCIJ"), although the Court is able to interpret parties' submissions, it is not for the Court to substitute itself for the parties and to formulate new submissions in their place simply on the basis of facts or arguments advanced (emphasis added), see PCIJ, *Certain German Interests in Polish Upper Silesia*, Merits, 1929 PCIJ Rep., Series A, No. 7, 35. In this respect, see also International Court of Justice ("the ICJ"), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, para. 207. In this respect, see also: GREEN (J.A.), "The Oil Platforms Case: An Error in Judgment?", *Journal of Conflict & Security Law*, Vol. 9, 2004, p. 10, footnote 90. In the *Asylum Case*, the ICJ held that "[i]t is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions", See ICJ, *Asylum Case (Colombia/Peru)*, Judgment, 20 November 1950, ICJ Reports., para. 402 (emphasis added). In the *Arrest Warrant of 11 April 2000* case, although it referred to the *non ultra petita* rule, the ICJ refused to examine the issue of "universal jurisdiction" for the sole reason that this issue had not been raised by the Congolese Government in its submissions. See ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Reports., para. 43. The ICJ's reasoning is supported by scholars. Particularly by SHIHATA: "the non ultra petita rule aims to preserve the consensual nature of the Court's jurisdiction, and provides that the ICJ cannot rule on aspects of the case not raised by the parties", see GREEN (J.A.), *op. cit. supra*, p. 10, footnote 88.

observations on the merits of this appeal, in view of the importance of the aspects it raises.

2. Admissibility of the Fourth Issue Under Appeal

21. Under regulation 64(2) of the *Regulations of the Court*, a document filed in support of an appeal lodged under rule 154 of the *Rules of Procedure and Evidence* shall set out “the grounds of appeal and shall contain the legal and/or factual reasons in support of each ground of appeal”.³³ Where the grounds for an interlocutory appeal have not been specified, the Appeals Chamber has ruled that the “grounds of appeal for appeals brought under article 82(1)(d) of the Statute can include those grounds that are listed at article 81(1)(a) of the Statute, which include errors of law”.³⁴ The grounds for the interlocutory appeal must be stated with reference to the decision which is the subject of the appeal,³⁵ since “this appeal is corrective and limited to the specific grounds of appeal raised.”³⁶

22. The Office submits that the OPCD submissions on the Fourth Issue Under Appeal do not relate to any alleged error of fact or law on the part of the Single Judge in her Decision of 24 December 2007. Yet, such an error is a *sine qua non* condition for the Appeal Chamber’s intervention under article 82(1)(d) of the *Rome Statute*. In its document filed in support of the appeal on 4 February 2008, the OPCD confines itself to making submissions on those requirements which must be satisfied in order to establish the existence of mental harm, without

³³ Under regulation 65(4) of the *Regulations of the Court*, the same requirements also apply to appeals submitted under rule 155 of the *Rules of Procedure and Evidence*.

³⁴ See the *Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’* (Appeals Chamber), No. ICC-01/04-01/06-568, 13 October 2006, para. 19.

³⁵ See Judge Pikis’s dissenting opinion in the *Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’*, *supra* footnote 34, para. 14.

³⁶ 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, para. 71, p. 21.

however showing how these submissions relate to the grounds or the conclusions set out in the Decision of 24 December 2007.³⁷ It follows that, since the OPCD appeal does not seek to invalidate any specific finding in the Decision of 24 December 2007, the Fourth Issue Under Appeal cannot serve as a basis for any appeal to the Appeals Chamber. Furthermore, a reading of the OPCD submissions on this issue reveals that the vast majority of them largely exceed the scope of the Fourth Issue Under Appeal as formulated by the Single Judge³⁸ and must therefore be dismissed by the Appeals Chamber on this ground alone.³⁹

23. Accordingly, the Office respectfully requests the Appeals Chamber to dismiss the OPCD appeal against the Decision of 24 December 2007 as inadmissible with respect to the Fourth Issue Under Appeal. In this regard, the Office observes that its submissions on the Fourth Issue Under Appeal are entirely in line with the corresponding submissions by the Office of the Prosecutor.⁴⁰

III. SPECIFIC OBSERVATIONS ON THE MERITS

24. The Office observes that the First, Second and Third Issues Under Appeal all relate to the possibility of the victims participating in the proceedings before the

³⁷ See *supra* footnote 9, para. 47-58. The OPCD generally explains, *inter alia*, under what conditions victims alleging that they have suffered mental harm should be admitted to participate in the proceedings, whereas it was incumbent on it to show that the Single Judge erred in examining the applications for participation.

³⁸ In particular, the following OPCD arguments greatly exceed the scope of the Fourth Issue Under Appeal: (i) with respect to the nature of harm suffered by the second person, see *supra* footnote 9, paras. 19 and 51 to 52; (ii) with respect to the degree of closeness between the applicant and the second person, see *supra* footnote 9, paras. 51 to 53 and 56; (iii) with respect to the degree of closeness between the applicant and the events at issue, see *supra* footnote 9, paras. 53 to 54; (iv) with respect to the general scope of interpretation of rule 85 of the *Rules of Procedure and Evidence*, see *supra* footnote 9, paras. 50 to 51; and (v) with respect to the standard of proof applicable, see *supra* footnote 9, paras. 48 and 57.

³⁹ According to the jurisprudence of the *ad hoc* tribunals, an appellant's failure to identify an error of fact or error of law with sufficient precision, and to demonstrate how this error affects the impugned decision, must result in the dismissal of the appeal in its entirety. In this respect, see ICTY, *The Prosecutor v. Radoslav Brdjanin*, case IT-99-36-A, Appeals Judgement, 3 April 2007, paras. 17 to 31.

⁴⁰ See *supra* footnote 23, paras. 29 to 37, pp. 9-11.

Court, independently of an assessment of the criteria set out in article 68(3) of the *Rome Statute* and rule 89 of the *Rules of Procedure and Evidence*, and are thus closely linked. Because of this close link between the three issues under appeal, the Office will first give a general outline of the arguments applicable to all three issues and will then proceed to examine each of these three issues in light of the appellants' submissions. The Office recalls that its observations on the merits of the First Issue Under Appeal are submitted only in the alternative, since, as its main submission, it is challenging this issue's admissibility. Furthermore, in view of the manifest inadmissibility of the Fourth Issue Under Appeal, the Office will not submit any observations on that issue's merits.

1. General observations on the First, Second and Third Issues Under Appeal

25. Article 68(3) of the *Rome Statute* states the express right of victims of crimes within the Court's jurisdiction to be heard and accordingly grants them the right to set out their views and concerns "where [their] personal interests [...] are affected."⁴¹ An analysis of the *travaux préparatoires* for all of the articles and rules governing victim participation in proceedings before the Court clearly demonstrates that such participation is not restricted over time or to specific stages in the proceedings and is therefore possible at all stages thereof.⁴²

26. In this regard, it is appropriate to observe that article 15(3) of the *Rome Statute*, taken together with rules 50(1) to 50(3) of the *Rules of Procedure and Evidence*, clearly provides for the right of victims to be heard at the investigation stage of a situation, even before the Pre-Trial Chamber has ruled on the Prosecutor's

⁴¹ This article makes no distinction between the various stages in proceedings before the Court and therefore covers, *inter alia*, the investigation stage of a situation.

⁴² See France's proposals, UN Doc. PCNICC/1999/DP.2, 1 February 1999, p. 7. See also Costa Rica's proposal, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999; and Colombia's proposal, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999. For a review of the *travaux préparatoires*, see BITTI (G.) and FRIMAN (H.), "Participation of Victims in the Proceedings", in LEE (R.S.) (ed.), *The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc. New York, 2001, pp. 456-474.

application to initiate an investigation⁴³. Neither the right of victims to be notified under rule 92(2) of the *Rules of Procedure and Evidence* nor their right to submit applications for participation under regulation 86(6) of the *Regulations of the Court* are subject to a preliminary judicial review. It follows that a narrow interpretation of article 68(3) of the *Rome Statute*, requiring any participation by victims in proceedings before the Court, including at the investigation stage, to be preceded by a prior assessment of the criteria set out in that article, would be in direct contravention of the abovementioned statutory and regulatory provisions.

27. The Office submits that victims' personal interests are generally affected at the investigation stage, since victim participation at this stage can serve to clarify the facts, to punish those responsible for crimes and to seek reparation for the harm suffered. This argument is not only supported by the Court's settled case-law to date,⁴⁴ but is also consistent with the general interest in victim participation in proceedings before the Court, which contributes to establishing the truth⁴⁵ and to justice being done,⁴⁶ of which the interest in receiving

⁴³ Under article 15(3) of the *Rome Statute*, "Victims may make representations to the Pre-Trial Chamber" when the Prosecutor concludes that there is a reasonable basis to proceed with an investigation and once the Prosecutor has submitted a request for authorization therefor to the Pre-Trial Chamber.

⁴⁴ See the *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6* (public redacted version, 22 March 2006) (Pre-Trial Chamber I), No. ICC-01/04-101, 17 January 2006, para. 63. See also the *Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06* (Pre-Trial Chamber II), No. ICC-02/04-101, 10 August 2007, para. 7-10 and 84 and the *Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07* (Pre-Trial Chamber I), No. ICC-02/05-111-Corr, 14 December 2007, para. 1, p. 6. Lastly, see the *Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case* (Pre-Trial Chamber I), No. ICC-01/04-01/07-474, 13 May 2008, paras. 31-44.

⁴⁵ The Office submits that the right of victims to have the truth established is clearly consistent with basic human rights principles such as those identified by the European Court of Human Rights ("the ECHR") and the Inter-American Court of Human Rights ("the IACHR"). This right includes, *inter alia*: (i) an interest in the determination of the facts of the case; (ii) an interest in the identification of those responsible for the crimes; et (iii) an interest in the extent of the perpetrators' liability for the crimes. In this regard, see: IACHR, *Bàmaca-Velasquez v. Guatemala*, judgment of 25 November 2000, Series C, No. 70, para. 201; *Barrios Altos v. Peru*, judgment of 14 March 2001, Series C, No. 75, para. 48; *Masacre de Mapimpán v. Colombia*, judgment of 15 September 2005, Series C, No. 134, para. 297; *Almohacid-Arellano et al v. Chile*, judgment of 26 September 2006, Series C, No. 154, paras. 148 et seq. See also: ECHR, *Hugh Jordan v. United Kingdom*, judgment of 4 May 2001, application No. 24746/94, para. 93. This definition

reparations is just one aspect.⁴⁷ It is moreover corroborated by the broad definition of the term “victim” in rule 85 of the *Rules of Procedure and Evidence*.⁴⁸ Lastly, the interest of victims in participating at the investigation stage is clearly consistent with basic principles of international human rights law.⁴⁹ This participation can be in no way be compared or confused with the prosecution’s

of the right to have the truth established is fully supported by doctrine. In this respect, see NAQVI (Y), “The Right to the Truth in International Law Fact or Fiction”, *ICRC International Review*, No. 88, 2006, pp. 267-268; MENDEZ (J), “The Right to Truth”, in JOYNER (Ch.) (ed.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights’ Proceedings of the Siracuse Conference*, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257 et seq. and AMBOS (K.), *El Marco Juridico de la Justicia de Transición*, Tenus, Bogota, 2008, pp. 42-44.

⁴⁶ The Office submits that the right of victims to justice being done goes beyond an interest in the determination of the facts and the identification of the person allegedly responsible for the crimes. In particular, this right includes an interest in seeing the perpetrator of a crime convicted and punished. Defined this way, this right is clearly consistent with basic human rights principles. In this respect, see: IACHR, *Velasquez-Rodriguez v. Honduras*, judgment of 29 July 1988, Series C, No. 7, paras. 162-166 and 174; *Comunidad Monviana v. Surinam*, judgment of 15 June 2005, Series C, No. 124, para. 204; *Almohacid-Arellano et al v. Chile*, judgment of 26 September 2006, Series C, No. 154, para. 148; *Vargas-Areco v. Paraguay*, judgment of 26 September 2006, Series C, No. 155, paras. 153 et seq.; and *La Cantuta v. Peru*, judgment of 29 November 2006, Series C, No. 162, para. 222. See also ECHR, *Aksoy v. Turkey*, judgment of 18 December 1996, application No. 21987/93, para. 98; *Aydm v. Turkey*, judgment of 25 September 1997, application No. 21178/94, para. 103; *Selcuk and Asker v. Turkey*, judgment of 24 April 1998, application No. 23184/94, para. 96; *Kurt v. Turkey*, judgment of 25 May 1998, application No. 24276/94, para. 140; *Selmouni v. France*, judgment of 28 July 1999, application No. 25803/94, para. 79; and *Hugh Jordan v. United Kingdom*, judgment of 4 May 2001, application No. 24746/94, paras. 16, 23, 157 and 160.

⁴⁷ Trial Chamber I unambiguously held that: “the participation of victims in the proceedings is not limited to an interest in receiving reparations: Article 68(3) of the Statute provides for participation by victims whenever their personal interests are affected, and these are self-evidently not limited to reparations issues”, see the *Decision on victims’ participation* (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, para. 98. According to Van Boven, victims’ interests in justice being done consists of three components: (i) an interest in access to justice; (ii) an interest in knowing the truth (and having it determined); and (iii) an interest in obtaining reparations. In this respect, see the Note prepared by the former Special Rapporteur of the SubCommission, Mr. Theo van Boven, in accordance with paragraph 2 of SubCommission resolution 1996/28, UN Doc. E/CN.4/1997/104, 16 January 1997, pp. 2 to 5. See also the Final report prepared by Mr. Joinet pursuant to SubCommission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997, pp. 3 to 31.

⁴⁸ This definition contains no restrictions on participation and simply links the term “victim” to the commission of a crime within the Court’s jurisdiction.

⁴⁹ The ECHR has, for example, recognised the right of victims and family members to be involved in and participate in investigation procedures. See ECHR, *Kiliç v. Turkey*, judgment of 28 March 2000, application No. 22492/93, paras. 91 to 93. See also *Kaya v. Turkey*, judgment of 19 February 1998, application No. 22729/93, paras. 106 to 107. The same approach was taken by the IACHR. See IACHR, *Blake v. Guatemala*, judgment of 24 January 1998, para. 98, as translated in UN Document E/CN.4/2002/71, para. 29.

role in the investigation procedure⁵⁰ and is unrelated to whether or not the alleged perpetrator of the crime has been identified, arrested, prosecuted or convicted.⁵¹

28. The Office further submits that victim participation at the investigation stage cannot in any circumstances have the slightest effect on the balance, fairness and objectivity of proceedings before the Court.⁵² Taking victims' interests into consideration from the start of proceedings is indeed a basic human rights principle and, furthermore, it is one of the factors which contribute to the balance of the proceedings, particularly since these directly concern the violation of the victims' fundamental rights. Nor can victim participation *per se* in any way prejudice the interests of the alleged perpetrators of crimes within the Court's jurisdiction.⁵³

⁵⁰ In this respect, 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 Verlagsgesellschaft, Baden-Baden, 1999, pp. 885-886: "The victim (or her/his representative) is a 'guardian' of the fairness of the proceedings with respect to her/his personal interest, and not an 'agent' in search of retribution. The possibility of intervention in the most crucial stages of the proceedings may represent an important step in the 'rehabilitation' of the victims" (footnote omitted).

⁵¹ See the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the United Nations General Assembly in its resolution No. 40/34 in its fortieth session, UN Doc. A/RES/40/34, 29 November 1985. In accordance with paragraph 2 of this Declaration, "[a] person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim." This definition, with some amendments, was reproduced in the *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*, adopted by the General Assembly of the United Nations in resolution No. 60/147 in its sixty-fourth plenary session, UN Doc. A/RES/60/147, 16 December 2005.

⁵² This argument is entirely consistent with Pre-Trial Chamber I's jurisprudence according to which "the 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", see the *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, *supra* footnote 44, para. 57, pp. 15-16.

⁵³ 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". The Office further recalls recent international human rights case-law in which victim participation in proceedings *per se* is not likely to adversely affect the fairness of the trial nor the rights

29. Lastly, contrary to the arguments put forward by the Prosecution⁵⁴ and the OPCD,⁵⁵ the Office submits that there is no contradiction between the jurisprudence of Pre-Trial Chamber I and that of the Appeals Chamber in relation to the interpretation of article 68(3) of the *Rome Statute* and rule 85 of the *Rules of Procedure and Evidence* regarding the participation of victims at the investigation stage.⁵⁶ First, the Office has not identified in the decisions of the Appeals Chamber any finding contradicting the findings of Pre-Trial Chamber I in the matter. Secondly, on the contrary, certain arguments of the Appeals Chamber are fully consistent with the findings of Pre-Trial Chamber I. Thirdly and lastly, there is no current jurisprudence of the Appeals Chamber concerning the interpretation and application of rule 85 of the *Rules of Procedure and Evidence* and article 68(3) of the *Rome Statute* in respect of other proceedings, except in the context of the present appeal. Hence, to date there is no relevant jurisprudence of the Appeals Chamber relating specifically to the interpretation of rule 85 of the *Rules of Procedure and Evidence* and article 68(3) of the *Rome Statute* in relation to the participation of victims at the investigation stage.

of the accused: See ECHR, *Verdú Verdú v. Spain*, judgment of 15 February 2007, application No. 43432/02, paras. 20 et seq.

⁵⁴ See *supra*, footnote 17, paras. 6, 14, 16, 20, 29 and 34.

⁵⁵ See *supra*, footnote 18, paras. 12, 33 and 34.

⁵⁶ The Appeals Chamber does appear to acknowledge the existence of a procedural status of victim, regardless of the evaluation of the criteria of article 68(3) of the *Rome Statute*. In particular, the Appeals Chamber ruled that “[i]n circumstances in which the particular victims have already been granted leave to participate in the proceedings before the Pre-Trial Chamber, the application would not need to be a repeat of the original application [...] [T]he question to be addressed is 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”; see *supra*, footnote 36, para. 45. Moreover, the Appeals Chamber ruled that “in circumstances in which victims have already been granted leave to participate in the proceedings before the Pre-Trial Chamber, it would not enquire into their victim status but will proceed to the next stage of its enquiry, namely, the question of whether their personal interests are affected by the interlocutory appeal”; see the *Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber’s I Decision of 6 December 2007* (Appeals Chamber), ICC-02/05-138, 18 June 2008, para. 53.

2. Observations on the First Issue Under Appeal

30. First, the Office observes, as does the Office of the Prosecutor⁵⁷ that the OPCD's appeal against the Decision of 7 December 2007 primarily concerns issues related to the participation of victims at the investigation stage of a situation,⁵⁸ whereas it is formulated in such a way as to apply not only to the investigation stage of a situation, but also to the pre-trial stage of a case. The Office submits that it was granted leave to file observations only in response to the appellants' arguments. Hence, in the context of its observations, the Office does not consider itself in a position to go beyond the boundaries set by the appellant itself.

a. Whether article 68(3) of the Rome Statute can be interpreted as providing for a "procedural status of victim" at the investigation stage of a situation and at the pre-trial stage of a case

31. The BCPD contends that article 68(3) of the *Rome Statute* cannot be interpreted as granting a "procedural status of victim" at the stage of an investigation in a situation or at the pre-trial stage of a case.⁵⁹

32. As regards whether granting a "procedural status of victim" is compatible with the Chamber's obligation under article 68(3) of the *Rome Statute*, the Office submits that, since the Court texts do not provide any specific procedure for the granting of such status, that procedure is fully covered by the provisions of

⁵⁷ See *supra*, footnote 16, para. 11 with footnote 15.

⁵⁸ See *supra*, footnote 9, paras. 5-18 and 34-55.

⁵⁹ In particular, the OPCD submits that: (i) granting applicants the "procedural status of victim" is incompatible with the obligation of the Chamber under article 68(3) of the *Rome Statute* to render a specific determination as to whether the personal interests of a victim are affected, and whether it would be appropriate for such a victim to participate at a specific stage in the proceedings; (ii) it is not appropriate or necessary to grant applicants the procedural status of victim at the investigation stage of the situation in the DRC; (iii) granting applicants the procedural status of victims during the situation phase unduly impacts on the fairness and impartiality of the proceedings; and (iv) granting applicants the procedural status of victim during the situation phase could potentially exceed the competence of the Pre-Trial Chamber, and the Court as a whole. See *supra*, footnote 9.

rules 85 and 89 of the *Rules of Procedure and Evidence*.⁶⁰ The procedure for the granting of procedural status of victim is a phase which precedes that for participation in the proceedings before the Court, and is distinct and separate from the latter procedure. The procedure for the granting of procedural status of victim has a limited purpose, which consists in determining whether the applicants may be granted the status of victims authorised to participate in the relevant proceedings.⁶¹ Hence, unlike the procedure seeking to set the modalities of participation,⁶² the procedure for the granting of procedural status of victim does not require an assessment of the personal interests of the victims.⁶³

33. In light of the sole purpose of the procedure for the granting of procedural status of victim, and contrary to what the OPCD maintains, that procedure is in no way incompatible with the Chamber's obligation regarding the assessment

⁶⁰ A study of the preparatory works relating to all of the articles and rules governing the participation of victims in proceedings before the Court shows that, at the end of the discussions held amongst the delegations, the Preparatory Commission for the International Criminal Court finally abandoned the idea of setting out a specific procedure for granting a procedural status of victim and considered that the procedure was fully covered by the provisions of rules 85 and 89 of the *Rules of Procedure and Evidence*. In this respect, see BITTI, G. and FRIMAN, H., "Participation of Victims in the Proceedings", in LEE, R.S. (ed.), *The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc. New York, 2001, p. 461.

⁶¹ A procedure for granting the procedural status of victim is specifically concerned with whether or not to grant the procedural status of victim to the applicants. Such an assessment must be made only in light of rule 85 of the *Rules of Procedure and Evidence*, which sets out four criteria required for the recognition of victim status, regardless of the stage of the proceedings in which the applicants seek to participate.

⁶² Determination of the personal interests of the victims is linked to the determination of the modalities of participation which may be granted to them by the Chamber. The judge assesses these additional criteria in light not of rule 85 of the *Rules of Procedure and Evidence*, but of article 68(3) of the *Rome Statute*.

⁶³ This conclusion is consistent with previous jurisprudence of Pre-Trial Chamber I, according to which "the assessment of the personal interests of the victims in specific proceedings taking place during the investigation of a situation and the pre-trial stage of a case is only to be conducted for the determination of the specific set of procedural rights attached to the procedural status of victims"; see "Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07" (Pre-Trial Chamber I), ICC-02/05-111-Corr, 14 December 2007, para. 13. The Office further submits that neither the *Rome Statute* nor the *Rules of Procedure and Evidence* provide that the modalities of participation of victims must necessarily be determined in the same decision as the decision on the status of victims itself. The personal interests of victims who are recognised as such under rule 85 of the *Rules of Procedure and Evidence* may be assessed *a posteriori* by the Chamber, without them having to file new applications for participation.

of the criteria set out in article 68(3) of the *Rome Statute*, since that obligation is relevant only in relation to the procedure subsequent to the granting of victim status and, in particular, in relation to the procedure devoted specifically to determining the modalities of participation which may be granted to victims both at the investigation stage of a situation and at the pre-trial stage of a case. This conclusion is entirely consistent with the approach adopted by the Single Judge in her Decision of 7 December 2007,⁶⁴ which the OPCD is appealing.

34. As regards the appropriateness of granting victim status at the investigation stage, the Office firstly reiterates that the personal interests of the victims are affected in general at the investigation stage, and in this respect refers back to its general submissions *supra* in relation to the three Issues Under Appeal. The Office further submits that – contrary what the OPCD asserts – it follows clearly from the consistent jurisprudence of the Court laid down by Pre-Trial Chambers I and II⁶⁵ that victims cannot effectively enjoy a number of significant procedural rights at the investigation stage in a situation until they have been granted the procedural status of victim pursuant to article 68(3) of the *Rome Statute*. Otherwise, the participation of applicants in the proceedings – already extremely limited in theory – risks being reduced to a minimum in practical

⁶⁴ See *supra*, footnote 1, para. 5.

⁶⁵ Pre-Trial Chamber I identified the following principles: (i) the right to participate in the investigation stage includes the possibility for the victims to “present their views and concerns and to file material pertaining to the ongoing investigation”, see *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, *supra*, footnote 44, para. 72; (ii) it is for the Chamber to decide whether persons with victim status in a situation may participate in specific proceedings initiated by the Chamber in accordance with article 56(3) or article 57(3)(c) of the *Rome Statute*, or initiated by the Office of the Prosecutor or by the Defence (*supra*, paras. 73-74); (iii) that victims authorised to participate in the situation “will also be entitled to request the Pre-Trial Chamber, pursuant to article 68 (3) of the Statute, to order specific proceedings. The Chamber will rule on such applications on a case-by-case basis after assessing their impact on the personal interests of the applicants”, and that the “victims, in exercising their procedural rights pursuant to article 68 (3) of the Statute, may, before the Pre-Trial Chamber and in connection with the current investigation: (a) Present their views and concerns; (b) File documents; (c) Request the Pre-Trial Chamber to order specific measures” (*supra*, para. 75 and p. 42). Pre-Trial Chamber II applied identical reasoning in the Situation in Uganda; see *Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06*, *supra*, footnote 44, paras. 89-104.

terms, stripping such participation of its very substance, which would be contrary to what the drafters of the *Rome Statute* intended.

35. As regards the impact of granting the procedural status of victim on the fairness and integrity of the proceedings, the Office refers back to its general considerations *supra* regarding the three Issues Under Appeal. The Office further submits that a determination of victim status can in no way affect the right to a fair and impartial trial or the interests of the other participants, since such determination is confined to an assessment of matters proper to the applicant and has direct consequences only for his or her status. Moreover, under rule 89 of the *Rules of Procedure and Evidence*, the OPCD is entitled – like the Prosecution – to present its observations on every application for participation that is filed, prior to any ruling by the Chamber on whether the applicant satisfies the criteria defining the status of victim in accordance with rule 85 of the *Rules of Procedure and Evidence*.

36. As to whether the granting of victim status is consistent with the limits of the relevant Chamber's jurisdiction, the Office submits that the test of "grounds to believe" at the investigation stage of a situation – just as with the test of "reasonable grounds to believe" at the pre-trial stage of a case as defined by the Court's established jurisprudence – requires only that the applicants demonstrate that the criteria set out in rule 85 of the *Rules of Procedure and Evidence* are satisfied *prima facie*.⁶⁶ Hence, in the context of a procedure for the granting of victim status, the role of a pre-trial chamber "will not consist in assessing the credibility of the statement [of an applicant] or engaging in a process of corroboration *stricto sensu*, but rather in checking whether the victim's account of events is consistent with official reports (particularly United

⁶⁶ As to the test of "grounds to believe" at the investigation stage in a situation, see the *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, *supra*, footnote 44, paras. 66 and 101. Concerning the test of "reasonable grounds to believe" at the pre-trial stage of a case, see the *Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo* (Pre-Trial Chamber I), ICC-01/04-01/06-172-tEN, 29 June 2006, p. 6.

Nations reports)".⁶⁷ Furthermore, for purposes of an assessment of the criteria of rule 85 of the *Rules of Procedural and Evidence*, the Chamber relies – contrary to what the OPCD asserts – not only on the information provided by the applicants but also on any "information otherwise available to the Chamber"⁶⁸ and, in particular, "the arguments presented by ad hoc Defence counsel and the Prosecutor",⁶⁹ as well as "other sources such as official reports of the United Nations".⁷⁰

37. In light of all of these considerations, the Office respectfully submits to the Appeals Chamber, in response to the first part of the First Issue Under Appeal, that article 68(3) of the *Rome Statute* can and must be interpreted as granting a "procedural status of victim" at the investigation stage of a situation and at the pre-trial stage of a case. Such a conclusion is entirely consistent with the approach adopted by the Single Judge in her Decision of 7 December 2007.

b. How should applications for participation at the investigation stage of a situation and at the pre-trial stage of a case be dealt with?

38. First, the Office submits that any mechanism for considering applications for participation at the investigation stage in a situation and at the pre-trial stage in a case must satisfy the requirements of a fair and impartial trial and, hence, must guarantee that victims may effectively exercise the rights granted to them by the Court's basic documents. In this respect, the Office submits that the mechanism for considering applications for participation, as proposed by the OPCD,⁷¹ would not comply with the requirements of a fair and impartial trial,

⁶⁷ See the *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, *supra*, footnote 44, para. 101.

⁶⁸ See the *Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06*, *supra*, footnote 44, para. 15.

⁶⁹ See the *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, *supra*, footnote 44, para. 101.

⁷⁰ *Ibid.*

⁷¹ According to the OPCD, any application for participation at the investigation stage of a situation must be handled outside the context of article 68(3) of the *Rome Statute* and without the applicants

and therefore cannot in any circumstances be approved by the Appeals Chamber. The Office submits that the mechanism proposed by the OPCD fails to include any right on the part of applicants to participate at the investigation stage of a situation, giving only a possibility. In particular, it provides that any participation by applicants at that stage would be subject to the Prosecutor's power of assessment. The Prosecutor's power of assessment would be entirely discretionary, since it would be for the Prosecutor alone ultimately to assess whether an applicant might be authorised to participate in a particular phase of the investigation. Moreover, this quasi-judicial mechanism would strip the Pre-Trial Chamber of its judicial authority on the matter, making the Prosecutor's power of assessment an absolute one. The Office is of the opinion that, outside the mechanism provided for under article 68(3) of the *Rome Statute*, read in conjunction with rule 89 of the *Rules of Procedure and Evidence* and regulation 86 of the *Regulations of the Court*, any further mechanism governing the procedure for considering applications for participation at the investigation stage of a situation and at the pre-trial stage of a case would necessarily contravene the requirements of a fair and impartial trial.⁷² Hence, such a mechanism would contravene the letter of the *Rome Statute*.

being granted the procedural status of victim, and in particular in the context of specific mechanisms designed to notify the Prosecutor of any potential victim: see *supra*, footnote 9, paras. 56-65.

⁷² In this respect, the Office observes that the Office of the Prosecutor, while not explicitly opposing the mechanism proposed by the OPCD, has nevertheless clearly advocated an exclusively judicial framework for any procedure to consider applications for participation of victims in the proceedings before the Court, regardless of the stages of their participation: see *supra*, footnote 16, para. 27. Lastly, the Office observes that the OPCD does not propose any mechanism for considering applications for participation at the pre-trial stage of a case.

3. Observations on the Second Issue Under Appeal

39. In its appeal against the Decision of 24 December 2007, the Prosecution claims that the Single Judge made three errors of law.⁷³

40. The Office would begin by observing that the Prosecution's arguments in relation to the Second Issue Under Appeal are, overall, very similar to those raised by the OPCD in relation to the First Issue Under Appeal, in that they challenge the possibility of victims being granted the "procedural status of victim" at the investigation stage of a situation, independently of an assessment of the criteria set out in article 68(3) of the *Rome Statute* and rule 89 of the *Rules of Procedure and Evidence*. The Office has already submitted its observations above on a major part of these arguments and refers back thereto in response to the arguments presented by the Prosecution.⁷⁴ In addition to the arguments already made, the Office now submits certain additional arguments.

41. As regards the first error alleged by the Prosecution, the Office observes that the Prosecution, while denying the possibility of granting victim status without an assessment of the criteria of article 68(3) of the *Rome Statute*, nevertheless

⁷³ The Prosecution maintains that the Single Judge: (i) erroneously interpreted article 68(3) of the *Rome Statute* and rule 89 of the *Rules of Procedure and Evidence* as granting the procedural status of victim at the investigation stage without prior assessment of the criteria of article 68(3) of the *Rome Statute* and without determination of the scope and the modalities of participation; (ii) erroneously applied the criteria of article 68(3) of the *Rome Statute* in ruling that the personal interests of the victims are affected in general at the investigation stage; and (iii) erroneously ruled that the appropriateness of the participation of victims at the investigation stage must be assessed in light of the stage of the proceedings in its entirety. See *supra*, footnote 17.

⁷⁴ The Office refers back to its observations on the following issues: (i) the scope of the right of victims to be heard (*supra*, para. 25); (ii) the participation rights of victims at the investigation stage, which are not subject to any form of judicial review (*supra*, para. 26); (iii) the existence of personal interests of the victims at the investigation stage (*supra*, para. 27); (iv) the compatibility of participation of victims at the investigation stage with the guarantees of a fair trial and with the interests of the other participants (*supra*, paras. 28 and 35); (v) the compatibility of the jurisprudence of Pre-Trial Chamber I with that of the Appeals Chamber on the participation of victims at the investigation stage (*supra*, para. 29); (vi) the compatibility of granting the "procedural status of victim" with the Chamber's obligation under article 68(3) of the *Rome Statute* (*supra*, paras. 32-33); (vii) the appropriateness and necessity of granting the procedural status of victim at the investigation stage (*supra*, para. 34); and (viii) the consistency of the granting of victim status with the limits of the jurisdiction of the Chamber and of the Court in general (*supra*, para. 36).

paradoxically admits, in paragraph 19 of its appeal brief, that the granting of victim status and determination of the modalities of victims' participation are two distinct procedures.⁷⁵

42. As regards the second error alleged by the Prosecution, the Office submits that there is a general presumption that the interests of the victims are affected in general at the investigation stage and that the onus is on the judges or the parties to demonstrate that the contrary is the case.⁷⁶ The Prosecution's arguments that the personal interests of the victims are not affected in general at the investigation stage are not supported anywhere in the Court's basic documents.⁷⁷

43. As regards the third error alleged by the Prosecution, the Office submits that, contrary to what the Prosecution maintains,⁷⁸ the Chamber's consideration of the appropriateness of the participation of victims at the investigation stage is in no way an abstract one, unconnected with the victims' applications for participation. Such consideration is undertaken on the basis of the precise

⁷⁵ The Prosecution maintains that "once this status has been determined for a given and specific set of proceedings, there is no need to re-address this status as the initial determination can be used in subsequent proceedings; only personal interests, appropriateness and modalities of participation need to be revisited", see *supra*, footnote 17, para. 19, p. 10.

⁷⁶ The Office submits that this approach is based on the general principle of criminal law *actori incumbit donatio*, which implies that the burden of proof is always on the applicant. This approach is consistent not only with all of the articles and rules which provide for the possibility of victims participating in all stages of the proceedings, but is also entirely consistent with the requirements of a fair and impartial trial. Lastly, the approach finds support in the reasoning of Judge René Blattmann, who takes the view that the requirement to submit two applications (one to be granted the procedural status of victim and the other to determine the modalities of participation of victims) "places too large a burden on victims. It should be possible for victims to apply to participate fully in their original application. Any information needed by the Trial Chamber to determine their right to participate and the appropriate moment at which to do so should be extracted by the Chamber from the information provided in the original victim application." See *Separate and Dissenting Opinion of Judge René Blattmann in the Decision on victims' participation* (Trial Chamber I), ICC-01/04-01/06-1119, para. 22, p. 57.

⁷⁷ Furthermore, the Office recalls the decision of Pre-Trial Chamber I that, "having regard to the present stage of the proceedings, i.e. that of investigation of the situation, it is reasonable to set a relatively low threshold [in relation to the criteria for the participation of victims at the investigation stage]"; see the *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, *supra*, footnote 44, para. 97, p. 24. The Office emphasises that that ruling is not under appeal.

⁷⁸ See *supra*, footnote 17, paras. 36-45, pp. 16-19.

criteria set out in rule 85 of the *Rules of Procedure and Evidence* and in light of the specific information provided by applicants individually. Lastly, the rights of victims at the investigation stage as set out in the Court's basic documents are formulated clearly and precisely. Implementation of these rights does not imply that the Chamber should assess the appropriateness of victims' participation at each stage of the proceedings.⁷⁹

4. Observations on the Third Issue Under Appeal

44. In its appeal against the Decision of 24 December 2007, the OPCD contends that victims cannot be granted a general right to participate at the investigation stage of a situation and that their personal interests and the appropriateness of their participation must be assessed in relation to each procedural phase.⁸⁰

45. The Office would begin by observing that the OPCD's arguments in respect of the Third Issue Under Appeal are, overall, very similar to the arguments it makes in relation to the First Issue under Appeal, in that they challenge the possibility of victims being granted the "procedural status of victim" at the investigation stage of a situation, independently of an assessment of the criteria set out in article 68(3) of the *Rome Statute* and rule 89 of the *Rules of Procedure and Evidence*. The Office has already submitted above its observations on a major part of these arguments, and refers back thereto in response to the OPCD's

⁷⁹ In this respect, the Office submits that a system whereby the Chamber would be called upon to assess, on a case-by-case basis, the appropriateness of the participation of victims in relation to each procedural act at the investigation stage cannot be consistent with the interests of the Defence or with the personal interests of the victims. In the opinion of the Office, the appropriateness of the participation of victims at the investigation stage constitutes a presumption; hence any ruling by the Chamber on this issue should be made in exceptional circumstances and in cases of necessity.

⁸⁰ In particular, the OPCD contends that: (i) the criteria of the personal interests of the victims and the appropriateness of participation as set out in article 68(3) of the *Rome Statute* must be interpreted in an effective manner; these criteria must be assessed in light of the particular circumstances of each applicant and in relation to each phase of the procedure; (ii) the personal interests of the victims are not affected in a general manner at the investigation stage of a situation; and (iii) granting a permanent procedural status of victim at the investigation stage is contrary to article 68(3) of the *Rome Statute*. See *supra*, footnote 18.

arguments.⁸¹ In addition to the arguments already made, the Office submits the following additional arguments.

46. As regards the appropriateness of victims' participation at the investigation stage, the Office reiterates that it is for the Chamber to rule on the modalities of participation of victims in the proceedings, and that the Court's basic documents grant victims specific rights in relation to their participation at the investigation stage, independently of intervention by the Chamber.⁸² It accordingly follows that there is no merit in the OPCD's argument that, in the absence of a determination by the Chamber of the modalities of participation, victims' participation at the investigation stage is not appropriate, since there is a risk of this taking place in a legal vacuum.⁸³ The Office further submits that no Chamber of the Court has ever ruled that the participation of victims must be confined to the trial stage, or indeed that the participation of victims at the investigation stage is inappropriate.⁸⁴

47. As to the OPCD's argument that the granting of victim status is not necessary in order for victims to be able to exercise their right to reparations,⁸⁵ the Office submits that certain proceedings which may arise at the investigation stage – in particular, proceedings related to the admissibility of the case and the jurisdiction of the Court or proceedings for the adoption of protective measures

⁸¹ See *supra*, footnote 74.

⁸² These rights are set out *inter alia* in article 15(3) of the *Rome Statute*, rules 50(1) to 50(3) and 92(2) of the *Rules of Procedure and Evidence* and regulation 86(6) of the *Regulations of the Court*.

⁸³ See *supra*, footnote 18, para. 47, p. 15.

⁸⁴ The Office submits that, in the very first decision on the participation of victims in the proceedings, Pre-Trial Chamber I studied the relevant provisions of the Court's basic documents relating to the participation of victims at the investigation stage of a situation and clearly established that "[i]t is [...] systematically consistent with the above-mentioned provisions to interpret the term "*procedure*" in the French version and "*proceedings*" in the English version of article 68 (3) of the Statute as including the stage of investigation of a situation, and therefore as giving victims a general right of access to the Court at this stage, subject to the conditions laid down in that regard. This analysis is also consistent with the fact that article 68 (1) refers specifically to the investigation stage." See *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, *supra*, footnote 44, para. 46, p. 12.

⁸⁵ See *supra*, footnote 18, para. 29, p. 10.

for the purpose of forfeiture – have a direct impact on reparations.⁸⁶ Furthermore, the Office reiterates that the participation of victims in the proceedings before the Court is not solely concerned with obtaining reparations, but is based on the much more general interest of contributing to justice being done and to the truth being established.⁸⁷

48. Lastly, the Office submits that the Single Judge’s finding regarding the appropriateness of the participation of victims at the investigation stage of a situation in no way affects the right of the Chamber to intervene if required, in order to assess the personal interests of a victim and/or the appropriateness of his or her participation in specific proceedings taking place in the context of the investigation stage and, where necessary, to deny the right of the victim to participate in those specific proceedings.⁸⁸

49. As regards the role of victims at the investigation stage, the Office firstly reiterates its arguments that the participation of victims at the investigation stage can in no way be comparable to or confused with the role of the Prosecution in those proceedings,⁸⁹ and recalls that this position is wholly consistent with the jurisprudence of the Court.⁹⁰

⁸⁶ The Office submits that, in proceedings related to the admissibility of a case and the jurisdiction of the Court, victims have the right to present observations pursuant to article 19(3) of the *Rome Statute*. Moreover, under rule 99 of the *Rules of Procedure and Evidence*, victims or their legal representatives who have submitted an application for reparations or have undertaken to do so in writing may seek before the Chamber the adoption of certain protective measures for the purpose of forfeiture pursuant to article 57(3)(e) of the *Rome Statute*.

⁸⁷ In this respect, the Office refers back to its General Observations on the Three Issues Under Appeal *supra* (III. 1.).

⁸⁸ The Office submits that the statutory texts oblige the Chamber to ensure that the participation of victims in the proceedings before the Court is consistent with their personal interests and is appropriate. Since the Court’s basic documents do not contain an exhaustive list of the specific proceedings in which victims may be involved at the investigation stage, the Chamber’s intervention must be limited to where it is necessary and on an exceptional basis, while the participation of victims at the investigation stage must, as a general rule, be presumed to be appropriate.

⁸⁹ In this respect, the Office refers back to its General Observations on the Three Issues under Appeal *supra* (III. 1.).

⁹⁰ According to Pre-Trial Chamber I: “the Statute grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, *vis-à-vis*

50. As to the OPCD's argument that the participation of victims in the proceedings has to be triggered by a Prosecution motion or a Chamber's decision,⁹¹ the Office submits that there is no indication in the Court's basic documents that victims can only participate in proceedings initiated by the Prosecution⁹² or by a Chamber. On the contrary, certain provisions of the Court's basic documents grant victims the explicit right to initiate certain proceedings.⁹³

51. Furthermore, since the OPCD appears to confuse the role of victims with that of witnesses,⁹⁴ the Office recalls the jurisprudence of the Court which guards against such mixing of categories.⁹⁵

52. Lastly, in response to the OPCD's argument that an applicant claiming to have suffered mental harm as a result of the commission of a crime against a third

vis the Prosecutor of the International Criminal Court so that victims can present their interests. As the European Court has affirmed on numerous occasions, victims participating in criminal proceedings cannot be regarded as "either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different", see the *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, *supra*, footnote 44, para. 51, pp. 13-14. This position was also recalled by Pre-Trial Chamber II; see the *Decision on "Prosecutor's Application to attend 12 February hearing"* (Pre-Trial Chamber II), ICC-02/04-01/05-155, 9 February 2007, p. 4. Lastly, according to Judge Song, "[t]he 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. This interest of victims is acknowledged in the Statute and the Rules of Procedure and Evidence." See the separate opinion of Judge Song in the *Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007*, *supra*, para. 13, p. 26.

⁹¹ See *supra*, footnote 18, paras. 38-39, p. 12.

⁹² See, for example, *supra*, footnote 43.

⁹³ For example, in accordance with rule 87(1) of the *Rules of Procedure and Evidence*, "[u]pon the motion of [...] a victim or his or her legal representative, if any, [...] a Chamber may order measures to protect a victim". Furthermore, in accordance with rule 88(1) of the *Rules of Procedure and Evidence*, "[u]pon the motion of [...] a victim or his or her legal representative, if any, [...] a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2".

⁹⁴ See *supra*, footnote 18, para. 44, p. 14.

⁹⁵ In its decision on the participation of victims, Pre-Trial Chamber I "rejects the submission of the defence that victims appearing before the Court in person should be treated automatically as witnesses. Whether or not victims appearing before the Court have the status of witnesses will depend on whether they are called as witnesses during the proceedings." See the *Decision on victims' participation*, *supra*, footnote 46, para. 132, p. 45.

party cannot be authorised to participate in the proceedings,⁹⁶ the Office submits that, while rule 85(b) of the *Rules of Procedure and Evidence* expressly provides that organizations or institutions must have sustained direct harm, rule 85(a) does not, however, lay down the same condition in respect of natural persons. Furthermore, this argument of the OPCD is entirely devoid of merit in light of the findings contained in the Decision of 24 December 2007 which are not under appeal.⁹⁷

ACCORDINGLY, the Principal Counsel of the Office of Public Counsel for Victims, acting as the legal representative of Victims a/0007/06, a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06 and a/0209/06, respectfully requests the Appeals Chamber:

- to dismiss, for inadmissibility and in the alternative for lack of merit, the appeal filed by the OPCD on 4 February 2008 against the Decision of 7 December 2007 in relation to the First Issue Under Appeal;
- to dismiss for lack of merit the appeal filed by the Prosecution on 29 February 2008 against the Decision of 24 December 2007, and the appeal filed by the OPCD on 29 February 2008 against the Decision of 24 December 2007, in relation to the Second and Third Issues Under Appeal; and
- to dismiss for inadmissibility the appeal filed by the OPCD on 29 February 2008 against the Decision of 24 December 2007 in relation to the Fourth Issue Under Appeal.

⁹⁶ See *supra*, footnote 18, paras. 16-18, pp. 6-7.

⁹⁷ Pre-Trial Chamber I found that "at the investigation stage, the causal link required by rule 85(a) of the Rules is established where the victim and, as the case may be, close relations or the dependants of the direct victim, provide sufficient evidence to establish grounds to believe that the harm suffered results from the commission of a crime falling within the jurisdiction of the Court." See *supra*, footnote 4, para. 38, p. 28.

_____[signed]_____
Paolina Massidda
Principal Counsel
Office of Public Counsel for Victims

Dated this 8 July 2008

At The Hague, The Netherlands