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Date: **10 November 2008**

PRE-TRIAL CHAMBER I

Before: **Judge Akua Kuenyehia, Presiding Judge**
Judge Anita Ušacka
Judge Sylvia Steiner

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

Public Document

Request to Leave to Appeal the "Decision on the Application for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0206/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08" dated 4 November 2008

Source: **The Office of Public Counsel for the Defence**

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

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1. Procedural History

1. In its decision of 17 August 2007, Pre Trial Chamber I ordered the Registry to transmit non-redacted applications to participate as victims in the situation phase to the Office of Public Counsel for the Defence (OPCD), and granted the OPCD the right to file observations in relation to these applications.[1]
2. On 26 May 2008, the Registry transmitted the following applications to the OPCD: a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0219/06 and a/0223/06.
3. On 3 July 2008, the Honourable Single Judge granted the OPCD until 18 July 2008 to file observations in relation to the 8 applications of a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08.[2]
4. On 4 November 2008, the Honourable Single Judge issued her 'Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08' (the impugned decision),[3] which adjudicated the observations of OPCD dated 12 June 2008,[4] and 18 July 2008[5] respectively.

2. Identification of an appealable issue

5. In the aforementioned observations, the OPCD raised several concerns regarding the nebulous role of intermediaries in the application process, and the impact which a failure to appropriately define and regulate the role of intermediaries could have on the integrity of the proceedings. These concerns were based firstly, on public allegations contained within a Human Rights Watch Report concerning the falsification of victim applications and the provision of financial inducements to applicants, and secondly, on the contents of certain applications which presented indicia of unreliability.

[1] 'Decision on the Requests of the Legal Representatives of Applicants on application for victims' participation and legal representation.' ICC-01/04-374, 20 August 2007, at p. 23.
[2] 'Decision Authorizing the Submission of Observations Pursuant to rule 89(1) of the Rules on Applications a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08', ICC-01/04-504, 3 July 2008.
[3] ICC-01/04-545.
[4] 'Observations du Bureau du Conseil Public pour la Défense sur les 28 demandes de participation en qualité de victimes du 12 Mai 2008', ICC-01/04-500, Conf ('Observations of 12 June 2008').
[5] 'OPCD's Observations on the 3 July 2008 Pre-Trial Chamber I Decision entitled "Decision Authorizing the submission of Observations Pursuant to rule 89(1) of the Rules on Applications a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08"', ICC-01/04-522 ('Observations of 18 July 2008').

6. Contrary to the statement of the Single Judge at paragraph 5 of the impugned decision, the OPCD would respectfully like to clarify that it did not assert that the applications *were* falsified, nor did it assert that the threshold for initiating contempt proceedings against any particular intermediary was met at this stage. In the absence of investigative facilities, the OPCD was not in a position to ascertain whether this was the case, as was clearly stated in the OPCD's filing.[6]
7. Rather, the OPCD requested the Chamber to consider taking appropriate measures to safeguard the integrity of the proceedings. These measures could include requesting the Prosecution to investigate the allegations with a view to ascertaining whether the threshold for initiating proceedings was met and suspending the Chamber's adjudication of the applications pending the outcome of these investigations.[7] Alternatively, the Chamber could decide that certain procedural safeguards should be implemented in order to protect the process against certain irregularities.[8]
8. It is not apparent from the reasoning of the decision as to why the OPCD's proposal that the allegations be investigated by the Prosecution was rejected. The Single Judge did not rule that the allegations contained within the Human Rights Watch were either irrelevant to this situation or to these particular applicants, or lacking in credibility. In this connection, Pre-Trial Chamber I has previously relied on allegations within Human Rights Watch reports to deny defendants the right to liberty.[9]
9. The ability of the Chamber to enforce legal standards and procedures directly against intermediaries may be ambiguous under the Statute and Rules. Nonetheless, the Chamber can indirectly enforce such standards and procedures through its consideration of the applications themselves, or by requesting the applicants to provide additional information in relation to the application process. To that end, the OPCD made several legal propositions designed to enhance the transparency and integrity of the proceedings.
10. For example, the Chamber can refuse to consider an application which has been amended by an intermediary in the absence of any information concerning whether the alleged victim consented to the amendment or that the intermediary is authorized to supplement the application on the behalf of the applicant.[10] This would not constitute a blanket denial of the applicant's right to participate as the applicant would retain the

[6] At para 17 of 18 July 2008 Observations.
[7] At para 17 of 18 July 2008 Observations.
[8] Paragraphs 7 of 18 July 2008 Observations, and 13, 17, 20, 22, 23, and 24 of 12 June 2008 Observations.
[9] 'Decision on the Application for the interim release of Thomas Lubanga Dyilo', 18 October 2006, ICC-01/04-01/06-586, and 'Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58', ICC-01/04-01/06-8.
[10] Paras 12-15 of 12 June 2008 Observations.

right to either sign the additional information (and thereby ratify its contents), or authorize a legal representative to submit such additions on the applicant's behalf.

11. In addition, the Chamber could require the applicant to list the names of any persons present during the application process and to provide any explanation as to their presence;[11] if illiterate, to confirm that the contents of the application form were read to the applicant in a language which the applicant understands;[12] and to state, with respect to addenda, whether the additional information in the addenda was translated/interpreted into a language which the applicant understands.[13]

12. These propositions would not incur any financial costs on the part of the applicant, and are consistent with procedural safeguards which have been implemented with relative ease by the *ad hoc* Tribunals within the context of numerous witness declarations taken in the field.[14]

13. Rather than considering these particular proposals, the Single Judge posited the propositions of the OPCD in extreme and inaccurate terms: "the OPCD's apparent solution would be to deny an applicant victim status if (i) he or she relies on an intermediary to present a complete application and/or his or her supporting documentation to the Court, (ii) he or she cannot read and is assisted by someone else filling out his or her application, or if (iii) he or she is accompanied by others when his or her application is filled out".[15]

14. In relation to the OPCD's concerns regarding applications or addenda which have been completed in the absence of an interpreter, notwithstanding the fact that the applicant in question does not understand the language in which the application was completed, the Single Judge also opined that:

> [i]f the Single Judge were to entertain the OPCD's suggestions, for example, for each applicant who is unable to read either French or English, the Single Judge would have to require that the intermediaries or the applicant videotapes the answers to the questions on the application form in the language the applicant speaks, transcribe the video in that language, and then translate the transcript of the video into one of the working languages of the Court, before submitting the transcript, along with any supporting documentation, to the

[11] Para 21 and 22 of 12 June 2008 Observations.
[12] See para 22 of 18 July 2008 Observations, and para 17 of the 12 June 2008 Observations.
[13] See para 26 of 18 July 2008 Observations.
[14] Para 23 and footnote 28 of the 12 June 2008 Observations. See also ICTY Practice Direction on Procedure for the Implementation of Rule 92bis(B) of the Rules of Procedure and Evidence, IT/191, 20 July 2001.
[15] Impugned decision at para 24.

Court. This process would not only pose a number of impractical hurdles prior to the applicants' access to the Court, but would also require resources unavailable to both the applicants and the non-governmental organizations which assist as intermediaries.[16]

15. The impugned decision therefore raises the appealable issue as to whether it would be appropriate to impose any of the procedural safeguards proposed by the OPCD in relation to the role of intermediaries in the application process. The OPCD is thus not seeking leave to appeal on the basis that all of the safeguards proposed by the OPCD should have been adopted, but that the decision of the Single Judge to refuse any of the proposals (or indeed, to consider alternative measures which could have equally addressed the concerns of the OPCD) creates both an accountability deficit and the potential for abuses within the application process.

3. The issue significantly impacts on the fairness of the proceedings

16. Pre-Trial Chamber I has previously held that the right to fair proceedings inures in all participants and parties to the proceedings.[17] In this regard, the OPCD respectfully submit that the Defence and alleged victims participating in the proceedings share a common objective of obtaining justice, based on fair and transparent proceedings. The right to participate under article 68(3) is thus delimited to a right to participate in fair proceedings, in a fair manner; there is no right to participate in unfair proceedings. As such, it is in the interests of all participants to the proceedings that the Chamber implements adequate safeguards to ensure the transparency, impartiality, and integrity of the proceedings, all of which are fundamental components of the fairness of the proceedings.

17. For the purposes of ascertaining whether the criteria under article 82(1)(d) have been met, the Appeals Chamber has held that the "issue must be one likely to have repercussions" on the fairness and expeditiousness of the proceedings, or the outcome of the trial.[18] It is clear from the Appeals Chamber's use of the phrase 'likely to have repercussions' that it is not necessary for the appealing party to prove that at this point in time, the appealable issue has affected the fairness (or expeditiousness) of the

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[16] Para 25 of Impugned decision.

[17] 'Décision relative à la requête du Procureur sollicitant l'autorisation d'interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, 31 March 2006, ICC-01/04-135 at para 38.

[18] 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006', ICC-01/04-168 at para 10.

proceedings. It suffices for the appealing party to demonstrate that there is a likelihood that the fairness and expeditiousness will be significantly affected if the issue has indeed been incorrectly decided.

18. In this regard, contrary to the statement of the Single Judge that the OPCD did not identify any impact on the integrity of the proceedings,[19] the OPCD specifically argued that verification as to whether the intermediary is duly authorised to submit information on behalf of the applicant is necessary to safeguard the interests and rights of the applicant. The OPCD notes that on a number of occasions, intermediaries have submitted additional information concerning key aspects of the contents of the applications, which have subsequently been contradicted by the applicants themselves.[20] It is possible to deduce from these occurrences that there is a strong likelihood that the Single Judge's decision not to require intermediaries to establish that the applicants have consented to the submission of additional information or amendments to the application forms will continue to affect the interests of applicants themselves, and the integrity of the proceedings.

19. Moreover, as noted by the OPCD in its Observations of 12 June 2008, the consent of an applicant is a fundamental guarantee for the integrity of the proceeding.[21] The underlying rationale of victim participation is to ensure that persons directly affected by the proceedings have a right to independently voice their concerns, and to be treated with respect, rather than as a passive object in the proceedings. Such a rationale would be completely vitiated if the Chamber were to disregard the right and obligation of the applicants to independently verify and ratify any information purportedly submitted on their behalf, which may impact on their right to participate. It is for this reason that a number of domestic codes of conduct specify that a lawyer cannot accept instructions from an intermediary unless the lawyer has first verified that the intermediary is duly authorized to act on behalf of the applicant with respect to the instructions in question.[22]

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[19] Impugned decision at para 25.
[20] See for example, applications a/0221/06, a/050/06, a/0224/06, a/0227/06, a/0229/06, and a/0238/06.
[21] At footnote 13.
[22] See for example, rule 23 of the Singapore Legal Profession (Professional Conduct) Rules (Authority of clients' agent), "An advocate and solicitor shall ensure that an agent giving instructions on behalf of a client has the required authority to do so and, in absence of evidence of such authority, the advocate and solicitor shall, within a reasonable time thereof, confirms the instructions with the clients." (Part III, Rule 23, issued in 1998, http://www.lawsociety.org.sg/public/you_and_your_lawyer/pdf/Professional_Conduct_Rule.pdf).

Rule 2.01 of the UK Solicitor Code of conduct (UK) (taking care of clients): "You are generally free to decide whether or not to take on a particular client. However, you must refuse to act or cease acting for a client in the following circumstances: […] (c) where instructions are given by someone other than the client, or by only one client on behalf of others in a joint matter, you must not proceed without checking that all clients agree with the

20. By allowing intermediaries to submit addenda and supplementary or indeed contradictory information on behalf of applicants - without requiring any proof that the applicant has consented to this information - the Single Judge has in fact expanded the category of persons entitled to act on behalf of another. At present, Rule 89(3) specifies that an application can either be made by the alleged victim, a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child, or when necessary, a victim who is disable. Rule 89(2) specifies that if an application is rejected, the "victim whose application has been rejected may file a new application later in the proceedings". It thus follows that only those persons who are entitled to file an application on behalf of an alleged victim, can resubmit the application if it is initially rejected.

21. This expansion of rule 89 by judicial fiat thus impacts on the principle of legality, which is a fundamental cornerstone of the fairness of the proceedings. The OPCD respectfully draws the attention of the Honourable Single Judge to the fact that issues linked to the procedural and evidential requirements for submitting applications has also been certified in both the DRC situation and the Uganda situation as meeting the cumulative criteria for leave to appeal under article 82(1)(d) of the Statute.[23]

22. As concerns the procedural safeguards which the OPCD suggested in connection with applicants who are either illiterate, or who do not speak one of the working languages of the Court, the OPCD specifically noted that in the absence of an interpreter, or a declaration that the contents of the application were read to the applicant, the signature of the applicant would be invalid, since the Court would not be able to discern on a *prima*

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instructions given". (Code issued in 2007, http://www.sra.org.uk/documents/code/solicitors-code-of-conduct-full.pdf).

Rule 3, Scottish Code of Conduct (Conflicts), "Solicitors must accept instructions only from clients or recognised agents authorised to give instructions on behalf of the clients; for example, persons authorised by a power of attorney or another lawyer." (Issued in 2002, http://www.lawscot.org.uk/Members_Information/rules_and_guidance/guides/Rules/Codeconduct/codeofconduct.aspx).

Rule 35(1) of the Dutch Code of Conduct. "Advocates may only accept engagements from an intermediary not admitted to the bar if they are convinced that the engagement was extended with the agreement of the client and they have in addition reserved the right to communicate directly at any time with that client". (cited in 'Submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07' ICC-02/04-01/05-318, 20 October 2008, at p. 8)

[23] 'Decision on the Defence Application for Leave to Appeal the 14 March 2008 Decision on Victims' Applications for Participation', ICC-02/04-139, 2 June 2009 at pages 8-9; 'Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation', 6 February 2008, ICC-01/04-444.

facie basis whether the applicant actually understood the contents of the application, and the significance of his or her signature.[24]

23. The potential impact of the absence of such safeguards on the fairness of the proceedings was also amply demonstrated by subsequent applications filed on 20 August 2008, in which several of the applicants claimed that they had been wrongly denied the right to participate on the basis that their initial application form was either incorrectly interpreted or transcribed.[25] These applications were filed before this Single Judge at least 2 months prior to the issuance of the 4 November 2008 decision. In its observations of 22 September 2008, the OPCD further underscored that "by failing to address this key issue of translation, the Court invites the possibility that either the applicants may indeed be misinterpreted, in which case their right to effectively participate can be jeopardized, or the applicants might use issues of mistranslation as a basis to effectively rewrite their applications to comply with any judicial findings."[26]

24. The Trial Chamber in the Thomas Lubanga Dyilo case also recognised that in order to protect the fairness and integrity of the proceedings, it is necessary to adopt procedural safeguards in connection with transcription process for witness statements to "ensure that there is no doubt as to what the witness said at the time" and to "reveal whether he or she [the witness] agrees with the way the account has been set out in the statement".[27]

25. Regarding the proposition that the applicants list the names of the persons who are present during the application process (and the reasons for their presence), the OPCD respectfully submits that the proposed safeguard significantly affects the fairness of the proceedings in the following ways. Firstly, this measure serves to ensure that the application is given voluntarily in the sense that it was free from coercive influences or harassment.[28] It also serves as a security measure concerning the safety of the applicant, since it enables the Court to verify which persons have had access to confidential details concerning the identity of the applicant and the details of the allegations. Finally, it provides a transparent record which enables the parties and future Chambers to gauge the impact of the presence of other persons on the

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[24] Observations of 18 July 2008 at para 26; Observations of 12 June 2008 at para 17.
[25] See for example, a/0221/06, a/0236/06, a/0049/06, and a/0050/06.
[26] 'Public Redacted Version of OPCD Observations on 28 victim applications', ICC-01-04-542 at para. 6.
[27] 'Decision regarding the Protocol on the practices to be used to prepare witnesses for trial', 23 May 2008, ICC-01/04-01/06-1351, at para 36.
[28] See ICTY Practice Direction on Procedure for the Implementation of Rule 92bis(B) of the Rules of Procedure and Evidence, IT/191, 20 July 2001, which requires the Presiding Officer to list the names of all persons who are present during the process and the reasons for their presence, and further certify that no pressure or undue influence was brought to bear on the witness to sign the declaration.

credibility of the applicant, should the applicant decide to testify as a witness, or tender evidence concerning the innocence or guilt of a defendant.[29]

26. As regards the proposals of the OPCD concerning the allegations of false victim applications and financial inducement, even if the level of suspicion concerning the falsification of applications did not warrant a full investigation with a view to assessing whether the threshold for initiating misconduct or contempt proceedings is met, the concession by one intermediary that the applicants were financially induced to submit applications is clearly linked to the credibility of those applicants.[30] The Single Judge therefore should have ordered the Prosecutor at the very least to ascertain the identity of the intermediary and related applicants in order to fulfill their article 67(2) and rule 77 obligations should the applicants testify or adduce evidence at a later stage of the proceedings. The ability of the Prosecutor to fulfill its disclosure obligations in a proactive and timely manner is also a key element of the fairness of the proceedings.

27. Finally, the OPCD observes that it would appear that the decision of the Single Judge not to impose additional safeguards was influenced by the following finding concerning the utility of intermediaries in the application process: "intermediaries who assist applicants in accessing the Court are essential to the proper progress of the proceedings".[31] With all due respect to the general work of such intermediaries, the OPCD respectfully submits that intermediaries who improperly provide financial inducements to applicants, or who fail to transcribe the actual view and concerns of victims, impede, rather than facilitate the proper conduct of proceedings before the ICC. The OPCD further notes that other elements of the judicial proceedings, such as witness testimony and State co-operation, which are equally if not much more essential to the proper progress of the proceedings are subject to far more rigid safeguards than the above procedures suggested by the OPCD.

28. The OPCD further submits that by creating a general exemption for intermediaries from such safeguards based on the fact that they play a necessary role in the

[29] In the Thomas Lubanga Dyilo case, the Trial Chamber recognised that communication between witnesses concerning the contents of their testimony could affect their credibility, and the integrity of the proceedings. The Chamber therefore endorsed the recommendation set out in the Protocol on the practices to be used to prepare and familiarise witnesses, prepared by the Victims and Witnesses Unit that witnesses should be directed not to discuss their evidence with other witnesses, and further explained the possible consequences which could result if they decide to do so. Decision regarding the Protocol on the practices to be used to prepare witnesses for trial', 23 May 2008, ICC-01/04-01/06-1351 at para 32.

[30] 'Decision on Defence Motion Seeking the Appointment of Amicus Curiae to Investigate Possible False Testimony by Witnesses GFA, GAP And GKB', Prosecutor v. Bizimungu et al, Case No. ICTR-99-50-T, 23 July 2008, at para 7.

[31] At para 25.

proceedings, the decision affects the independence of the Court *vis-à-vis* the intermediaries. In this regard, judicial independence is a key component of the fairness of the proceedings,[32] which requires that the Chamber base its decision on the facts and law before it, rather than political or financial considerations.[33] The ICTY Appeals Chamber has therefore recognised that whilst the ICTY is heavily dependent on State co-operation and must therefore accommodate States' interests in order to facilitate such cooperation, this "deference to States' interests does not go so far as to supersede a Trial Chamber's authority to maintain control over the fair and expeditious conduct of the trial". [34]

4. The issue significantly affects the expeditiousness of the proceedings.

29. In its judgment of 13 July 2006, the ICC Appeals Chamber held that in evaluating whether criteria under article 82(1)(d) have been met, the Chamber must examine the consequences on the proceedings should the ruling be incorrect.[35] The term 'proceedings' in this context "is not confined to the proceedings in hand but extends to proceedings prior to and subsequent to".[36]

30. If the findings of the Honourable Single Judge concerning the imposition of procedural safeguards on the role of intermediaries are indeed incorrect, the expeditiousness of the investigative phase, pre-confirmation phase, pre-trial phase, and trial phase are significantly affected. In this connection, since the Single Judge has found that the personal interests of these applicants are engaged by the proceedings before the Court, it must be assumed that the applicants will participate in concrete proceedings at some point in time.

31. As concerns the allegations regarding financial inducements or falsification of applications, if the veracity of these allegations are subsequently discovered during the trial stage or appeal stage, then it might be necessary for the Court to invalidate and reconvene any proceedings in which the applicants have participated. It might also be

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[32] See article 40 of the ICC Statute, article 10 of the Universal Declaration on Human Rights, article 6 of the European Convention on Human Rights, and article 14 of the International Covenant on Civil and Political Rights.
[33] See Separate Declaration of Judge Nieto-Navio, 'Decision on Prosecutor's Request for Review or Reconsideration', Prosecutor v. Barayagwiza, 31 March 2000, paras 1-18, and Principles 1 and 2 of the 1985 United Nations Basic Principles on the Independence of the Judiciary.
[34] Prosecutor v. Milutinovic, 'Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65*ter* List', 20 April 2007 at para. 18 http://www.un.org/icty/milutino87/appeal/decision-e/070420.pdf
[35] 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal', 13 July 2006, ICC-01/04-168 at para 13.
[36] At para 12.

necessary for the Chamber to halt the proceedings, or suspend certain aspects of the proceedings pending the outcome of investigations into the allegations in question.

32. In terms of the OPCD's propositions concerning the need for the applicant to verify that the contents of the statement and addenda were read or interpreted to the applicant in a language which the applicant understood, the OPCD observes that several applicants have reapplied on the basis that their application was wrongly transcribed or interpreted.[37] Multiple applications expend the resources of all participants, and delay the ability of the Court to properly adjudicate the merits of their application, thereby affecting the overall expeditiousness of the proceedings.

33. As regards the OPCD's proposition concerning the identification of the persons who were present during the application process, in the event that confidential information concerning the applicant or contents of the application is leaked, then the list of the names of the persons present would significantly facilitate any investigation into the source of the leak. If, however, these details are not noted in the initial application, it might be far more difficult to divine this information at a later stage as the participants might be reluctant to confirm their presence in response to inquiries emanating from a contempt investigation.

34. Similarly, if a Chamber rules at a later stage that the party calling a victim-participant to testify as a witness must disclose the details of any persons who were exposed to the applicant's account of the events, it would be far more time consuming and complicated to collate these details several years after the fact, than would have been the case if these details were recorded contemporaneously.

5. A decision of the Appeals Chamber would materially advance the proceedings

35. The role of intermediaries in the victim application process is pertinent to all cases and situations before the ICC, at all stages of the proceedings. However, at present, the OPCD is the only Defence entity which has received information concerning the specific details of these intermediaries. As such, the OPCD is the only Defence oriented entity which can effectively contest the role of intermediaries within the proceedings. A decision of the Appeals Chamber would therefore ensure that the concerns of the Defence in relation to this role can be addressed and subsequently applied to all proceedings before the ICC.

[37] See for example, a/0221/06, a/0236/06, a/0049/06, and a/0050/06.

36. Moreover, as noted at paragraphs 31, 33 and 34 above, a failure to implement procedural safeguards concerning the role of intermediaries could affect the expeditiousness of the proceedings as concerns specific cases before the ICC. Rather than potentially jeopardising a future defendant's right to a speedy trial, it would be preferable for the Appeals Chamber to immediately resolve the issue within the context of the situation phase.

37. Finally, the OPCD notes that the Court is still at a relatively early stage of the proceedings as concerns the implementation of victim participation before the Court. The OPCD recognises that an alteration to the current procedures for victim participation could affect the applicants who have already requested to participate thus far in the proceedings. However, if, on the contrary, such issues are only addressed at the final appeal stage of a specific case, the potential impact on all applicants who would have requested to participate or actually participated by then would be much greater. The overall efficacy and certainty of the proceedings before the ICC would thus be greatly enhanced by receiving an appeal decision on this issue at the present juncture.

6. Relief Sought

38. For the reasons set out above, the OPCD respectfully requests the Honourable Pre-Trial Chamber to grant the OPCD leave to appeal the 'Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08'.

Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this 10 November 2008

At The Hague, The Netherlands