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**International
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Court**

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Date: **3 April 2007**

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single Judge

Registrar: Mr. Bruno Cathala

SITUATION IN UGANDA

IN THE CASE OF

THE PROSECUTOR

***vs. JOSEPH KONY, VINCENT OTTI, RASKA LUKWIYA, OKOT
ODHIAMBO and DOMINIC ONGWEN***

Public Document

**Prosecution's Objection to "OPCV's Observations on the Victims'
Applications 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 to Participate in the Uganda Situation and in the
Case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska
Lukwiya and Dominic Ongwen*"**

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Preliminary Statement

The Office of the Prosecutor (“OTP”) respectfully objects to the submission of the “OPCV’s Observations on the Victims’ Applications 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 to participate in the Uganda situation and in the case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen*” (“OPCV’s Observations”).¹ For the reasons stated below, the OTP respectfully submits that the OPCV’s Observations were filed without a legal basis and outside the mandate conferred by the “Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit, for submission of observations on 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/00127/06” (“1 February 2007 Decision”).² That Decision determined that appointment of a legal representative for the Applicants for participation, at this stage, was not warranted, and that OPCV’s mandate, under the Regulations, was that of providing assistance to the Applicants “which fall short of legal representation.”³ Therefore, the OPCV’s Observations should be rejected by the Single Judge.

I. Background

A. The Applications for Participation and the 1 February 2007 Decision

1. On 22 November 2006, Pre-Trial Chamber II appointed the Single Judge to address all issues related to victims’ applications to participate in the

¹ ICC-02/04-01/05-232 and ICC-02/04-89, 26 March 2007.

² ICC-02/04-01/05-134, 1 February 2007.

³ 1 February 2007 Decision, para. 13.

Uganda situation and in the case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen*.⁴

2. As of 1 February 2007, 49 applications for participation in the proceedings as victims (“Applications”) had been filed both in the record of the Uganda situation⁵ and in the record of the case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen*.⁶
3. On 1 February 2007, the Single Judge rendered the 1 February 2007 Decision.
4. The first determination in the 1 February 2007 Decision was to decline to appoint a legal representative (individual or common) for the Applicants.⁷ The Single Judge found that the appointment of a legal representative was not mandatory, and also did not serve the “interests of justice,” within the meaning of Regulation 80(1), prior to any decision

⁴ See “Decision designating a Single Judge on Victims’ issues”; ICC-02/04-01/05-130, 22 November 2006.

⁵ See “Prosecution’s Reply under Rule 89(1) to the Applications for Participation of Applicants 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 in the Uganda situation”; ICC-02/04-85, 28 February 2007 (“Prosecution’s Reply to Victims’ Applications in the Uganda Situation”), footnotes 3-6, p. 2.

⁶ See “Prosecution’s Reply under Rule 89(1) to the Applications for Participation of Applicants 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 in the case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen*”; ICC-02/04-01/05-214, 28 February 2007 (“Prosecution’s Reply to Victims’ Applications in the Case”), footnotes 11-15, pp. 3-4.

⁷ 1 February 2007 Decision, para. 12.

on the merits of the Applications.⁸ The 1 February 2007 Decision found that as a result of the determination not to appoint a legal representative, it was unnecessary to decide whether any representative of OPCV should be appointed as representative. The Decision noted that OPCV yet retained, under Regulation 81, the mandate to provide “forms and methods of assistance to victims which fall short of legal representation.”⁹ The Decision instructed the Registrar to transmit an unredacted copy of the Applications to the OPCV, with a view to allow this section of the Registry to provide the Applicants with any support and assistance which may be necessary or appropriate at this stage of the proceedings.¹⁰

5. After determining to appoint *ad hoc* counsel for the Defence, the 1 February 2007 Decision ordered the Registrar to provide the Prosecutor and the newly-appointed *ad hoc* counsel for the Defence with redacted copies of the Applications so as to enable the parties to fulfil their entitlement to “reply” to the applications under Rule 89(1).¹¹ The 1 February 2007 Decision set forth deadlines by which the Prosecutor and *ad hoc* counsel for the Defence were obligated to reply.¹²

⁸ *Ibid.*, paras. 11 and 12.

⁹ *Ibid.*, para. 13.

¹⁰ *Ibid.*, para. 13.

¹¹ *Ibid.*, para. 16.

¹² *Ibid.*, Disposition.

B. The Litigation relating to the Lifting of the Redactions and the OPCV's Request for Additional Information

6. One strand of litigation followed from the 1 February 2007 Decision involves the OTP's efforts to vary the protective measures imposed in that Decision of providing the OTP with redacted versions of the Applications. On 6 February 2007, the OTP applied to the Single Judge to lift the redactions from the Applications provided to the OTP, in order to allow it to file a meaningful reply, pursuant to Rule 89 (1) of the Rules of Procedure and Evidence ("Rules").¹³ On 15 February 2007¹⁴, the OTP provided additional submissions to that Application. On 20 February 2007, the Single Judge dismissed the requests contained in the Prosecutor's Application to Lift Redactions and the 15 February 2007 Submissions on procedural grounds, without considering the merits.¹⁵ After unsuccessfully seeking leave to appeal this dismissal,¹⁶ the OTP filed, on 22 March 2007, the "Prosecution's Application under Regulation 42(3) to vary Protective Measures by Lifting Redactions from Applications for Victims' Participation Provided to the OTP, and To

¹³ See "Application to Lift Redactions From Applications for Victims' Participation to be Provided to the OTP"; ICC-02/04-01/05-150, 6 February 2007 ("Application to Lift Redactions").

¹⁴ See "Prosecution's further submissions supplementing its 'Application to Lift Redactions from Applications for Victims' Participation to be Provided to the OTP', dated 6 February 2007, and request for extension of time"; ICC-02/04-01/05-208, dated 15 February 2007;

¹⁵ See "Decision on Prosecutor's 'Application to lift redactions from applications for Victims' Participation to be provided to the OTP' and on the Prosecution's further submissions supplementing such Application, and request for extension of time"; ICC-02/04-01/05-209, 20 February 2007 ("20 February 2007 Decision").

¹⁶ See "Decision on the 'Prosecution's Request for Leave to Appeal the Decision Denying the 'Application to Lift Redactions From Applications for Victims' Participation to be Provided to the OTP'"; ICC-02/04-01/05-219, 9 March 2007 ("9 March 2007 Decision").

Submit a Further Reply under Rule 89(1) in the Case and Situation¹⁷ (“Prosecution’s Application to Vary Protective Measures”), which remains pending.

7. In the litigation related to the lifting of the redactions, the OTP has argued, among other things, that no necessity for maintaining the redactions, vis-à-vis the OTP, has been demonstrated and, thus, that the redactions and non-disclosure to the OTP lack legal justification.¹⁸

8. Another branch of litigation related to the Applications has been the OPCV’s request to access documents and material. On 7 February 2007, by means of a “Decision on the OPCV’s` Request to access documents and material” (“16 March 2007 Decision”)¹⁹ the OTP learned for the first time that on 5 February 2007, the OPCV had requested, in an under seal and *ex parte* filing, to be granted access to sealed and confidential information in the records of the situation and the case. On 12 February 2007, the Single Judge held an *in camera* and *ex parte* hearing with the OPCV,²⁰ in connection with the OPCV’s request and after rejecting the OTP’s objection to the *ex parte* nature of the hearing.²¹

¹⁷ ICC-02/04-01/05-231 and ICC-02/04-88, 22 March 2007.

¹⁸ See Application to Lift Redactions and Prosecution’s Application to Vary Protective Measures.

¹⁹ ICC-02/04-01/05-222, 16 March 2007.

²⁰ *Ibid.*, p.3.

²¹ “Decision on ‘Prosecutor’s Application to Attend 12 February hearing’”; ICC-02/04-01/05-155, 9 February 2007.

9. The 16 March 2007 Decision²² which was ultimately rendered by the Single Judge bears potential relevance to this application, because like the 1 February 2007 Decision, it addressed the mandate of the OPCV.²³ The 16 March 2007 Decision denied the OPCV's request to obtain information, insofar as that request sought information from the records of the situation and the case.²⁴ The Single Judge considered that the following tasks, as articulated by the OPCV itself at the *in camera* hearing of 12 February 2007 were in full compliance with the statutory tasks of the OPCV:

- “provid[ing] the applicants with any legal advice related to their applications,”²⁵ and “any advice to supplement, if need be, their request”;²⁶
- “explain[ing] to the applicants the procedure before a decision on the application is taken by the relevant Chamber; and, more in general ... explain[ing] their general rights as potential victims in a proceeding before the Court”;²⁷

The Single Judge noted that, by contrast, it fell beyond the OPCV's mandate “to assess any potential risks for the applicants,”²⁸ or to perform functions “relating to concerns that such applicants may have for their

²² ICC-02/04-01/05-222, 16 March 2007.

²³ *Ibid.* pp. 4 and 5.

²⁴ *Ibid.* p. 6.

²⁵ *Ibid.*, p. 4.

²⁶ *Ibid.*, p. 4.

²⁷ *Ibid.*, p. 4.

²⁸ *Ibid.*, p. 5.

security and safety,”²⁹ because functions within the remit of the Registry generally should not be construed to be vested in the OPCV.³⁰

C. The Parties’ Replies under Rule 89(1)

10. The parties obtained extensions of time to file their replies to the Applications under Rule 89(1)³¹, and accordingly the Prosecution and the *ad hoc* counsel for the Defence filed their observations concerning the Applications on 28 February 2007³² and 5 March 2007³³, respectively. Among the issues briefed by the parties were the scope of the right to participate (and particularly, the entitlement of victims to participate in the investigation phase), the legal standards by which the right to participate in the situation and case should be determined, and the manner in which those standards should be applied either to grant or deny the 49 Applications at issue.³⁴

²⁹ *Ibid.*, p. 5.

³⁰ *Ibid.*, p. 5.

³¹ See “Requête de la Défense en extension de délai afin de répondre aux ‘Observation(s) de la Défense sur les demandes de participation à la procédure a/0010/06, a/0064/06 à a/0070/06, a/0070/06, a/0081/06 à a/0104/06 et a/0111/06 à a/0127/06’”; ICC-02/04-01/05-210, 21 February 2007 and “Decision on Requête de la Défense en extension de délai afin de répondre aux ‘Observation(s) de la Défense sur les demandes de participation à la procédure a/0010/06, a/0064/06 à a/0070/06, a/0081/06 à a/0104/06 et a/0111/06 à a/0127/06’”; ICC-02/04-01/05-211, 23 February 2007.

³² See Prosecution’s Reply to Victims’ Applications in the Uganda Situation and Prosecution’s Reply to Victims’ Applications in the Case.

³³ See “Observations de la Défense sur les demandes de participation à la procédure a/0010/06, a/0064/06 à a/0070/06, a/0081/06 à a/0104/06 et a/0111/06 à a/00127/06, ICC-02/04-01/05-216”, 5 March 2007 (“Defence Observations on Victims’ Applications”).

D. The OPCV's Spontaneous 26 March 2007 Filing

11. On 26 March 2007, the OPCV spontaneously filed the OPCV's Observations. For the first time in any public submission, the OPCV alleged that the 1 February 2007 Decision vested the OPCV with the "possibility to provide the Chamber with legal arguments on the admissibility of the applications"³⁵ and to provide "to the Chamber . . . any assessment and/or information that could be useful in the process of the examination of the applications."³⁶ The OPCV's Observations addressed the stage of the proceedings when victims should be entitled to participate,³⁷ and the legal standards by which the Chamber should determine to grant or deny the Applications.³⁸ Also consistent with its own interpretation of the OPCV mandate at this stage, the OPCV rendered an "assessment" of which Applications should be granted in the situation³⁹ and the case,⁴⁰ while recommending the rejection of others.⁴¹

12. The OPCV's Observations also informed the Chamber and the parties that the OPCV had undertaken a mission to Uganda and, as such, was in a position to provide additional information to the Chamber which

³⁴ See Prosecution's Reply to Victims' Applications in the Uganda Situation and Prosecution's Reply to Victims' Applications in the Case and Defence Observations on Victims' Applications.

³⁵ OPCV's Observations, para. 19.

³⁶ *Ibid.*

³⁷ *Ibid.*, paras. 21-38.

³⁸ *Ibid.*, paras. 39-43.

³⁹ *Ibid.*, paras. 44 and 62.

⁴⁰ *Ibid.*, para. 63.

⁴¹ *Ibid.*, paras. 59 and 61.

might be useful for the assessment of the Applications.⁴² The OPCV noted that it was filing, together with the OPCV's Observations, annexes on a confidential and *ex parte* basis which included its "legal assessment for each application."⁴³

II. The Scope of this Application

13. In the present filing the OTP respectfully submits that the OPCV has failed to offer any proper legal basis for filing the OPCV's Observations. Pre-Trial Chamber II has repeatedly stressed that every submission submitted to it must have an identifiable legal basis.⁴⁴ Here, the Single Judge's 16 March 2007 Decision determined that the OPCV possesses the authority to: render legal advice about the application process and the decision which will be taken to the Chamber, with the purpose of enabling the Applicants to supplement their Applications, as necessary.⁴⁵ The OPCV's Observations and accompanying annexes, however, exceed this authority by offering legal argumentation related to the merits of the Applications, an assessment of the merits of each Application, and ultimately a request that some Applicants for participation be admitted

⁴² *Ibid.*, para. 20.

⁴³ *Ibid.*, para. 2.

⁴⁴ See 20 February 2007 Decision, pp. 5 and 6; "Decision on Prosecutor's Application dated 2 November 2006"; ICC-02/04-01/05-129, 17 November 2006, p. 3; "Decision on Prosecutor's Applications for Leave to Appeal dated the 15th day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal dated the 11th day of May 2006"; ICC-02/04-01/05-90-US-Exp, 10 July 2006, para. 13; "Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration and Motion for Clarification"; ICC-02/04-01/05-60; 28 October 2005; "Decision on the Prosecutor's Motion for Clarification and Urgent Request for Variation of the Time-Limit enshrined in Rule 155"; ICC-02/04-01/05-18-US-Exp, 18 July 2005, pp. 2 and 7.

and others denied. The OPCV has never been authorized to file any submission. There is also no support in the Statute, Rules or Regulations, or in the 1 February 2007 Decision, for the proposition that the OPCV possesses such authority or to submit such assessments or argumentation, and for that reason, the Observations and annexes should be rejected.

14. The OTP notes that the importance of clarifying the OPCV's role vis-à-vis the Applicants is further demonstrated by the OPCV's latest submission, the "OPCV's Request to appear before the Single Judge or to otherwise be heard on the protective measures for Applicants 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 in the Uganda situation and in the case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen* and to file a response to the Prosecution's Application to Vary Protective Measures."⁴⁶ In this submission, filed on the 29 March 2007, the OPCV requests to appear on the issue of whether the protective measures imposed by the 1 February 2007 decision should be varied, as sought in the OTP's application of 22 March 2007.⁴⁷ The OTP intends to respond to this submission in a separate filing.
15. While it is apparent from the submissions themselves that the OTP does not disagree with some of the legal propositions stated by the OPCV,

⁴⁵ 16 March 2007 Decision, p. 4.

⁴⁶ ICC-02/04-01/05-234 and ICC-02/04-90, 29 March 2007.

⁴⁷ See Prosecution's Application to Vary Protective Measures.

particularly regarding the standard for participation in the case, the OTP will not, in this filing, address the merits of the OPCV's arguments.

16. This submission is necessarily based on information known to the OTP, and there has been only limited disclosure to the OTP, for example, of the colloquy at the *ex parte* hearing held on 12 February 2007.⁴⁸ If during that hearing or by some other means additional authority was granted to the OPCV by the Single Judge,⁴⁹ the OTP respectfully requests that the information be made public.

III. Discussion

A. The OPCV Exceeded the Authority Granted to it under the Statute, Rules, and Regulations, and the 1 February 2007 Decision, in Submitting the OPCV's Observations

17. As the 1 February 2007 Decision set forth, the Statute, Rules and Regulations define the respective mandates of the legal representatives of victims and the OPCV. Legal representatives, under Article 68(3), may in circumstances permitted by the Chamber, present "views and concerns" on behalf of victims. Under Rule 90, when there are a number of victims, the Chamber may either request that those victims choose a common legal representative or, if necessary because of time constraints, request

⁴⁸ See 16 March 2007 Decision, p. 6.

⁴⁹ See 16 March 2007 Decision and "Decision on 'Prosecutor's Application to attend 12 February Hearing'"; ICC-02/04-01/05-155, 9 February 2007 (in which the Single Judge rejected the OTP's participation to the *ex parte* and *in camera* hearing in which VPRS and OPCV were appearing before the Single Judge).

that the Registry choose a representative for the victims.⁵⁰ Rule 91 states that acts such as participation in hearings and the questioning of a party or witness can be performed only by a legal representative.

18. The Office of Public Counsel for Victims is a creation of the Regulations. Regulation 81(4) states that: “[t]he Office of the Public Counsel for victims shall provide support and assistance to the legal representative for victims and to victims, including, where appropriate: a) Legal research and advice; and b) [a]ppearing before a Chamber in respect of specific issues.”

19. As described above, in paragraph 4 , in the 1 February 2007 Decision, the Single Judge, upon detailed consideration of the matter, found that the appointment of a legal representative was not necessary or in the “interests of justice” before a determination on the merits of the Applications.⁵¹ The 1 February 2007 Decision carefully distinguished between representation – which was deemed unnecessary at this stage – and the function of the OPCV. The Single Judge described the role of the OPCV vis-à-vis the Applicants as one of support and assistance “which fall short of legal representation.”⁵² In its 16 March 2007 Decision, the Single Judge elaborated that the OPCV should provide advice to Applicants regarding the application procedure and the

⁵⁰ Rule 90(6) requires legal representatives to possess the qualifications set forth in Rule 22(1).

⁵¹ See 1 February 2007 Decision, para. 12.

⁵² *Ibid.*, para. 13.

relevant decisionmaking, with the aim of aiding the supplementation of the Applications, as necessary.⁵³

20. It is respectfully submitted that in filing spontaneously the OPCV's Observations, the OPCV exceeded its authority. The Single Judge has never requested any submissions of the OPCV. Further, the OPCV's filing mistakenly undertakes precisely the "legal representation" that the 1 February 2007 Decision declined to vest in the OPCV and found inappropriate at this stage in the proceedings. Instead of limiting itself to the mandated task of assisting the Applicants, by providing them with the assistance that would enable them to supplement their Applications, the OPCV has submitted legal argumentation, which clearly is a function of a legal representative.⁵⁴

⁵³ 16 March 2007 Decision, p. 4.

⁵⁴ The potential consequence of any improper expansion of mandate by the OPCV also extends into the area of representation of accused persons, because the distinction in roles between an office of public counsel and a legal representative is also maintained in that area. Regulation 77(5), which sets out the role of support and assistance of the Office of Public Counsel for the Defence, defines the OPCD's "support and assistance" role in similar terms as Regulation 81(4), relating to OPCV.

The Special Court for Sierra Leone ("SCSL") has had occasion to stress the desirability of maintaining distinct roles for a "legal representative" and a "support and assistance" office and, in particular, the impropriety of an office of "support and assistance" advancing legal arguments and applications. In the SCSL, the "Defence Office" is the organ intended by its Rules of Procedure and Evidence (rule 45) to provide legal support and assistance to detainees and Defence counsel. The SCSL Trial Chamber has held on at least two occasions that there is a distinction in roles between the Defence Office and Defence Counsel. In a decision, the Trial Chamber held that the Principal Defender (as head of the Defence Office) lacked the *locus standi* to file the motion seeking a review of the Registrar's Decision. (See *The Prosecutor v. Sam Hinga Norman, et al.*, Decision on the Principal Defender's Motion for a Review of the Registrar's Decision to install Surveillance Cameras in the Detention Facility of the Special Court of Sierra Leone decision; SCSL-04-14-T (15157-15160), 6 April 2006, p. 4).

21. In addition, in this instance, OPCV has created a potential conflict of interests within the group it was charged to assist.⁵⁵ The 1 February 2007 Decision defined the OPCV's mandate in a manner which would have prevented this conflict: the OPCV was charged to render the same assistance to all Applicants. However, in recommending on the basis of its legal assessments that 21 of the 49 Applications should be granted in the case⁵⁶ and 48 in the situation in Uganda⁵⁷; the OPCV has favoured some of the Applicants while acting against the interests of others. Applicants cannot reasonably be put in the position of seeking and accepting advice from OPCV while unaware that the OPCV may use knowledge gained during the interaction to recommend denial of status as a participant. Similarly, OPCV's compliance with the mandate to aid

In dismissing the Principal Defender's motion, the Trial Chamber affirmed the position of the Interim Registrar who had submitted that: "It is for counsel for the accused to defend the detainees and to protect their fair trial rights not the Principal Defender who assigned them this responsibility, with the authority of the Registrar. The counsel for the detainees are therefore the ones who may bring an action to protect fair trial rights, not the principal defender." (See *The Prosecutor v. Sam Hinga Norman, et al.*, Interim Registrar's Response to Principal Defender's Motion for a Review of the Registrar's Decision to install Surveillance Cameras in the Detention Facility of the Special Court of Sierra Leone; SCSL-04-14-T (14912-14931), 8 February 2006, p. 6.) In a different case the Defence Office filed a motion seeking leave to file *amicus curiae* briefs on jurisdiction issues raised by Defence counsel. In dismissing the Defence Office's application, the SCSL Trial Chamber stressed that unless the Defence Office is appointed as a legal representative it will remain: "a legal resource support unit for the permanent pool of defence counsel representing suspects and accused persons, essentially researching common legal issues such as jurisdiction in conjunction with the latter. It would, therefore, be highly undesirable for the proper determination of the cases of these accused for the Defence Office to perform the role of a third party intervenor [...]" (See "*The Prosecutor v. Morris Kallon*, Decision on the Application for Leave to Submit *Amicus Curiae* Briefs"; SCSL-2003-07-PT-067 (1075-1080), 17 July 2003, para. 11).

⁵⁵ Under Rule 90(4), it is clear that even legal representatives for the victims are obligated to avoid any conflict of interests.

⁵⁶ OPCV's Observations, para. 63.

⁵⁷ *Ibid.*, para. 44.

all Applicants can be open to question when the OPCV defends a legal interpretation which denies the participation of some of the Applicants.

22. It is respectfully submitted that either the OPCV should act for all Applicants as was authorized, or it is unavoidable that it represents some of the Applicants and not others. If all Applicants do not share the same legal rights, or if there is a question as to whether all Applicants have equal legal rights, the OPCV, upon discovery of such a state of affairs, could have and should have requested that the Single Judge appoint legal representatives to represent the varying interests of the Applicants in accordance with Rule 90(4).⁵⁸ The submission which was made without following that procedure should be rejected.

B. The Scope and Nature of the OPCV's Observations Wrongly Elevate the OPCV to the Status of an Independent Adviser to the Single Judge

23. The OPCV's Observations also were unauthorized because they place the OPCV in a role – not granted in the governing texts or the 1 February 2007 Decision – of acting as an independent adviser to the Single Judge.
24. Again, the incompatibility of the roles is apparent. Regulation 81 sets forth that the “support and assistance” provided by OPCV shall be “to the legal representatives and to victims;” OPCV has no mandate, similar

⁵⁸ In the OTP's view, by submitting a recommendation which excluded certain Applicants, the OPCV has disqualified itself from being appointed as legal representative for *all* the Applicants.

to that of VWU,⁵⁹ of acting as an independent adviser to the Court. The OPCV cannot, without creating a potential conflict of interest, undertake to give independent legal advice to the Chamber or the Single Judge while it is charged at the same time with rendering support and assistance to the Applicants. Most starkly, when the OPCV requests that the Single Judge deny certain Applications, it is no longer performing the role of supporting and assisting the pool of Applicants.

C. The Scope and Nature of the OPCV's Observations Erroneously Grant the OPCV the Right of Replying under Rule 89(1)

25. According to a plain reading of Rule 89, the OPCV is not authorized to comment upon victims' applications to participate in the proceedings. Rule 89(1) provides that only the Prosecution and the Defence shall receive copies of victims' applications to participate in the proceedings. The purpose of the distribution of such applications to the parties is revealed in Rule 89(2) which implicitly acknowledges the parties' ability to comment upon such applications. Rule 89(2) specifies that there are only two means by which the Chamber may reject an application: on "its own initiative" or "on the application of the Prosecutor or the defence."

26. In the 1 February 2007 Decision, the Single Judge affirmed the principle that only the Prosecutor and the Defence have the right to reply to any application for participation in the proceedings.⁶⁰ The Single Judge set a

⁵⁹ See 16 March 2007 Decision, p. 4. See also Article 68(4).

⁶⁰ See 1 February 2007 Decision, para. 16.

time-limit by which the parties had to file their submissions on the Applications.⁶¹

27. When the Registrar was ordered to transmit the Applications to the OPCV, the Single Judge specified that the purpose of such communication was to provide support and assistance to the Applicants and nothing more.⁶² There was no provision made for the OPCV to comment on the Applications or reply to the parties' submissions on the Applications. The 1 February 2007 Decision established no deadline for the submission of any filing by the OPCV.
28. By submitting the OPCV's Observations, the OPCV therefore acted *ultra vires* also with respect to Rule 89 and the Single Judge's interpretation of that rule. The OPCV, through its Observations, has claimed exactly the entitlement which should be limited to the Prosecution and the defence by the clear language of Rule 89(2) – that of submitting a “reply” to the Applications. Legal argumentation and reliance on that argumentation to urge the acceptance of some Applications and the denial of others is a role reserved to the parties; indeed, this Rule does not permit the Chamber to rely on any submission other than that of the Prosecution or the Defence to reject applications.
29. In the circumstances present here, it would invert the Rule to fail to reject the OPCV's Observations. Rule 89 vests in the parties a unique

⁶¹ *Ibid.*, para. 16 and Disposition.

entitlement to submit replies to applications for participation. Here, because the OPCV is the only entity which has been granted unredacted versions of the Applications, if it is permitted to submit legal argumentation and to recommend which Applications should be accepted and denied, it is clearly being afforded a right *superior* to that of the parties. This intent, importantly, cannot be drawn from the 1 February 2007 Decision. Rather, the access to the confidential information contained in the Applications was granted to the OPCV to better assist and support all the Applicants in their effort to participate in the proceedings.

D. Regulation 24 is not Relied upon by the OPCV and Does not Authorize any Response in any Event

30. The OPCV does not rely upon Regulation 24 as a legal basis for any part of its filing, and this circumstance alone is sufficient to prevent the Observations from being accepted on that basis.⁶³ In any event, Regulation 24 is inapplicable for a number of reasons.
31. Regulation 24(2) provides that “victims or their legal representatives may file a response [...] when they are permitted to participate in the proceedings in accordance with article 68(3) and Rule 89(1) subject to any order of the Chamber.”

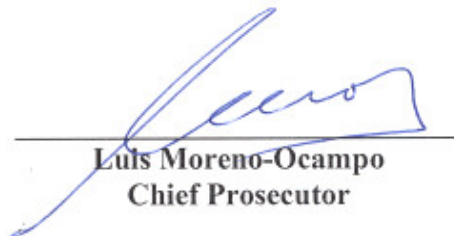
⁶² *Ibid.*, para. 16.

⁶³ 9 March 2007 Decision, p. 4 (in which the Single Judge, after determining that the Prosecution had not relied upon the adequate provision (Regulation 42(3)) in its previous submissions, rejected the Prosecution’s request for leave to appeal without due consideration to Regulation 42(3)).

32. Under this Regulation the OPCV was not qualified to participate in the proceedings. No victims have been permitted to participate to date and the Single Judge specifically refrained from appointing a “legal representative.”
33. Regulation 24(5) allows “[p]articipants” to reply “with the leave of the Chamber, unless otherwise provided in these regulations.” Again, no participant yet has been specified in the case or situation. In any event, such leave was never provided and therefore any response is *ultra vires*.
34. Finally, it is not at all clear that Rule 89(2) could be reconciled with granting even a victim or legal representative a right to reply or respond to a submission made by the Prosecution or the Defence under Rule 89(1). The Chamber cannot rely on any submission other than that of the Prosecutor or Defence in rejecting an application, and this prohibition would seem to make clear that participants cannot respond to the legal argumentation or requests for relief made by the parties.

IV. Relief

35. The OTP respectfully requests that the Single Judge reject the OPCV’s Observations and the accompanying annexes. The OTP also respectfully requests that to the extent the OPCV has submitted information supplementing the Applications themselves, the OPCV be ordered to re-file separately, and the parties afforded access to the information in order to supplement their Rule 89(1) replies.



Luis Moreno-Ocampo
Chief Prosecutor

Dated this 3rd day of April 2007
At The Hague, The Netherlands

List of Cited Authorities

I. JURISPRUDENCE

SCSL

1. *The Prosecutor v. Sam Hinga Norman, et al.*, Case no. SCSL-04-15-T (18534-18537), Decision on the Principal Defender's Motion for a Review of the Registrar's Decision to Install Surveillance Cameras in the Detention Facility, 6 April 2006. (Not available on line).
2. *The Prosecutor v. Sam Hinga Norman, et al.*, Case no. SCSL-04-14-T (14912-14931), Interim Registrar's Response to Principal Defender's Motion for a Review of the Registrar's Decision to install Surveillance Cameras in the Detention Facility of the Special Court of Sierra Leone, 8 February 2006. (Not available on line).
3. *The Prosecutor v. Morris Kallon*, Case no. SCSL-2003-07-PT-067 (1075-1080), Decision on the Application for Leave to Submit *Amicus Curiae* Briefs, 17 July 2003. (Not available on line).

II. LEGISLATION

International

4. Rules of Procedure and Evidence, Special Court for Sierra Leone, <http://www.sc-sl.org/rulesofprocedureandevidence.pdf> (Last visited 2 April 2007).