

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/04

Date: 11 April 2011

**PRE-TRIAL CHAMBER I**

**Before:** Judge Cuno Tarfusser, Presiding Judge  
Judge Sylvia Steiner  
Judge Sanji Mmasenono Monageng

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**Public Document**

**Decision on victims' participation in proceedings relating to the situation in the  
Democratic Republic of the Congo**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor  
Ms Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

**Legal Representatives of Victims**

Mr Emmanuel Daoud  
Mr Patrick Baudouin  
Ms Carine Bapita Buyangandu  
Mr Luc Walleyrn  
Mr Franck Mulenda  
Mr Joseph Keta  
Mr Jean-Louis Gilissen  
Mr Hervé Diakese  
Mr Jean Chrysostome Mulamba  
Nsokolini  
Mr Michael Verhaeghe  
Mr Bisimwa Ntakobajira Sylvestre  
Mr Michel Shebele

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

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

Mr Xavier-Jean Keita

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Deputy Registrar**

Mr Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Ms Fiona McKay

**Others**

**PRE-TRIAL CHAMBER I** of the International Criminal Court (“Chamber” and “Court” respectively) hereby renders a framework decision on victims’ participation in proceedings relating to the situation in the Democratic Republic of the Congo (“DRC”), irrespective of and outside the context of any case which may arise from that situation.

## **I. Background**

1. On 17 January 2006, the Chamber issued the “*Décision sur les demandes de participation à la procédure de VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6*”<sup>1</sup>, (“17 January 2006 Decision”) which accorded the “status of victim” to six applicants, allowing them to participate in the proceedings at the stage of investigation of the situation in the DRC.<sup>2</sup> The Chamber held that “proceedings”, referred to in article 68(3) of the Rome Statute (“Statute”) also exist at the stage of the investigation of a situation and that this article therefore applies at this stage.<sup>3</sup> The Chamber also found that the personal interests of victims are affected in general at the investigation stage.<sup>4</sup>

2. The Chamber ruled that “persons accorded the status of victims will be authorized, notwithstanding any specific proceedings being conducted in the framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in DRC.”<sup>5</sup> The Chamber identified three scenarios of proceedings in which “persons having the status of victims” may participate: (i) specific proceedings initiated *proprio motu* by the Chamber under articles 56(3) and 57(3)(c) of the Statute; (ii) proceedings initiated by the Office of the

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<sup>1</sup> ICC-01/04-100-Conf-Exp; a public redacted and corrected version in English: ICC-01/04-101-tEN-Corr.

<sup>2</sup> 17 January 2006 Decision, p. 41.

<sup>3</sup> 17 January 2006 Decision, para. 54.

<sup>4</sup> 17 January 2006 Decision, para. 63.

<sup>5</sup> 17 January 2006 Decision, para. 71.

Prosecutor or by counsel representing the general interests of the Defence; and (iii) proceedings initiated at a request of the persons having the status of victims.<sup>6</sup>

3. Subsequently, relying on the principles set forth in the 17 January 2006 Decision, the Chamber granted the status of victims at the investigation stage of the situation in the DRC to 3 applicants by a decision of 28 July 2006;<sup>7</sup> 32 applicants by a decision of 3 July 2008;<sup>8</sup> and to 30 applicants by a decision of 4 November 2008.<sup>9</sup>

4. On 7 December 2007, Judge Sylvia Steiner acting as Single Judge of the Chamber rendered 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” (“Decision on the Requests of the OPCD”).<sup>10</sup> The decision concerned two requests by the Office of the Public Counsel for the Defence (“OPCD”) relating to information about applicants for victims’ participation. In her decision, the Single Judge recalled the distinction between the process of victims’ application for participation and the determination of the modalities of participation by those to whom the procedural status of victims is granted. Consequently, the Single Judge rejected the requests made by the OPCD.

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<sup>6</sup> 17 January 2006 Decision, paras 73-75.

<sup>7</sup> “Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo”, 28 July 2006, ICC-01/04-170-Conf-Exp-tENG; public redacted version of 31 July 2006: ICC-01/04-177-tENG, p. 16.

<sup>8</sup> “Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of the Congo by applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06”, 3 July 2008, ICC-01/04-505, p. 41.

<sup>9</sup> “Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the 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”, 4 November 2008, ICC-01/04-545, p. 38.

<sup>10</sup> ICC-01/04-417.

5. On 24 December 2007, Judge Sylvia Steiner acting as Single Judge of the Chamber, issued a decision<sup>11</sup> granting the “status of victims authorised to participate in the proceedings at the investigation stage of the situation in the DRC” to 68 applicants (“Decision on the 68 Applicants”).<sup>12</sup> Following the established jurisprudence of the Chamber, the Single Judge recalled “that a) the investigation stage of a situation and the pre-trial stage of a case are appropriate stages of the proceedings for victim participation as provided for in article 68(3) of the Statute; and that b) it is therefore possible to have the status of victim authorised to participate in situation- and case-related proceedings before the Pre-Trial Chamber.”<sup>13</sup>

6. On 19 December 2008, the Appeals Chamber rendered the “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007” (“Appeals Chamber Judgment”),<sup>14</sup> whereby the Appeals Chamber reversed the aforementioned Decision on the Requests of the OPCD and the Decision on the 68 Applicants.

7. The Appeals Chamber rejected the principle, recalled in these decisions, that victims can be granted a general right to participate in the proceedings at the investigation stage of a situation.<sup>15</sup> The Appeals Chamber clearly distinguished the investigation conducted by the Prosecutor from judicial proceedings and held that the participation of victims at the stage of a situation can take place only within the context of judicial

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<sup>11</sup> « 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/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 et a/0241/06 à a/0250/06 » , 24 December 2007, ICC-01/04-423; amended by a Corrigendum issued on 31 January 2008, ICC-01/04-423-Corr; English translation: ICC-01/04-423-Corr-tENG.

<sup>12</sup> Decision on 68 Applicants, p. 51.

<sup>13</sup> Decision on 68 Applicants, para. 5.

<sup>14</sup> ICC-01/04-556.

<sup>15</sup> Appeals Chamber Judgment, paras 2, 43, 44 and 57.

proceedings.<sup>16</sup> The Appeals Chamber further acknowledged that “victims are not precluded from seeking participation in any judicial proceedings, including proceedings affecting investigations, provided their personal interests are affected by the issues arising for resolution.”<sup>17</sup>

8. Having regard to the Appeals Chamber Judgment and in accordance with articles 21 and 68(3) of the Statute, rules 85 to 93 of the Rules of Procedure and Evidence (“Rules”) and regulations 86 and 87 of the Regulations of the Court, the Chamber finds it desirable to ensure consistency of the principles governing victims’ participation and deems it appropriate to set out a new substantive and procedural framework for victims’ participation in the situation in the DRC.

## II. Analysis and Conclusions

### *New applications for participation*

9. In light of the Appeals Chamber Judgment, the Chamber acknowledges that victims may not be granted a general right to participate at the stage of the investigation in a situation. The victims are entitled, however, to participate in any judicial proceeding conducted at this stage, including proceedings affecting investigations. The Chamber shall therefore not grant participatory rights to victims, unless there is a judicial proceeding in which they would be able to participate.

10. The Chamber notes that the Statute and the Rules envisage various judicial proceedings that can be conducted at the situation stage: *inter alia*, proceedings regarding a review by the Pre-Trial Chamber of a decision by the Prosecutor not to proceed with an

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<sup>16</sup> Appeals Chamber Judgment, para. 45.

<sup>17</sup> Appeals Chamber Judgment, para. 56.

investigation or prosecution pursuant to article 53 of the Statute;<sup>18</sup> proceedings concerning the preservation of evidence or the protection and privacy of victims and witnesses pursuant to article 57(3)(c) of the Statute; and proceedings concerning preservation of evidence in the context of a unique investigative opportunity pursuant to article 56(3) of the Statute.<sup>19</sup> Victims can participate in such judicial proceedings if they demonstrate that their interests are affected. The Chamber also takes note of rule 93 of the Rules, according to which the Chamber may seek the views of victims or their legal representatives on any issue. Victims may participate in judicial proceedings by presenting their views in this way also at the stage of the investigation of a situation.

11. The way in which applications for participation are processed by the Chamber will largely depend on the time of their filing. Applications that have been filed at a time when no judicial proceedings are conducted by the Chamber, will need to be kept by the Victims Participation and Reparation Section (“VPRS”). Only when judicial proceedings have been initiated, or upon an order from the Chamber, will those applications which relate to the subject-matter of these specific proceedings be transmitted by the VPRS to the Chamber for examination under rule 85 of the Rules and article 68(3) of the Statute.

12. If applications for participation are filed at a time when a judicial proceeding is conducted, the Chamber will assess them on receipt, to determine whether the applicants should be granted the right to participate as victims in that proceeding.

13. In the process of assessing applications for participation, the Chamber will be assisted by the VPRS, which shall conduct an initial examination of the applications, including the assessment of their completeness and the analysis of their compliance with the relevant criteria, and transmit to the Chamber those complete and reviewed applications which are related to the subject-matter of the judicial proceedings that have

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<sup>18</sup> Pursuant to Rule 92(2), the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53.

<sup>19</sup> See “Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya”, 3 November 2010, ICC-01/09-24 (“Kenya Decision”), para. 12.

been or are about to be initiated by the Chamber. The VPRS shall report to the Chamber every three months on the applications it has received. The Chamber takes note of directions to the VPRS issued by Pre-Trial Chamber II with respect to the situation in the Republic of Kenya.<sup>20</sup> The Chamber finds it appropriate that the VPRS also follows those directions, *mutatis mutandis* and consistently with the jurisprudence of the Chamber, in the present situation.

*Applications for participation already processed by the Chamber*

14. As detailed earlier in this decision, a number of applicants have previously been granted the “procedural status of victim”, allowing them to participate in the proceedings at the stage of investigation of the situation in the DRC. As indicated earlier, one of the Chamber’s decisions granting such status was reversed by the Appeals Chamber.<sup>21</sup> The Chamber notes that the remaining decisions allowing victims to participate in the proceedings at the stage of investigation of the situation in the DRC, granted them the same “procedural status of victim” as the one which the Appeals Chamber found erroneous.

15. In light of the ruling of the Appeals Chamber, the “procedural status” granted to the victims by earlier decisions of this Chamber can no longer be sustained in the form envisaged in those decisions. The Chamber thus holds that these victims do not enjoy a general right to participate in the investigation, although they can be allowed to participate in judicial proceedings taking place at the stage of the investigation of the situation in the DRC.

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<sup>20</sup> Kenya Decision, paras 18-23.

<sup>21</sup> Appeals Chamber Judgment, para. 59. The Appeals Chamber held that the notion of “procedural status of victims” was nowhere defined and has no distinct meaning; Appeals Chamber Judgment, paras 43-44.



16. The Chamber notes, however, that in all the decisions allowing victims to participate in the proceedings at the stage of investigation of the situation in the DRC, an assessment was also made of whether the criteria for qualifying as a victim, set out in rule 85 of the Rules, were met. With regard to this issue, the Appeals Chamber ruled that a person has the right to participate in proceedings “if a) he/she qualifies as a victim under the definition of this term provided by rule 85 of the Rules, and b) his/her personal interests are affected by the proceedings in hand”.<sup>22</sup> The Chamber is, therefore, of the view that those previous findings on the requirements of rule 85 shall be retained.<sup>23</sup> When judicial proceedings take place in the context of the situation in the DRC, the Chamber will then directly proceed with the assessment of whether the personal interests of the victims, with respect to whom the assessment under rule 85 was already made in the said decisions and whose applications have been transmitted to the Chamber by the VPRS in accordance with the procedure set out above.

17. As regards the Decision on the 68 Applicants, the Majority of the Chamber, with Judge Sylvia Steiner dissenting in this particular issue, is of the view that the Appeals Chamber Judgment reversed that Decision in its entirety and that the Chamber will thus not rely on it for the purposes of assessment pursuant to rule 85. However, the victims who were granted rights of participation by that decision need not file new applications. When judicial proceedings relating to these applications are to take place, the Chamber will assess whether the requirements of rule 85 are met and whether these victims’ personal interests are affected by such proceedings, based on the original applications.

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<sup>22</sup> Appeals Chamber Judgment, para. 45.

<sup>23</sup> The Majority of the Chamber, with Judge Sylvia Steiner dissenting, is, however, of the view that, for the reasons provided in paragraph 17 of the present decision, the Chamber shall not rely on the findings under rule 85 made in the Decision on the 68 Applicants.

*Applications on which observations have recently been made*

18. Finally, the applications that have recently been processed by the VPRS<sup>24</sup> and to which the Prosecutor<sup>25</sup> and the Office of Public Counsel for the Defence have replied,<sup>26</sup> shall be assessed by the Single Judge, albeit only with respect to the requirements of rule 85 of the Rules. A decision on these matters will be given in due course.

**FOR THESE REASONS**, the Chamber decides that:

(a) the framework for participation of victims in proceedings at the stage of the situation in the DRC set forth in the present decision shall apply from now on; and

(b) the Chamber's previous findings on the requirements of rule 85 in relation to specific victims of the situation in the DRC, apart from those whose applications were granted in the Decision on the 68 Applicants,<sup>27</sup> are retained.

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<sup>24</sup> Applications a/0259/07, a/0260/07, a/0261/07, a/0262/07, a/0263/07, a/0264/07, a/0265/07, a/0266/07, a/0267/07, a/0268/07, a/0269/07, a/2310/10, a/2311/10.

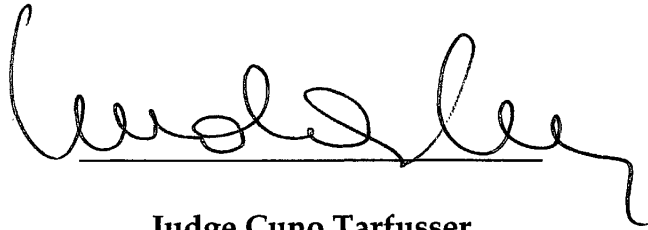
<sup>25</sup> ICC-01/04-585-Conf; ICC-01/04-585-Red; ICC-01/04-588-Conf.

<sup>26</sup> ICC-01/04-586-Conf.

<sup>27</sup> As indicated earlier, Judge Sylvia Steiner dissents in one specific aspect of this ruling. *See supra* para. 17.

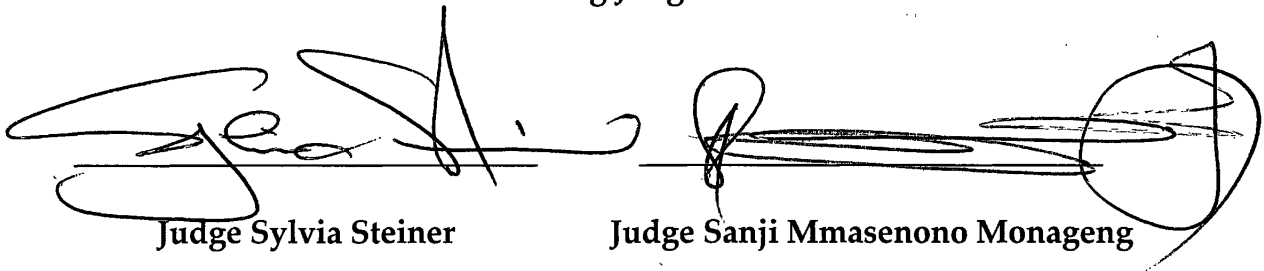
Judge Sylvia Steiner appends her partly dissenting opinion to the present decision.

Done in English and French, the English version being authoritative.



**Judge Cuno Tarfusser**

**Presiding Judge**



**Judge Sylvia Steiner**

**Judge Sanji Mmasenono Monageng**

Dated this Monday, 11 April 2011

At The Hague, The Netherlands

## Partly Dissenting Opinion of Judge Sylvia Steiner

1. The Majority held at paragraph 17 of the Decision that the Appeals Chamber Judgment<sup>1</sup> has reversed the Decision on the 68 Applicants<sup>2</sup> in its entirety, including the assessment made pursuant to rule 85 of the Rules. As a result, for the purposes of deciding upon the participation of victims in future judicial proceedings at the investigation stage of the DRC situation, the Chamber will not be able to rely on the Rule 85 assessments already made in the reversed decision. According to the ruling of the Majority, the Chamber will have to decide anew on these 68 applications.
2. My partial disagreement with the Majority's decision is strictly confined to this part of the ruling. In my view, the reading of the Majority renders the Appeals Chamber Judgment *ultra vires*, as if it were outside the scope of the appealable issues, as framed by the decision of the Pre-Trial Chamber that granted leave to appeal.<sup>3</sup> I therefore partly dissent on the present Decision on victims' participation in the proceedings relating to the situation in the DRC, for the following reasons.

### I. Background

3. As previously recalled, the Decision of 24 December 2007 granted to 68 applicants "the status of victims authorised to participate in the proceedings at the

<sup>1</sup> Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556 [Hereinafter 'Appeals Chamber Judgment'].

<sup>2</sup> 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/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 et a/0241/06 à a/0250/06", 24 December 2007, ICC-01/04-423; amended by a Corrigendum issued on 31 January 2008, ICC-01/04-423-Corr; English translation: ICC-01/04-423-Corr-tENG., [Hereinafter « Decision on the 68 Applicants » or « Decision of the 24 December 2007 » ].

<sup>3</sup> 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.

investigation stage of the situation in the DRC".<sup>4</sup> Such decision followed the established jurisprudence of the Chamber, and granted to certain applicants the "status of victim", after having analysed the applications in relation to both, the fulfilment of the requirements of Rule 85 of the Rules and their personal interest in accordance with article 68(3) of the Statute.

4. On 6 February 2008, upon requests of the Prosecution,<sup>5</sup> the OPCD<sup>6</sup> and the OPCV,<sup>7</sup> leave to appeal the Decision on the 68 Applicants was granted.<sup>8</sup> It was found that the first issue raised by the Prosecution<sup>9</sup> and the first issue raised by the OPCD<sup>10</sup> were inextricably linked. Both issues related to the manner in which the victims' personal interests were assessed and the definition of the appropriate stages of the proceedings in which the victims' views and concerns may be presented and considered, in accordance with article 68(3) of the Statute, rule 89 of the Rules and regulation 86 of the Regulations.<sup>11</sup> It was further stressed that those issues were part of the overarching issue for which the Chamber had previously granted another

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<sup>4</sup> ICC-01/04-423-Corr-tENG, page 51.

<sup>5</sup> 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", 7 January 2008, ICC-01/04-428.

<sup>6</sup> 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", 7 January 2008, ICC-01/04-429.

<sup>7</sup> Demande du BCPV aux fins d'autorisation d'interjeter appel à l'encontre de la Décision rendue le 24 Décembre 2007 relative aux demandeurs a/0047/06 à a/0052/06, 4 January 2008, ICC-01/04-426.

<sup>8</sup> 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.

<sup>9</sup> The Prosecutor identified his first issue as follows: "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 definition of the personal interests, or following the steps required by the Appeals Chamber's jurisprudence".

<sup>10</sup> The OPCD identified its first issue as follows: "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".

<sup>11</sup> ICC-01/04-444, p. 7.

leave to appeal on 23 January 2008,<sup>12</sup> which referred *inter alia* to “whether article 68(3) of the Statute can be interpreted as providing for a ‘procedural status of victim’ at the investigative stage”.<sup>13</sup>

5. The Appeals Chamber in its Judgement of 19 December 2008 further acknowledged that the common theme of the appeals was “the existence of power, if any, to accord procedural status to victims with a view to participating in the Prosecutor’s investigations in a situation.”<sup>14</sup> In this respect, when mapping the reasoning for its Judgment, the Appeals Chamber clearly states that it “understands the Single Judge to have intended the granting of “procedural status of victim” to confer upon victims participatory rights, entitling them to express their views and concerns generally in respect of the Prosecutor’s investigation into the situation. *The Appeals Chamber will therefore limit its judgement to that subject and will not rule upon any other issue.*”<sup>15</sup>

## II. Analysis

6. The power of the Appeals Chamber to decide upon interlocutory appeals is exclusively restricted to the issue in relation to which the appeal is granted.<sup>16</sup> Indeed, as already ruled by the Appeals Chamber:

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<sup>12</sup> See Decision on the 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”, 23 January 2008, ICC-01/04-438.

<sup>13</sup> ICC-01/04-438 p. 6.

<sup>14</sup> ICC-01/04-556, para. 1.

<sup>15</sup> ICC-01/04-556, para. 4 [Emphasis added].

<sup>16</sup> See *The case of The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Judgment on the appeals of the Defence against the decisions entitled “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” of Pre-Trial Chamber II, 23 February 2009, ICC-02/04-179, paras. 32. “*The Appeals Chamber notes that the present appeals concern only a narrow issue*”. It is relevant to note that in this case the issue of appeal was the interpretation given by Pre-Trial Chamber to one of requirements of Rule 85 and not the analysis of the persons interest in relation to article 68 of the Statute, therefore, the Appeals Chamber did not rule on that and clearly specified in para. 33 that “*The Appeals Chamber notes furthermore that the Pre-Trial*

[o]nly an “issue” may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic.<sup>17</sup>

[A]rticle 82(1)(d) of the Statute does not confer a right to appeal interlocutory or intermediate decisions of either the Pre-Trial or the Trial Chamber. A right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber. This opinion constitutes the definitive element for the genesis of a right to appeal. In essence, the *Pre-Trial or Trial Chamber is vested with the power to state, or more accurately still, to certify the existence of an appealable issue.*<sup>18</sup>

The remedy provided in article 82(1)(d) of the Statute is particularly restrictive,<sup>19</sup> and the subject-matter of the appeal is consequently restricted to the particular issue defined by the decision of the Chamber which grants leave to appeal.

7. Consequently, in my view the Judgment of the Appeals Chamber only refers to the issues clearly delimited by the decision that granted leave to appeal. This was further acknowledged by the Appeals Chamber when spelling out the scope of its judgement as underlined in paragraph 4 above. Thus, the Appeals Chamber “reversal” of the Decision on the 68 Applicants, only refers to the granting (or not) of the “status of victims authorised to participate in the proceedings at the investigation stage of the situation in DRC” to victims’ applicants.

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*Chamber did not grant leave to appeal in respect of the question of whether victims may be granted general participatory rights in relation to the Prosecutor’s investigations”*

<sup>17</sup> *Situation in the Democratic Republic of the Congo*, 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, para. 9.

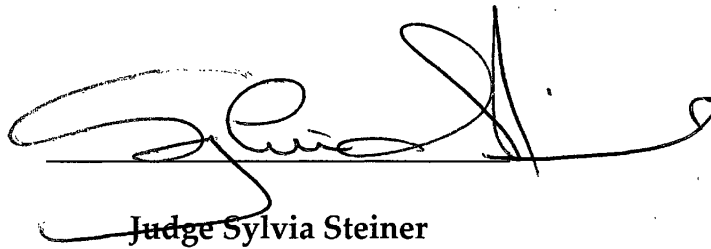
<sup>18</sup> *Ibid.*, para. 20. [Emphasis added].

<sup>19</sup> *Situation in Uganda*, Decision on Prosecutor’s application for leave to appeal in part Pre-Trial Chamber II’s decision on the Prosecutor’s applications for warrants of arrest under article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp, p.10, par. 15

### III. Conclusion

8. In conclusion, I see as the only possible interpretation of the scope of the Appeals Chamber's Judgment that the "reversal" of the Decision on the 68 Applicants only encompasses the interpretation given in that decision to article 68(3) of the Statute, when determining the stage at which victims' participation is appropriate (the operative part). As a result, the thorough assessment made in that decision in relation to each and every application—in order to determine whether or not the applicants would qualify as victims under the meaning of rule 85 of the Rules—cannot be considered as being reversed, unless it is accepted that the Appeals Chamber ruled *ultra vires*.

Done in English and French, the English version being authoritative.



Judge Sylvia Steiner

Dated this Monday, 11 April 2011

At The Hague, The Netherlands