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Pénale
Internationale**



**International
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Court**

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PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single judge

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

Public Document

**Response of Legal Representative of Victims a/0101/06 and a/0119/06 to the
Prosecution's Application for Leave to Appeal the Decision on Victims'
Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to
a/0104/06 and a/0111/06 to a/0127/06**

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I. Procedural History

1. On 22 November 2006, Judge Mauro Politi has been designated as Single Judge on Victim's Issues by the Pre-Trial Chamber II¹ seized of the situation in Uganda² and of the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen*.

2. On 1st February 2007, the Single Judge rendered 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/0127/06", in which he requested the Office of Public Counsel for Victims (the "OPCV" or the "Office") *"to provide the Applicants with any support and assistance which may be necessary or appropriate at this stage of the proceedings."*³

3. In the same decision, the Single Judge ordered the transmission of the applications for participation, in a redacted format, to the Office of the Prosecutor (the "OTP") and to the Defence for the purposes of rule 89(1) of the Rules of Procedure and Evidence (the "Rules"). He also requested both participants to submit their observations by 26 February 2007.⁴

4. On 28 February 2007 the OTP filed its reply on the applications,⁵ and on 5 March 2007, the *ad hoc* Counsel for the Defence filed her reply.⁶

¹ See the "Decision designating a Single Judge on Victim's issues", No. ICC-02/04-01/05-130, 22 November 2006.

² See the "Decision assigning the situation in Uganda to Pre-Trial Chamber II" issued by the Presidency, No. ICC-02/04-1, 5 July 2004.

³ See 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/0127/06", No. ICC-02-04-01-05-134, 1st February 2007, par. 13.

⁴ *Ibid.*, p. 19.

⁵ See the "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", No. ICC-02/04-85, 28 February 2007.

5. On 26 March 2007, the OPCV filed observations on the applications both in the situation⁷ and in the case⁸. The Prosecution then filed an objection to the OPCV observations on 3 April 2007⁹ while the *ad hoc* Counsel for the Defence filed her response on 10 April 2007.¹⁰

6. On 16 April 2007, following the objections by the OTP and the *ad hoc* Counsel for the Defence, the Single Judge dismissed the submissions by the OPCV as inadmissible.¹¹

7. On 10 August 2007, the Single Judge rendered the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" ("the Decision").¹²

8. On 20 August 2007, the OTP filed an "Application for Leave to Appeal the Decision on Victims' Application for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" ("the Prosecution's Application").¹³

⁶ See the "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/0127/06", No. ICC-02-04-01-05-216, 5 March 2007.

⁷ See 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 Lukivya and Dominic Ongwen", No. ICC-02/04-89, 26 March 2007.

⁸ See 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 Lukivya and Dominic Ongwen", No. ICC-02/04-01/05-232, 26 March 2007.

⁹ See the "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'", No. ICC-02/04-91, 3 April 2007.

¹⁰ See the "Réponse de la Défense sur les Observations des Conseils Public des Victimes "OPCV" sur les demandes des demandeurs a/0010/06, a/0064/06 à a/0070/06, a/0081/06 à a/0104/06 et a/0111/06 à a/127/06 dans la situation en Ouganda et dans l'Affaire : le Procureur c/ Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen", No. ICC-02/04-93, 10 April 2007.

¹¹ See the "Decision on the OPCV's observations on victims' applications and on the Prosecution's objections thereto", No. ICC-02/04-01/05-243, 17 April 2007.

¹² See the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", No. ICC-02/04-01/05-252, 10 August 2007.

¹³ See the "Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", No. ICC-02/04-103, 20 August 2007.

9. On 28 August 2007, the Single Judge issued the “Decision on legal representation of Victims a/0101/06 and a/0119/06” in which he appointed the Principal Counsel of the OPCV as legal representative of Victims a/0101/06 and a/0119/06, requesting her to file a response to the Prosecution’s Application within three days from the notification of the decision.¹⁴ The Office was notified of the decision the same day.

10. The Legal Representative of Victims a/0101/06 and a/0119/06 (the “Legal Representative”) submits the following arguments.

11. The Prosecution sought leave to appeal the Decision, challenging, in particular, the legal basis for victims to participate at the investigation phase in the context of the Situation in Uganda.

12. The Prosecution in its submission impugns the Decision on the premise that *“the decision provides for a definition of the personal interest of victims diverting from other Chamber”*¹⁵ and that the interpretation of the procedural activities to be performed by the victims at the investigative stage goes *“beyond the framework established by Article 68(3) of expressing ‘views and concerns’.”*¹⁶ It therefore seeks leave to enable the *“Appeals Chamber [to] exercise its powers of appellate review and enter an authoritative decision ending any uncertainty as to the scope of victims’ participation.”*¹⁷

13. The Legal Representative requests the Single Judge to dismiss the Prosecution’s Application on the ground that it falls outside of the scope of the grounds upon which leave can be granted under article 82(1)(d) of the Rome Statute.

14. Accordingly, prior to submitting her response to specific issues canvassed by the Prosecution, the Legal Representative will make general submissions on the contents of the Decision as well as the right of victims to participate in the proceedings before the Court, where their personal interests are affected.

¹⁴ See the “Decision on legal representation of victims a/0101/06 and a/0119/06”, No. ICC-02/04-105, 28 August 2007, p. 5.

¹⁵ *Ibid.*, p. 2.

¹⁶ *Ibid.*, pp. 2-3.

¹⁷ *Ibid.*, par. 22, p. 12.

II. The Right of Victims to participate in the Proceedings before the Court when their Personal Interests are affected

15. The Rome Statute grants victims of crimes falling under the jurisdiction of the Court explicit rights to submit observations and to have their views and concerns presented and considered “*where [their] personal interests are affected*” in accordance with article 68(3) of the Rome Statute. This article does not make any difference between the different stages of the proceedings before the Court, therefore covering the investigation of a situation.

16. The Legal Representative notes that article 15(3) of the Rome Statute and rules 50(1) and (3), and 107(5) of the Rules encapsulate this interpretation since victims are entitled to specific rights during the investigation phase. Therefore, it can be inferred that victims benefit from rights even before the investigation is authorised by the Pre-Trial Chamber and accordingly, there is no reason to interpret article 68(3) of the Rome Statute in a narrow sense, which will contradict other provisions of the same text. A similar conclusion may be drawn from rule 92(2) of the Rules and regulation 86(6) of the Regulations of the Court, which specifically refer to “victims of the situation” in the context of participation in the proceedings.

17. An examination of the preparatory works for the drafting of the Rome Statute and of the Rules of Procedure and Evidence¹⁸ lead to the same conclusion reached by the Single Judge¹⁹; that victims have rights to participate in all phases of the proceedings.

¹⁸ See UN Doc. PCNICC/1999/DP.2, 1st February 1999, p. 7.

¹⁹ The same reasons lead Pre-Trial Chamber I to allow VPRS 1 to 6 and a/0001/06 to a/0003/06 to participate to the investigation phase. See the “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006 (Public redacted version: 22 March 2006). See also the “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”, No. ICC-01/04-177-tEN, 31 July 2006.

18. This approach was raised on several occasions and shared by several delegations during the discussion of the then Part 5 of the Rules on Investigation and Prosecution.²⁰ The Working Group dealing with the issue decided that a comprehensive discussion on the participation of victims in the proceedings was necessary. Prior to this, an International Seminar on access of Victims to the International Criminal Court was held in Paris in April 1999, where the paradigm for the discussions of the preparatory Commission was fashioned out.²¹

19. Pursuant to Article 68(3) of the Rome Statute, victims can participate in the proceedings only “[w]here their personal interests [...] are affected.” This criterion is met at the investigation phase since victims have a personal interest in providing information to the Court.

20. This position finds support from the broad definition of victims under rule 85 of the Rules which does not specify any limitation for participation, but merely links the term “victim” to the commission of a crime falling under the jurisdiction of the Court.

21. Various human rights documents also advocate for a broad approach to victims’ participatory rights. The right of victims to be involved in criminal proceedings has generally been understood as being independent from the determination of the criminal responsibility of alleged perpetrators. This is illustrated by the notion of victim in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law²² and in the Declaration of Basic Principles of Justice for Victims of Crime and Abuses of Power, which provides that “a person may be considered a

²⁰ See UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999 and UN Doc. PCNICC/1999/WGRPE/DP. 37, 10 August 1999.

²¹ See UN Doc. PCNICC/1999/WGRPE/INFI/1, 6 July 1999.

²² See the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, adopted by the United Nations General Assembly, Resolution 60/147 of 16 December 2005.

victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted [...].”²³

22. Moreover, the European Court of Human Rights has acknowledged the right for victims and their relatives to be involved in the proceedings, including at the investigation stage.²⁴ The same approach has been taken by the Inter-American Court of Human Rights.²⁵

23. Therefore, the Legal Representative contends that the personal interests of Victims a/0101/06 and a/0119/06 are affected in general during the investigation phase, since their participation can serve to clarify the facts and to assist the Court to fight impunity. At this stage, they have a legitimate interest that the persons allegedly responsible for the crimes from which they suffered be identified and consequently sought for by the Court.

24. The Legal Representative therefore submits that the Rome Statute and the Rules provide for a right of victims to participate in *“the proceedings before the Court”* and such terms should not be confined to those activities that require judicial involvement and that are carried out after the issuance of a warrant of arrest or a summons to appear. In fact, *“there are numerous instances where the term ‘proceedings’ is used to refer to the investigation of a situation (or to activities related to the investigation of a situation), and even to the activities that take place during the triggering proceedings, irrespective of judicial involvement in their performance.”*²⁶

25. Furthermore, although the Prosecution’s Application implies that the Decision is fraught with interpretative inferences which go beyond the scope of article 68(3) of

²³ See the “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”, adopted by the United Nations General Assembly, Resolution 40/34 of 29 November 1985, at point A.2.

²⁴ See ECHR, *Kilic v. Turkey*, Application No. 22492/93, 28 March 2000, par. 91-93 and *Kaya v. Turkey*, Application No. 22729/93, 19 February 1998, par. 106-107.

²⁵ See IACHR, *Blake v. Guatemala*, Judgement, Series C no. 36, 24 January 1998.

²⁶ See OLÁSULO (H.), *The Triggering Procedure of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden/Boston, 2005, p. 108. See also the “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006 (Public redacted version: 22 March 2006), par. 32-34, pp. 9-10 and par. 38, p. 11.

the Rome Statute, the Single Judge reiterated that participation by victims is still subject to the judicial discretion of determining the appropriateness of victim's participation *vis-à-vis* the impact on the personal interests of the applicant. Indeed, as acknowledged by the Single Judge, *"there is also a need to indicate how the 'personal interests' of the victims could be affected in relation to proceedings in which they may participate, despite the fact that no case involving these victims is (as yet) under judicial scrutiny. As recalled above, article 68, paragraph 3 of the Statute makes it clear that the Court's discretion in determining the appropriateness of a victim's participation has to be exercised against the criterion of the existence of an impact on the personal interests of the applicant. With regard to each of the victims involved, this determination will then depend not only upon the nature and scope of the proceeding, but also upon the personal circumstances of the victim in question."*²⁷

26. It is then clear that allowing Victims a/0101/06 and a/0119/06 to participate in the investigation phase does not amount to fixing the modalities of the said participation. This will be determined on a case-by-case basis, and is, the Legal Representative submits, a more holistic approach to give effect to the rights of victims.

27. The Prosecution's submissions seem to suggest a restrictive remedy which limits the victim's rights even before they have begun to be exercised thus rendering the participatory rights of victims in the context of the Situation, putative. In the light of the above, it is difficult to see how the Appeals Chamber could reach a different conclusion from that of the Pre-Trial Chamber with regards to the interpretation given to the rights of victims in the context of a Situation.

28. In objecting to the victims' participatory rights in the context of articles 56 and 57(3)(c) of the Rome Statute, the Prosecution fails to take cognisance of the fact that

²⁷ See the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", *supra* note 12, par. 89, pp. 32-33.

these articles of the Rome Statute enshrine the rights of victims and are a reflection of the spirit of the authors of the principal instrument of the Court.²⁸

29. On the specific grounds advanced by the Prosecution, the Legal Representative submits that the Prosecution's Application does not meet the criteria for the grant of leave to appeal under article 82(1)(d) of the Rome Statute as the decision of the Single Judge neither affects the fair and expeditious conduct of the proceedings or the outcome of the trial, nor does an examination by the Appeals Chamber advance the proceedings in any way.

III. The Issue for which the Prosecution seeks Leave to Appeal does not fulfil the Criteria under Article 82(1)(d) of the Rome Statute

30. The Prosecution's application is based on Article 82(1)(d) of the Rome Statute which reads:

"1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."

31. The Legal Representative submits that Pre-Trial Chamber II already established that, in order for leave to appeal a decision based on article 82(1)(d) to be granted, the applicant must meet two concurrent criteria:

(a) The decision must involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and

²⁸ See *supra* par. 18.

(b) An immediate resolution of such issue by the Appeals Chamber may materially advance the proceedings.²⁹

32. The Pre-Trial Chamber II further elaborates that *“this means that the party applying for leave to appeal needs to demonstrate the existence of both the above requirements; and that failure by the applicant to establish the first of such requirements will exempt the Chamber from considering whether the second has been met. It is also to be noted that the first requirement consists of two conditions: the issue on which the appeal is sought must significantly affect either the proceedings both in terms of fairness and in terms of expeditiousness (the “first limb”) or the outcome of the trial (the “second limb”). [...] What the party seeking leave needs to demonstrate is that the issue at stake affects, first and foremost, the fairness and expeditiousness of the proceedings currently before the Chamber or the outcome of the related trial, as well as the impact (in terms of material advancement) of an immediate resolution of the issue on such proceedings. Failing such demonstration, leave to appeal cannot be granted [...].”*³⁰

33. This interpretation is in compliance with the analysis of the same provision by the Appeals Chamber³¹ which established that “[n]ot every issue may constitute the subject of an appeal but it must be one apt to significantly affect, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial.’”³²

34. The Prosecution’s Application identifies three grounds: First, that the instances and modalities of the right of victims to participate, affects the fairness of the proceedings; second, that victim participation affects the efficiency and expeditious conduct of the proceedings and third that the immediate resolution will materially advance the proceedings.

²⁹ See the “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”, No. ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision No. ICC-02/04-01/05-52 dated 13 September 2005, 19 August 2005, par. 20, p. 14.

³⁰ *Ibid.*, par. 21, pp. 14-15 (we underline).

³¹ See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168, 31 July 2006, par. 6-20, pp. 4-8.

³² *Ibid.*, par. 10, p. 5.

i) The Issue does not affect the Fair Conduct of the Proceedings

a) Alleged Impact on the Proceedings and Prosecution's Investigations in the context of articles 56 and 57(3) of the Rome Statute

35. The Prosecution alleges that the *"potential involvement of victims in proceedings relating to the gathering and preservation of evidence in particular in the context of article 56 and 57,"*³³ impacts on the issue of fairness of the proceedings. The Legal Representative begs to disagree and submits that presentation of the views and concerns of victims participating in the proceedings, particularly pursuant to articles 56 and 57(3) of the Rome Statute, cannot violate the principle of fairness of those proceedings neither is it prejudicial to nor inconsistent with a fair and impartial trial.

36. In general terms, victims' participation is part of the concept of a fair trial. International human rights law highlighted the idea, already known to many domestic legal systems, that victims must enjoy certain rights in criminal proceedings.³⁴ The balance of criminal trials is not affected by the participation of victims; on the contrary, taking their interests into account constitutes one of the factors contributing to the balance in the trial which is all the more essential since the proceedings concern the violation of their fundamental rights.

37. Moreover, the Prosecution purports that allowing the victims to participate in the investigation phase will impact the fairness of the proceedings by affecting the Prosecution's investigations since *"[v]ictims have different priorities, interests, or perceptions of events."*³⁵ However, the Legal Representative is of the opinion that the views and concerns of the victims, when allowed by the relevant Chamber, can help the said Chamber to establish the truth, in addition to the evidence gathered by the Prosecution.

38. The Pre-Trial Chamber I even considered that *"giving persons with the status of victims the right to present in general terms their views and concerns regarding the*

³³ See the Prosecution's Application, *supra* note 13, par. 12, p. 7.

³⁴ See *supra* par. 21 and 22 and accompanying footnotes.

³⁵ See the Prosecution's Application, *supra* note 13, par. 13, p. 7.

investigation of a situation and to submit material to the Pre-Trial Chamber cannot have an adverse impact on the investigation.”³⁶ It further stated that “[t]his procedural right does not entail giving access to the “record of the investigation” nor does it affect the Prosecutor’s capacity to conduct the investigation in conformity with the requirements of the Statute and in particular article 54 (1) (a).”³⁷

b) Alleged Risk to the Victims

39. With regard to the issue of protection as put forward by the Prosecution,³⁸ it appears that the Decision does not imply an automatic access to the investigation record. Victims are well aware of these issues and this is one of the reasons behind their requests for anonymity.

40. The Legal Representative further submits that as correctly stated by the Pre-Trial Chamber I “*the participation of victims during the stage of investigation of a situation does not per se jeopardise the appearance of integrity and objectivity of the investigation, nor is it inherently inconsistent with basic considerations of efficiency and security.*”³⁹

41. Furthermore, the Prosecution has failed to establish in concrete terms, how the Decision to authorise participation within the context of the Situation limits the protective resources of the Court. The Legal Representative submits that the parameters set for the Victims and Witnesses Unit to take appropriate measures to provide for the protection of victims,⁴⁰ are more than adequate to ensure that the protection system provided by the Court does not fail.

³⁶ See the “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, *supra* note 26, par. 59, pp. 15-16.

³⁷ *Ibid.*, p. 16.

³⁸ See the Prosecution’s Application, *supra* note 13, par. 16, p. 9.

³⁹ See the “Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp” (Pre-Trial Chamber I), No. ICC-01-04-73, 21 July 2005, pp. 5-6.

⁴⁰ See Rules 16, 17, 87 and 89 of the Rules of Procedure and Evidence, Regulations 41 and 42 of the Regulations of the Court and Regulations 92 to 96 of the Regulations of the Registry.

42. Finally, the Legal Representative submits that, pursuant to article 57(3)(c) of the Rome Statute, the Chamber is responsible for ensuring the protection and privacy of victims and witnesses where necessary. Therefore, the Chamber will take all necessary measures to protect the safety and well-being of victims.

c) Alleged Imbalance to Defence Rights

43. The Prosecution's Application also raises an issue of the lack of fairness to the Defence by reason of a perceived 'imbalance' and makes reference to previous concerns raised by the Defence in this regard.⁴¹ This position, the Legal Representative submits, has been adjudicated upon and dismissed by the Appeals Chamber in its ruling dated 13 February 2007.⁴² The reasoning of the Appeals Chamber was that it had the prerogative to ensure that "*the manner of [the victims'] participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.*"⁴³ This runs contrary to the Prosecution's assertion and further buttresses the submissions of the Legal Representative in this regard.

44. Moreover, regarding the alleged imbalance *vis-à-vis* the Defence "*which lack similar rights at this stage,*"⁴⁴ the Legal Representative notes that the practice of the Court has always been to appoint an *ad hoc* Counsel for the Defence in order to protect the rights of future suspects or accused,⁴⁵ notwithstanding the fact that

⁴¹ See footnotes 35 and 36 of the Prosecution's Application, *supra* note 13, referring to the "Defence observations on applications for participation in the proceedings a/0010/06, a/0064-06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127", No. ICC-02/04-01/05-216-tEN, 5 March 2007, par. 37-42.

⁴² See the "Decision on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" (Pre-Trial Chamber I), No. ICC-01/04-01/06-824, 13 February 2007.

⁴³ *Ibid.*, par. 55, p. 16.

⁴⁴ *Ibid.*, par. 17, p. 10.

⁴⁵ See *inter alia* the "Decision authorising the filing of observations on the applications for participation in the proceedings a/0004/06 to a/0009/06, a/0016/06 to a/0063/06 and a/0071/06" (Pre-Trial Chamber I), No. ICC-01/04-01/06-463, 22 September 2006, pp. 6 and 7; the "Decision on the Prosecutor's Request for Measures under Article 56" (Pre-Trial Chamber I), No. ICC-01/04-21, 26 April 2005, p. 4 and the "Decision Appointing Ad Hoc Counsel and Establishing a Deadline for the Prosecution and the Ad

pursuant to rule 91(2) of the Rules, “[t]he Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.” Moreover, as put forward by Pre-Trial Chamber I, “subject to victim and witness protective measures, future accused will be afforded access to all evidence for the purposes of preparing their defence.”⁴⁶

45. Therefore, contrary to the Prosecution’s assertion, the participation of victims in the context of the Situation and particularly pursuant to articles 56 and 57(3) of the Rome Statute does not affect the fair conduct of the proceedings but instead gives effect to the emerging role of victims under the aegis of international human rights and humanitarian law.

ii) The Issue does not affect the Expeditious Conduct of the Proceedings

46. The Prosecution further submits that the Decision affects the “predictability” and efficiency of the proceedings and that specifying the nature and scope of victim participation is critical to ensuring “predictability, certainty and effectiveness.”⁴⁷

47. The Legal Representative submits that the very nature of the framework in which the Decision was rendered, was to give specificity and efficiency in the exercise of the rights of the victims. The guidelines, which have been built into the framing of the Rome Statute and the Rules, facilitate the conditions for the participation of victims and the effectiveness of proceedings.

48. Accordingly, the Legal Representative submits that contrary to the Prosecution’s Application the Decision does not affect the fair and expeditious conduct of the proceedings and neither would it affect the outcome of the trial,

Hoc Counsel to Submit Observations on the Applications of Applicants a/0001/06 to a/0003/06” (Pre-Trial Chamber I), No. ICC-01/04-147, 18 May 2006.

⁴⁶ See the “Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the application for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” (Pre-Trial Chamber I), No. ICC-01/04-135-tEN, 31 March 2006, par. 54, p. 19.

⁴⁷ See the Prosecution’s Application, *supra* note 13, par. 19, p. 11.

particularly because the participation of victims will always be determined by a ruling of the Chamber.

iii) *Immediate Resolution of the Issue will not Materially Advance the Proceedings*

49. The Prosecution maintains that the Decision “*justifies that the Appeals Chamber exercise its powers of appellate review and enter an authoritative decision pending any uncertainty as to the scope of victims’ participation, since the decision provides for a definition of the personal interest of victims diverting from other Chambers and as to the procedural activities that they may perform at the investigative stage.*”⁴⁸ The Prosecution also expresses the need for an authoritative decision ending uncertainty as to the scope of victims’ participation where the Appeals Chamber’s intervention will provide the certainty to all participants.⁴⁹

50. However, the Prosecution’s argument over the alleged diversion does not meet with the condition laid down in the second part of article 82(1)(d) of the Rome Statute. Although, the Prosecutor’s Application recalls a diversion upon a “*definition of the personal interest of victims*” and “*procedural activities that they may perform at the investigative stage*”, it presents no discussion showing the source, nature and manner of the diversion or uncertainty in the minds of the Prosecution. Neither does the Prosecution’s Application invoke any factual circumstances which create an uncertainty in the perception of any other relevant parties or participants who have been involved or could be involved in this process.

51. In any case, the Legal Representative notes that the argument put forward by the Prosecution⁵⁰ is erroneous. Indeed, the jurisprudence of both Pre-Trial Chambers which had to deal with victims’ participation at the investigation phase is unified

⁴⁸ *Ibid.*, par. 22.

⁴⁹ *Ibid.*, par. 22 and 27.

⁵⁰ *Ibid.*, par. 26, p. 14.

and leaves no doubt to victims and to participants on the possibility for victims to participate at this stage.⁵¹

52. Moreover, Pre-Trial Chamber II already established that *“the mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal.”*⁵²

53. As the ICTY has held, asking for a leave to appeal in an unspecific way or arguing in very general terms, that the immediate resolution of these issues may materially advance the procedure would be contrary to the purpose of granting interlocutory appeal and such an unspecific and general approach would, if accepted, justify leave to be granted whenever a party seeks to appeal a decision which- in his or her opinion – has not been decided to his or her satisfaction.⁵³

54. In the view of the Legal Representative, the Decision never diverted from the previous decisions taken by Pre-Trial Chamber I, rather it expanded the scope of and enforced the concepts and the principles inferred from the said decisions.

55. The Legal Representative further submits that the Prosecution has failed to demonstrate any uncertainty about the content of the Decision. The test to have been applied by the Prosecution in showing whether or not a decision by the Appeals Chamber would have materially advanced the proceedings is whether the issue would have been the *“subject of different practice”* in different Chambers⁵⁴ or whether

⁵¹ See *supra* notes 12, 19 and 27.

⁵² See the “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”, *supra* note 29, par. 21, p. 15. See also ICTY, *Prosecutor v. Jadranko Prlić Bruno Stojić Slobodan Praljak Milivoj Petković Valentin Ćorić, Berislav Pušić*, “Decision on Milivoj Petković’s Application for Certification to Appeal Decision on Motions Alleging Defect in Form of Indictment”, Case No. IT-04-74-PT, 19 September 2005.

⁵³ See ICTY, *Prosecutor v. Jadranko Prlić Bruno Stojić Slobodan Praljak Milivoj Petković Valentin Ćorić, Berislav Pušić*, “Decision on Milivoj Petković’s Application for Certification to Appeal Decision on Motions Alleging Defect in Form of Indictment”, Case No. IT-04-74-PT, 19 September 2005.

⁵⁴ See ICTY, *Prosecutor v. Slobodan Milošević*, “Decision on Prosecution’s Application for Certification under Rule 73(B) concerning Rule 70”, Case No. IT-02-54-T, 29 August 2002.

“there is serious doubt as to the correctness of the legal principles at issue”⁵⁵ that would justify leave to appeal.

56. The Prosecution’s Application states that *“victim participation is a key feature of this Court, and should be placed on a certain solid footing”* and further submits that the Decision established *“a general regime applicable for investigative activities”* and raised *“matters of fundamental importance”* which require resolution by the Appeals Chamber in order to avert danger of later nullification of the Pre-Trial Chamber’s decision and prevent the judicial proceedings from possible mistakes.⁵⁶ The Prosecution further expresses the need of *‘enhancing clarity’* and *‘predictability’* in the Court’s proceedings through the Appeals Chamber’s *‘authoritative determination’* that would provide *‘clear guidance to all Chambers and participants’*.⁵⁷

57. The Appeals Chamber stated that *“the crucial word in the second leg of article 82(1)(d) is ‘advance’”* and *“[t]he meaning conveyed by advance in the latter part of subparagraph (d) is ‘move forward’ by ensuring that the proceedings follow the right course.”⁵⁸* It is therefore for the party requesting leave, to argue how an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁵⁹

58. In this sense, the ICTY held that the purpose of interlocutory appeal is to *“give the Appeals Chamber the opportunity to assess whether concerns of one or more of the parties with respect to an issue involved in the impugned decision were “legitimate” [...] the standard that has to be met is not whether an immediate resolution by the Appeals Chamber of an issue involved in the impugned decision is “necessary”, but rather that, in the opinion*

⁵⁵ See ICTR, *The Prosecutor v. Théoneste Bagosora, Gratian Kabiligi, Aloys Ntabakuze Anatole Nsengiyumva*, “Decision on Certification of Appeal concerning Admission of Written Statement of Witness XXO”, Case No. ICTR-98-41-T, 11 December 2003, par. 6.

⁵⁶ See the Prosecution’s Application, *supra* note 13, par. 24-25.

⁵⁷ See the Prosecution’s Application, *supra* note 13, par. 26.

⁵⁸ See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168, 13 July 2006, par. 15.

⁵⁹ See ICTR, *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, “Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal the ‘Decision on Defence Urgent Motion to Declare Parts of the Evidence OO Witnesses RV and QBZ Inadmissible’”, Case No. ICTR-97-21-T, 18 March 2004, par. 17.

*of the Trial Chamber, an immediate resolution of an issue involved in the impugned decision may materially advance the proceedings.*⁶⁰

59. However, the Prosecution's Application fails to show how exactly the intervention by the Appeals Chamber will materially advance or "*move forward*" the proceedings in the "*right course*". In fact, the Prosecution's Application simply suggests that the decision is not "*solid*" enough and the Pre-Trial Chamber is not competent enough to effectively adjudicate on matters arising within the scope of its competence.

60. The Prosecution maintains that "*the issues involved in this Decision cut across all situations before the Court*" and "[g]ranted leave to appeal this issue at this stage would therefore also materially advance other proceedings, by giving the Appeals Chamber an opportunity to confirm the procedural framework within which the applications for participation in a situation are to be dealt with" because the relevant issue "*has not yet been considered by the Appeals Chamber*".⁶¹

61. The Legal Representative submits that, the purpose of interlocutory appeal is not to give the Appeals Chamber the opportunity to assess the legitimacy of certain decisions,⁶² but to determine "*whether leaving the matter to be resolved in any later appeal creates a risk of unnecessarily complicating and delaying the proceedings, all of which could be avoided by having the matter resolved at this stage.*"⁶³

62. In considering a similar application, the ICTY further explained that the "*focal question is whether the proceedings may be materially advanced, if the matter is to be resolved at the present stage rather than by the appeals judgement at a later stage. In other words, the two ways of resolving the issue should be compared in terms of material advancement of the*

⁶⁰ See ICTY, *Prosecutor v. Enver Hadžihasanović, Amir Kubura*, Decision on "Joint Defence Request for Certification of the 'Decision on Motion for Leave to Amend the Amended Indictment' Dated 18 June 2003", Case No. IT-01-47-PT, 25 July 2003, par. 14.

⁶¹ See the Prosecution's Application, *supra* note 13, par. 28, p. 14.

⁶² See ICTY, *Prosecutor v. Enver Hadžihasanović, Amir Kubura*, *supra* note 60.

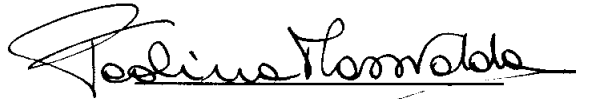
⁶³ See ICTY, *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić*, "Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to Rule 65 TER List", Case No. IT-05-87-T, 14 March 2007, par. 15, p. 7.

*proceedings: one being an "immediate resolution" by way of interlocutory appeal, and the other being a later resolution by way of appeal against the Trial Chamber judgement."*⁶⁴ Moreover, the Appeals Chamber has already ruled that *"the term 'immediate' underlines the importance of avoiding errors through the mechanism provided by the sub-paragraph (d) by prompt reference of the issue to the court of appeal."*⁶⁵

The Legal Representative is therefore of the view that the Prosecutor's Application does not pass this requirement of demonstrating the urgency or the timeliness of the supervision of the Appeals Chamber. Furthermore, the Prosecutor's Application does not raise any compelling arguments that the issue it brought must be instantly and immediately solved at the present stage by the Appeals Chamber rather than at a later stage.

FOR THE FOREGOING REASONS,

the Legal Representative respectfully requests the Single Judge to reject the Prosecution Application for Leave to Appeal.


Paolina Massidda
Principal Counsel
Office of Public Counsel for Victims

Done in English.

Dated this 31st day of August 2007

At The Hague

The Netherlands

⁶⁴ See ICTY, *Prosecutor v. Šefer Halilović*, "Separate Opinion of Judge O-Gon Kwon appended to Trial Chamber Decision dated 12 January 2005 on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment'", Case No. IT-01-48-PT, 14 January 2005, par. 5.

⁶⁵ See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 31, par. 18.