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Pénale  
Internationale**



**International  
Criminal  
Court**

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**PRE-TRIAL CHAMBER I**

**Before:** Judge Akua Kuenyehia, Single judge

**Registrar:** Mr Bruno Cathala

**SITUATION IN DARFUR, SUDAN**

**Public Document**

**Response of the Legal Representatives of Victims to the Prosecution's Application and the OPCD's Request for Leave to Appeal the "Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07"**

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## I. Procedural History

1. On 10 May 2007, Pre-Trial Chamber I seized of the situation in Darfur, Sudan designated Judge Akua Kuenyehia as Single Judge from that date until otherwise decided by the Chamber.<sup>1</sup>
2. On 23 May 2007, the Single Judge rendered the “Decision authorising the filing of observations on applications for participation in the proceedings a/0011/06 to a/0015/06”, requesting the Prosecution and the Office of Public Counsel for the Defence (the “OPCD”) to file their observations on the applications, within 15 days of notification of the applications.<sup>2</sup>
3. On 31 May 2007, the Legal Representatives of victims a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 (the “Legal Representatives”) filed a power of attorney to the Principal Counsel of the Office of Public Counsel for Victims granting her, *inter alia*, the power to make “*written submissions before the Chamber on notice to the legal representatives.*”<sup>3</sup>
4. On 8 June 2007, both the Prosecution<sup>4</sup> and the OPCD<sup>5</sup> filed their observations, in which they requested the Single Judge to dismiss the applications for participation a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06.
5. On 23 July 2007, the Single Judge issued the “Decision authorising the filing of observations on applications for participation in the proceedings a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07,” requesting the Prosecution and the OPCD to

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<sup>1</sup> See the “Decision on the Temporary Designation of a Single Judge”, No. ICC-02/05-73, 10 May 2007.

<sup>2</sup> See the “Decision authorising the filing of observations on applications for participation in the proceedings a/0011/06 to a/0015/06”, No. ICC-02/05-74, 23 May 2007.

<sup>3</sup> See the “Power of Attorney from the Legal Representatives of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, to the Principal Counsel of the Office of Public Counsel for victims”, No. ICC-02/05-76, 31 May 2007.

<sup>4</sup> See the “Prosecution’s Reply under Rule 89(1) to the Application for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 in the Situation in Darfur, Sudan”, No. ICC-02/05-81, 8 June 2007.

<sup>5</sup> See the “Observations on Applications a/0011/06 to a/0015/06”, No. ICC-02/05-80-Conf., 8 June 2007.

file their observations on the applications, within 30 days of notification of the applications.<sup>6</sup>

6. On 20 and 24 September 2007, the Prosecution<sup>7</sup> and the OPCD<sup>8</sup> filed their observations in which they requested the Single Judge to dismiss the applications for participation /0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07.

7. On 6 December 2007, the Single Judge issued the "Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07"<sup>9</sup> (the "Decision"), in which she granted the procedural status of victim to applicants a/011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07, and a/0038/07, allowing them to participate in the proceedings at the investigation stage of the Situation in Darfur, Sudan. In the same Decision, the Single Judge denied the procedural status of victims to applicants a/0014/06, a/0021/07, a/0025/07, a/0027/07, a/0028/07, a/0030/07, a/0031/07, a/0032/07, a/0033/07 and a/0035/07 pending the submissions of further information with regard to some applications.

8. On 12 December 2007, the Prosecution filed the "Prosecution's Application for Leave to Appeal the Single Judge's 6 December 2007 Decision on Applications for Participation in the Proceedings" (the "Prosecution's Application").<sup>10</sup>

9. On 12 December 2007, the OPCD filed its "Request for Leave to Appeal the 'Decision on the Applications for Participation in the Proceedings of Applicants

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<sup>6</sup> See the "Decision authorising the filing of observations on applications for participation in the proceedings a/0011/06 to a/0015/06", No. ICC-02/05-85, 23 July 2007.

<sup>7</sup> See the "Prosecution's Observations under Rule 89(1) to the Applications for Participation of a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 in the Situation in Darfur, Sudan", No. ICC-02/05-101-Conf, 20 September 2007.

<sup>8</sup> See the "Observations on applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07", No. ICC-02/05-103-Conf., 24 September 2007.

<sup>9</sup> See the "Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07", No. ICC-02/05-111, 6 December 2007.

<sup>10</sup> See the "Prosecution's Application for Leave to Appeal the Single Judge's 6 December 2007 Decision on Applications for Participation in the Proceedings", No. ICC-02/05-114, 12 December 2007.

a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07” (the “OPCD’s Request”).<sup>11</sup>

10. On 14 December 2007, the Single Judge issued a *Corrigendum* to the Decision.<sup>12</sup>

11. The Legal Representatives of victims allowed to participate in the situation in Darfur, Sudan submit the following arguments in response to both the Prosecution’s Application and the OPCD’s Request for leave to appeal the Decision.

## **II. The Right of Victims to participate in the Proceedings before the Court when their personal interests are affected**

12. 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.

13. The Legal Representatives note that article 15(3) of the Rome Statute and rules 50(1) and (3), and 107(5) of the Rules of Procedure and Evidence (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

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<sup>11</sup> See the “Request for Leave to Appeal the Decision on the applications Single Judge issued the ‘Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07’”, No. ICC-02/05-113, 12 December 2007.

<sup>12</sup> See the “Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07”, No. ICC-02/05-111-Corr, 14 December 2007.

Court, which specifically refer to “victims of the situation” in the context of participation in the proceedings.

14. An examination of the preparatory works for the drafting of the Rome Statute and of the Rules of Procedure and Evidence<sup>13</sup> lead to the same conclusion reached by the Single Judge<sup>14</sup> in the Decision that victims have rights to participate in all phases of the proceedings, and therefore also at the investigation stage.

15. This approach was adopted on several occasions and shared by several delegations during the discussion of the then Part 5 of the Rules on Investigation and Prosecution.<sup>15</sup> 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.<sup>16</sup>

16. 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 stage since victims have a personal interest in providing information to the Court.

17. 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.

18. Various human rights documents also advocate for a broad approach to victims’ participatory rights. The right of victims to be involved in criminal

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<sup>13</sup> See UN Doc. PCNICC/1999/DP.2, 1<sup>st</sup> February 1999, p. 7.

<sup>14</sup> The same reasons lead Pre-Trial Chamber I to allow VPRS 1 to VPRS 6 and a/0001/06 to a/0003/06 to participate to the investigation stage. See the “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 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.

<sup>15</sup> See UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999 and UN Doc. PCNICC/1999/WGRPE/DP. 37, 10 August 1999.

<sup>16</sup> See UN Doc. PCNICC/1999/WGRPE/INF.1, 6 July 1999.

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 Law<sup>17</sup> 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 victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted [...]”*<sup>18</sup>

19. 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.<sup>19</sup> The same approach has been taken by the Inter-American Court of Human Rights.<sup>20</sup>

20. Therefore, the Legal Representatives contend that the personal interests of the victims are affected in general during the investigation stage, 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.

21. The Legal Representatives therefore submit that the Rome Statute and the Rules of Procedure and Evidence 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*

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<sup>17</sup> 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.

<sup>18</sup> 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.

<sup>19</sup> 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, para. 106-107.

<sup>20</sup> See IACHR, *Blake v. Guatemala*, Judgement, Series C no. 36, 24 January 1998.

*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.”<sup>21</sup>*

### **III. Criteria to be met under article 82(1)(d) of the Rome Statute**

22. The Legal Representatives respectfully request the Single Judge to dismiss both the Prosecution’s Application and the OPCD’s Request on the ground that they do not meet the criteria for leave to appeal to be granted under article 82(1)(d) of the Rome Statute. Indeed, 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 will advance the proceedings in any way.

23. The Legal Representatives submit that the jurisprudence of the Court has already established that, in order for leave to appeal a decision based on article 82(1)(d) of the Rome Statute 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
- (b) An immediate resolution of such issue by the Appeals Chamber may materially advance the proceedings.<sup>22</sup>

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<sup>21</sup> See OLÁSOLO (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”, *supra* note 14, para. 32-34 and para. 38.

<sup>22</sup> 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, para. 20.

24. 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 [...]”*<sup>23</sup>

25. This interpretation complies with the analysis of the same provision by the Appeals Chamber<sup>24</sup> 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.’”*<sup>25</sup>

#### IV. Specific Submissions in Response to the Prosecution’s Application

26. The Prosecution sought leave to appeal the Decision, challenging, in particular, *“the fact that the decision does not take into consideration whether there is any prejudice to the defence and fair trial nor does it determine the permissible modalities [of participation] so as not to affect the responsibilities of the Prosecution.”*<sup>26</sup>

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<sup>23</sup> *Ibid.*, para. 21.

<sup>24</sup> 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”, No. ICC-01/04-168, 31 July 2006, paras. 6-20.

<sup>25</sup> *Ibid.*, para. 10.

<sup>26</sup> See the “Prosecution’s Application for Leave to Appeal the Single Judge’s 6 December 2007 Decision on Applications for Participation in the Proceedings”, *supra* note 10, para. 12.



27. The Prosecution in its submission impugns the Decision on the premise that *“the decision does not entirely provide certainty”*<sup>27</sup> and that the procedural activities to be performed by the victims at the investigative stage, is of *“direct relevance to the efficiency of its investigation.”*<sup>28</sup> It therefore seeks leave to appeal so as to enable the *“Appeals Chamber [...] [to] exercise its review functions in relation to the decision.”*<sup>29</sup>

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

***a) Alleged Impact on the Proceedings and Prosecution’s Investigations***

28. The Prosecution alleges that the *“granting of a procedural status to victims in the proceedings, without assessing in real terms whether their personal interests are affected or determining the modalities of participation [...] is inextricably linked with the fairness of those proceedings.”*<sup>30</sup>

29. The Legal Representatives submit that in her assessment of the applications the Single Judge had taken due cognisance of the link between the fairness of the proceedings and the modalities of participation, as observed by the Prosecution in its submissions.<sup>31</sup> Indeed, the Single Judge acknowledged that the assessment of the personal interests of victims in the specific proceedings had to be conducted in the context of the modalities of participation by the victims and that, in doing so, the Chamber *“must ensure that [such modalities] are not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”*.<sup>32</sup>

30. 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.<sup>33</sup> 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

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<sup>27</sup> *Ibid.*, para. 3.

<sup>28</sup> *Ibid.*, para. 5.

<sup>29</sup> *Ibid.*, para. 40.

<sup>30</sup> *Ibid.*, para. 16.

<sup>31</sup> *Ibid.*, para. 17.

<sup>32</sup> *Ibid.*, paras. 12 and 13.

<sup>33</sup> See *supra* paras. 18 and 19 and accompanying footnotes.

factors contributing to the balance in the proceedings which is all the more essential since the proceedings concern the violation of their fundamental rights.

31. Moreover, the Prosecution purports that allowing the victims to participate in the investigation stage will impact on the fairness of the proceedings by affecting the Prosecution's investigations, in particular, since the Decision "*gives no guidance as to the classes of specific proceedings [...] for victims to demonstrate that their personal interests are affected and participate through appropriate modalities.*"<sup>34</sup> However, the Legal Representatives are 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. Furthermore, the purport of the Decision in giving effect to the participatory rights of the victims is to grant them the right to participate whilst vesting in the Chamber the discretionary powers to control the modalities of participation in a manner that shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

32. 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 investigation of a situation and to submit material to the Pre-Trial Chamber cannot have an adverse impact on the investigation.*"<sup>35</sup> 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)."<sup>36</sup>

#### *b) Alleged Risk to the Victims*

33. The Prosecution further raises the issue of the risk that may arise should the victims engage in the gathering and preservation of evidence.

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<sup>34</sup> See the "Prosecution's Application for Leave to Appeal the Single Judge's 6 December 2007 Decision on Applications for Participation in the Proceedings", *supra* note 10, para. 13.

<sup>35</sup> 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 14, para. 59.

<sup>36</sup> *Ibid.*, para. 59.

34. The Legal Representatives submit that, as correctly stated by 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.”*<sup>37</sup>

35. Furthermore, the Prosecution has failed to establish in concrete terms, how the Decision to authorise participation within the context of a situation has, in any previous instances, definitely affected the investigative process of the Prosecution. Having failed to discharge such an onus, the Prosecution cannot rely on a predictive but unsubstantiated basis for which the victim’s participatory rights should be curtailed.

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

36. The Prosecution further submits that the Decision affects the *“predictability”* and efficiency of the proceedings and that specifying the nature and scope of victims’ participation is critical in ensuring *“predictability, certainty and effectiveness.”*<sup>38</sup>

37. The Legal Representatives submit 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.

38. Accordingly, the Legal Representatives note that, contrary to the assertion in 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, in particular because the modalities of victims’ participation will always be determined

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<sup>37</sup> See the “Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp”, No. ICC-01-04-73, 21 July 2005, pp. 5-6.

<sup>38</sup> See the “Prosecution’s Application for Leave to Appeal the Single Judge’s 6 December 2007 Decision on Applications for Participation in the Proceedings”, *supra* note 10, para. 2.

by a ruling of the Chamber which will take into account the criteria established under article 68(3) of the Rome Statute.

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

39. The Prosecution argues that *“granting procedural status to a wide range of individuals, without defining or delimiting the rights which attach to that status, will affect the expeditious conduct of the proceedings by leading to a series of time and resource intensive litigation as those individuals or their Legal Representatives attempt to determine the scope of those rights”*.<sup>39</sup>

40. However, the Prosecution’s Application contains no factual circumstances which create an uncertainty in the perception of any other participants who have been involved or could be involved in the proceedings and are entirely speculative.

41. In any case, the Legal Representatives note that the argument put forward by the Prosecution is erroneous. Indeed, the jurisprudence of Pre-Trial Chambers I and II on victims’ participation at the investigation stage is unified and leaves no doubt on the possibility for victims to participate at this stage of the proceedings.

42. 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.”*<sup>40</sup>

43. As held by the ICTY, asking for a leave to appeal in an unspecific way or arguing in very general terms that the immediate resolution of an issue may materially advance the procedure would be contrary to the purpose of granting interlocutory appeal, and such an unspecific and general approach would, if

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<sup>39</sup> See the “Prosecution’s Application for Leave to Appeal the Single Judge’s 6 December 2007 Decision on Applications for Participation in the Proceedings”, *supra* note 10, para. 26.

<sup>40</sup> 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 22, para. 21. 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.

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.<sup>41</sup>

44. The Legal Representatives further submit 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 consists in knowing whether the issue would have been the “*subject of different practice*” in different Chambers<sup>42</sup> or whether “*there is serious doubt as to the correctness of the legal principles at issue*”<sup>43</sup> that would justify leave to appeal.

45. 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.”<sup>44</sup> It is therefore for the party requesting leave to appeal to argue on how an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>45</sup>

46. 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 of the Trial*

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<sup>41</sup> 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.

<sup>42</sup> 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.

<sup>43</sup> 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, para. 6.

<sup>44</sup> 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 24, par. 15.

<sup>45</sup> In this sense, 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, para. 17.

*Chamber, an immediate resolution of an issue involved in the impugned decision may materially advance the proceedings.*<sup>46</sup>

47. 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 that Pre-Trial Chamber I is not competent enough to effectively adjudicate on matters arising within the scope of its competence.

48. The Legal Representatives submit that the purpose of interlocutory appeals is not to give the Appeals Chamber the opportunity to assess the legitimacy of certain decisions,<sup>47</sup> 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.*"<sup>48</sup>

49. 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 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.*"<sup>49</sup> Moreover, the Appeals Chamber has already ruled that "*the term 'immediate'*

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<sup>46</sup> 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.

<sup>47</sup> In this sense, see ICTY, *Prosecutor v. Enver Hadžihasanović, Amir Kubura*, *supra* note 46.

<sup>48</sup> In this sense, 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, para. 15.

<sup>49</sup> 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, para. 5.

*underlines the importance of avoiding errors through the mechanism provided by the subparagraph (d) by prompt reference of the issue to the court of appeal.”<sup>50</sup>*

## **V. Specific Submissions in Response to the OPCD’s Request**

50. The OPCD sought leave to appeal the Decision identifying the following “appealable issues” : “(i) *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 a specific proceeding(s) on the personal interests of the applicants, and an assessment as to the propriety of their participation; and (ii) whether the decision lacks sufficient reasoning concerning whether the applicants meet the requisite factual and legal criteria to be admitted as victims.*”<sup>51</sup>

### ***i) The Issues do not affect the Fair Conduct of the Proceedings***

51. The OPCD impugns the Decision on the basis that it does not provide a “‘reasoned determination’ [on] *specific proceedings within investigations phase*’ and on ‘*whether it would be appropriate for victims to participate in such proceedings*’.”<sup>52</sup> It further submits that this impacts on the fairness of the proceedings and the principle of legality.<sup>53</sup>

52. The OPCD argues that the right of victims to participate “*cannot be made in the abstract but must be tailored to specific factual circumstances and legal regime applicable to the Darfur situation.*”<sup>54</sup> In support of this assertion, the OPCD refers to the jurisprudence of the Appeals Chamber and concludes that the Single Judge’s

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<sup>50</sup> 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 24, para. 18.

<sup>51</sup> See the “Request for Leave to Appeal the Decision on the applications Single Judge issued the ‘Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07’”, *supra* note 11, para. 21

<sup>52</sup> *Ibid.*, para. 22.

<sup>53</sup> *Ibid.*, para. 25.

<sup>54</sup> *Ibid.*, para. 23.

Decision being contrary to the Appeals Chamber's decision, it causes uncertainty to the proceedings and therefore impacts on its fairness.

53. The Legal Representatives submit that the principle in law established by the Appeals Chamber's decision relied upon by the OPCD was limited to participation of victims in an interlocutory appeal, and therefore cannot be understood as a general principle related to the right of participation as a whole. Furthermore, the Legal Representatives note that the said decision was not taken unanimously since Judge Song appended a dissenting opinion on the notion of participation.<sup>55</sup>

54. The Legal Representatives submit, that contrary to the OPCD's assertion, the Single Judge took due cognisance of the reasoning of the Appeals Chamber on the spectrum of victims' participation before tailoring the Decision to the specific factual circumstances and legal regime applicable to the situation in Darfur, Sudan, and pronouncing that the *"assessment of the personal interests of the victims in specific proceedings taking place during the investigation of a situation and the pre trial stage of a case is only to be conducted for the determination of the specific set of procedural rights attached to the procedural status of victim."*<sup>56</sup>

55. The Legal Representatives also note that the Single Judge applied the jurisprudence established by the Pre-Trial Chamber I with regard to the criteria to be met for granting the status of victims in the situation to applicants, as can be inferred by the analysis of each application done by the Single Judge in paragraphs 36 to 50 of the Decision. In assessing the applications, the criterion related to the appropriateness is not relevant since pursuant to article 68(3) of the Rome Statute such criterion must be taken into account when authorising the victims to present their views and concerns before a Chamber, and therefore relates directly to the modalities of participation and not to the status *per se*.

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<sup>55</sup> See the "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007", No. ICC-01/04-01/06-925, 13 June 2007, Dissenting Opinion of Judge Song.

<sup>56</sup> *Ibid.* para. 13. See, in this regard, para. 12 of the Decision.



**iii) The Issues do not affect the Expeditious Conduct of the Proceedings**

56. The OPCD, in arguing on the expeditiousness of the proceedings, wrongly relies on the separate opinion of Judge Song in the 13 June 2007 Appeals Chamber's decision<sup>57</sup> which was in favour and not against the participation of victims in the proceedings, since Judge Song was "*not convinced by the argument of the Appellant that the participation of the Victims would lead to a delay in the proceedings and therefore would be inconsistent with the right to an expeditious trial. Obviously, if the Victims were to participate in the appeal, they would have to be given some time to make their submissions; the Appellant and the Prosecutor would be given time to respond (rule 91(2) of the Rules of Procedure and Evidence). Such delay will arise whenever victims are allowed to participate. Unless special circumstances exist, this delay is not inconsistent with the rights of the accused, but merely a consequence of the fact that the Statute provides for the participation of victims in proceedings before the Court.*"<sup>58</sup> Moreover, considering that this argument was put forward in a ruling of the Appeals Chamber dealing with the most expeditious of the interlocutory appeals, namely an appeal concerning a decision in matter of liberty, it is clear that the OPCD's argument does not stand.

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

57. The OPCD argues that the immediate resolution of the issue will provide guidance regarding the assessment of future applications so that they can be "*processed and adjudicated in accordance with the correct legal principles.*"<sup>59</sup>

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<sup>57</sup> See *supra* note 55.

<sup>58</sup> *Ibid.*, para. 27.

<sup>59</sup> See the "Request for Leave to Appeal the Decision on the applications Single Judge issued the 'Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07'", *supra* note 11, para. 34.

58. The Legal Representatives submit that the OPCD has failed to demonstrate any uncertainty about a principle established in the Decision for which leave to appeal is sought.

59. The Legal Representatives further submit that the OPCD has failed to demonstrate any uncertainty about the content of the Decision. The test to have been applied by the OPCD 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 Chambers<sup>60</sup> or whether "*there is serious doubt as to the correctness of the legal principles at issue*"<sup>61</sup> that would justify leave to appeal.

60. On the issue, the Legal Representatives further recall the jurisprudence quoted in paragraphs 46, 48 and 49 of the present submission.

61. Finally, the Legal Representatives submit that the arguments of the OPCD contained in paragraphs 27 to 29 and 35 to 39 of its request would solely be relevant should the leave to appeal be granted. As the ICTR has noted, submission of arguments on the merits or the substance at an early stage must be considered "*irrelevant and premature.*"<sup>62</sup>

## FOR THE FOREGOING REASONS,

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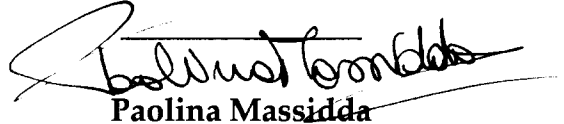
<sup>60</sup> See ICTY, *Prosecutor v. Slobodan Milošević*, "Decision on Prosecution's Application for Certification under Rule 73(B) concerning Rule 70", Case No. IT-02-54-T, 29 August 2002.

<sup>61</sup> 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, para. 6.

<sup>62</sup> See ICTR, *Prosecutor v. Arsene Shalom Ntahobali and Paulina Nyiramasuhuko*, ICTR-97-21-T, 18 March 2004, para. 20.

the Legal Representatives respectfully request the Single Judge to reject both the Prosecution's Application and the OPCD's Request for Leave to Appeal the "Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07" dated 6 December 2007.

**Wanda M. Akin  
Raymond M. Brown  
Legal Representatives**

A handwritten signature in black ink, appearing to read 'Paolina Massidda', is written over a horizontal line.

**Paolina Massidda  
Principal Counsel  
Office of Public Counsel for Victims**

Done in English.

Dated this 17<sup>th</sup> day of December 2007

At The Hague (The Netherlands) and Newark (U.S.A.)