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Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

Public Document

Decision on 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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
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Ad Hoc Counsel for the Defense

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Legal Representative of Victims

a/0101/06 and a/0119/06
Ms Paolina Massidda

I, Judge Mauro Politi, judge at the International Criminal Court (“the Court”);

NOTING the “*Decision designating a Single Judge on victims’ issues*”, dated 22 November 2006;¹

HAVING RECEIVED 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*”, dated 20 August 2007² (“the Prosecutor’s Application”);

HAVING RECEIVED the “*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*”, dated 31 August 2007³ (“the Response of the Legal Representative of Victims”);

HAVING CONSIDERED these submissions,

HEREBY RENDER THIS DECISION.

¹ ICC-02/04-01/05-130.

² ICC-02/04-103.

³ ICC-02/04-106.

I. Procedural History

1. On 10 August 2007, the Single Judge for victims' issues rendered his "*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"),⁴ filed on 13 August 2007 in the record of the Situation in Uganda ("the Situation") and in the record of the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*. In that Decision, the Single Judge, *inter alia*, granted Applicants a/0101/06 and a/0119/06 the status of victim in the context of the Situation and requested the Registrar to assist them in appointing a common legal representative.

2. On 20 August 2007, the Prosecutor's Application seeking leave to appeal the Decision pursuant to article 82(1)(d) of the Statute of the Court ("the Statute"),⁵ was filed in the record of the Situation.

3. On 28 August 2007, the Single Judge issued the "*Decision on legal representation of Victims a/0101/06 and a/0119/06*"⁶ and, pending the appointment of a common legal representative in accordance with the Decision, he appointed the Principal Counsel of the Office of Public Counsel for Victims as Legal Representative of Victims a/0101/06 and a/0119/06 ("the Legal Representative") in order to enable them to effectively exercise their right to file a response to the Prosecutor's Application.

4. On 31 August 2007, the Response of the Legal Representative of Victims was filed in the record of the Situation.⁷

⁴ ICC-02/04-101.

⁵ ICC-02/04-103.

⁶ ICC-02/04-105.

⁷ ICC-02/04-106.

II. Submissions of the Parties

Subject-matter of the Prosecutor's Application

5. The Prosecutor seeks leave to appeal the “issue of to what extent and in what manner victims may participate in an investigation, under Article 68(3), including in relation to Articles 56 and 57(3)(c), which [he] submits affects the fair and expeditious conduct of the proceedings”.⁸

6. In his submission, the Prosecutor advances a number of arguments in support of his request for leave to appeal. In his view, the Decision broadens the scope and intended framework for victims’ participation under article 68(3) of the Statute and permits extensive participation at the investigative stage including activities undertaken pursuant to articles 56 and 57 of the Statute.⁹ He further maintains that the Decision “leaves open the possibility of further (and undefined) participation”,¹⁰ adding that granting victims the “right to file material in the record of the investigation and requesting specific proceedings or measures from the Chamber can have serious consequences for the fair and expeditious conduct of the proceedings”.¹¹

7. The Prosecutor also argues that victims’ involvement in proceedings at the investigative stage relating to the “gathering and preservation of evidence” within the framework of articles 56 and 57 of the Statute,¹² would lead to the “conduct of conflicting and contradictory evidence gathering

⁸ The Prosecutor’s Application, para. 7.

⁹ The Prosecutor’s Application, paras. 6-7.

¹⁰ The Prosecutor’s Application, para. 7.

¹¹ The Prosecutor’s Application, para. 7.

¹² The Prosecutor’s Application, para. 12.

activities”, which “could seriously affect the fairness and the efficiency of the Prosecution’s investigations”.¹³

8. The Prosecutor further claims that the fairness of the proceedings is affected because the Decision may lead to participation of former LRA members or their collaborators in an attempt to either obtain “information” about or interfere with “ongoing investigations”.¹⁴

9. According to the Prosecutor, fairness could also be affected since the Decision does not limit access to confidential material.¹⁵ Further, the Prosecutor claims that victims may be involved in evidence gathering activities by making their own preparatory enquiries.¹⁶ He also claims that the Decision allows participation that goes beyond the presentation of “views and concerns”, which leads to an “imbalance” of rights *vis-à-vis* the Defence.¹⁷ He then submits that since the Decision acknowledges that the predictability and efficiency of the proceedings will be affected and enhanced by providing guidance on the nature and scope of victims’ participation, “the issues underlying those principles and guidance impact on the expeditiousness of those proceedings”.¹⁸

10. The Prosecutor asserts that the Decision will lead to an increase in the number of requests for victims’ participation, noting that “processing” and responding to the applications received “is time and resource intensive”.¹⁹ He then maintains that to permit a large number of victims to submit requests for protective or specific measures to the Chamber at the initial stages could

¹³ The Prosecutor’s Application, para. 13.

¹⁴ The Prosecutor’s Application, para. 14.

¹⁵ The Prosecutor’s Application, para. 15.

¹⁶ The Prosecutor’s Application, para. 16.

¹⁷ The Prosecutor’s Application, para. 17.

¹⁸ The Prosecutor’s Application, para. 19.

¹⁹ The Prosecutor’s Application, para. 20.

dilute the Court's "limited protective resources"²⁰ and would necessarily have an impact on the expeditiousness of the proceedings.

11. As regards the material advancement of the proceedings, the Prosecutor argues that since the Decision deviates from the decisions of other Chambers with respect to the definition of "personal interest of victims" and the "procedural activities that they may perform at the investigative stage", it is important for the Appeals Chamber to exercise its powers of appellate review in order to end any "uncertainty" surrounding the scope of victims' participation.²¹ In the Prosecutor's view, the Decision creates a general framework for victims' participation throughout the entire investigative process, raising issues of "fundamental importance" requiring an immediate resolution which would be of benefit to "present and future" proceedings. This, the Prosecutor adds, would provide "clear guidance to all Chambers and participants", thus unifying the Court's jurisprudence on the issue at stake.²² Finally, he submits that the importance of the issue and the fact that it may not be susceptible to full discussion in an appeal under article 81 of the Statute constitute further reasons for leave to appeal to be granted at this stage.²³

III. The Response of the Legal Representative of Victims

12. The Legal Representative submits that the Prosecutor's Application does not meet the criteria under article 82(1)(d) of the Statute for leave to appeal to be granted since the Decision "neither affects the fair and expeditious conduct of the proceedings or the outcome of the trial", adding

²⁰ The Prosecutor's Application, para. 21.

²¹ The Prosecutor's Application, para. 22.

²² The Prosecutor's Application, paras. 24, 26.

²³ The Prosecutor's Application, paras. 28-29.

that a review by the Appeals Chamber would not materially advance the proceedings.²⁴

13. The Legal Representative considers that the presentation of the “views and concerns” of victims participating in 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”.²⁵ She maintains that victims’ participation is part of the concept of a fair trial because “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”.²⁶

14. The Legal Representative disagrees with the Prosecutor’s assertion that the participation of victims at the investigative stage may have an adverse impact on his investigation. On the contrary, she contends 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”.²⁷ Moreover, the Legal Representative observes that the Decision does not allow “an automatic access to the investigation record”,²⁸ and that consequently victims cannot freely access any confidential information. With regard to the lack of fairness to the Defence alleged by the Prosecutor, the Legal Representative claims that this issue has already been adjudicated upon and dismissed by the Appeals Chamber,²⁹ and points out

²⁴ The Response of the Legal Representative of Victims, para. 29.

²⁵ The Response of the Legal Representative of Victims, para. 35.

²⁶ The Response of the Legal Representative of Victims, para. 36.

²⁷ The Response of the Legal Representative of Victims, para. 37.

²⁸ The Response of the Legal Representative of Victims, para. 39.

²⁹ The Response of the Legal Representative of Victims, para. 43.

that the Court has always had the practice of appointing an *ad hoc* counsel for the defence so as to protect the rights of future suspects or accused.³⁰

15. Given that the Prosecutor does not, in her opinion, prove the existence of any uncertainty regarding the scope of victims' participation or divergence of jurisprudence entailing the certainty of subsequent proceedings, the Legal Representative asserts that the Prosecutor's Application fails to show how supervision by the Appeals Chamber, let alone immediate supervision, would materially advance the proceedings.³¹

IV. Determinations by the Chamber

General remarks on interlocutory appeals

16. The Single Judge recalls the first decision on the issue of interlocutory appeals dated 19 August 2005³² in which Pre-Trial Chamber II held that when dealing with an application for leave to appeal, it must be guided by three principles: (a) the restrictive character of the remedy provided for in article 82(1)(d) of the Statute; (b) the need for the applicant to satisfy the Chamber as to the existence of the requirements set out in this provision; and (c) the irrelevance of or non-necessity for the Chamber to address arguments relating to the merit or substance of the appeal.³³ The Single Judge also recalls the judgment of the Appeals Chamber defining the object of article 82(1)(d) of the Statute in which it stated that the object of such remedy is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the

³⁰ The Response of the Legal Representative of Victims, para. 44.

³¹ The Response of the Legal Representative of Victims, paras. 59, 62.

³² ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005.

³³ *Ibid.*, para. 15.

outcome of the trial”.³⁴ It is therefore the view of the Single Judge that the Prosecutor’s Application for leave to appeal must be assessed in light of this framework.

17. Article 82(1)(d) of the Statute restricts the possibility of leave to appeal to decisions “that involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”. If this requirement is met, leave shall only be granted if “an immediate resolution of such issue by the Appeals Chamber may materially advance the proceedings”. Failure to satisfy either of the two limbs of the first requirement exempts the Single Judge from considering whether the second requirement has been fulfilled.³⁵

The alleged existence of an appealable issue under article 82(1)(d) of the Statute

18. In its judgment of 13 July 2006, the Appeals Chamber considered that article 82(1)(d) of the Statute consisted in two major components. The first concerns the prerequisites of the definition of an “appealable issue”, while the second concerns the elements “by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.³⁶

19. The Single Judge notes therefore that examining the impact on the fairness and expeditiousness of the proceedings requires first and foremost a determination of the existence of an “issue” which may qualify as the subject-matter of an appealable decision.

³⁴ ICC-01/04-168, para. 19.

³⁵ ICC-02/04-01/05-90-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-135, dated 5 February 2007, para. 38; ICC-01/04-135-tEN, paras. 28 and 61.

³⁶ ICC-01/04-168, para. 8.

20. According to the Appeals Chamber, an “issue” is defined as:

[A]n identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.³⁷

21. The Single Judge observes that the identification of an “issue” is subject to the fulfilment of two conditions: (a) it must be an identifiable subject or topic which (b) requires a decision by the Appeals Chamber for its resolution; more specifically, the resolution of this identifiable subject should be “essential for the determination of matters arising in the judicial cause under examination”.

22. The Single Judge sees no difficulty in characterising the subject-matter of the Prosecutor’s Application as an “identifiable subject or topic”. Yet, whether its resolution by a decision of the Appeals Chamber is “essential for the determination of matters arising in the judicial cause under examination”, requires further consideration.

23. In his submission, the Prosecutor seeks leave to appeal the “issue of to what extent and in what manner victims may participate in an investigation, under Article 68(3), including in relation to Articles 56 and 57(3)(c), which [the Prosecutor] submits affects the fair and expeditious conduct of the proceedings”.³⁸ In presenting his views, the Prosecutor advances three main arguments:

³⁷ *Ibid.*, para. 9.

³⁸ The Prosecutor’s Application, para. 7.

- a. The definition of the notion of “personal interests of victims” provided in the Decision diverges from the definition provided by other Chambers;
- b. The Decision leaves the “views and concerns” in article 68(3) of the Statute open to interpretations that go beyond the framework established by this provision; and
- c. The Decision “includes extensive participation” at the investigative stage in accordance with articles 56 and 57 of the Statute and “leaves open the possibility of further (and undefined) participation”.³⁹

24. The Single Judge observes that the Decision provides a detailed survey of the legal basis and regime for victims’ participation in the context of a situation. Such legal basis and regime are determined in relation to articles 53, 56(3), 57(3)(c) and 68(3) of the Statute and rules 89(1), 92 (2) and 93 of the Rules.⁴⁰ Following the arguments submitted in the Prosecutor’s Application, it should be noted that the Prosecutor is *de facto* challenging the legal treatment of victims’ rights to participate, as contained in the Decision. The core of the Prosecutor’s Application reflects a sort of “disagreement” or a “conflict of opinion” in relation to the Single Judge’s interpretation of the provisions regulating victims’ participation in the context of a situation. As stated by the Appeals Chamber, such disagreement or conflict of opinion “does not define an appealable subject”.⁴¹ Furthermore, the Single Judge considers that at this stage, where no application has been submitted by a victim (recognized as such in the Decision) under article 68(3) including in relation to articles 56 and 57(3)(c) of the Statute, a resolution of the subject-matter described by the

³⁹ The Prosecutor’s Application, paras. 6-7.

⁴⁰ The Decision, paras. 88, 90-103.

⁴¹ ICC-01/04-168, para. 9.

Prosecutor does not appear “essential for the determination of matters arising in the judicial cause under examination”. It is therefore the view of the Single Judge that the Prosecutor has not presented an “issue” that may clearly form the subject-matter of an appealable decision. However, even assuming *arguendo* that the subject-matter of the Prosecutor’s Application falls within the Appeals Chamber’s definition, leave to appeal cannot be granted unless it is demonstrated that the other requirements under article 82(1)(d) of the Statute have been fulfilled.

The alleged impact on the fairness of the proceedings

25. The Prosecutor argues in general terms that the Single Judge himself “recognises in the Decision the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings”.⁴² In the view of the Single Judge, to state that the right of victims to participate may have a profound impact on the overall fairness of the proceedings before the Court does not mean *per se* that every matter addressed in the context of a decision involving victims’ participation would significantly affect the fair and expeditious conduct of the proceedings within the meaning of article 82(1)(d) of the Statute. A party applying for leave to appeal in accordance with the latter provision must demonstrate that the “issue” raised “significantly affect[s]” in a “material way” *prior, current, or future* proceedings in terms of fairness as well as expeditiousness.⁴³

26. The Single Judge notes that examining the concept of fairness of proceedings under article 82(1)(d) of the Statute requires looking into the

⁴² The Prosecutor’s Application, para. 11.

⁴³ ICC-01/04-168, para. 12.

broad concept of a fair trial enshrined in human rights instruments.⁴⁴ This is also consistent with the essence of the Statute, which requires that the application of its provisions be consonant with “internationally recognized human rights”.⁴⁵ The jurisprudence of the Court has confirmed this viewpoint on more than one occasion.⁴⁶

27. It is commonly understood that the right to a fair trial in criminal proceedings mainly ensues to the benefit of the defendant or the defence. Yet, fairness also extends to other parties in proceedings such as the Prosecution. As the European Court of Human Rights has consistently stated in defining the right to an adversarial trial, which is an essential component of the right to a fair trial in criminal cases, “both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party”.⁴⁷ It remains the view of the Single Judge that the notion of fairness of the proceedings “should be preserved to the benefit of all participants in the proceedings”.⁴⁸ This includes

⁴⁴ *International Covenant on Civil and Political Rights* (ICCPR), adopted 16 December 1966, entered into force 23 March 1976, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966), 999UNTS 171, art.14; *American Convention on Human Rights* (Pact of San José), signed 22 November 1969, entered into force 18 July 1978, OASTS 36, O.A.S. Off. Rec. OEA/Ser.L/V/11.23, doc. 21, rev. 6 (1979), art. 8; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, signed 4 November 1950, entered into force 3 September 1953, 213 UNTS 221, ETS 5, art. 6; and *African Charter on Human and Peoples’ Rights*, entered into force 21 October 1986, art. 7.

⁴⁵ ICC Statute, article 21(3).

⁴⁶ ICC-01/04-01/06-772, para. 36; ICC-01/04-101-tEN, para. 81.

⁴⁷ *Jussi Uoti v. Finland*, ECHR Judgment, 23 October 2007, para. 32; *Botmeh and Alami v. The United Kingdom*, ECHR Judgment 7 June 2007, para. 37; *V. v. Finland*, ECHR Judgment 24 April 2007, para. 74; *Metelitsa v. Russia*, ECHR Judgment 22 June 2006, para. 29; *Öcalan v Turkey*, ECHR Judgment 12 May 2005, para. 146; *Edwards and Lewis v The United Kingdom*, ECHR Judgment 27 October 2004, para. 46; *Brandstetter v. Austria*, ECHR Judgment 28 August 1991, para. 67.

⁴⁸ ICC-02/04-01/05-90-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-135, dated 5 February 2007, para. 24.

victims “as guaranteed by the relevant statutes”, in systems which recognise the participation of victims in criminal proceedings.⁴⁹

28. The Single Judge is also aware that the idea of a fair trial reflected in article 82(1)(d) of the Statute is not confined to trial proceedings but extends to pre-trial proceedings.⁵⁰ Thus, a breach of the principles of fairness at the pre-trial stage “may have implications on the proceedings and may affect the outcome of the trial”.⁵¹

29. Upon review of the Prosecutor’s submission, in light of this framework, the Single Judge is of the opinion that the Prosecutor has failed to prove that the fairness of the proceedings has been significantly affected. The Single Judge will now address in detail the Prosecutor’s arguments as presented.

30. The Prosecutor argues that the fairness of the proceedings “would be directly impacted to the extent that victims are permitted to actively intervene in, initiate, or petition for, activities related to the gathering and preservation of evidence”, particularly in the context of articles 56 and 57 of the Statute.⁵²

31. In this regard, the Decision does not create a procedure which enables victims in the context of a situation to participate in “evidence gathering”. The Decision only permits victims to play a role in the process of the “preservation of evidence” under articles 56(1) and 57(3)(c) of the Statute. Even in relation to this process, the Decision confines victims’ involvement to

⁴⁹ ICC-01/04-135-tEN, para. 38.

⁵⁰ ICC-01-/04-168, para. 11; See also *Girdauskas v. Lithuania*, ECHR Judgment 11 December 2003, para. 22; *Baena-Ricardo et al v Panama*, IACHR Judgment 2 February 2001, para. 124.

⁵¹ ICC-01-/04-168, para. 11.

⁵² The Prosecutor’s Application, paras. 12-13.

presenting their “views and concerns”.⁵³ Thus, the Single Judge is not satisfied that granting victims the right to such participation can be characterized as a form of “active” intervention which could “significantly affect in a material way” the fairness of the proceedings.

32. The Decision also makes it clear that the power to initiate proceedings for the preservation of evidence under articles 56 and 57 of the Statute is vested with the Prosecutor or the Pre-Trial Chamber acting *proprio motu*.⁵⁴ The Decision, therefore, does not establish a right for victims in the context of a situation to trigger proceedings pursuant to those provisions. The process of victims’ participation is neither automatic nor unconditional. It is regulated and governed by the provisions of the Statute and the Rules, in particular article 68(3) of the Statute, which is also applicable in the context of articles 56 and 57. Article 68(3) entrusts the Chamber with wide supervisory powers to first assess and then grant requests for participation and presentation of “views and concerns” when “determined to be appropriate [...] and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. In its decision of 8 February 2006, Pre-Trial Chamber I denied victims (VPRS 1 to VPRS 6) the right to participate in proceedings initiated by the Prosecutor pursuant to articles 56(1)(b) and (2) of the Statute on the ground that their personal interests were not affected as required by article 68(3) of the Statute.⁵⁵ Accordingly, the Single Judge is of the opinion that the Prosecutor’s assertion that the “fairness of the proceedings would be directly impacted” has no grounds.

33. The Prosecutor further argues that the “conduct of conflicting or contradictory evidence gathering activities at the request of multiple victims

⁵³ The Decision, paras. 100-101.

⁵⁴ *Ibid.*, para. 100.

⁵⁵ ICC-01/04-112.

could seriously affect the fairness and the efficiency of the Prosecution's investigations"⁵⁶, such risk being increased by "organized actors with specific interests in the outcome of the Court's investigations and proceedings".⁵⁷ Former LRA members or their collaborators, he asserts, may "seek participation" in the situation by "fairly characterising themselves as victim-abductees" in an attempt to either obtain "information" or interfere with "ongoing investigations".⁵⁸

34. As to the first argument, the Single Judge has already clarified that the Decision by no means recognises or permits the participation of victims in "evidence gathering" activities.

35. As to the second argument, the Single Judge is of the view that the Prosecutor invokes hypothetical scenarios for which concrete evidence is lacking. The Single Judge recalls once again that the participation procedure, far from granting an automatic right to victims, is subject to rigorous judicial scrutiny aimed at ensuring proper and effective participation. At the same time, the possibility that some individuals might try to obtain information or interfere with the ongoing proceedings cannot be entirely ruled out and it could also occur in the context of a case. To accept the Prosecutor's claim would mean that the Single Judge or the Chamber should generally deny victims the right to participate at both the situation and case stages. Therefore, the Prosecutor's arguments must be dismissed.

⁵⁶ The Prosecutor's Application, para. 13.

⁵⁷ The Prosecutor's Application, para. 14.

⁵⁸ The Prosecutor's Application, para. 14.

36. The Prosecutor also claims that the impact of the issue at stake on the fairness of the proceedings “is all the greater as it does not limit access of the victims to confidential material, including the names of possible suspects”.⁵⁹

37. The Single Judge disagrees with the Prosecutor as the Decision cannot be interpreted as permitting victims to access “confidential material”. The fact that the Decision is not explicit on this point does not mean *per se* that it leaves open the possibility of victims accessing confidential material either. In its 17 January 2006 decision, Pre-Trial Chamber I considered that:

[G]iving 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. This procedural right does not entail giving access to the “record of the investigation” ...⁶⁰

38. The same view was reiterated in the “*Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*” in which Pre-Trial Chamber I stated:

[T]he Chamber recalls 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. This procedural right does not entail giving access to the confidential documents in the “record of investigation”.⁶¹

39. The Decision similarly speaks of the right for victims to present their “views and concerns”. Thus, there are no reasons for reaching a different conclusion than the one outlined in the jurisprudence of Pre-Trial Chamber I, although access to confidential material is not directly addressed in the

⁵⁹ The Prosecutor’s Application, para. 15.

⁶⁰ ICC-01/04-101-tEN-Corr, para. 59.

⁶¹ ICC-01/04-135-tEN, para. 46

Decision. The Single Judge also notes that, in any event, this is an issue which pertains to the modalities of victims' participation under article 68(3) of the Statute, and will be dealt with by the Single Judge or the Chamber when appropriate.

40. The Prosecutor also submits that the concerns relating to the impact of the issue at stake on the protection of victims "are further exacerbated because the participation of victims in evidence gathering activities can expose the victims to important risks. Such participation [, he submits,] can easily lead to victims making their own preparatory inquiries", which "could impact on the ongoing investigations of the Prosecution".⁶² The Prosecutor further claims that since preparatory enquires will "generally" take place "prior to the relevant application to participate in a given proceeding", the competent Chambers "will not have the opportunity to intervene" and "regulate" these activities "on a case-by-case basis".⁶³

41. The Single Judge responded earlier in this decision to similar arguments raised by the Prosecutor on the question of victims' involvement in the gathering of evidence and pointed out that the Decision by no means permits this form of participation.

42. The Single Judge is also of the view that since the Decision does not support victims' participation in evidence gathering activities, the Prosecutor's assertion that "such participation can easily lead to victims making their own preparatory enquiries" is ill-founded. Moreover, victims may decide to engage in preparatory enquiries regardless of the approach taken in the Decision. Neither the Single Judge (nor the Chamber or the Prosecutor) can evidently monitor victims' activities outside the framework of

⁶² The Prosecutor's Application, para. 16.

⁶³ The Prosecutor's Application, para. 16.

judicial proceedings. Thus, the Single Judge is of the opinion that the Prosecutor fails to demonstrate that the fairness of the proceedings would be significantly affected.

43. Finally, the Prosecutor maintains that granting victims the right to participate at the investigative stage “beyond views and concerns, is capable of creating an imbalance *vis-à-vis* the defence, which lacks similar rights at this stage”. Such imbalance, he asserts, “is proof of the impact that the issue of modalities of victim participation can have on the fairness of the proceedings”.⁶⁴

44. As already underlined, the Decision makes clear that the right of victims to participate in the context of a situation does not go beyond the right to present their views and concerns even within the framework of articles 56 and 57 of the Statute. In addition, with regard to the possibility for victims to submit requests for protective measures, one cannot see how an “imbalance *vis-à-vis* the defence” can be created, since this power of initiative recognized to the victims is linked, as stated in the Decision, to their fundamental interest in the protection of their security. The Prosecutor’s argument must therefore be rejected.

45. In light of these considerations, it is the view of the Single Judge that no discernible impact, let alone a significant impact, on the fairness of the proceedings can be detected.

The alleged impact on the expeditiousness of the proceedings

46. The Single Judge recalls Pre-Trial Chamber II’s decisions dated 19 August 2005 and 10 July 2006, as well as the jurisprudence of Pre-Trial

⁶⁴ The Prosecutor’s Application, para. 17.

Chamber I, pursuant to which failure by the Prosecutor to demonstrate that the “fairness” tenet of the first limb of the first requirement of article 82(1)(d) of the Statute is met would *per se* exempt the Chamber from the need to assess the alleged significant impact of the issue on the “expeditiousness” of the proceedings.⁶⁵ Nevertheless, the Single Judge considers it appropriate to state the reasons why this latter tenet has also not been met, with reference to the Prosecutor’s submissions.

47. The Prosecutor submits that since principles and guidance provided by the Decision are intended to ensure the predictability, certainty and effectiveness of the proceedings, “then the issues underlying those principles and guidance impact on the expeditiousness of those proceedings”.⁶⁶ In particular, he argues that “to the extent that victim participants would be granted the right to request the Chamber to order specific proceedings expeditiousness of the proceedings is necessarily affected”; and specifically contends, in this regard, that, under the terms of the Decision, victims in the context of the Situation would be allowed to submit requests for protective measures to the Chamber.⁶⁷ The Prosecutor also recalls the judgment of the Appeals Chamber in which it was held that “[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial” and in which reference was made to a series of expressions of the right to be tried “within a reasonable time” or “without undue delay”.⁶⁸

48. The Single Judge notes that the Prosecutor’s assertion that the issues underlying the principles set forth in the Decision necessarily affect the expeditiousness of the proceedings is simply made without further

⁶⁵ ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 35; ICC-02/04-01/05-90, para. 38; ICC-01/04-135-tEN, paras. 28,61.

⁶⁶ The Prosecutor’s Application, para. 19.

⁶⁷ The Prosecutor’s Application, para. 21.

⁶⁸ The Prosecutor’s Application, para. 18.

elaboration. It is the opinion of the Single Judge that enhancing the efficiency of proceedings is a natural and constant objective of the activity of Chambers, especially at a time when the jurisprudence of the Court is being established and is not yet fully developed. The pursuit of this objective does not enable any consequences to be anticipated which are not envisaged in the relevant provisions of the Statute or the Rules. In other words, to maintain that the intent to enhance the efficiency of the proceedings would automatically have a significant impact on expeditiousness would unduly expand the scope of interlocutory appeals beyond the precise and rigorous limits set forth in article 82(1)(d) of the Statute.

49. The Prosecutor also specifically refers to the possibility for victims to submit requests for protective measures to the Chamber, and to the alleged risk that the Court might dilute its limited resources allocated to protection, due to the potentially large-scale participation of victims.⁶⁹ However, the Prosecutor acknowledges that the impact on the said resources of any potentially large-scale participation of victims “is a question relating to the merits of the Decision”, and adds that “the consequences of this issue on the expeditious conduct of the proceedings [...] on an ongoing basis, is significant”.⁷⁰

50. The Single Judge simply notes, in this respect, that the first point made by the Prosecutor (that the question relates to the merits of the Decision) necessarily absorbs the somewhat contradictory claim of the alleged impact on the expeditiousness of the proceedings. As a result, and since “the arguments on the merits or the substance of the appeal are more appropriately for consideration and examination before the Appeals Chamber

⁶⁹ The Prosecutor’s Application, para. 21.

⁷⁰ The Prosecutor’s Application, para. 21.

if and when leave to appeal has been granted”,⁷¹ this question will not be addressed at this stage of the proceedings.

Irrelevance of the assessment of whether the issue would have a significant impact on the outcome of the trial

51. Since the Prosecutor does not claim that the issue at stake would significantly affect the outcome of the trial, there is no need for the Single Judge to examine it.

Irrelevance of the assessment of whether an immediate resolution by the Appeals Chamber may advance the proceedings

52. Finally, the Single Judge is of the opinion that the Prosecutor’s failure to prove that the issue has an impact on the fairness and expeditiousness of the proceedings or the outcome of the trial makes it unnecessary for him to examine whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.

FOR THESE REASONS, HEREBY

REJECT the Prosecutor’s Application.

⁷¹ ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 22; *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, ICTR-97-21-T, Decision 18 March 2004, para. 20; *The Prosecutor v. Casimir Bizimungu et al*, ICTR-99-50-T, Decision on Prosper Mugiranzema’s Motion for Leave to Appeal, 24 February 2005, para. 9.

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

A handwritten signature in black ink, reading "Mauro Politi." with a period at the end.

Judge Mauro Politi
Single Judge

Dated this 19 December 2007

At The Hague, The Netherlands.