

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04
Date: 7 January 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

**Prosecution's Application for Leave to Appeal the Single Judge's 24 December 2007
"Décision sur les demandes de participation à la procédure déposées dans le cadre de
l'enquête en République démocratique du Congo"**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia, Senior Appeals Counsel
Mr Ekkehard Withopf, Senior Trial Attorney

Legal Representatives of Applicants

Ms Carine Bapita Buyagandu
Mr Patrick Baudouin
Mr Emmanuel Daoud
Mr Bisimwa Ntakobajira Sylvestre
Mr Michel Shebele
Mr Michael Verhaeghe
Mr Joseph Keta

Ad hoc Counsel for the Defence

Mr Joseph Tshimanga

**Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

Office of Public Counsel for Victims

Ms Paolina Massidda

Introduction

1. On 24 December 2007, the Single Judge rendered a decision on a series of applications by victims to participate in the investigation stage of the situation in the Democratic Republic of the Congo (the “Decision”).¹ The Decision granted a number of applicants the procedural status of “*victimes autorisées à participer à la procédure au stade de l’enquête sur la situation en RDC*”.²
2. The framework established in the Rome Statute regarding victim participation represents a key innovative feature of this Court. Interaction with the victims is a statutory duty of the Prosecution and has been a key element of its prosecutorial strategy. The provisions of Article 68(3) allowing the Court to hear the views and concerns of victims at stages of the proceedings where their personal interests are affected is, in the Prosecution’s view, a milestone in international criminal justice. It is important to address all issues of relevance to victims’ participation in a clear, consistent and certain manner.
3. In this regard, the Prosecution respectfully submits that the Decision did not address whether the applications satisfied the requirements of Article 68(3) and Rule 89, and in particular, whether the applicant’s personal interests were affected and what modalities of participation flowed from their status as victims:³ At no time did the Single Judge make any determination as to whether the applications contained a showing pertaining to whether and how the applicants personal interests are affected as well as why it is “appropriate” to permit their views and concerns to be presented, as required by the Appeals Chamber.⁴
4. In deciding that certain applicants qualify as victims without clarifying their personal interests or the modalities of their participation, the Decision appears to contravene both the framework of Article 68(3) and Rule 89, and the jurisprudence of the Appeals Chamber. The

¹ *Situation in the Democratic Republic of the Congo*, ICC-01/04-423, Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 à a/0241/06 à a/0250/06, 24 December 2007.

² Decision, para. 4 and p. 58 (dispositifs). (“Victims authorised to participate in the procedure at the investigation stage of the situation in the DRC”).

³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 2, 44 and 46. See also *Prosecutor v. Lubanga*, ICC-01/04-01/06-825 OA8, 13 June 2007, para. 23.

⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 2, 44 and 46. See also *Prosecutor v. Lubanga*, ICC-01/04-01/06-825 OA8, 13 June 2007, para. 23

latter requires that, once an application to participate in certain proceedings has been received, the respective “Chamber *will rule* upon whether, and in what manner, the victims may participate in the [proceedings], necessarily taking into account the provisions of article 68(3).”⁵ Furthermore, “[a]n assessment will need to be made in each case as to whether the interests asserted by victims, do not in fact, fall outside the personal interest and belong instead to the role assigned to the Prosecutor”.⁶

5. Further, the Decision is also at odds with previous decisions of this Pre-Trial Chamber and of Pre-Trial Chamber II. Without entering the merits of respective decisions, the Prosecution submits that the uncertainty created by these different approaches affects the efficiency of proceedings.
6. The Decision remains silent on a number of relevant legal, procedural and factual issues, thereby falling short of providing adequate reasoning. The Prosecution submits that admission of applicants as victims entitled to participate in the proceedings, without proper discussion of the relevant legal and factual requirements, risks undermining the victims’ participation system, and meets the qualifications for leave to appeal.
7. As the Prosecution has consistently argued in previous submissions, all these issues are of direct relevance to the efficiency of its investigations. They are capable of affecting the fair and expeditious conduct of the proceedings. Particularly insofar as there is an emerging pattern in tension with existing law,⁷ the Appeals Chamber should provide certainty and finality to this fundamental issue in this and other situations, for the benefit of all interested participants.

I. Procedural History

8. On 10 May 2007, Pre-Trial Chamber I appointed the Single Judge in the situation in the DRC.⁸

⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 47 and 48 (emphasis supplied).

⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28.

⁷ See paras. 34 and 36-39 below.

⁸ ICC-01/04-328, 10 May 2007.

9. On 22 September 2006, the Pre-Trial Chamber rendered a decision authorising the Prosecution and the then *ad hoc* counsel for the defence to submit observations on applications a/0004/06 to a/0009/06, a/0016/06 to a/0063/06 and a/0071/06 to participate as victims in the proceedings.⁹ On 29 September 2006, the Pre-Trial Chamber issued a decision authorising the submission of observations on applications a/0072/06 to a/0080/06 and a/0105/006.¹⁰ The *ad hoc* counsel for the defence filed a response on 28 November 2006,¹¹ and the Prosecution filed a response on 30 November 2006.¹²
10. On 23 May 2007, the Single Judge rendered the decision authorising the Prosecution and the Office of Public Counsel for the Defence (“OPCD”) to file observations on applications 0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06 to a/0250/06 to participate as victims in the proceedings (“23 May 2007 Decision”).¹³ The Prosecution¹⁴ and the OPCD¹⁵ each filed responses on 25 June 2007.
11. Per the terms of the Single Judge’s order of 24 August 2007¹⁶ (“24 August 2007 Order”), on 3 September 2007, the VPRS transmitted further information received under Regulation 86(4) of the Regulations of the Court in regard to certain applications.¹⁷
12. On 11 September 2007, the Single Judge issued a decision granting the OPCD’s 29 August request¹⁸ for access to all filings referred to in the 24 August 2007 Order. The Single Judge granted the request with respect to certain applications and invited submissions as to the supplemental information transmitted on 3 September 2007.¹⁹ The OPCD filed its response on 25 September.²⁰
13. On 24 December 2007, the Single Judge rendered the “Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique

⁹ ICC-01/04-228, 22 September 2006.

¹⁰ ICC-01/04-241, 29 September 2006.

¹¹ ICC-01/04-314-Conf, 28 November 2006; ICC-01/04-314-Conf-Anx1-2, 28 November 2006.

¹² ICC-01/04-315, 30 November 2006; ICC-01/04-Conf-Exp-Anx, 30 November 2006.

¹³ ICC-01/04-329, 24 May 2007.

¹⁴ ICC-01/04-346, 25 June 2007.

¹⁵ ICC-01/04-347-Conf, 25 June 2007.

¹⁶ ICC-01/04-376, 24 August 2007.

¹⁷ ICC-01/04-384-Conf-Exp, 3 September 2007.

¹⁸ ICC-01/04-379, 29 August 2007.

¹⁹ ICC-01/04-389, 11 September 2007.

²⁰ ICC-01/04-398-Conf, 25 September 2007.

du Congo par a/0004/06 à a/009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06”, in which the Single Judge granted the procedural status of victim to 66 of the applicants.²¹

14. The Prosecution respectfully hereby applies for leave to appeal the Decision pursuant to Article 82(1)(d).²²

II. The Issues for Which Leave to Appeal is Sought

15. The Decision involves two issues:²³ The first issue is whether a “procedural status of victim”, within the terms of the Decision, can be granted independent of any finding by the Chamber that the requirements of Article 68(3) and Rule 89, are satisfied, and without addressing and providing for a definition of the personal interests, or following the steps required by the Appeals Chamber’s jurisprudence (“First Issue”). The second issue is whether the Decision lacks sufficient legal and factual reasoning (“Second Issue”).
16. As to the First Issue, the Decision does not consider or assess the personal interests of the applicants or any prejudice to the Prosecution, the defence or to a fair trial. Nor does it determine the permissible modalities so as not to affect the responsibilities of the Prosecution. These issues appear to be deferred until a later stage in the proceedings. By failing to make a finding on the personal interests and define the appropriate modalities of participation, the Decision goes beyond the framework established by Article 68(3), Rule 89 and the guidance of the Appeals Chamber. It also differs from other decisions from other Chambers, a factor which,

²¹ ICC-01/04-423 (hereinafter “the Decision”), 24 December 2007.

²² Rule 155 prescribes the time limit for filing an application for leave to appeal as 5 days. According to the jurisprudence of this Chamber, neither the day of the issuance of the decision nor the day of the filing of the application for leave to appeal are counted as part of these 5 day (ICC-01/04-01/06-466; see also ICC-01/04-135-tEN, paras. 8-9).

²³ “An issue is constituted by a subject the resolution of which is essential for the determination of matters arising from the judicial cause under examination.” *Situation in the DRC*, ICC-01/04-168, 13 July 2006 (“Judgment on Extraordinary Review”), para. 9.

without entering the merits of each decision, creates general uncertainty for the Prosecution and other participants in the proceedings, cutting across all situations²⁴.

17. The Prosecution submits that the First Issue arises directly out of the Decision. The Single Judge refers in the dispositif,²⁵ as well as throughout the Decision²⁶ to the procedural status of "*victimes autorisées à participer à la procédure au stade de l'enquête sur la situation en RDC*". The Prosecution submits that a Chamber is required - as part of the procedure granting participation under Rule 89(1) - to rule on the applicable modalities, and to determine both (i) whether the participation of the applicants would affect the interests of the Prosecution, the defence and a fair trial, and (ii) whether and how the victims' personal interests are affected.²⁷
18. As to the Second Issue, the Decision remains silent on a number of critical matters relevant to a decision on victims' applications.²⁸ The Prosecution submits that the Second Issue also arises directly out of the Decision. The Decision does not include any findings in relation to the requirements of Article 68(3); it does not even state how its findings relate to Article 68(3) or on what alternative legal basis, if any, the Single Judge decided on the applications. Further, the Decision does not define the procedural status granted to the victims: it does not state the specific rights attached to that status, nor does it spell out a specific procedure that must be followed by victims to exercise certain rights of participation in the proceedings. The factual reasoning in relation to each of the applicants also fails to indicate with sufficient clarity the basis of the decision.

²⁴ In this context, the Prosecution notes, for instance, a previous decision issued by another Single Judge of the same Pre-Trial Chamber (*Situation in Darfur, Sudan*, ICC-02/05-111, 6 December 2007 ("Darfur Victims Participation Decision")) : in assessing the applications, the Single Judge also made no specific findings in respect of the personal interests of each applicant. The Decision further contains no determination on the modalities. But it ruled explicitly that the requirements of article 68-3 only applied at a later stage, in relation to specific proceedings, para. 13, 14 and 21. In another situation, the Single Judge of Pre-Trial Chamber II has suggested that victim applications to participate in the investigation stage of that situation were not made under Article 68(3). However, the Single Judge did not indicate the alternative legal and procedural basis for those applications (see *Uganda Victims Participation Decision*, para. 89; see also *Situation in Uganda*, ICC-02/04-112, para. 24).

²⁵ Decision, p. 58, first para.

²⁶ Decision, para. 4.

²⁷ Such an approach has been taken explicitly by another Single Judge of the same Pre-Trial Chamber: see *Situation in Darfur, Sudan*, ICC-02/05-111, 6 December 2007 paras. 13, 14 and 21. In assessing the applications, the Single Judge also made no specific findings in respect of the personal interests of each applicant. The Decision further contains no determination on the modalities.

²⁸ According to the Appeals Chamber, it is not sufficient to refer to some applicable principles without stating which these are. The Appeals Chamber ruled that "[t]he reasons for a decision must be comprehensible from the decision itself" (*Prosecutor v. Lubanga*, ICC-01/04-01/06-774 OA6, 14 December 2006, para. 33).

19. The Appeals Chamber has ruled that a “decision must set out which of the relevant facts and legal arguments that were before the Pre-Trial Chamber were found to be persuasive for the determination it reached.” It must also provide information on “how it applied the [relevant legal] provisions to the facts of the case”.²⁹ It further found that “[t]he extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the respective Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.”³⁰

III. The Issues Fulfil the Criteria in Article 82(1)(d)

20. The Prosecution submits that, leaving aside any considerations as to its correctness, the Decision raises issues capable of affecting the fair and expeditious conduct of the proceedings, within the terms of Article 82(1)(d). Further, an immediate resolution by the Appeals Chamber will materially advance the proceedings. The Decision establishes a general regime which will govern the ongoing participation of these victims, as well as future applications for participation within the framework of the DRC situation, which will also have an impact on other situations. The Prosecution submits that, especially as the Appeals Chamber has already provided partial guidance on victim participation, it should have the opportunity to enter a comprehensive and authoritative decision ending any uncertainty for all participants.

A. The First Issue satisfies the requirements of Article 82(1)(d)

(a) The First Issue affects the Fair Conduct of the Proceedings

21. 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 which attach to that status, is inextricably linked with the fairness of those proceedings, which has been defined by Pre-Trial Chamber I to “include[] respect for the

²⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-774 OA6, 14 December 2006, paras. 32-33.

³⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06-773 OA5, 14 December 2006, para. 20; *Prosecutor v. Lubanga*, ICC-01/04-01/06-774 OA6, 14 December 2006, para. 30.

procedural rights of the Prosecutor, the Defence and the Victims”.³¹ The Prosecution submits that the requirements for such status, and the manner or extent to which any such right may be exercised, inherently impact on the fairness of the proceedings *vis-à-vis* the parties, the participants, as well as any potential participants.

22. The Decision itself recognises this link between the fairness of the proceedings and the modalities of participation. The Single Judge held that the modalities of victim participation must be defined in a manner that is not prejudicial to the rights of the Defence.³² By granting procedural status to victims at this stage without making a finding on their personal interests and without defining the modalities of their participation – thus deferring consideration of these critical safeguards – the Single Judge failed to determine whether fairness and the rights of the parties were being adequately protected. The Prosecution submits that considerations pertaining to the fairness of the proceedings cannot be deferred in this manner, and that this in and of itself affects the fairness of the proceedings.³³
23. In this context, the Prosecution recalls that the Single Judge of Pre-Trial Chamber II has confirmed “the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings.”³⁴ The Appeals Chamber has also confirmed that the principles of fairness “are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime”.³⁵
24. The failure to make a finding in relation to the personal interest of victims, as well as to define the modalities of participation, affects fairness in respect of all parties, as they are denied any certainty regarding the participants and the procedural landscape in which they

³¹ *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006 (“PTC-I’s 31 March 2006 Decision Denying Leave to Appeal”), para. 38; see also para. 39. See also *Situation in Uganda*, ICC-02/04-112, para. 27.

³² Decision, para. 5.

³³ In this context, see *Situation in Uganda*, ICC-02/04-112, 19 December 2007, para. 35.

³⁴ *Situation in Uganda*, ICC-02/04-101 (“Uganda Victim Participation Decision”), para. 16. The Single Judge of Pre-Trial Chamber II later clarified that not “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. [...] (*Situation in Uganda*, ICC-02/04-112, 19 December 2007, para. 25).

³⁵ See Judgment on Extraordinary Review, para. 11. See also PTC-I’s 31 March 2006 Decision Denying Leave to Appeal, paras. 35, 39. Furthermore, as one commentator has noted, “there cannot be a really *fair* trial, if this fairness has not been practiced and guaranteed appropriately in the phases prior to the trial” (Marchesiello, “Proceedings before the Pre-Trial Chambers”, in Cassese, Gaeta and Jones (ed) *The Rome Statute of the International Criminal Court* (2002) 1231 at 1232). Given that the essence of Article 82(1)(d) is consideration of the impact of the issue on the ongoing proceedings, fairness cannot be measured only by fairness to the parties present at this stage. Rather, the Chamber must consider the impact of the issue on the fairness of the proceedings *vis-à-vis* future participants, in particular future suspects or accused persons.

operate and are thus unable to effectively plan their activities. For instance, certain conceivable modalities of participation – e.g., allowing a victim participant to intervene in investigative steps undertaken by the Prosecution – can seriously impact on the Prosecution’s investigations, and thus affects fairness in terms of “respect for the procedural rights of the Prosecutor”.³⁶

25. Such uncertainty is reinforced by the differences between a number of decisions on victims’ participation. The present Decision does not make any determination as to the personal interests at stake under Article 68(3). Other rulings by other Chambers do.³⁷ The Decision also fails to provide guidance as to the classes of “specific proceedings” in which the Single Judge considers that those who have been granted the procedural status of victim may be able to demonstrate that their personal interests are affected, and therefore participate through appropriate modalities. The uncertain and open-ended nature of this potential participation may also affect the fairness of the proceedings.³⁸ In addition, granting an undefined procedural status to such persons, prior to any concrete showing of personal interests or assessment of the impact on the rights of the defence and a fair trial, raises the risk that such persons may be found to have standing to petition for, or initiate, such proceedings, which would further impact on the overall procedural fairness.³⁹

³⁶ *Situation in the Democratic Republic of the Congo*, ICC-01/04-135, 31 March 2006, para. 38.

³⁷ For instance, Uganda Victims Participation Decision, paras 9-10, 84, 90, 97-98 and 100; *Situation in the Democratic Republic of the Congo*, ICC-01/04-101, 17 January 2006, para. 61-64.

³⁸ Specific examples of the impact of an issue on these proceedings will necessarily have a predictive element. The Appeals Chamber has previously recognised that certainty of that impact is not required to grant leave to appeal, referring to “ridding ... the judicial process of possible mistakes that might taint either the fairness of the proceedings” and to “[r]emoving doubts about the correctness of a decision”. Judgment on Extraordinary Review, paras. 14, 15 (emphasis added). See also *Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005 at para 9 (“The point of contention is whether those consequences will actually ensue. In its decision, the Chamber considered the dangers raised by the Defence to be remote ... [However] If the Chamber’s interpretation of the witness protection orders is incorrect, then the effect on the Defence would be profound. In these circumstances, the Chamber finds that its decision involves an issue that ‘would significantly affect the fair and expeditious conduct of the proceedings.’”); *Prosecutor v Strugar*, IT-01-42-PT, Decision on the Defence’s Request for Certification to Appeal the Trial Chamber’s Decision dated 26 November 2003, 12 December 2003, para. 6 (“some error must be alleged by the moving party and this error [i.e. the issue raised by the decision] must have the capacity to significantly affect the fair and expeditious conduct of the proceedings” - emphasis added); *The Prosecutor v Bagosora*, ICTR-98-41-T, Decision on Certification of Interlocutory Appeal from Decision on Severance and Scheduling of Witnesses, 11 September 2003, para. 9 (“The Defendant’s motions have questioned the fairness of the proceedings against the Accused, and have suggested that the outcome of the trial may be at stake” - emphasis added).

³⁹ Another potential impact of granting procedural status to victims without any concrete showing of personal interests may be on the capability of the Court to effectively protect victims and witnesses, if the Court is expected to extend its protective efforts to all those victims admitted to participate at the situation level.

26. The impact of the uncertainty created by the Decision is further increased by the existence of organised actors with specific interests in the outcome of the Court's investigations and proceedings. These pose additional risks in situations where victims in respect of one set of crimes may live in areas controlled by individuals or groups who are also the subject of other investigations within the situation.⁴⁰
27. The question is not whether the Single Judge will manage proceedings in order to maintain their fairness, but whether the granting of the status in issue in and of itself affects the fairness of the proceedings in a way which the procedural devices available to the Judge arguably cannot adequately remedy.⁴¹

(b) The First Issue affects the Expeditious Conduct of the Proceedings

28. The Appeals Chamber has held that "[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial," referring to a series of expressions of the right to be tried "within a reasonable time" or "without undue delay."⁴² The Single Judge in the Darfur Situation also linked expeditiousness with "the effectiveness of the proceedings."⁴³ The Prosecution submits that expeditious conduct of proceedings requires that the proceedings be conducted in a timely and efficient manner.⁴⁴

⁴⁰ A clear example for such potential conflict is in the two cases currently before the Court in the DRC situation, where the alleged leaders of two ethnically-based militias which engaged in extensive conflict are each accused of crimes. In the context of the DRC situation, see also e.g. UNSC Resolution 1771 (2007): "*Reiterating* its serious concern regarding the presence of armed groups and militias in the Eastern part of the Democratic Republic of the Congo, particularly in the provinces of North and South Kivu and the Ituri district, which perpetuate a climate of insecurity in the whole region"). The recently announced developments in the Darfur investigation demonstrate the potential for such conflicts to arise in the future in this situation.

⁴¹ For instance, while the appointment of *ad hoc* counsel in certain circumstances may ameliorate some of the unfairness towards future suspects or accused persons, in specific and confined proceedings, such *ad hoc* counsel cannot substitute for properly instructed counsel when it comes to broad rights of participation in ongoing proceedings. This very point has been raised by *ad hoc* counsel in the other proceedings (*Prosecutor v Kony et al*, ICC-02/04-01/05-216-tEN, 5 March 2007, paras. 37-42).

⁴² Judgement on Extraordinary Review, para. 11 and footnote 13.

⁴³ Darfur Victims Participation Decision, para. 9.

⁴⁴ This is consistent with the recent references to "the requirement that the proceedings be conducted expeditiously" by Pre-Trial Chamber I, in the context of ensuring that the confirmation of charges is not unduly delayed (*Prosecutor v Lubanga*, "Decision on the Confirmation of Charges", ICC-01/04-01/06-803-tEN, 29 January 2007, paras. 54 and 55). See further *Prosecutor v Kallon*, SCSL-2003-07-PT, Decision on the Defence Application for Leave to Appeal 'Decision on the Prosecution's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure', 10 December 2003, para. 34; *Prosecutor v Brima et al*, SCSL-04-16-T, Decision on Joint Defence Application for Leave to Appeal Against the Ruling of Trial Chamber II of 5 April 2005, 15 June 2005, para. 22.

29. 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.
30. In this context, the Prosecution submits that the predictability and efficiency of the proceedings will be enhanced by the Appeals Chamber providing guidance on the role that victims may play at various stages in the proceedings.⁴⁵ The nature and scope of the proceedings in which the victims may participate are “critical” to ensuring the predictability, certainty and effectiveness of the proceedings and the victims’ participation in them.⁴⁶
31. The First Issue also affects the expeditiousness of the proceedings as it mandates a multi-tiered approach to assessing applications for participation. Although the Decision does not explicitly so provide, there will in practice have to be a further application by the victims, and an assessment by the Chamber, of the personal interests of the victims and a ruling on the specific set of procedural rights and the modalities of participation attached to the procedural status of victim.⁴⁷ Thus, the parties will be forced to consider a series of applications and file multiple responses in relation to each application for participation before the criteria prescribed in Article 68(3) and Rule 89 are fulfilled.
32. The Prosecution respectfully submits that the question in this application for leave is not whether that impact is justified, or supported by the Statute and the Rules – a matter inextricably linked to the merits of the Decision - but merely whether that impact exists. In this sense, the Prosecution notes that the processing of, and responses to, these applications, and subsequent litigation, have already proved to be time and resource intensive. The Prosecution further recalls that in another decision, the Single Judge recently – in considering the impact on “the expeditiousness and effectiveness of the proceedings” of a proposal relating to victim-applications – looked precisely at the practical implications, and held that it was “not only impractical now, but will be extremely impractical as the number of applicants

⁴⁵ Uganda Victim Participation Decision, para. 5.

⁴⁶ Uganda Victim Participation Decision, para. 88 and 89. The Single Judge makes a similar point regarding the role that victims could play in specific proceedings. Uganda Victim Participation Decision, para. 96.

⁴⁷ See Darfur Victim Participation Decision, para. 13, which states this explicitly.

continues to increase.”⁴⁸ On this basis, the Prosecution submits that the impact which the issue, rightly or wrongly, has on the expeditious conduct of proceedings cannot be denied.

(c) Immediate Resolution of the First Issue will Materially Advance the Proceedings

33. The Appeals Chamber has ruled that the requirement that “immediate resolution may materially advance the proceedings” means that “prompt reference of the issue to the court of appeal”⁴⁹ and its “authoritative determination”⁵⁰ will help the proceedings “move forward” by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”⁵¹
34. The Prosecution respectfully submits that to the extent that the Decision fails to incorporate existing guidance from the Appeals Chamber, in particular on the requirement of the personal interest of victims and the procedure to be followed when being seized of an application for victim participation,⁵² the Decision forms part of an emerging pattern of decisions deviating from the Appeals Chamber’s jurisprudence which should be addressed.⁵³
35. Victim participation is a key feature of this Court, and should be put on a clear, consistent and certain footing from the outset. The First Issue involved in this Decision cuts across all situations before the Court. Final determination of this critical issue⁵⁴ by the Appeals Chamber will provide clear guidance to all Chambers and participants, in line with its

⁴⁸ *Situation in the DRC*, ICC-01/04-01/06-418, para. 15.

⁴⁹ Judgment on Extraordinary Review, para. 18.

⁵⁰ *Ibid.*, para. 14.

⁵¹ *Ibid.*, para. 15.

⁵² See *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 47 and 48. See also the guidance with respect to the application and the assessment relevant to the personal interests of victims (*Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 2, 44 and 46; and *Prosecutor v. Lubanga*, ICC-01/04-01/06-825 OA8, 13 June 2007, para. 23).

⁵³ For example, the Darfur Victims Participation Decision did not set out a list of the modalities and instances of participation for those with the procedural status of victims. Darfur Victims Participation Decision, para. 13.

⁵⁴ While recognizing that issues of general importance, and the fact that an issue has not yet been considered by the Appeals Chamber, are not in themselves grounds for granting leave to appeal, the Prosecution submits that the importance of the issues raised by the Decision underscore the desirability of prompt consideration of this issue by the Appeals Chamber. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings”. *Prosecutor v. Kony et al.*, ICC-02/04-01/05-20-US-Exp, 19 August 2005, para. 54 (unsealed pursuant to ICC-02/04-01/05-52).

function to unify the law of the Court, and to ensure that it evolves in a coherent and standardised manner.⁵⁵

36. The need for Appeals Chamber review is reinforced by the different approaches to this issue taken by different Pre-Trial Chambers at different times.⁵⁶ In contrast to this Decision, this very Pre-Trial Chamber, in the *Situation in the DRC*, did set out the modalities of participation for those with the procedural status of victim.⁵⁷ Further, a Single Judge in Pre-Trial Chamber II referred to certain modalities and provided guidance on the nature and scope of specific proceedings. In that ruling, it was determined that victims might participate on the basis of their personal interests, a requirement which was considered necessary to ensure the predictability, certainty and effectiveness of the proceedings and the victims' participation in them.⁵⁸
37. In addition, the Appeals Chamber's jurisprudence pertaining to the procedure to be followed in relation to victims applications, requires that, once an application to participate in certain proceedings has been received, the respective "Chamber *will rule* upon whether, and in what manner, the victims may participate in the [proceedings], necessarily taking into account the provisions of article 68(3)."⁵⁹ Furthermore, "[a]n assessment will need to be made in each case as to whether the interests asserted by victims, do not in fact, fall outside the personal interest and belong instead to the role assigned to the Prosecutor".⁶⁰ These findings counsel that, in assessing a victim application, a Chamber should not limit itself to determining

⁵⁵ See e.g. *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 7: one concern of the Appeals Chamber "is to ensure the development of the Tribunal's case-law and the standardisation of the applicable law". See also *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 113(ii): "The fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law". This includes providing guidance to Pre-Trial and Trial Chambers on the interpretation of the law.

⁵⁶ The fact that different first instance Chambers have taken different approaches to a matter has been considered as a factor supporting a conclusion that immediate resolution would materially advance the proceedings. See e.g. *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecution's Application for Certification under Rule 73(B) concerning the Evidence of an Investigator, 20 June 2002; *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecution's Application for Certification under Rule 73(B) concerning Rule 70, 29 August 2002.

⁵⁷ *Situation in the DRC*, ICC-01/04-100-tEN, 17 January 2006, paras. 69-75.

⁵⁸ Uganda Victim Participation Decision, para. 88-89, 96-103. In the decision denying leave to appeal the Uganda Victim Participation Decision, the same Single Judge of Pre-Trial Chamber II, clarified that the issue of presenting the victims 'views and concerns' "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" (*Situation in Uganda*, ICC-02/04-112, para. 39).

⁵⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 47 and 48 (emphasis supplied).

⁶⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28.

whether the applicants have demonstrated reason to believe that the alleged harm results from a crime within the jurisdiction of the Court and the temporal, geographic, and personal parameters defining the situation concerned. Indeed, they suggest that a Chamber deciding on a victim application must make a full determination with respect to the personal interests and the modalities of participation pursuant to Article 68(3) and Rule 89.

38. In light of this apparent conflict in jurisprudence, the Prosecution submits that the proceedings will be materially advanced if the Appeals Chamber is afforded the opportunity to provide comprehensive guidance on this issue. It is in the interests of all participants and the proceedings generally that any differences of interpretation be addressed at the earliest opportunity. In short, the proceedings will materially advance if the Appeals Chamber is allowed to enter an authoritative decision ending any uncertainty as to the procedure and scope of any right of victim participation at the investigative stage.
39. The Appeals Chamber has held that the proceedings which must be materially advanced “encompass [...] the proceedings in their entirety”, and that they are “not confined to the proceedings in hand but extend[] to proceedings prior and subsequent thereto”.⁶¹ Granting leave to appeal this issue at this stage would materially advance all proceedings,⁶² by giving the Appeals Chamber an opportunity to confirm the procedural framework within which the applications for participation are to be addressed.⁶³ This would significantly reduce the amount of litigation on this issue, provide clarity to victim applicants, and allow future applications to be dealt with promptly.

⁶¹ Judgment on Extraordinary Review, paras. 12 and 17.

⁶² While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor which can be weighed in deciding whether to grant leave. See *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para. 4; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

⁶³ To the extent that the current framework set by the Decision is not correct, having this matter addressed by the Appeals Chamber now will materially advance the proceedings as it will ensure that all proceedings are conducted under the correct legal framework, and that any error is pre-empted before it can taint the ongoing proceedings. See Judgment on Extraordinary Review, paras. 14, 19.

40. Further, the Prosecution submits that none of the factors which may militate against granting leave to appeal apply in this case. In particular, given the stage of the proceedings granting leave to appeal is not likely to cause any significant delay.⁶⁴
41. Finally, the Prosecution notes that the First Issue may not be susceptible to full discussion in an appeal under Article 81.⁶⁵ The Prosecution submits that this is an additional reason in favour of leave to appeal being granted at this stage.⁶⁶
42. On the basis of these considerations, the Prosecution respectfully submits that the Appeals Chamber ought to be given the opportunity to exercise its review functions in relation to the Decision and the important matters raised by the Single Judge in relation to the First Issue.

A. The Second Issue satisfies the requirements of Article 82(1)(d)

(a) The Second Issue affects the Fair Conduct of the Proceedings

43. The Decision does not define the status of the victims with sufficient clarity. Neither does it define the rights attached to the status of “*victimes autorisées à participer à la procédure au stade de l’enquête sur la situation en RDC*”. The decision also fails to analyze its compatibility with the requirements enshrined in Article 68 (3), including the personal interests of the victims. Due to the lack of factual reasoning it is further not possible to interpret the Decision with sufficient precision. This situation impairs the fair conduct of the proceedings with respect for the procedural rights of the Prosecutor, the Defence and the

⁶⁴ In this context, the Prosecution observes that the Decision does not rule in relation to those applications that have also been filed before Trial Chamber I and that are pending before that Chamber (see Decision, para. 142). On the relevance of any likely delay to proceedings of granting leave to appeal, see e.g. *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, at paras 7 and 8; *Prosecutor v. Mile Mrksic*, IT-95-13/1-PT, Decision Granting Certification To Appeal, 29 May 2003; *Prosecutor v. Hadzihasanovic*, IT-01-47-T, Decision on The Request For Certification to Appeal the Decision Rendered Pursuant to Rule 98bis of the Rules, 26 October 2004.

⁶⁵ It is highly unlikely that an issue such as this, which affects victims participation across an entire *situation*, could be properly addressed as part of a final appeal in any particular *case*. The issue may arise during a final appeal only indirectly and to a limited extent, for instance as part of the challenge of evidence that has been manipulated by the intervention of victims at the situation stage.

⁶⁶ The Prosecution recalls that the purpose of article 82(1)(d) is to regulate whether an issue should be appealed at this stage of proceedings, or whether it should be left to be raised (if necessary) as part of a final appeal against judgement. See e.g. *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 6; see further submissions in *Situation in the DRC*, ICC-01/04-103, 23 January 2006, paras. 37-38 and authorities cited therein.

same victims, to the extent that their current status remains largely undefined.⁶⁷ As the Appeals Chamber has stated, “the right to a reasoned decision is an element of the right to a fair trial”.⁶⁸

(b) The Second Issue affects the Expeditious Conduct of the Proceedings

44. The absence of reasoning provided in a decision can impact on the expeditiousness of the proceedings.⁶⁹ The Prosecution submits that the inclusion of greater degree of legal and factual reasoning would facilitate the ability of the parties and the victims to prepare and conduct the proceedings. The current situation will necessarily lead to further litigation and decisions by the Single Judge with a view to clarifying the procedural status of the victims and to enable victims to exercise certain procedural rights.

(c) Immediate Resolution of the Second Issue will Materially Advance the Proceedings

45. The Prosecution submits that a decision by the Appeals Chamber concerning the legal and factual determination of the rights afforded by the Decision, would materially advance the proceedings as it would lead to proper guidance being provided for the Prosecution, the Defence and the victims and would facilitate the adjudication of future applications in this situation and in other situations.

⁶⁷ See, *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006 (“PTC-I’s 31 March 2006 Decision Denying Leave to Appeal”), para. 38; see also para. 39. See also *Situation in Uganda*, ICC-02/04-112, para. 27.

⁶⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-773 OA5, 14 December 2006, para. 20; *Prosecutor v. Lubanga*, ICC-01/04-01/06-774 OA6, 14 December 2006, para. 30.

⁶⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-489, 28 September 2006, p. 12.

Conclusion

For the foregoing reasons, the Prosecution respectfully requests the Single Judge to grant leave to appeal the Decision under Article 82(1)(d) in relation to the two issues addressed above.



Luis Moreno-Ocampo
Prosecutor

Dated this 7th day of January 2007
At The Hague, The Netherlands