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**PRE-TRIAL CHAMBER II**

**Before:** Judge Mauro Politi, Single Judge

**Registrar:** Mr Bruno Cathala

**SITUATION IN UGANDA**

**Public Document**

**Defence Application for Leave to Appeal the *Decision on victims'*  
*applications for participation* issued on 14 March 2008**

**The Office of the Prosecutor**  
Mr Luis Moreno Ocampo  
Ms Fatou Bensouda  
Mr Eric MacDonald

**Ad Hoc Counsel for the Defence**  
Ms Michelyne C. St-Laurent

**The Office of Public Counsel for  
Victims**  
Ms Paolina Massida

## PROCEDURAL BACKGROUND

1. On 22 November 2006, Pre-Trial Chamber II designated the Honourable Judge Mauro Politi as Single Judge, responsible for all victims' applications for participation in the Situation in Uganda and in the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ("the Case").<sup>1</sup>

2. On 1 February 2007, in his *Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on application for participation* a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 ("the Decision of 1 February 2007"),<sup>2</sup> the Honourable Judge Politi of Chamber II, Single Judge, notified the Prosecutor that the Registry had filed the applications of 49 applicants for participation as victims in the proceedings in the Situation<sup>3</sup> and in the Case.<sup>4</sup>

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<sup>1</sup> ICC-02/04-01/05-130.

<sup>2</sup> ICC-02/04-01/05-134.

<sup>3</sup> a/0010/06 (ICC-02/04-22-Conf-Exp); a/0064/06 (ICC-02/04-23-Conf-Exp); a/0065/06 (ICC-02/04-24-Conf-Exp); a/0066/06 (ICC-02/04-25-Conf-Exp); a/0067/06 (ICC-02/04-26-Conf-Exp); a/0068/06 (ICC-02/04-27-Conf-Exp); a/0069/06 (ICC-02/04-28-Conf-Exp); a/0070/06 (ICC-02/04-29-Conf-Exp); a/0081/06 (ICC-02/04-32-Conf-Exp-Anx1); a/0082/06 (ICC-02/04-32-Conf-Exp-Anx2); a/0083/06 (ICC-02/04-32-Conf-Exp-Anx3); a/0084/06 (ICC-02/04-32-Conf-Exp-Anx4); a/0085/06 (ICC-02/04-32-Conf-Exp-Anx5); a/0086/06 (ICC-02/04-32-Conf-Exp-Anx6); a/0087/06 (ICC-02/04-32-Conf-Exp-Anx7); a/0088/06 (ICC-02/04-32-Conf-Exp-Anx8); a/0089/06 (ICC-02/04-32-Conf-Exp-Anx9); a/0090/06 (ICC-02/04-32-Conf-Exp-Anx10); a/0091/06 (ICC-02/04-32-Conf-Exp-Anx11); a/0092/06 (ICC-02/04-32-Conf-Exp-Anx12); a/0010/06 (ICC-02/04-22-Conf-Exp); a/0064/06 (ICC-02/04-23-Conf-Exp); a/0065/06 (ICC-02/04-24-Conf-Exp); a/0066/06 (ICC-02/04-25-Conf-Exp); a/0067/06 (ICC-02/04-26-Conf-Exp); a/0068/06 (ICC-02/04-27-Conf-Exp); a/0069/06 (ICC-02/04-28-Conf-Exp); a/0070/06 (ICC-02/04-29-Conf-Exp); a/0081/06 (ICC-02/04-32-Conf-Exp-Anx1); a/0082/06 (ICC-02/04-32-Conf-Exp-Anx2); a/0083/06 (ICC-02/04-32-Conf-Exp-Anx3); a/0084/06 (ICC-02/04-32-Conf-Exp-Anx4); a/0085/06 (ICC-02/04-32-Conf-Exp-Anx5); a/0086/06 (ICC-02/04-32-Conf-Exp-Anx6); a/0087/06 (ICC-02/04-32-Conf-Exp-Anx7); a/0088/06 (ICC-02/04-32-Conf-Exp-Anx8); a/0089/06 (ICC-02/04-32-Conf-Exp-Anx9); a/0090/06 (ICC-02/04-32-Conf-Exp-Anx10); a/0091/06 (ICC-02/04-32-Conf-Exp-Anx11); a/0092/06 (ICC-02/04-32-Conf-Exp-Anx12).

<sup>4</sup> a/0010/06 (ICC-02/04-01/05-98-Conf-Exp); a/0064/06 (ICC-02/04-01/05-99-Conf-Exp); a/0065/06 (ICC-02/04-01/05-100-Conf-Exp); a/0066/06 (ICC-02/04-01/05-101-Conf-Exp); a/0067/06 (ICC-02/04-01/05-102-Conf-Exp); a/0068/06 (ICC-02/04-01/05-103-Conf-Exp); a/0069/06 (ICC-02/04-01/05-104-Conf-Exp); a/0070/06 (ICC-02/04-01/05-105-Conf-Exp); a/0081/06 (ICC-02/04-01/05-

Ad Hoc Counsel for the Defence was granted until 26 February 2007 to submit her observations on the applications for participation in the proceedings.

3. On 23 February 2007, the Honourable Single Judge issued the *Decision on "Requête de la Défense en extension de délai afin de répondre aux 'Observations de la Défense sur les demandes de participation à la procédure'"*,<sup>5</sup> granting Ad Hoc Counsel for the Defence until 6 March 2007 to submit the Observations.

4. On 5 March 2007, Ad Hoc Counsel for the Defence filed her Observations on the applications for participation in the proceedings in the Situation and in the Case.<sup>6</sup> On 26 March 2007, the Office of Public Counsel for Victims (OPCV) filed Observations on the applications for participation.<sup>7</sup> Ad Hoc Counsel for the Defence filed a response to the Observations of the OPCV

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123-Conf-Exp-Anx1); a/0082/06 (ICC-02/04-01/05-123-Conf-Exp-Anx2); a/0083/06 (ICC-02/04-01/05-123-Conf-Exp-Anx3); a/0084/06 (ICC-02/04-01/05-123-Conf-Exp-Anx4); a/0085/06 (ICC-02/04-01/05-123-Conf-Exp-Anx5); a/0086/06 (ICC-02/04-01/05-123-Conf-Exp-Anx6); a/0087/06 (ICC-02/04-01/05-123-Conf-Exp-Anx7); a/0088/06 (ICC-02/04-01/05-123-Conf-Exp-Anx8); a/0089/06 (ICC-02/04-01/05-123-Conf-Exp-Anx9); a/0090/06 (ICC-02/04-01/05-123-Conf-Exp-Anx10); a/0091/06 (ICC-02/04-01/05-123-Conf-Exp-Anx11); a/0092/06 (ICC-02/04-01/05-123-Conf-Exp-Anx12); a/0093/06 (ICC-02/04-01/05-123-Conf-Exp-Anx13); a/0094/06 (ICC-02/04-01/05-123-Conf-Exp-Anx14); a/0095/06 (ICC-02/04-01/05-123-Conf-Exp-Anx15); a/0096/06 (ICC-02/04-01/05-123-Conf-Exp-Anx16); a/0097/06 (ICC-02/04-01/05-123-Conf-Exp-Anx17); a/0098/06 (ICC-02/04-01/05-123-Conf-Exp-Anx18); a/0099/06 (ICC-02/04-01/05-123-Conf-Exp-Anx19); a/0100/06 (ICC-02/04-01/05-123-Conf-Exp-Anx20); a/0101/06 (ICC-02/04-01/05-123-Conf-Exp-Anx21); a/0102/06 (ICC-02/04-01/05-123-Conf-Exp-Anx22); a/0103/06 (ICC-02/04-01/05-123-Conf-Exp-Anx23); a/0104/06 (ICC-02/04-01/05-123-Conf-Exp-Anx24); a/0111/06 (ICC-02/04-01/05-128-Conf-Exp-Anx1); a/0112/06 (ICC-02/04-01/05-128-Conf-Exp-Anx2); a/0113/06 (ICC-02/04-01/05-128-Conf-Exp-Anx3); a/0114/06 (ICC-02/04-01/05-128-Conf-Exp-Anx4); a/0115/06 (ICC-02/04-01/05-128-Conf-Exp-Anx5); a/0116/06 (ICC-02/04-01/05-128-Conf-Exp-Anx6); a/0117/06 (ICC-02/04-01/05-128-Conf-Exp-Anx7); a/0118/06 (ICC-02/04-01/05-128-Conf-Exp-Anx8); a/0119/06 (ICC-02/04-01/05-128-Conf-Exp-Anx9); a/0120/06 (ICC-02/04-01/05-128-Conf-Exp-Anx10); a/0121/06 (ICC-02/04-01/05-128-Conf-Exp-Anx11); a/0122/06 (ICC-02/04-01/05-128-Conf-Exp-Anx12); a/0123/06 (ICC-02/04-01/05-128-Conf-Exp-Anx13); a/0124/06 (ICC-02/04-01/05-128-Conf-Exp-Anx14); a/0125/06 (ICC-02/04-01/05-128-Conf-Exp-Anx15); a/0126/06 (ICC-02/04-01/05-128-Conf-Exp-Anx16); a/0127/06 (ICC-02/04-01/05-128-Conf-Exp-Anx17).

<sup>5</sup> ICC-02/04-01/05-211.

<sup>6</sup> ICC-02/04-01/05-216-tEN.

<sup>7</sup> ICC-02/04-89 and ICC-02/04-01/05-232.

on 10 April 2007.<sup>8</sup> On 16 April 2007, the Honourable Judge Politi dismissed the OPCV's Observations.<sup>9</sup>

5. On 10 August 2007, in 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*,<sup>10</sup> the Single Judge granted the application for participation of two victims.

6. On 20 August 2007, the Prosecutor filed before the Single Judge an application for leave to appeal the Decision under article 82(1)(d) of the *Rome Statute*.<sup>11</sup>

7. On 19 December 2007, in his *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*,<sup>12</sup> the Single Judge rejected the Prosecutor's application for leave to appeal.

8. On 12 October 2007, the Single Judge received the "Report on the identity documents available in the Ugandan legal and administrative system and other supporting documentation for applications for participation in proceedings in Uganda" submitted by the Victims Participation and Reparations Section (VPRS). The report provides significant information in respect of the identity documents available in Uganda.

9. On 14 March 2008, the Honourable Single Judge issued his *Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06,*

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<sup>8</sup> ICC-02/04-01/05-242-tENG.

<sup>9</sup> ICC-02/04-01/05-243.

<sup>10</sup> ICC-02/04-101 and ICC-02/04-01/05-252.

<sup>11</sup> ICC-02/04-103.

<sup>12</sup> ICC-02/04-112.

a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06,<sup>13</sup> by which he granted the status of victim respectively to applicants a/0094/06, a/0095/06, a/0103/06, a/0117/06, a/0120/06, a/0121/06, a/0123/06 and a/0124/06 in the Case, and to applicants a/0065/06, a/0068/06, a/0093/06, a/0096/06, a/0117/06, a/0120/06 and a/0123/06 in the Situation.

10. Ad Hoc Counsel for the Defence, on the grounds set forth below, respectfully submits before the Pre-Trial Chamber an application under article 82(1)(d) of the *Rome Statute* for leave to appeal the Decision of 14 March 2008, since it involves various issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

## AS TO THE LAW

### Preliminary observations on the requirements of article 82(1)(d)

11. Under article 82(1)(d) of the Statute, “[e]ither party may appeal [...] [a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

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<sup>13</sup> ICC-02/04-125 and ICC-02/04-01/05-282.

12. Following the Appeals Chamber's judgment of 13 July 2006:<sup>14</sup>
- i. Only an "issue" may form the subject-matter of an appealable decision.<sup>15</sup>
  - ii. 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.<sup>16</sup>
  - iii. Not every issue may constitute the subject of an appeal. 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>17</sup>
  - iv. The issue must be one "for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".<sup>18</sup>

The issues raised by the impugned decision:

13. In order to obtain leave to appeal under article 82(1)(d), an issue must be identified the resolution of which is essential for the determination of matters arising in the judicial cause under examination.<sup>19</sup>

14. Article 68(3) of the Statute provides as follows:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the

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<sup>14</sup> ICC-01/04-168, *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, 13 July 2006.

<sup>15</sup> ICC-01/04-168, para. 9.

<sup>16</sup> ICC-01/04-168, para. 9.

<sup>17</sup> ICC-01/04-168, para. 10.

<sup>18</sup> ICC-01/04-168, para. 14.

<sup>19</sup> ICC-01/04-168, *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, 13 July 2006, para. 9.

proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

15. Ad Hoc Counsel for the Defence respectfully submits that the Honourable Single Judge did not consider how and in what manner the personal interests of the applicants are affected by the proceedings at issue in the Case and in the Situation. At no point does the Single Judge address the issue; he refers implicitly to his 10 August 2007 decision in which he reiterates and adopts the conclusions of Pre-Trial Chamber I's 27 January 2006 decision,<sup>20</sup> which appears to grant the victims a general right of access to the proceedings.<sup>21</sup> The decision refers several times to the 10 August 2007 decision<sup>22</sup> in respect of the criteria governing the participation of victims in the proceedings. It needs to be determined whether the personal interests criterion set forth in article 68(3) of the Statute is an additional requirement for granting victim status<sup>23</sup> or whether they are considered to be affected *per se* once the characterisation of victim is accepted.<sup>24</sup> In his decision, the Honourable Single Judge seems to consider that once the definitional criteria under rule 85 of the *Rules of Procedure and Evidence* have been fulfilled and the applicant's identity is established,<sup>25</sup> there is no reason to consider any impact

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<sup>20</sup> ICC-01/04-101.

<sup>21</sup> ICC-01/04-101, para. 46.

<sup>22</sup> *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, ICC-02/04-101 and ICC-02/04-01/05-252.

<sup>23</sup> "The Chamber submits that the "personal interests" criterion expressly set out in article 68(3) constitutes an additional criterion to be met by victims, over and above the victim status accorded to them." ICC-01/04-101, para. 62.

<sup>24</sup> "[... ] subject to the need for the Chamber to determine whether the constituent elements of the definition of victim under rule 85 of the Rules are present, the fact that such a victim's personal interests are "affected" by criminal proceedings relating to the event or events in question seems incontrovertible", ICC-02/04-101 and ICC-02/04-01/05-252, paras. 9 and 11.

<sup>25</sup> Yet in his separate opinion in the Appeals Chamber Judgment of 13 June 2007, Judge Pikis held that "The first constituent requires that 'the personal interests of the victim must be affected'. The status or identity of a person as a victim does not legitimize as such participation in any proceedings before the Court. ICC-01/04-01/06-925, para. 13.

of the proceedings on the personal interests of the victims.<sup>26</sup> Furthermore, the Single Judge does not indicate in what manner victim participation in the current proceedings would be appropriate.<sup>27</sup>

16. Ad Hoc Counsel for the Defence respectfully submits that the failure to consider these criteria (personal interest and appropriateness of the participation) appears to run counter to previous decisions, thereby weakening the Court's jurisprudence and shrouding proceedings in uncertainty. The issue of a general right to participate and that of the appropriate participation are yet to be resolved; not only are they likely to be resolved on appeal, they have to be considered on appeal in order to establish a consistent, clear and clear-cut jurisprudence for the purpose of procedural fairness and parity.

17. Furthermore, the Honourable Single Judge does not indicate precisely what type of information is required for the purpose of identifying applicants who allege mental harm as a result of the physical harm caused to another person. In his decision, the Single Judge granted victim status to several applicants<sup>28</sup> on account of the mental harm they suffered as a result of the death of their close family members. The Honourable Single Judge held that

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<sup>26</sup> Decision, para. 8: "(i) whether the identity of the applicant as a natural person appears duly established; (ii) whether the events described by each applicant constitute a crime within the jurisdiction of the Court; (iii) whether the applicant claims to have suffered harm; and (iv) most crucially, whether such harm appears to have arisen "as a result" of the event constituting a crime within the jurisdiction of the Court".

<sup>27</sup> ICC-01/04-01/06-925, *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*, para. 28: "Even when the personal interests of victims are affected within the meaning of article 68(3) of the Statute, the Court is still required, by the express terms of that article, to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings and to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

<sup>28</sup> Applicants a/0095/06, a/0120/06, a/0121/06 and a/0123/06.



for applicants participating on behalf of another person, proof of identity and their relationship with the victim<sup>29</sup> must be provided. These requirements do not seem to apply to applications based on mental harm.

18. Ad Hoc Counsel for the Defence respectfully submits that the decision raises the following issues:

- i. Can victims be granted a general right to participate or should it be considered that such participation is only possible if it is established that specific personal interests of the applicant are affected by the proceedings and that such participation is appropriate at the stage of the proceedings?
- ii. In order to establish mental harm suffered as a result of physical harm suffered by another person, should the identity of the latter and the relationship of the applicant with the person be required?

**Issue 1:** Can victims be granted a general right to participate or should it be considered that such participation can only be allowed if it is established that it is appropriate at the stage of the proceedings and that personal interests of the applicant are affected by the proceedings?

*The impact on the fair conduct of the proceedings*

19. Article 68(3) of the Statute requires that victim participation should be appropriate and should be neither prejudicial to nor inconsistent with the rights of the accused and a fair and impartial trial. This position is reiterated in the impugned decision. In fact, the Single Judge reiterates the considerations set forth in his 10 August 2007<sup>30</sup> decision to the effect that the participation of victims in the proceedings has a profound impact on the parties and the fair conduct of the proceedings.<sup>31</sup>

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<sup>29</sup> Decision, para. 7.

<sup>30</sup> *Decision on victims' applications for participation*, para. 16.

<sup>31</sup> Decision, para. 6.

20. Ad Hoc Counsel for the Defence respectfully submits that the clear provisions of article 68(3) of the Statute require the Chamber to determine, first, whether there is a particular proceeding at the pre-trial phase that could affect the personal interests of the applicants, and then, whether it would be appropriate for the victims to participate in such proceedings.

21. The Defence further submits that the jurisprudence of the Appeals Chamber suggests that the determination of the victim's right to participate in the proceedings cannot be made in the abstract,<sup>32</sup> but must be adapted to the specific factual circumstances and the legal framework applicable in those circumstances.

22. Ad Hoc Counsel for the Defence respectfully submits that this issue affects the fair conduct of the proceedings, such as the issuance of apparently inconsistent jurisprudence by the Court on the determination of the persons authorised to participate, which could have an impact on the principles of legality and legal certainty.

23. The lack or inadequacy of legal and factual reasoning underpinning a decision directly affects the fair conduct of the proceedings. The adversarial principle and the principle of equality of arms are affected *de facto*, and the

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<sup>32</sup> The ability of victims to participate in proceedings was not considered to be automatic, but rather as depending on a decision by which the Appeals Chamber would deem it appropriate. Victims must attach to their applications for participation "a statement from the victims in relation to whether and how their personal interests are affected by the particular interlocutory appeal, as well as why it is "appropriate" for the Appeals Chamber to permit their views and concerns to be presented." *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"*. ICC-01/04-01/06-824, 13 February 2007, para. 40. See also ICC-01/04-01/06-925, *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*, para. 23.

general nature of the Chamber's findings does not lend itself to any in-depth examination of the criteria required for victim participation.

24. The impact is significant in that the purpose of such criteria is to protect the rights of the parties in the proceedings.

25. Ad Hoc Counsel further submits that the term "appropriate" used in article 68(3) of the Statute requires a determination as to whether it would be proper, in the sense of fairness,<sup>33</sup> to authorise the participation of victims in particular proceedings in light of the particular factual circumstances. An abstract determination of the appropriateness or otherwise of participation deprives the parties of the right to make concrete submissions on the factual and legal specificities in this case concerning Uganda.

26. That the Single Judge authorised victim participation at the pre-trial proceedings stage, without even considering whether such participation was appropriate, makes the appropriateness of participation criterion otiose. Accordingly, this significantly reduces the fairness of the proceedings.

27. Moreover, the fact that the Honourable Judge has decided to rely on less stringent criteria for the applicants to provide proof of their identities than those set out in the Decision on victims' applications may dangerously affect the fairness of the proceedings with respect to legal certainty if the

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<sup>33</sup> "The manner of presentation of victims' views and concerns is subject to an important proviso. It must not be inconsistent with a) the rights of the accused and b) a fair and impartial trial. This is also a consideration relevant to the determination of the appropriateness of the stage at which such views and concerns may be presented." ICC-01/04-01/06-925, para. 17.

judge has complete discretion to change the way in which victims are identified.<sup>34</sup>

*The impact on the expeditious conduct of the proceedings*

28. In a separate opinion in the *Thomas Lubanga Dyilo* case, Honourable Judge Song stated that determining whether it was appropriate to participate in proceedings also involved considering the impact of participation on the expeditious conduct of the proceedings.<sup>35</sup>

29. Similarly, Ad Hoc Counsel for the Defence respectfully submits that basing the appropriateness of participation on a general conclusion constitutes an evasion of the Chamber's duty to ascertain whether such participation affects the conduct of the proceedings and that making a generic and common determination that participation is appropriate at this stage of the proceedings exempts the Chamber from its duty to assess the impact of participation on the expeditious conduct of the proceedings.

30. Ad Hoc Counsel submits that it is necessary to consider the proceedings before the Court *in toto*, in their entirety, to assess the impact of an issue on the proceedings.<sup>36</sup> If there are no possible proceedings in which an applicant may participate or which require a formal determination as to the

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<sup>34</sup> See Decision, para. 6.

<sup>35</sup> "If the Victims now were allowed to make submissions on the admissibility, it is likely that the proceedings would be further delayed, in particular in view of the fact that the Appellant still is not represented by counsel. As both the Appellant and the Prosecutor have made extensive submissions on the admissibility of the appeal, which seem to cover all angles of the question, further submissions by the Victims are not likely to add substantially to it. On balance, the participation of the Victims at this stage of the proceedings therefore would be inappropriate", Separate opinion of Judge Song, ICC-01/04-01/06-925, para. 23.

<sup>36</sup> "The term "proceedings" as encountered in the first part of article 82(1)(d) is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto": *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04-168, 13 July 2006, para. 12.

victim's status, issuing a general decision which will never be implemented in practice affects the expeditious conduct of the proceedings, resulting in waste of time and resources for the Court instead of concentrating on concrete rights.

*The need for immediate resolution of the "issue" which may materially advance the proceedings*

31. Ad Hoc Counsel for the Defence respectfully submits that leave to appeal should be granted if the resolution of the issue materially advances the proceedings which will arise from the Decision now at issue.

32. Ad Hoc Counsel for the Defence respectfully submits that the issue whether it is possible to grant victims a general right to participate in the proceedings or whether such participation is granted only if the personal interests of the victim are affected by the proceedings and if the participation is appropriate materially affects the applications under consideration and future applications for participation at all stages of the proceedings. Indeed, the Pre-Trial Chamber should take into account the potentially recurrent nature of the issue, which facilitates its early determination. Moreover, this procedure is new, significant and complex.

33. The ICTR<sup>37</sup> viewed the establishment of a legal principle which is likely to be applied at all stages of the proceedings as an issue the resolution of which may materially advance the proceedings. An Appeals Chamber judgment will indeed enable early determination of the scope of victim participation with certainty.

34. Accordingly, Ad Hoc Counsel for the Defence respectfully submits that an immediate resolution of the issue would enable the applications of all

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<sup>37</sup> Decision on Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, *The Prosecutor v. Nzirorera*, 9 October 2007.

future applicants for participation as victims to be assessed having regard to the proper legal principles and would eliminate the need to review victim status in the event that the status had been incorrectly or prematurely granted to them. In subsequent proceedings, this will enable the avoidance of superfluous hearings, requests and applications and delays resulting from the consideration of additional applications from persons without the requisite status.

**Issue 2:** Should proof of the identity of a person who suffered physical harm and proof of the applicant's relationship with that person be required in order to establish mental harm resulting from physical harm caused to that person?

*Impact on the fair conduct of the proceedings*

35. Ad Hoc Counsel for the Defence respectfully submits that this issue has a significant impact on the reliability and the credibility of the application for participation in the proceedings. Neither the Chamber nor the parties have the means to ascertain whether those persons who suffered physical harm really existed and their relationship with the applicant who suffered mental harm.

36. The Honourable Single Judge considers that victim participation in the proceedings has a profound impact on the parties and the fair conduct of the proceedings.<sup>38</sup>

37. The Honourable judge set a list of documents enabling the identity of an applicant acting on behalf of a victim to be established.<sup>39</sup> On the other hand,

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<sup>38</sup> "Given the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings, it would be equally inappropriate not to require that some kind of proof meeting a few basic requirements be submitted", Decision, para. 6.

he appears not to require any proof of the identity of the victim of physical harm or of the relationship between the applicant and that victim. As such, the evidentiary requirements for an applicant acting on behalf of a victim and an applicant who suffered mental harm are not the same. These disparities and uncertainties are likely to affect the fair conduct of the proceedings.

38. Ad Hoc Counsel for the Defence respectfully submits that the fairness of the proceedings would be jeopardised if the applicants, acting on behalf of another person who suffered harm, are exempt from providing the slightest document for the purpose of ascertaining the identity of the person who suffered the harm and the relationship between the applicant and that person. The integrity of the proceedings would also be brought into question if the applicants were not required to provide such information in the case of mental harm which was based on the same factual events.

39. Ad Hoc Counsel for the Defence acknowledges that in certain circumstances it may be difficult to establish the identity of a deceased person. However, such issues must be resolved on a case by case basis in light of the applicants' particular circumstances. This is a substantive issue which may nevertheless determine whether the proceedings are fair or not.

*Impact on the expeditious conduct of the proceedings*

40. Ad Hoc Counsel for the Defence submits that although the standard of proof varies during the proceedings, there should be a mechanism for ascertaining that the essential components of the application for participation have been adhered to, the existence of the victim being the most fundamental

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<sup>39</sup> The Single Judge will accept as proof of such link any of the following documents: (i) "short" birth certificate or "long" birth certificate, (ii) birth notification card, (iii) baptism card, (iv) letter issued by a Rehabilitation Centre, (v) letter from a local Council, (vi) affidavit sworn before a Magistrate or Commissioner of Oaths, Decision, para. 7.

of all. The Honourable Judge's decision not to require identification of kinship or personal relationship at this stage of the proceedings postpones the resolution of this issue to a later stage; this may result in a delay in the proceedings. Resolving this issue now would contribute to ensuring that the proceedings will be conducted expeditiously.

*The need for immediate resolution of the "issue" which may materially advance the proceedings*

41. Ad Hoc Counsel for the Defence respectfully submits that leave to appeal should be granted if the resolution of the issue materially advances the proceedings which will result from the Decision now at issue.

42. Ad Hoc Counsel for the Defence respectfully submits that the issue of which identification information is required to establish victim status in the case of mental harm resulting from physical harm caused to another person materially affects the applications now under consideration and future applications for participation at all stages of the proceedings.

43. Accordingly, Ad Hoc Counsel for the Defence respectfully submits that an immediate resolution of the issue would enable the applications of all future applicants for participation as victims to be assessed having regard to the proper legal principles and would eliminate the need to review victim status in the event that the status had been incorrectly or prematurely granted to them. At subsequent stages of the hearings, this would enable the avoidance of superfluous hearings, requests and applications and delays resulting from the consideration of additional applications from persons who do not have the requisite status.



**CONCLUSION**

44. Ad Hoc Counsel for the Defence respectfully requests the Pre-Trial Chamber to grant her leave to appeal Pre-Trial Chamber II's 14 March 2008 decision on victim participation in the trial.

Respectfully submitted,

**Ms Michelyne C. St-Laurent [signed]**

**Counsel for the Defence**

Done this 25 March 2008

At Quebec