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**International
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PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single Judge

Registrar: Mr Bruno Cathala

**SITUATION IN UGANDA
IN THE CASE OF
THE PROSECUTOR
*vs. JOSEPH KONY, VINCENT OTTI, RASKA LUKWIYA,
OKOT ODHIAMBO and DOMINIC ONGWEN***

Public Document

**Prosecution's Request for Leave to Appeal the Decision Denying
the "Application to Lift Redactions From Applications for
Victims' Participation to be Provided to the OTP"**

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Introduction

The Single Judge's Decision of 20 February 2007 denied the Prosecution's Application to Lift Redactions based solely on the ground that it was allegedly "deprived of a procedural basis", without considering the merits in any way. This raises the issue of whether there is any mechanism for a party to seek to vary or revisit an order for protective measures – even an order made without any opportunity for that party to intervene – other than applying for leave to appeal. The jurisprudence purportedly established by the Decision, which contradicts the procedure explicitly proposed by Pre-Trial Chamber I and the Regulations of the Court, goes to the heart of the range of procedural avenues and remedies available to a party before a Chamber of first instance. It thus affects the fair and expeditious conduct of these, and other, proceedings. Resolution of this issue by the Appeals Chamber has been left as the only avenue open to advance these proceedings. Review by the Appeals Chamber at this stage will also advance proceedings by clarifying the procedures available to parties and resolving the inconsistency between the jurisprudence of different Pre-Trial Chambers. The Prosecution therefore seeks leave to appeal against the Decision pursuant to Article 82(1)(d).

Procedural Background

1. On 1 February 2007, the Single Judge issued a decision entitled, "Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and 1/0111/06 to a/0127/06".¹

¹ ICC-02/04-01/05-134, 1 February 2007 ("1 February 2007 Decision").

2. On 6 February 2007, the Prosecution filed its "Application to Lift Redactions From Applications for Victims' Participation to be Provided to the OTP".²
3. The Registry notified redacted versions of the victims' applications, in accordance with the Decision, on 13 February 2007.³ On 15 February 2007, the Prosecution filed further submissions supplementing the Application to Lift Redactions, based on a preliminary reading of the redacted applications.⁴
4. On 20 February 2007, the Single Judge issued its "Decision on the Prosecutor's 'Application to Lift Redactions From Applications for Victims' Participation to be Provided to the OTP' and on the Prosecution's further submissions supplementing such Application, and request for extension of time", which held that "the Prosecutor's Application is deprived of procedural basis and that, accordingly, the Single Judge will not consider the merits of the submissions".⁵

The nature of the issue

5. An issue is "a subject the resolution of which is essential for the determination of matters arising from the judicial cause under examination."⁶ The Single Judge in this case refused to consider the merits of the submissions and dismissed the Application to Lift Redactions purely on the basis that it was "deprived of a procedural basis".⁷ The Prosecution submits that the issue of whether a party may file a motion or application to vary protective measures before the original Chamber,

² ICC-02/04-01/05-150, 6 February 2007 ("Application to Lift Redactions").

³ In the situation, the Prosecution received 47 applications on 13 February 2007 and 2 applications on 14 February 2007. In the case, the Prosecution received 9 applications on 13 February 2007, 39 applications on 14 February 2007, and one application on 15 February 2007.

⁴ Prosecution's further submissions supplementing its 'Application to Lift Redactions From Applications for Victims' Participation to be Provided to the OTP', dated 6 February 2007, and request for extension of time, ICC-02/04-01/05-208, 15 February 2007 ("Prosecution's Supplementary Submissions").

⁵ ICC-02/04-01/05-209, 20 February 2007 ("the Decision"), at p. 6.

⁶ Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 ("Judgment on Extraordinary Review"), para. 9.

⁷ Decision, p. 6.

or alternatively whether an application for leave to appeal under Article 82(1)(d) “is the only remedy of a general nature whereby participants can voice their concerns regarding a Chamber’s decision”, does arise from this Decision.

6. It is well established that discussion of the merits of any subsequent appeal is inappropriate in, and irrelevant to, an application for leave.⁸ Nevertheless, more than a mere conflict of opinion is required to define an issue for the purposes of seeking leave to appeal.⁹ The Prosecution submits that the issue identified above rises above such a mere conflict of opinion. The Prosecution submits further that the findings on which the Decision was based, namely that the application was without any procedural basis, constituted an error of law and/or a procedural error, and that the basic texts of this Court, the prior decision of another Chamber, and the jurisprudence of other international courts and tribunals, provide ample support for the validity of that application.
7. The Prosecution submits that this suffices to identify the issue for the purpose of a request for leave to appeal. However, to outline further elements substantiating the

⁸ “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 1-6””, ICC-01/04-135-tEN, 31 March 2006 (“PTC-I’s 31 March 2006 Decision Denying Leave to Appeal”), paras. 29-30; “Decision on Prosecutor’s applications for leave to appeal dated the 15th day of March 2006 and to suspend or stay consideration of leave to appeal dated the 11th day of May 2006”, ICC-02/04-01/05-90-US-Exp, 10 July 2006 (“PTC-II’s 10 July 2006 Decision Denying Leave to Appeal”) (Reclassified as public pursuant to Decision ICC-02/04-01/05-135), para. 16.

A grant of leave does not in any way imply that the Pre-Trial Chamber agrees with the party’s position on the underlying issues, merely that it recognises that the issue itself is of important: see e.g. “Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal”, ICC-01/04-01/06-166, 23 June 2006, at paras. 31, 37-42, 54. When considering the impact of an issue on the proceedings, the Pre-Trial Chamber should grant leave where, if the issue was wrongly decided, it would affect the fair and expeditious conduct of the proceedings. Even if the Chamber considers the chance of the decision being in error to be small, if the implications of such an error would still significantly affect the fair and expeditious conduct of the proceedings, then leave shall be granted: see e.g. *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecutor’s Application for Certification under Rule 73(B) Concerning the Evidence of an Investigator, 20 June 2002; *The 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; *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor’s Motion for Certification to Appeal the Trial Chamber’s Decision on Protection of Defence Witnesses, 28 September 2005, para. 5; see further “Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-141, 24 April 2006, paras. 56 and 58 and authorities cited therein.

⁹ Judgment on Extraordinary Review, para. 9. The Prosecution submits that participants seeking leave to appeal should identify some arguable error.

issue, and without delving into the merits of any future appeal, the Prosecution submits that the Chamber's error is firstly demonstrated by Regulation 42(3) of the Regulations of the Court, which provides that "Any application to vary a protective measure shall first be made to the Chamber which issued the order." Further, the Appeals Chamber has stated that "It may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it".¹⁰

8. The Prosecution also submits that the different approaches taken by Pre-Trial Chambers I and II on this point further underscore the existence of this issue. Pre-Trial Chamber I previously held, in similar factual circumstances, that a participant

"could have filed a motion requesting the lifting of all or part of the redactions and, in the alternative, leave to appeal against the Decision Establishing a Deadline; [and] that neither after the issuance of the Decision Establishing the Deadline nor after the receipt of the redacted versions of the Applications, did the Defence do so".¹¹

Pre-Trial Chamber I thus considered a motion requesting the lifting of redactions to be a viable procedural mechanism in circumstances such as these.¹² The fact that a

¹⁰ *Judgment on Extraordinary Review*, para. 20. Here, in addition to an inherent power to vary an order, the Pre-Trial Chamber has an explicit power to vary an order for protective measures under Regulation 42.

¹¹ Decision on Defence Motion for Leave to Appeal, ICC-01/04-01/06-338, 18 August 2006 ("PTC-I's 18 August 2006 Decision"), p. 8. Pre-Trial Chamber I in that instance did refer to the filing of a motion "within the time limits provided for in rule 155", however this would apply to any motion seeking leave to appeal in the alternative. As demonstrated below, this could not apply to a motion requesting the lifting of the redactions, as Pre-Trial Chamber I contemplated such a motion after receipt of the redacted applications, which itself only took place 15 days after the issuance of the decision. Furthermore, in the present proceedings the Prosecution filed the Application to Lift Redactions within 5 days of the Decision.

¹² The Prosecution submits that the reference to the submissions of such a motion by Pre-Trial Chamber I was not "made on a hypothetical basis" (Decision, p. 4). Rather, Pre-Trial Chamber held that the Defence "could have filed a motion requesting the lifting of all or part of the redactions", and that on this basis the procedure followed by the Chamber "did not prejudice the procedural rights of the Defence" (PTC-I's 18 August 2006 Decision, p. 8).

request for leave to appeal was also an option,¹³ and that both could be used in the alternative in appropriate circumstances, does not detract from this. Nothing in the decision of Pre-Trial Chamber I could lead to a conclusion that the validity of the motion is conditional upon an application for leave to appeal being made in the alternative. Under this Decision, the reference to a “motion requesting the lifting of all or part of the redactions” would be superfluous, as it would be disregarded as having no procedural basis.

9. The independent validity of a motion requesting the lifting of redactions is further demonstrated by the fact that Pre-Trial Chamber I contemplated such motions being made “after the receipt of the redacted versions of the Applications”.¹⁴ This is logical, as the impact on the rights of a participant may not become clear until the extent of the redactions is seen. In both the present proceedings and the proceedings before Pre-Trial Chamber I, the redacted versions of the applications were not transmitted until well after the 5 day time limit for filing a request for leave to appeal.¹⁵

¹³ An application for leave to appeal might be the appropriate option where the relevant participant had provided full submissions to the Pre-Trial Chamber in advance of the decision.

¹⁴ PTC-I's 18 August 2006 Decision, p. 8 (emphasis added).

¹⁵ In this case, the redacted victims' applications were transmitted to the Prosecution on 13 February 2007, 12 days after the 1 February 2007 Decision. In the context of the PTC-I's 18 August 2006 Decision, the redacted applications were notified to the Defence on 2 June 2006, 15 days after the relevant decision was issued. As this Chamber has held, the time limit for filing an application for leave to appeal set out in Rule 155(1) cannot be varied – “Decision on the Prosecutor's Motion for Clarification and Urgent Request for Variation of the Time-Limit Enshrined in Rule 155”, ICC-01/05-18-US-Exp, 18 July 2005 (unsealed pursuant to ICC-02/04-01/05-52).

The issue affects the fairness of the proceedings

10. Fairness, as held by Pre-Trial Chamber I, “includes respect for the procedural rights of the Prosecutor, the Defence and the Victims”.¹⁶ The Prosecution therefore submits that fairness requires that the procedural and substantive rights and obligations of all participants be respected.
11. In addition to respecting the rights and obligations of all participants, this Pre-Trial Chamber has held that fairness includes that “participants be granted a genuine opportunity to present their case and to be apprised of and comment on the observations and evidence submitted to the Court that might influence its decision.”¹⁷
12. In these proceedings, the protective measures were imposed by the Single Judge in the 1 February 2007 Decision without providing any opportunity to the Prosecution to make submissions on the need for or scope of the redactions. The Prosecution therefore made a good faith attempt to present submissions on the need to vary the protective measures imposed by the Single Judge.¹⁸ These submissions were made in conformity with one of the valid procedures identified to participants by Pre-Trial Chamber I.¹⁹ They were also made in conformity with Regulation 42(3).²⁰ The Single Judge denied the Prosecution the availability of a procedural vehicle, indeed the

¹⁶ PTC-I’s 31 March 2006 Decision Denying Leave to Appeal, para. 38; see also para. 39.

¹⁷ PTC-II’s 10 July 2006 Decision Denying Leave to Appeal at para. 24.

¹⁸ The Prosecution has previously made, and this Chamber has previously considered, applications to lift protective measures in the form of the under seal character of a document (see e.g. “Request to Unseal Pre-Trial Chamber’s Decision Dated the 10th Day of July 2006 And Renewal of Request to Unseal All Previous Filings, Decisions And Court Proceedings Related to the Subject Matter of that Decision”, ICC-02/04-01/05-93, 21 July 2006; “Décision Relative à la Levée des Scellés et à la Reclassification de Certains Documents dans les Dossiers la Situation et de l’affaire et Annexes”, ICC-02/04-01/05-135, 2 February 2007). The Prosecution submits that the fact that in this case the protective measures were issued against the Prosecution, and without any prior opportunity to make submissions, does not alter the principle that an application to lift protective measures is the appropriate procedure.

¹⁹ See paras. 8-9, above.

²⁰ As noted above, Regulation 42(3) provides that “Any application to vary a protective measure shall be made first to the Chamber which issued the order” – see para. 7, above.

proper procedural vehicle, to seek the lifting or amendment of the protective measures ordered by the Chamber. This denial of the procedural right, to bring a valid request before the Chamber, affects the fairness of these proceedings *vis-à-vis* the Prosecution.

13. By dismissing the Application to Lift Redactions on a purely procedural ground, without considering the merits of the application, the Single Judge has also denied the Prosecution a genuine opportunity to present submissions on the necessity, propriety and scope of the protective measures, and on the need to vary those measures as against the Prosecution. This, by the Pre-Trial Chamber's own definition, affects the fairness of these proceedings. The Prosecution has been wrongfully deprived of the right to have an important issue with potentially critical implications fully considered by the Chamber.
14. The consequences of this Decision also affect the fairness of the proceedings on an ongoing basis, beyond the denial of the ability to seek a variation of the protective measures. The redactions continue to deny the Prosecution the ability to adequately respond to the victims' applications, and participate in the determination, in a meaningful fashion.²¹ The redactions also prevent the Prosecution from considering whether any of the applicants are also a witness for the Prosecution, and from making submissions to the Chamber on the potential implications of any overlap between the status of victim-participant and a pre-existing role as witness.²² Further,

²¹ See further Prosecution's Supplementary Submissions, paras. 1-5. While the Prosecution will file a response to the victims' applications pursuant to the 1 February 2007 Decision (as amended by the Single Judge's Decision of 23 February 2007, ICC-02/04-01/05-211), the Prosecution maintains that it is unable to meaningfully respond to the applications, in the context of participation in the case, in their redacted form. It is filing a response in order to assist the Single Judge on the broad issues as best it can. The filing of this response under these circumstances in no way constitutes a fair procedure.

²² See further Prosecution's Supplementary Submissions, paras. 8-9; "Prosecution's 25 August 2006 Observations on the Applications for Participation of Applicants a/0047/06 - a/0052/06", ICC-01/04-01/06-390, 6 September 2006, pp. 9-23. In response to the Prosecutions submissions, Pre-Trial Chamber I held that "in this context, and having carefully considered each case, the Chamber is of the opinion that granting Applicants a/0047/06 to a/0052/06 the status of victims with standing to participate would be inappropriate at this particular stage in the proceedings;" –

the Prosecution is deprived of the opportunity to adequately perform its duties and assess whether the nature of the victims' applications require the Prosecution to adjust its existing protective measures.²³ It also denies the Prosecution any genuine opportunity to fully present its views in relation to the victims' applications, and their relationship with and implications for this case. In each of these respects, the Decision continues to affect the fairness of the ongoing proceedings.

15. Beyond the determination of the present applications, it is also likely that there will be future applications for victim participation in this case. The jurisprudence that this Decision purports to establish will similarly affect the fairness of each of those proceedings,²⁴ as on its terms it deprives all participants of a procedural right to seek a variation of protective measures.²⁵
16. The Decision held that an application for leave to appeal "is the only remedy of a general nature whereby participants can voice their concerns regarding a Chamber's decision", and that failure to do so "is tantamount to that participant waiving its rights".²⁶ The Single Judge has thus ruled that no other procedural avenues and remedies will be available to any party in the future.²⁷ The Prosecution submits that such a blanket denial of procedural rights cannot but affect the fairness of the proceedings.

"Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*", ICC-01/04-01/06-601-tEN, 20 October 2006, p. 11.

²³ See further Application to Lift Redactions, para. 8; Prosecution's Supplementary Submissions, para. 6.

²⁴ The Appeals Chamber has held that proceedings, for the purposes of determinations under Article 82(1)(d), should be read broadly: it "is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto." See Judgment on Extraordinary Review, para. 12.

²⁵ By depriving participants of the right to seek a variation of protective measures before the original Chamber, the principles set out in the Decision will also deny those same participants a genuine opportunity to present their case in relation to the protective measures, and will affect this aspect of fairness as well.

²⁶ Decision, p. 5.

²⁷ The issue involved in this Decision thus also appears to preclude participants from bringing any motion, the result of which would be to affect an order previously made, even where circumstances have changed or where there is new information or circumstances which the participant was not able to put before the Chamber at the time of the original order.

17. As a result of this Decision, if left unreviewed, participants will be deprived of any possibility of an opportunity, let alone a “genuine opportunity”, to make their case before the proper decision making authority on a range of issues. The only course provided by the Decision, an application for leave to appeal, does not provide such a genuine opportunity to influence the decision. An application for leave cannot present submissions relating to the merits of a decision, or why an order should be varied – it may only address the specific criteria for leave to appeal under Article 82(1)(d). Leave may not be granted in all cases. More importantly, even where leave is granted appeals have a specific, corrective purpose. They are not a re-hearing,²⁸ and therefore not a forum for making submissions for the first time.²⁹ Furthermore, the rigidity of the emerging system renders it incapable of preventing unfairness: for example, in the present proceedings the redacted victims’ applications were not provided to the Prosecution within the 5 day time limit for filing an application for leave to appeal.³⁰ To the extent that the need to apply to vary the protective measures only becomes clear once the redactions are seen, an application for leave to appeal provides no opportunity to voice such concerns at all.

²⁸ See e.g. “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. 71.

²⁹ See e.g. *The Prosecutor v Bagosora et al*, ICTR-98-41-T, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para. 5; *Prosecutor v Blagojevic*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team, 7 November 2003, para. 10.

³⁰ The time limit for transmitting the redacted applications was also more than 5 days from the date of the decision in the analogous proceedings before Pre-Trial Chamber I. See footnote 15, above. The rigidity of the system imposed by the Decision and the unfairness it causes is underscored in the present proceedings by the fact that the late transmission of the redacted applications prompted the Single Judge to grant an extension of time for the Prosecution to file its replies – yet no such extension would be possible for an application for leave to appeal. See “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 a/0010/06, a/0064/06 à a/0070/06, a/0070/06, a/0081/06 à a/0104/06 et a/0111/06 à a/0127/06’”, ICC-02/04-01/05-211, 23 February 2007, pp. 2, 5.

The issue affects the expeditious conduct of the proceedings

18. The Appeals Chamber has held that “The 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”.³¹ The Prosecution submits that expeditious conduct of proceedings therefore requires that the proceedings be conducted in a timely and efficient manner, and that decisions at all stages not unnecessarily delay the overall determination of responsibility.³² This Decision, and the issue that it raises, affects the expeditious conduct of the proceedings.

19. First, the dismissal of the Prosecution’s Application to Lift Redactions without any consideration of the merits will affect the expeditious conduct of these proceedings. The fact that the Single Judge has declined to consider the Prosecution’s concerns about the redactions, and the difficulties that they pose for the proper determination of the participation of victims, the protection of victims and witnesses and the progress of the proceedings, does not mean that these issues will go away. Instead of taking this opportunity to timely and fully explore and address issues relating to the applications for participation³³ in a single procedure, prior to any determination being made (the most expeditious course), the potential difficulties relating to the

³¹ Judgement on Extraordinary Review, para. 11 and footnote 13.

³² See e.g. *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. See further “Prosecution’s Application for Leave to Appeal Pre-Trial Chamber I’s Decision on the Application for Participation in the Proceedings of VPRS 1-6”, ICC-01/04-103, 23 January 2006, para. 29 and authorities cited in footnote 15.

³³ Some of the relevant issues can only be fully addressed with the meaningful participation of the Prosecution. In this regard the Prosecution refers in particular to the potential conflicts between any dual status as victim and witness, and issues relating to protection where the Prosecution has substantial existing obligations and extensive experience in cooperation with VWU.

participation of victims, which now cannot be resolved, will continue to affect the proceedings.

20. Unless the issues are fully considered at this stage, consequences of participation will manifest themselves, and have to be dealt with, in a piecemeal fashion as proceedings progress. The participation of victims could have serious repercussions for the ongoing proceedings, which might have been addressed or dealt with through a full process at this point. For example, neither the Prosecution nor the Single Judge is presently able to authoritatively determine whether any of the victims' applications relate to persons who may be Prosecution witnesses.³⁴ The implications of a dual status of an individual as both a witness and victim participant may impact on later stages of the proceedings, and may be of crucial importance to the progress of those proceedings. The implications of the failure to fully address matters in a timely manner can have a significant impact on the expeditious conduct of the proceedings.
21. Second, the Decision forces every participant who wishes to make submissions on, or seek to vary, an order or an issue arising out of a decision to seek leave to appeal under Article 82(1)(d), even where the party was not permitted to make submissions prior to the order or decision being made. If they do not do so, under the principles set out in the Decision, they will be deemed to have waived their rights. This will substantially and unnecessarily delay proceedings, as matters which should properly and promptly be resolved before the Chamber already seized of the matter will be put through the process of seeking leave to appeal and then, if leave is granted, the appellate process.

³⁴ In this respect, the Prosecution notes that the Single Judge is only aware of the identity of a limited number of individuals who have been interviewed by the Prosecution and who may serve as witnesses in this case.

22. In the instant proceedings, the question of varying the protective measures ordered could, should, and according to Regulation 42(3) must have been brought first before the Pre-Trial Chamber. Instead, as a result of the Decision, this question has been diverted from the proper procedural path and unnecessarily transformed into the subject of an application for leave to appeal. By forcing the Prosecution to seek review by the Appeals Chamber of an issue which should have been dealt with by the Pre-Trial Chamber – the Chamber which was best placed to make the determination as it had all of the relevant information before it – the Decision has affected the expeditious conduct of these specific proceedings.
23. However the effects of the Decision go beyond these proceedings: the Decision effectively alters the nature of the appellate process and reshapes the procedural law of the Court, with application for leave to appeal being the only vehicle to achieve any dialogue with a Chamber. Rather than being reserved for the review of decisions based on specific errors, participants will be forced to go to the Appeals Chamber in order to raise new arguments that they never had an opportunity to present before the original Chamber.³⁵ A system where participants cannot bring motions before the original Chamber, but must address every issue by way of appeal, will be unworkable. Such an approach turns the system of interlocutory appeals on its head – instead of interlocutory appeals being the exception, for important issues, participants are forced to apply for leave to appeal every decision on which they wish to make any submissions. It is precisely because of the restrictive nature of interlocutory appeals that participants not only can, but must, make all legitimate and good faith efforts to resolve an issue before the original Chamber prior to seeking leave to appeal.

³⁵ This in itself demonstrates the inappropriate nature of an application for leave to appeal as a vehicle to seek variation of the protective measures in this case. Appeals Chambers in general will not accept new arguments that were not made before the first instance Chamber (see footnote 29, above). Yet in this case, the Prosecution has not been given any opportunity to present submissions before the Pre-Trial Chamber.

24. The delays caused by the system set out in the Decision will be exacerbated by the fact that the original Chamber is the appropriate forum to receive the submissions and is best placed to render a decision. If the application for leave is granted and the appeal is successful, then the Appeals Chamber will most likely remand the matter to the original Chamber to reissue the decision. During this period, many months may have passed, with proceedings in a state of uncertainty, only for the Appeals Chamber to put proceedings back where they were when the application was filed.³⁶
25. Such delays, both to the original proceedings³⁷ and by overburdening the Appeals Chamber with issues which need not have gone before it, will continue to affect the expeditious conduct of these and any subsequent proceedings.³⁸

**Immediate resolution of this issue by the Appeals Chamber
will materially advance the proceedings**

26. As stated by the Appeals Chamber, the requirements that “immediate resolution may materially advance the proceedings”³⁹ means that “prompt reference of the issue to the court of appeal”⁴⁰ and its “authoritative determination”⁴¹ 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

³⁶ This is most likely to be the case when the original Chamber did not give a participant an opportunity to make submissions prior to the decision. In such a case, the error is not an error in the substantive decision, but a procedural error in the process of making the decision. The Appeals Chamber would most likely correct that error by directing the original Chamber to reissue the decision after the proper procedure, based on all the relevant submissions (the alternative being for the Appeals Chamber to remake the original decision on the merits based on full submissions)

³⁷ The delays to proceedings will be exacerbated by the fact that participants may be forced to file applications for leave to appeal, in order not to be deemed to have waived their right to address an issue, before they have sufficient information to fully appreciate the implications of that decision. See para. 17 and footnote 15, above.

³⁸ As noted above, the Appeals Chamber has held that proceedings, for the purposes of fairness and expeditiousness under Article 82(1)(d), includes subsequent proceedings. See Judgment on Extraordinary Review, para. 12.

³⁹ Article 82(1)(d).

⁴⁰ Judgment on Extraordinary Review, para. 18.

⁴¹ *Ibid*, para. 14.

action along the right lines provides a safety net for the integrity of proceedings.”⁴² The restrictions on interlocutory appeals in Article 82(1)(d) do not serve to deny a participant the right to have an alleged error reviewed; they merely regulate which issues should be reviewed immediately, and which should be reserved for review as part of the final judgement.⁴³

27. Under the terms of the Decision, the only way that consideration of the propriety and scope of the redactions imposed *vis-à-vis* the Prosecution can be advanced is through the resolution of this matter by the Appeals Chamber. Thus immediate resolution of this issue by the Appeals Chamber will advance the proceedings in the most direct sense.
28. At present, the Prosecution is not in a position to meaningfully participate, or assist the Chamber, in assessing the applications for victim participation. Therefore the resolution of this issue by the Appeals Chamber is also the only avenue which may advance the proper determination of the victims’ applications, while ensuring that the participation of victims is conducted in a manner which promotes the fairness of the proceedings and the rights of all participants.
29. In addition, resolution of the issue at this stage will advance future applications involving protective measures for victims, of which there may well be more in this case and situation and in others.⁴⁴ Clarification by the Appeals Chamber of the procedures available before the Pre-Trial Chamber in these circumstances will assist in resolving future applications regarding protective measures or their variation, and consequentially the underlying applications for participation, more efficiently.

⁴² *Ibid*, para. 15.

⁴³ See e.g. *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 6.

⁴⁴ The Appeals Chamber has held that the proceedings which must be materially advanced “encompass[] the proceedings in their entirety” (Judgment on Extraordinary Review, para. 17), and that they are “not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto” (Judgment on Extraordinary Review, para. 12).

In light of the broad scope of the principle established by the Decision, it will also advance a wide range of future proceedings in this case.

30. This issue requires the immediate attention of the Appeals Chamber. If this issue is not resolved now, but is left until a final appeal against judgement,⁴⁵ then extensive pre-trial and trial proceedings will have taken place during which all participants may have been deprived of certain procedural rights and remedies, to the detriment of both the fair and the expeditious conduct of the proceedings.⁴⁶ The Prosecution submits that this is the very role envisaged for Article 82(1)(d) by the Appeals Chamber, by “ridding ... the judicial process of possible mistakes that might taint ... the fairness of the proceedings”.⁴⁷
31. The Prosecution submits that immediate resolution of this issue by the Appeals Chamber would materially advance the proceedings in this case, and that this satisfies the final requirement of Article 82(1)(d). However given the broad principle espoused in the Decision, which purports to deny the procedural validity of any motion or application addressing the subject matter of a prior decision, the resolution of the issue by the Appeals Chamber may also materially advance the proceedings in other cases.⁴⁸

⁴⁵ The Prosecution notes that it may not be possible to meaningfully appeal this issue at all as part of a final judgement, and submits that this is a further factor to be weighed in favour of immediate resolution by the Appeals Chamber materially advancing the proceedings.

⁴⁶ Furthermore, some of the issues arising out of the victims' applications may cause irreparable prejudice if they are not addressed in a timely fashion. For example, depending on the approach of the relevant Trial Chamber, then if some of the applicants are also witnesses for the Prosecution, and it is subsequently decided that their participation as victims impacts on their ability to give testimony as a witness, then this may even force to the Prosecution to drop some charges – a matter which could never be cured by an appeal against final judgement.

⁴⁷ Judgment on Extraordinary Review, para. 14. The Prosecution notes that the Appeals Chamber refers to “possible errors that might taint”. This reinforces the Prosecution's earlier submissions (see footnote 8, above) that the grant of leave to appeal does not imply that a Pre-Trial Chamber considers that there is an error in a decision, or that leave should only be granted where the Pre-Trial Chamber thinks there may be an error. Indeed, the confirmation of a decision by the Appeals Chamber may itself often materially advance the proceedings (see para. 34, below).

⁴⁸ This Chamber has previously recognised that in certain circumstances, the impact on other proceedings may be considered “as an additional argument in support of the alleged significant impact on the current proceedings” - “Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the

32. The immediate resolution of the issue will further advance the proceedings by allowing the Appeals Chamber to consider and reconcile the inconsistent approaches of different Pre-Trial Chambers on the range of procedural avenues available in relation to redacted applications by victims to participate.⁴⁹ Participants before both Chambers are now faced with uncertainty. An authoritative determination of the Appeals Chamber will benefit participants in, and will materially advance, all proceedings. It will ensure that all participants are in a position to effectively exercise their procedural rights, and that decisions on the use and variation of protective measures are made on a solid procedural basis. The Prosecution submits that such prompt resolution of uncertainties, rather than allowing them to linger over the proceedings, is one of the primary objectives of Article 82(1)(d).⁵⁰
33. The Prosecution submits that one function of the Appeals Chamber is to ensure that the law of the Court evolves in a coherent and standardised manner, and to provide guidance to Pre-Trial and Trial Chambers on the interpretation of the law.⁵¹ 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

Prosecutor's Applications for Warrants of Arrest under Article 58", ICC-01/05-20-US-Exp, 19 August 2005, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See further *The 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; *The Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005 at para 4; *Prosecutor v Milutinovic et al*, IT-99-37-PT, Decision on the Defence Request for Certification of Appeal Against the Decision of the trial Chamber on Motion for Additional Funds, 16 July 2003; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003; *Prosecutor v Norman et al*, SCSL-04-14-T, Decision on the Motions by the First and Second Accused for Leave to appeals the Chamber's Decision on the Motions for Issuance of a Subpoena, 28 June 2006, para. 12.

⁴⁹ PTC-I's 18 August 2006 Decision. See further paras. 8-9, above.

⁵⁰ Judgment on Extraordinary Review, paras. 14 and 18. See also e.g. *Prosecutor v Blagojevic et al*, IT-02-60-PT, Decision on Joint Defence Motions for Certification of Decision on Joint Defence Motions for Reconsideration of Trial Chamber's Decision to Review All Discovery Materials, 10 February 2003.

⁵¹ 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").

would materially advance the proceedings.⁵² The Prosecution submits that this is entirely consistent with the approach of the Appeals Chamber, which considered this limb of Article 82(1)(d) in terms of whether “immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination”.⁵³

34. The immediate resolution of this issue will materially advance and benefit all proceedings before this Court regardless of whether the Decision is upheld or reversed by the Appeals Chamber. In the specific context of these applications, victim protection and participation are important features of this Court, and should be put on a clear, consistent and certain footing. Furthermore, if the Decision is correct and there can be no applications to lift redactions, then the decision of Pre-Trial Chamber I effectively invites participants to make use of a procedural device that is actually not available to them, and accordingly should not be followed.
35. Finally, this Decision and the jurisprudence that it establishes purports to alter the nature and scope of the appellate regime of this Court.⁵⁴ By doing so, it arguably broadens the role of the Appeals Chamber, beyond its customary corrective mission. The Prosecution submits that such a change must not be entrenched without any review or input from the body which will be most affected.

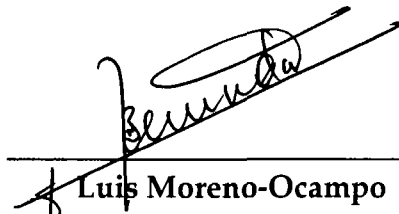
⁵² See e.g. *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecution’s Application for Certification under Rule 73(B) concerning the Evidence of an Investigator, 20 June 2002; *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecution’s Application for Certification under Rule 73(B) concerning Rule 70, 29 August 2002.

⁵³ Judgment on Extraordinary Review, para. 14.

⁵⁴ See para. 23, above.

Conclusion

36. The blanket denial of a procedural right to all participants throughout the proceedings is a “consequential” error. As demonstrated above, it affects the fair and expeditious conduct of the proceedings. The ability to remedy such errors and ensure “the integrity of the proceedings” is “at the core of article 82 (1) (d)”.⁵⁵
37. For the foregoing reasons, the Prosecution respectfully requests that the Single Judge grant leave to appeal against the Decision, pursuant to Article 82(1)(d).



Luis Moreno-Ocampo
Prosecutor

Dated this 26th day of February 2007
At The Hague, The Netherlands

⁵⁵ Judgment on Extraordinary Review, para. 11.