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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

Public Document

**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**

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Introduction

On 10 August 2007, the Single Judge rendered a decision on the applications of 49 victims to participate in the investigation of the situation in Uganda and the associated case.¹ The Decision, building on the prior jurisprudence of Pre-Trial Chamber I, provides further detail, clarity and certainty regarding victims participation and the implementation of relevant provisions of the Statute and the Rules.

The Single Judge notes *inter alia* the interest of enhancing the efficiency and predictability of proceedings, in particular regarding the role that victims may play, and notes that this issue has *profound effects on the fair and expeditious conduct of the proceedings*.

The Prosecution agrees with these considerations. 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 the Prosecutorial strategy, including in relation with the situation in Northern Uganda.² 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 build upon the experience of the last three years of activities of the Court in this regard and address all issues of relevance to victims' participation in a clear, consistent and certain manner.

In this regard, the Prosecution respectfully submits that the decision does not entirely provide the *certainty* required by the Prosecution and other participants to the proceedings. Specifically, regarding the scope of victims' participation the decision provides for a definition of the personal interest of victims diverting from other Chamber.³ Also the Single Judge does not

¹ "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, 10 August 2007 ("the Decision"). The Decision is dated 10 August 2007, and was notified on 13 August 2007.

² Office of the Prosecutor, Report on the activities performed during the first three years (June 2003 – June 2006), 12 September 2006 (http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf), p. 16.

³ An assessment will need to be made in each case as to whether the interest asserted by victims, do not in fact, fall outside the personal interest and belong instead to the role assigned to the Prosecutor. *Prosecutor v. Lubanga*, 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, ICC-01/04-01/06-925, App. Ch., 13 June 2007, para. 28.

define the precise modalities of victim participation in relation to investigations; the wording of the decision can be interpreted as envisaging modalities for participation going beyond the framework established by Article 68 (3) of expressing ‘views and concerns’.⁴ It is not excluded, *inter alia* that victims could request investigative activities, gather evidence or request access to Prosecution records. As the Prosecution has consistently argued in previous submissions, those issues are of direct relevance to the efficiency of its investigations. Further, due to their importance and vast implications, they are capable of affecting the fair and expeditious conduct of the proceedings.

The Appeals Chamber could provide certainty and finality to this fundamental issue in this and other situations, for the benefit of all interested participants.

I. Procedural History

1. On 22 November 2006, Pre-Trial Chamber II appointed the Single Judge to deal with all issues in connection with victims’ applications for participation in the Uganda situation and in the single existent case.⁵
2. On 1 February 2007,⁶ the Single Judge notified the Prosecution that the Registrar had filed in the record of the Uganda Situation, 49 victims’ applications for participation in the proceedings.⁷ The Prosecution and Ad-hoc Defence Counsel were granted until 26 February 2007 to submit observations in reply to the applications, under Rule 89(1).⁸

⁴ Decision, paras. 5, 84-85 and 96.

⁵ “Decision Designating a Single Judge on Victims’ Issues”, ICC-02/04-01/05-130, 22 November 2006, p. 3.

⁶ “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”; ICC-02/04-01/05-134, 1 February 2007 (“1 February 2007 Decision”).

⁷ The same applications were also filed in the record of the case of *Prosecutor v. Kony et al.* (ICC-02/04-01/05). In the context of that case, the Prosecution applied to vary the protective measures imposed in the 1 February 2007 decision by lifting the redactions insofar as they applied to the Prosecution (ICC-02/04-01/05-150; ICC-02/04-01/05-208), which the Single Judge denied on purely procedural grounds without consideration of the merits (ICC-02/04-01/05-209). The Prosecution then applied for leave to appeal that decision (ICC-02/04-01/05-212), which was also denied (ICC-02/04-01/05-219).

⁸ 1 February 2007 Decision, p. 19. The redacted copies of 47 of those applications, insofar as they requested participation in the Situation, were provided to the Prosecution on 13 February 2006 and two on 14 February 2006. A copy of application a/0117/06 (ICC-02/04-33-Conf-Exp-Anx7) (ICC-02/04-66-Conf-Corr) was received for the first time on 14 February 2006 (both for the situation and the case).

3. On 28 February 2007, the Prosecution filed its reply to the Applications in the situation.⁹ Ad-hoc Defence Counsel filed its reply to the Applications on 5 March 2007.¹⁰
4. On 26 March 2007, the Office of Public Counsel for Victims (OPCV) filed observations on the Applications.¹¹ The Prosecution filed a document objecting to the OPCV's Observations on 3 April 2007,¹² and Ad-hoc Defence Counsel filed a response to the OPCV's Observations on 10 April 2007.¹³ On 16 April 2007, the Single Judge dismissed the OPCV's Observations as inadmissible.¹⁴
5. On 10 August 2007, the Single Judge rendered the Decision on the Applications, granting two applications for participation in the situation and deferring consideration of a further 30 applications.¹⁵ This Decision was notified on 13 August 2007. The Prosecution respectfully hereby applies for leave to appeal the Decision pursuant to Article 82(1)(d).

II. The Issue for which Leave to Appeal is Sought

6. The Decision involves the issue¹⁶ of the extent to which victims may participate under Article 68(3); specifically, regarding the scope of victims' participation, the Decision provides for a definition of the personal interests of victims diverting from the other chambers; in addition, concerning the procedural activities that they may perform at the investigative stage the Decision is open to interpretations that go beyond the framework established by Article 68 (3) of presenting their views and concerns.¹⁷

⁹ ICC-02/04-85. The Prosecution simultaneously filed a reply in the case of *Prosecutor v. Kony et al.* (ICC-02/04-01/05-214).

¹⁰ ICC-02/04-01/05-216-tEN. Pursuant to a request of *ad-hoc* Counsel for the Defence on 21 February 2007 (ICC-02/04-01/05-210), on 23 February 2007 the Single Judge granted the Prosecution an extension of time until 28 February 2007 and the defence an extension of time until 6 March 2007 (ICC-02/04-01/05-211).

¹¹ ICC-02/04-89. The same observations were filed in the case of *Prosecutor v. Kony et al.* (ICC-02/04-01/05-232).

¹² ICC-02/04-91. The Prosecution simultaneously filed the same objections in the case of *Prosecutor v. Kony et al.* (ICC-02/04-01/05-236).

¹³ ICC-02/04-01/05-242.

¹⁴ ICC-02/04-01/05-243.

¹⁵ *Situation in Uganda*, "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, 10 August 2007 ("Decision").

¹⁶ "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*, "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.

¹⁷ Decision, paras. 5, 84-85 and 96.

7. The Prosecution submits that, on the one hand, the Decision includes extensive participation at the investigative stage, including in activities undertaken pursuant to Articles 56 and 57 of the Statute, and further leaves open the possibility of further (and undefined) participation.¹⁸ On the other hand, the Decision, through references to existing jurisprudence of Pre-Trial Chamber I and through recognition that ‘victims of incidents which do not or are yet to constitute the subject of a case, are vested with autonomous procedural rights’¹⁹, arguably offers interpretations of ‘views and concerns’ going beyond Article 68 (3), potentially covering requests for specific investigative measures. In this sense, the Prosecution emphasizes that providing victims the right to file material in the record of the investigation and requesting specific proceedings or measures from the Chamber can have serious consequences for the fair and expeditious conduct of the proceedings. The Prosecution therefore respectfully seeks leave to appeal the issue of to what extent and in what manner victims may participate in an investigation, under Article 68(3), including in relation to Articles 56 and 57(3)(c), which it submits affects the fair and expeditious conduct of the proceedings.²⁰

III. The Issue Fulfills the Criteria in Article 82(1)(d)

8. The Prosecution submits that the Decision, leaving aside any considerations as to its correctness, does raise issues capable of affecting the fair and expeditious conduct of the proceedings, within the terms of Article 82(1)(d). The impact of these issues are further heightened since, as emphasized in the Decision, the list of proceedings where victims can participate provided in the Decision is not exhaustive.²¹

¹⁸ Decision, para. 88.

¹⁹ Decision, para. 103

²⁰ The Prosecution notes that Pre-Trial Chamber I has previously denied leave to appeal a substantially similar issue (*Situation in the DRC*, “Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation of VPRS 1-6”, ICC-01/04-135-tEN, 31 March 2006 – “PTC-I’s 31 March 2006 Decision Denying Leave to Appeal”). The Prosecution has already expressed its concerns about the manner in which Pre-Trial Chamber I reached this conclusion (*Situation in the DRC*, “Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-141, 25 April 2006), in particular that Pre-Trial Chamber I exceeded its discretion by deciding on the merits of the underlying decision, and by imposing an erroneous and impracticable standard for proving the future impact of an issue on the proceedings (which was at variance with the language of the Appeals Chamber, which recognised a predictive element in such determinations – see para. 12, below). The Single Judge is not bound to follow the decision of another Pre-Trial Chamber (Article 21(2) only provides a discretion for one Chamber to follow the principles and rules of law emerging from prior jurisprudence). Rather, the Single Judge must make his own determination of the issues before him, which the Prosecution submits must necessarily take account, *inter alia*, of the highly relevant subsequent experience of the Court.

²¹ Decision, para. 88.

9. The Prosecution further submits that an immediate resolution by the Appeals Chamber may materially advance the proceedings. The decision establishes a general regime of participation applicable to all investigative activities conducted within the framework of the Uganda situation, and which will also have an impact on other situations. It is therefore justified that the Appeals Chamber exercise its powers of appellate review and enter an authoritative decision ending any uncertainty for all participants. This is all the more important as the Decision assesses the criterion of personal interests of applicant victims in ways which in part diverge from previous jurisprudence, and also appears to differ from Pre-Trial Chamber I's decision in its approach to proof of causality under Rule 85.²² It is respectfully submitted that the Prosecution and all participants require certainty and a unified approach.

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

10. The instances and modalities of the right of victims to participate in proceedings at the investigation stage affects the fairness of the proceedings, which includes, in accordance with the Pre-Trial Chamber I, "respect for the procedural rights of the Prosecutor, the Defence and the Victims".²³
11. The Single Judge recognises in the Decision "the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings".²⁴ The

²² For example, Pre-Trial Chamber I took an approach to the requirement that the personal interests of victims be affected, holding that they "are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered" (*Situation in the DRC*, "Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 5 and VPRS 6", ICC-01/04-01/06-101-Corr-tEN, 17 January 2006, para. 63). The Single Judge took a different approach, holding that "this determination will then depend not only upon the nature and scope of the proceeding, but also upon the personal circumstances of the victim in question" (Decision, para. 89). The Appeals Chamber has also taken a specific approach, stating that "any determination by the Appeals Chamber of whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis", and has specifically noted that those interests are different from the role of the Prosecutor (*Prosecutor v. Lubanga*, "Decision on Participation of Victims in the Appeal against the Confirmation Decision under Article 82(1)(b)", ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28; see also *Prosecutor v. Lubanga*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'D cision sur la demande de mise en libert  provisoire de Thomas Lubanga Dyilo'", ICC-01/04-01/06-824 OA7, 13 February 2007, para. 40). In relation to standard of proof and causation, contrast Decision, paras. 12-20 and 106-113; with *Situation in the DRC*, "Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 5 and VPRS 6", ICC-01/04-01/06-101-Corr-tEN, 17 January 2006, para. 97-101.

²³ PTC-I's 31 March 2006 Decision Denying Leave to Appeal, para. 38; see also para. 39.

²⁴ Decision, para. 16.

Appeals Chamber has 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.”²⁵

12. Specific examples of the impact of an issue on those proceedings will necessarily have a predictive element; as the Appeals Chamber has previously recognised,²⁶ certainty of that impact is not required to grant leave to appeal.²⁷ The Prosecution respectfully submits that the potential involvement of victims in proceedings relating to the gathering and preservation of evidence, in particular in the context of article 56 and 57, provides one such example of the impact of this issue on the fairness of the proceedings.
13. The Prosecution submits that the fairness of the proceedings would be directly impacted to the extent that victims are permitted to actively intervene in, initiate, or petition for, activities related to the gathering and preservation of evidence. Any such activity can impact the Prosecution’s investigations, and thus affects fairness in terms of “respect for the procedural rights of the Prosecutor”.²⁸ Victims have different priorities, interests, or perceptions of events.²⁹ Furthermore, and unlike the Prosecutor, external actors are not bound by the

²⁵ Judgment on Extraordinary Review, para. 11. See also PTC-I’s 31 March 2006 Decision Denying Leave to Appeal, paras. 35, 39. Given that the essence of Article 82(1)(d) is constituted by the 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 (see also below, paras. 24 and 27). 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.

²⁶ The Appeals Chamber referred 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).

²⁷ *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’”.

See also *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).

²⁸ PTC-I’s 31 March 2006 Decision Denying Leave to Appeal, para. 38.

²⁹ For example, in the Decision, all victims admitted in the case appear to be the victims of the same attack. However victims a/0118/06 (para. 56) and a/0119/06 (para. 63) cite the LRA as responsible for the attack, whereas victim a/0122/06 considers the UPDF to have been responsible (para. 72). While not the object of this application, it is submitted that the Single Judge might wish to consider whether victim a/0122/06 should have separate legal

obligations set forth in Article 54 and more specifically the requirement to ensure that the investigation covers all relevant circumstances to establish the truth.³⁰ The conduct of conflicting or contradictory evidence gathering activities at the request of multiple victims could seriously affect the fairness and the efficiency of the Prosecution's investigations. In addition, in the absence of properly instructed counsel for the defence, the participation of such victims in proceedings conducted pursuant to Articles 56 and 57(3)(c) will likely impact on the balance of those proceedings, and thus affect the fairness of those proceedings *vis-à-vis* future accused persons.³¹

14. The Prosecution stresses that the risk mentioned above is increased by organized actors with specific interests in the outcome of the Court's investigations and proceedings. In Northern Uganda, victims live in areas where individuals sought by the Court wield substantial influence and command armed groups that could be still active.³² Hostility to the ICC investigation by some actors is a matter of public record. This risk is further intensified given that a portion of those who sympathise or collaborate with the LRA, and even former LRA members, may readily seek participation in the situation by fairly characterising themselves as victim-

counsel as he identifies a different perpetrator group, to avoid potential conflicts of interest amongst the victims. In this context, the Prosecution notes that Rule 90(4) of the Rules of Procedure and Evidence requires the Chamber and the Registry to take all reasonable steps to ensure that the distinct interest of victims are accommodated in the selection of common legal representatives and that conflicts of interest are avoided.

³⁰ To the contrary, *Pre-Trial Chamber I referred to the victims' interest in punishing perpetrators and seeking reparations. Situation in the DRC*, "Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 5 and VPRS 6", ICC-01/04-01/06-101-Corr-tEN, 17 January 2006, para. 63. In contrast, the Appeals Chamber has held that the interests of victims are different to the role of the Prosecutor: *Prosecutor v. Lubanga*, "Decision on Participation of Victims in the Appeal against the Confirmation Decision under Article 82(1)(b)", ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28.

³¹ Counsel for the Defence has already raised concerns over the role of victims in proceedings, and in particular the prospect that they play the role of a second prosecutor, in a number of filings before Pre-Trial Chamber I – see e.g. *Prosecutor v. Lubanga*, "Corrigendum to the Response to the application by victims a/0001/06,a/0002/06,a/0003/06 and a/0105/06 for authorization to participate in the Appeal proceedings relating to the *Decision on the confirmation of charges*", ICC-01/04-01/06-901-Corr-tEN, 16 May 2007, paras. 25, 29-31; *Prosecutor v. Lubanga*, "Defence Response to the Appeals Chamber Order of 24 November 2006", ICC-01/04-01/06-734, 29 November 2006, paras. 26-28; *Prosecutor v. Lubanga*, "Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06", ICC-01/04-01/06-379-tEN, 4 September 2006, paras. 18, 29. Furthermore, to the extent that the impact on the fairness of the proceedings identified above may give rise to future challenges by the defence, this also impacts on the expeditious conduct of future proceedings.

³² See e.g. "Uganda: Former LRA Rebel Kamdulu Attacked in Gulu", *New Vision*, 7 June 2007 (<http://allafrica.com/stories/20070608114.html>). This concern is not limited to Northern Uganda, but also applies to many other situations in which the Court operates – see 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*".

abductees in an effort to obtain information about, or interfere in ongoing investigations.³³ In such potential scenarios, the issue could affect the fairness of the proceedings regardless of whether the Single Judge's decision is correct or not.

15. The Prosecution also submits that the impact of this issue, under the terms of the Decision, on the fairness of the proceedings is all the greater as it does not limit access of the victims to confidential material, including the names of possible suspects. The absence of such limitations could compromise the confidentiality of the investigations, to the detriment of their efficiency, of the preservation of evidence and of the protection of other victims and witnesses.³⁴
16. The Prosecution submits that the concerns relating to the impact of this issue on the protection of victims are further exacerbated because the participation of victims in evidence gathering activities can expose the victims to important risks. Such participation can easily lead to victims making their own preparatory inquiries, in order to be in a position to petition the Court. These preparatory inquiries could impact on the ongoing investigations of the Prosecution. Furthermore, the investigations conducted thus far by the Prosecution are in ongoing conflict zones, and the Prosecution takes great care, and has significant experience, in ensuring that its investigative activities are conducted in a low-profile manner, so as not to reveal, amongst other things, the identity of potential victims or witnesses or otherwise put them at risk. Victims themselves, on the other hand, may not be aware of the necessary protection issues. Furthermore, as these preparatory inquiries will generally be conducted prior to the relevant application to participate in a given proceeding, Chambers of the Court will not have an opportunity to intervene and to regulate such activities on a case-by-case basis. Thus the manner in which the Decision could be seen to encourage or invite such activities by victims must be balanced against the duty of the Court pursuant to Article 68(1) to protect the well being and safety of the victims and witnesses and preserve the integrity of the investigative activities of the Prosecution.

³³ On the existence of a network of LRA collaborators, including within Uganda, see e.g. "Uganda: Kony's Wife Netted at Busia Border", *New Vision*, 28 June 2006 (<http://allafrica.com/stories/200606290354.html>).

³⁴ In this sense, the Prosecution notes that Pre-Trial Chamber I's decision established that victims did not have the right to access the record of the investigation, and that "in principle" victims would only have access to the public record (*Situation in the DRC*, "Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 5 and VPRS 6", ICC-01/04-01/06-101-Corr-tEN, 17 January 2006, para. 59 and 76). The Decision is silent on the matter of access to confidential material.

17. Finally, granting rights of participation to victims at the investigative stage, beyond views and concerns, is capable of creating an imbalance *vis-à-vis* the defence, which lacks similar rights at this stage. The ability of the Court to prevent or correct such imbalance will depend on the specific circumstances of each case. In this sense, the Prosecution notes that concerns have already been expressed in proceedings before the Court regarding the adequacy of the available measures used to date.³⁵ In any event, the relevant consideration here is that the possibility of an emerging imbalance between defence and victims is proof of the impact that the issue of modalities of victim participation can have on the fairness of the proceedings.³⁶

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

18. 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”.³⁷ 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 do not unnecessarily delay the overall determination of responsibility.³⁸

³⁵ While the appointment of *ad hoc* counsel in certain circumstances may ameliorate some of the potential 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. *Ad hoc* counsel in the present proceedings raised this very point in her observations on the applications – “Defence observations on applications for participation in the proceedings 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-02/04-01/05-216-tEN, 5 March 2007, paras. 37-42.

³⁶ Counsel for the Defence has already raised concerns over the role of victims in proceedings, and in particular the prospect that they play the role of a second prosecutor, in a number of filings before Pre-Trial Chamber I – see e.g. *Prosecutor v. Lubanga*, “Corrigendum to the Response to the application by victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 for authorization to participate in the Appeal proceedings relating to the *Decision on the confirmation of charges*”, ICC-01/04-01/06-901-Corr-tEN, 16 May 2007, paras. 25, 29-31; *Prosecutor v. Lubanga*, “Defence Response to the Appeals Chamber Order of 24 November 2006”, ICC-01/04-01/06-734, 29 November 2006, paras. 26-28, *Prosecutor v. Lubanga*, “Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06”, ICC-01/04-01/06-379-tEN, 4 September 2006, paras. 18, 29. Furthermore, to the extent that the impact on the fairness of the proceedings identified above may give rise to future challenges by the defence, this also impacts on the expeditious conduct of future proceedings.

³⁷ Judgement on Extraordinary Review, para. 11 and footnote 13.

³⁸ 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.

19. The Decision itself recognises that the predictability and efficiency of the proceedings will be affected, indeed enhanced, by providing guidance on the role that victims may play before the Court at various stages in the proceedings,³⁹ and that specifying the nature and scope of the proceedings in which the victims may participate is “critical” to ensuring the predictability, certainty and effectiveness of the proceedings and the victims’ participation in them.⁴⁰ The Prosecution submits that to the extent that these supplementary principles and guidance are required to ensure the efficiency and expeditiousness of the proceedings – and the Prosecution agrees that they are – then the issues underlying those principles and guidance impact on the expeditiousness of those proceedings.
20. The Court’s experience demonstrates the impact of victim participation in the proceedings conducted.⁴¹ The processing and responses to the applications received, and subsequent litigation, is time and resource intensive.
21. In particular, to the extent that victim participants would be granted the right to request the Chamber to order specific proceedings expeditiousness of the proceedings is necessarily affected. Also, the potentially large-scale participation of victims,⁴² which under the terms of the Decision would allow them to submit requests for protective measures to the Chamber,⁴³ risks diluting the limited protective resources of the Court, and in particular of the VWU.⁴⁴ This could result in the Court being unable to provide adequate protection to persons who are

³⁹ Decision, para. 5.

⁴⁰ Decision, para. 88. The Single Judge makes a similar point regarding the role that victims could play in specific proceedings – Decision, para. 96.

⁴¹ Approximately 175 applications for participation have already been transmitted to the Prosecution in the DRC situation; while 21 applications have been transmitted in the Darfur situation. In all situations it can be reasonably expected that further applications will be, or may already have been, submitted as in both situations the trend has been towards increasing levels of applications. The Decision appears to implicitly recognise this fact (see para. 6 of the Decision). It is not surprising that the levels of victim applications will increase over time, as understanding of the work of the Court increases. In the Darfur situation the legal representatives of the current applicants are known to be actively seeking further potential victims – see further, *Situation in Darfur*, “Prosecution’s Reply under Rule 89(1) to the Application for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 in the Situation in Darfur, Sudan”, ICC-02/05-81, 8 June 2007, para. 30.

⁴² While at this stage only two victims have been permitted to participate in the situation, this was due to the need for the remaining applicants to provide sufficient proof of identity and their applications remain pending. The question at hand in this application for leave to appeal is the impact of the issue, and is not confined to the particular decision.

⁴³ Decision, para. 98.

⁴⁴ In the DRC situation, one legal representatives of the victims already expressed an opinion that the protective duties of Article 68(1) extend to all those victims admitted to participate in the proceedings – “Observations of the Legal Representative of VPRS 1 to VPRS 6 following the Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber I’s Decision on the Applications for Participation in Proceedings of VPRS 1 to VPRS 6”, ICC-01/04-105-tEN, 27 January 2006, para. 27.

endangered. None of this is to say that such impact and use of resources are inappropriate or unwarranted, as it is linked with paramount duties of the Court to protect the victims and uphold the rights of participants in the proceedings. This is a question relating to the merits of the Decision. Regardless, the consequences of this issue on the expeditious conduct of the proceedings (the matter for determination in this application), on an ongoing basis, is significant.⁴⁵

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

22. The Prosecution submits that the importance of the Single Judge's Decision justifies that the Appeals Chamber exercise its powers of appellate review and enter an authoritative decision ending any uncertainty as to the scope of victims' participation, since the decision provides for a definition of the personal interest of victims diverting from other Chambers and as to the procedural activities that they may perform at the investigative stage .. This is supported by the view expressed by the Single Judge when he notes that "specifying the nature and scope of the proceedings in which victim may participate...is critical to ensuring the predictability of proceedings and ultimately the certainty and effectiveness of victim's participation".⁴⁶
23. The Appeals Chamber has ruled that the requirement "immediate resolution may materially advance the proceedings" means that "prompt reference of the issue to the court of appeal"⁴⁷ and its "authoritative determination"⁴⁸ will help the proceedings "'move forward'; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a

⁴⁵ In this regard, not only will victims and other participants benefit from certainty of the procedures, as the Single Judge noted. All organs of the Court will benefit from the certainty that would be provided by an authoritative determination of the proper scope of victim participation in the situation by the Appeals Chamber. This certainty would allow all relevant organs to properly and effectively plan their activities and allocate their resources, which would enhance their ability to expeditiously perform their obligations in support of the proceedings.

⁴⁶ See in particular, Decision, para. 88; see also para. 5. The Single Judge went on to add that "the list of proceedings provided [in the Decision] does not intend to be necessarily exhaustive" and that "all possible scenarios can not be foreseen at this stage" (para. 88), and also mentioned that " ...the objective of providing as specific and detailed a view of the procedural rights afforded to applicant victims" and the need for him to focus "for the sake of the predictability of proceedings, ...on the role which might be assigned to victims in the context of proceedings under article 56 and article 57, paragraph 3 (c)" (para. 96).

⁴⁷ Judgment on Extraordinary Review, para. 18.

⁴⁸ *Ibid*, para. 14.

decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”⁴⁹

24. Victim participation is a key feature of this Court, and should be placed on a certain solid footing. The Decision establishes a general regime of participation applicable to all investigative activities conducted within the framework of the Uganda situation. Consequently, the Decision raises matters of fundamental importance which require resolution not only for these specific applications, but also for other proceedings, present and future, within that situation. 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 extends to proceedings prior and subsequent thereto”.⁵⁰ The Prosecution submits that the present Decision proposes to set out a general framework and it is therefore justified to seek leave to Appeal to allow for the review of such general framework, without prejudging future submissions on a case by case basis.
25. It is respectfully submitted that to the extent that the Decision is, as demonstrated above, capable of affecting the fairness of the proceedings, timely intervention of the Appeals Chamber will avert the danger that subsequent proceedings affected by the Decision are later nullified, in whole or in part, by challenges brought by the parties. In this sense, the Prosecution stresses that the very role envisaged for Article 82(1)(d) by the Appeals Chamber is to “rid ... the judicial process of possible mistakes that might taint ... the fairness of the proceedings”.⁵¹
26. 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 as to the correct interpretation of the law,⁵² thereby enhancing clarity and predictability in the Court’s proceedings. The Prosecution submits that this is reflected in the present limb of

⁴⁹ *Ibid.*, para. 15.

⁵⁰ *Ibid.*, paras. 12 and 17.

⁵¹ *Ibid.*, para. 14. The Prosecution notes that the Appeals Chamber refers to “possible mistakes that might taint” (emphasis added).

⁵² 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”.

Article 82(1)(d), which has been defined in terms of whether “immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination”.⁵³ Final determination of the critical issues raised in the Decision by the Appeals Chamber will provide clear guidance to all Chambers and participants. It will also provide clarity to victim applicants, who will be in a position to determine with precision from the outset how they are entitled to participate in the Court’s proceedings. This is all the more important since there are points, such as the definition of the notion of “personal interests”,⁵⁴ where the jurisprudence of the different Chambers of this Court diverges.⁵⁵

27. In addition to unifying the jurisprudence of the Court on the participation of victims, a decision by the Appeals Chamber on this issue now will also materially advance these proceedings by providing certainty to all participants, and organs of the Court. This will allow all participants and organs to plan and allocate their resources in the most effective manner to discharge their mandates. Should the Decision ultimately be modified by the Appeals Chamber, it will also ensure that significant resources (from a limited pool) have not been expended needlessly.
28. Furthermore, the issues involved in this Decision cut across all situations before the Court. Granting leave to appeal this issue at this stage would therefore also materially advance other proceedings,⁵⁶ by giving the Appeals Chamber an opportunity to confirm the procedural framework within which the applications for participation in a situation are to be dealt with. This would significantly reduce the amount of litigation on this issue and allow future applications to be dealt with promptly and in a streamlined fashion. 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

⁵³ Judgment on Extraordinary Review, paras. 14 and 18. See also e.g. *Prosecutor v. Blagojević 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.

⁵⁴ See above, footnote 22.

⁵⁵ 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. Milošević*, 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. Milošević*, IT-02-54-T, Decision on Prosecution’s Application for Certification under Rule 73(B) concerning Rule 70, 29 August 2002.

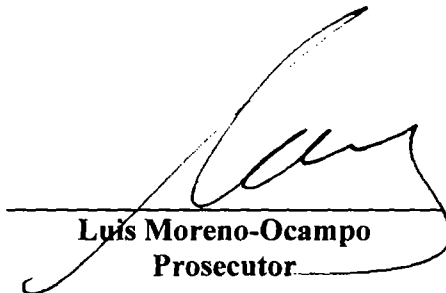
⁵⁶ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor which can be weighed in deciding whether to grant leave - see *Prosecutor v. Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor’s 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. Mrkšić*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

submits that the importance of the issues raised by the Decision underscore the desirability of prompt consideration of this issue by the Appeals Chamber.⁵⁷

29. Finally, the Prosecution notes that the current issue may not be susceptible to full discussion in an appeal under Article 81.⁵⁸ The Prosecution submits that this is an additional reason strongly militating in favour of leave to appeal being granted at this stage.
30. 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.

Conclusion

31. For the foregoing reasons, the Prosecution respectfully requests the Single Judge to grant leave to appeal the Decision under Article 82(1)(d), to the extent specified in this document.



Luis Moreno-Ocampo
Prosecutor

Dated this 20th day of August 2007
At The Hague, The Netherlands

⁵⁷ This Chamber 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” - “Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”, ICC-01/05-20-US-Exp, 19 August 2005, para. 54 (unsealed pursuant to ICC-02/04-01/05-52).

⁵⁸ 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.