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**International
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Court**

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PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN DARFUR, SUDAN

Public Document

**Prosecution's Application for Leave to Appeal the Single Judge's 6 December 2007
Decision on Applications for Participation in the Proceedings**

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Introduction

1. On 6 December 2007, the Single Judge rendered a decision on a series of applications by victims to participate in the situation in Darfur. In reaching this Decision, the Single Judge recognised recent Appeals Chamber jurisprudence relating to the need for “careful consideration on a case-by-case basis” of the personal interests of applicants, and the appropriateness of participation and its modalities.¹ However the Single Judge considered that these requirements only applied at a later stage, in relation to specific proceedings,² and granted those applicants whose applications were complete the (undefined) “procedural status of victim” apparently based solely on the prior assessment that all victims’ personal interests are affected in general by the investigation.³
2. The framework established in the Rome Statute regarding victim participation represents a key innovative feature of this Court. Interaction with the victims is a statutory duty of the Prosecution and has been a key element of the Prosecutorial strategy. The provisions of Article 68(3) allowing the Court to hear the views and concerns of victims at stages of the proceedings where their personal interests are affected is, in the Prosecution’s view, a milestone in international criminal justice. It is important to 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.
3. 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 that adopted by other Chambers.⁴ The Appeal Chamber said “An assessment will need to be made in each case as to whether the interests asserted by victims, do not in fact, fall outside the personal interest and belong instead to the role assigned to the Prosecutor”.⁵

¹ Decision, para. 12.

² Decision, para. 13.

³ Decision, para. 11 and p. 22 (dispositifs).

⁴ Decision, para. 11.

⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28.

4. *The Decision also does not address the modalities of the victims' participation. The Prosecution submits that admission of applicants as victims entitled to participate in the proceedings, without reference to these requirements, risks undermining the victims' participation system, and meets the qualifications for leave to appeal.*
5. *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.*
6. *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

7. *On 10 May 2007, Pre-Trial Chamber I appointed the Single Judge in the Darfur situation.⁶*
8. *In response to a series of victims' applications filed in the record of the investigation into the situation in Darfur, the Single Judge provided the Prosecution and the Office of Public Counsel for the Defence ("OPCD") with opportunities to respond.⁷ The Prosecution filed responses to the various applications on 8 June 2007⁸ and 20 September 2007,⁹ and OPCD filed responses on 8 June 2007¹⁰ and 24 September 2007.¹¹*
9. *On 21 and 24 August, OPCD filed requests for the Single Judge to order the applicants to provide supporting documentation and for the Prosecution to disclose exculpatory materials.¹² The Single Judge denied the requests on 3 December 2007,¹³ and OPCD sought leave to appeal that decision on 10 December 2007.¹⁴*

⁶ ICC-02/05-73.

⁷ ICC-02/05-74; ICC-02/05-85.

⁸ ICC-02/05-81.

⁹ ICC-02/05-101.

¹⁰ ICC-02/05-80-Conf.

¹¹ ICC-02/05-103-Conf.

¹² ICC-02/05-94-Conf; ICC-02/05-97. The Prosecution filed a consolidated response on 11 September 2007 – ICC-02/05-99-Conf.

¹³ ICC-02/05-110.

¹⁴ ICC-02/05-112.

10. On 6 December 2007, the Single Judge rendered the “Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07”, in which the Single Judge granted the procedural status of victim to 11 of the applicants.¹⁵
11. The Prosecution respectfully hereby applies for leave to appeal the Decision pursuant to Article 82(1)(d).¹⁶

II. The Issue for Which Leave to Appeal is Sought

12. The Decision involves the issue¹⁷ of whether a “procedural status of victim” can be granted in the proceedings, independent of victims who are granted the right to participate within the terms of Article 68(3) and Rule 89, and provides for a definition of the personal interests diverting from the Appeals Chamber’s jurisprudence.¹⁸ The Decision does not take into consideration whether there is any prejudice to the defence and fair trial, or determine the permissible modalities so as not to affect the responsibilities of the Prosecution. By failing to define such modalities, the Decision is open to interpretations that go beyond the framework established by Article 68 (3) of presenting victims’ views and concerns.
13. The Prosecution submits that this issue arises directly out of the Decision. The Single Judge refers throughout the Decision to “the procedural status of victim”,¹⁹ including in the dispositif.²⁰ The Single Judge defers until a later point in the proceedings any consideration of the modalities of participation (which a Chamber is required to rule on as part of a grant of participation under Rule 89(1)²¹), and of whether the participation of the applicants would

¹⁵ ICC-02/05-111 (hereinafter “the Decision”).

¹⁶ Rule 155 prescribes the time limit for filing an application for leave to appeal as 5 days. According to the jurisprudence of this Chamber, neither the day of the issuance of the decision nor the day of the filing of the application for leave to appeal are counted as part of these 5 day (ICC-01/04-01/06-466; see also ICC-01/04-135-tEN, paras. 8-9).

¹⁷ “An issue is constituted by a subject the resolution of which is essential for the determination of matters arising from the judicial cause under examination.” *Situation in the DRC*, ICC-01/04-168, 13 July 2006 (“Judgment on Extraordinary Review”), para. 9.

¹⁸ Decision, para. 11.

¹⁹ Decision, paras. 8, 13, 14, 23 .

²⁰ Decision, p. 23, first and second paras.

²¹ “...the Chamber shall then specify the proceedings and manner in which participation is considered appropriate...” (emphasis added).

impact on the interests of the defence and a fair trial, as well as any meaningful determination of whether the personal interests of the victims are affected.²²

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

14. The Prosecution submits that the Decision, leaving aside any considerations as to its correctness, raises issues capable of affecting the fair and expeditious conduct of the proceedings, within the terms of Article 82(1)(d). The Prosecution recalls that the Single Judge of Pre-Trial Chamber II recognised “the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings”.²³
15. 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 which will govern the ongoing participation of these victims, as well as future applications for participation within the framework of the Darfur situation, and which will also have an impact on other situations. The Prosecution submits that, especially as the Appeals Chamber has already provided partial guidance on victim participation, some of which was relied upon in the Decision, the Appeals Chamber should have the opportunity to enter a comprehensive and authoritative decision ending any uncertainty for all participants.

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

16. The granting of a procedural status to victims in the proceedings, without assessing in real terms whether their personal interests are affected or determining the modalities of participation which attach to that status, is inextricably linked with the fairness of those proceedings, which has been defined by Pre-Trial Chamber I to “include[] respect for the

²² Decision, paras. 13, 14 and 21. In assessing the applications, the Single Judge made no specific findings in respect of the personal interests of each applicant. Rather, the discussion of the Prosecution’s submission merely recalls Pre-Trial Chamber I’s earlier determination that “the personal interests of victims 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 and to request reparations for the harm suffered.” (Decision, para. 11, quoting ICC-01/04-100-Conf-Exp-tEN-Corr, para. 63). The Decision also contains no determination on the modalities, beyond the rulings that those with the procedural status of victim shall only be contacted through their legal representatives and shall, for the time being, not be given access to non-public documents (Decision, p. 23).

²³ *Situation in Uganda*, ICC-02/04-101, 10 August 2007 (“Uganda Victim Participation Decision”), para. 16.

procedural rights of the Prosecutor, the Defence and the Victims”.²⁴ The Prosecution submits that the requirements for such status, and the manner or extent to which any such right may be exercised, inherently impacts on the fairness of the proceedings *vis-à-vis* the parties, the participants, and potential participants.

17. The Decision itself recognises this link between the fairness of the proceedings and the modalities of participation. Throughout the Decision, the Single Judge held that it was in respect of the modalities of participation that the requirement to ensure that the participation was not prejudicial to a fair trial or the rights of the accused, i.e. that it did not prejudice the fairness of the proceedings.²⁵ By granting procedural status to victims at this stage without defining the modalities of their participation, deferring consideration of this critical safeguard, the Single Judge failed to determine whether fairness and the rights of parties have been protected. The Prosecution submits that considerations of the fairness of the proceedings cannot be deferred in this manner, and that this in itself affects the fairness of the proceedings.
18. In this context, the Prosecution recalls that the Single Judge of Pre-Trial Chamber II has recently confirmed “the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings”.²⁶ The Appeals Chamber has also confirmed that an issue may impact on the fairness of the proceedings during investigations.²⁷
19. The failure to define the modalities of participation affects the fairness in respect of all parties, as they are denied any certainty regarding the participants and procedural landscape in which they operate and are thus unable to effectively plan their activities.

²⁴ *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006 (“PTC-I’s 31 March 2006 Decision Denying Leave to Appeal”), para. 38; see also para. 39.

²⁵ See e.g. Decision, paras. 13, 14 and 21.

²⁶ Decision, para. 16.

²⁷ The 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” - Judgment on Extraordinary Review, para. 11. See also PTC-I’s 31 March 2006 Decision Denying Leave to Appeal, paras. 35, 39. Furthermore, as one commentator has noted, “there cannot be a really *fair* trial, if this fairness has not been practiced and guaranteed appropriately in the phases prior to the trial” - Marchesiello, “Proceedings before the Pre-Trial Chambers”, in Cassese, Gaeta and Jones (ed) *The Rome Statute of the International Criminal Court* (2002) 1231 at 1232. Given that the essence of Article 82(1)(d) is consideration of the impact of the issue on the ongoing proceedings, fairness cannot be measured only by fairness to the parties present at this stage. Rather, the Chamber must consider the impact of the issue on the fairness of the proceedings *vis-à-vis* future participants, in particular future suspects or accused persons.

20. In contrast to other decisions on victim participation,²⁸ this Decision gives no guidance as to the classes of “specific proceedings”²⁹ in which the Single Judge considers that those who have been granted the procedural status of victim may be able to demonstrate that their personal interests are affected, and therefore participate through appropriate modalities. The uncertain and open-ended nature of this potential participation, which appears to be contemplated by the Decision and is built on a system where persons have been granted procedural status without any safeguards, may also affect the fairness of the proceedings.³⁰ In addition, the Prosecution submits that the fairness of the proceedings would be directly impacted to the extent that victims are permitted, for example,³¹ to actively intervene in activities related to the gathering and preservation of evidence, as has been suggested in other decisions relating to victim participation.³² Further, granting an undefined procedural status to such persons, prior to any concrete showing of personal interests or assessment of the impact on the rights of the defence and a fair trial, raises the risk that such persons may further be interpreted as having standing to petition for, or initiate, such proceedings, which would further impact on fairness.

²⁸ See e.g. Uganda Victim Participation Decision, paras. 96-103.

²⁹ Decision, para. 13.

³⁰ Specific examples of the impact of an issue on these proceedings will necessarily have a predictive element. The Appeals Chamber has previously recognised that certainty of that impact is not required to grant leave to appeal, referring to “ridding ... the judicial process of possible mistakes that might taint either the fairness of the proceedings” and to “[r]emoving doubts about the correctness of a decision” - Judgment on Extraordinary Review, paras. 14, 15 (emphasis added). See also *Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005 at para 9 (“The point of contention is whether those consequences will actually ensue. In its decision, the Chamber considered the dangers raised by the Defence to be remote ... [However] If the Chamber’s interpretation of the witness protection orders is incorrect, then the effect on the Defence would be profound. In these circumstances, the Chamber finds that its decision involves an issue that ‘would significantly affect the fair and expeditious conduct of the proceedings’.”); *Prosecutor v Strugar*, IT-01-42-PT, Decision on the Defence’s Request for Certification to Appeal the Trial Chamber’s Decision dated 26 November 2003, 12 December 2003, para. 6 (“some error must be alleged by the moving party and this error [i.e. the issue raised by the decision] must have the capacity to significantly affect the fair and expeditious conduct of the proceedings” - emphasis added); *The Prosecutor v Bagosora*, ICTR-98-41-T, Decision on Certification of Interlocutory Appeal from Decision on Severance and Scheduling of Witnesses, 11 September 2003, para. 9 (“The Defendant’s motions have questioned the fairness of the proceedings against the Accused, and have suggested that the outcome of the trial may be at stake” - emphasis added).

³¹ Another potential impact of granting procedural status to victims without any concrete showing of personal interests may be on the capability of the Court to effectively protect victims and witnesses, if the Court is expected to extend its protective efforts to all those victims admitted to participate at the situation level.

³² See e.g. Uganda Victim Participation Decision, paras. 97, 100-101.

21. Any such activity can impact the Prosecution's investigations, and thus affects fairness in terms of "respect for the procedural rights of the Prosecutor".³³ Despite the importance of these questions, the Decision is silent on all of them.³⁴
22. The Prosecution stresses that the impact of the risks mentioned above are further increased by organised actors with specific interests in the outcome of the Court's investigations and proceedings. This issue, and the system that it creates whereby victims are granted procedural status within the investigation without any further showing of personal interests, poses additional risks in situations where victims in respect of one set of crimes may live in areas controlled by, individuals or groups who are also the subject of other investigations within the situation.³⁵
23. Finally, and fundamentally, the issue of granting a "procedural status as victim", without a link to a specific proceeding or concrete finding of personal interests, creates an open-ended participation in the proceedings, which will inherently affect fairness of those proceedings.³⁶
24. The Prosecution further notes that the question is not whether the Single Judge will manage proceedings in order to maintain their fairness, but whether the granting of the status in issue in itself affects the fairness of the proceedings in a way which the procedural devices available to the Judge arguably cannot adequately remedy.³⁷

³³ PTC-I's 31 March 2006 Decision Denying Leave to Appeal, para. 38.

³⁴ The Prosecution notes that the Office of Public Counsel for the Defence has specifically identified these as factors which it considers affect the fairness of those proceedings. ICC-02/05-112, paras. 32-33. Counsel for the Defence had also 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*, ICC-01/04-01/06-901-Corr-tEN, 16 May 2007, paras. 25, 29-31; *Prosecutor v. Lubanga*, ICC-01/04-01/06-734, 29 November 2006, paras. 26-28; *Prosecutor v. Lubanga*, 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.

³⁵ A clear example for such potential conflict is in the two cases currently before the Court in the DRC situation, where the alleged leaders of two ethnically-based militias which engaged in extensive conflict are each accused of crimes. In the context of the DRC situation, see also e.g. UNSC Resolution 1771 (2007): "Reiterating its serious concern regarding the presence of armed groups and militias in the Eastern part of the Democratic Republic of the Congo, particularly in the provinces of North and South Kivu and the Ituri district, which perpetuate a climate of insecurity in the whole region"). The recently announced developments in the Darfur investigation demonstrate the potential for such conflicts to arise in the future in this situation.

³⁶ Indeed, this impact is all the more when that same issue then fails to prescribe the rights attached.

³⁷ As has been noted above, the OPCD has already identified the granting of applications to participate during the investigation as an issue which affects the fairness of the proceedings vis-à-vis the Defence. Defence counsel has also previously raised concerns that granting victims general rights at the investigative stage is capable of creating an imbalance vis-à-vis the defence, which lacks similar rights at this stage, and the same concerns may well apply regarding granting of procedural status. Further, while the appointment of *ad hoc* counsel in certain circumstances may ameliorate some of the unfairness towards future suspects or accused persons, in specific and confined

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

25. 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”.³⁸ The Single Judge also linked expeditiousness with “the effectiveness of the proceedings.”³⁹ The Prosecution submits that expeditious conduct of proceedings therefore requires that the proceedings be conducted in a timely and efficient manner.⁴⁰
26. The Prosecution submits that granting procedural status to a wide range of individuals, without defining or delimiting the rights which attach to that status, will affect the expeditious conduct of the proceedings by leading to a series of time- and resource-intensive litigation as those individuals, or their legal representatives, attempt to determine the scope of those rights.
27. In this context, the Prosecution also recalls that the Single Judge of Pre-Trial Chamber II has recently recognised 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,⁴¹ 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.⁴² The absence of any such guidance on the role that can be played by those who are granted the procedural status of victim impacts upon predictability and efficiency of the proceedings, and thus affects their expeditiousness within the meaning of Article 82(1)(d).

proceedings, such *ad hoc* counsel cannot substitute for properly instructed counsel when it comes to broad rights of participation in ongoing proceedings. This very point has been raised by *ad hoc* counsel in the other proceedings – *Prosecutor v Kony et al*, ICC-02/04-01/05-216-tEN, 5 March 2007, paras. 37-42.

³⁸ Judgement on Extraordinary Review, para. 11 and footnote 13.

³⁹ Decision, para. 9.

⁴⁰ 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.

⁴¹ Uganda Victim Participation Decision, para. 5.

⁴² Uganda Victim Participation Decision, para. 88 and 89. The Single Judge makes a similar point regarding the role that victims could play in specific proceedings – Uganda Victim Participation Decision, para. 96.

28. The issue also affects the expeditiousness of the proceedings as it mandates a multi-tiered approach to assessing applications for participation. The Single Judge has indicated that there will have to be a further “assessment of the personal interests of the victims in specific proceedings taking place during the investigation ... conducted for the determination of the specific set of procedural rights attached to the procedural status of victim” and that there will also have to be a “determin[ation of] the modalities of participation”.⁴³ Thus the parties will be forced to consider a series of applications and file multiple responses in relation to each application for participation⁴⁴ before the criteria prescribed in Article 68(3) and Rule 89 are fulfilled.
29. The very sequence of processing, considering, responding to and deciding upon applications is resource intensive. Adding further assessments of each application, in order to deal with the critical issues of personal interests and modalities of participation, will only multiply this effect.⁴⁵
30. None of this is to say that such impact and use of resources are inappropriate or unwarranted, a matter which is inextricably linked to the merits of the Decision. However the consequences of this issue on the expeditious conduct of the proceedings, the matter for determination in this application, are significant and ongoing. The Prosecution respectfully submits that the question in this application for leave is not whether that impact is justified, or supported by the Statute and the Rules, but merely whether that impact exists.
31. In considering the impact of decisions governing the extent of victim participation, the Prosecution submits that one cannot ignore the circumstances in which the Court operates⁴⁶ and the Court’s accumulated experience to date. The processing and responses to these

⁴³ Decision, para. 13.

⁴⁴ i.e. initially for the grant of procedural status of victim, and then again for each of the relevant determinations of personal interests and modalities of participation in respect of each specific proceedings and determination. If, on the other hand, the Single Judge does not consider that the parties will be given an opportunity to make submissions in relation to these subsequent determinations of participation in specific proceedings, then the Prosecution submits that this issue would additionally affect the fairness of the proceedings as the parties would be denied a right to make submissions on critical issues (namely the determinations of personal interests, modalities and prejudice to fair trial and defence).

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, e.g. para. 22, above.

applications, and subsequent litigation, have already proved to be time and resource intensive.⁴⁷ The Prosecution recalls that another Single Judge of this Pre-Trial Chamber recently – in considering the impact on “the expeditiousness and effectiveness of the proceedings” of a proposal relating to victim-applications – looked precisely at the practical implications, and held that it was “not only impractical now, but will be extremely impractical as the number of applicants continues to increase.”⁴⁸ The Prosecution submits that the Single Judge should therefore consider the practical implications of granting this procedural status. On this basis, the Prosecution submits that the impact which the issue, rightly or wrongly, has on the expeditious conduct of proceedings cannot be denied.

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

32. The Appeals Chamber has ruled that the requirement that “immediate resolution may materially advance the proceedings” means that “prompt reference of the issue to the court of appeal”⁴⁹ and its “authoritative determination”⁵⁰ will help the proceedings “move forward”; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”⁵¹
33. The Prosecution recognizes that the Single Judge’s Decision incorporates existing guidance from the Appeals Chamber, and seeks to reconcile and integrate those elements with the existing jurisprudence of the Pre-Trial Chamber. In light of this, the Prosecution submits that, given the manner in which the Single Judge seeks to build on and incorporate the elements which have been decided by the Appeals Chamber, the proceedings will be materially advanced by the Appeals Chamber being afforded the opportunity to provide

⁴⁷ In addition to the present application, approximately 175 applications for participation have already been transmitted to the Prosecution in the DRC situation, while 49 applications have been transmitted to the Prosecution in the Uganda situation. A significant proportion of these applications remain outstanding. 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.

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

⁴⁹ Judgment on Extraordinary Review, para. 18.

⁵⁰ *Ibid*, para. 14.

⁵¹ *Ibid*, para. 15.

comprehensive guidance on this issue. Without entering into the merits of the Decision, the Prosecution notes that the approach of the Single Judge in confining the Appeals Chamber's jurisprudence to later specific proceedings could be seen as conflicting with the underlying principles of that jurisprudence, especially in relation to the issue of personal interests. It is in the interests of all participants and the proceedings generally that any such differences of interpretation be addressed at the earliest opportunity. In short, the proceedings will benefit if the Appeals Chamber is allowed to complete its role as the ultimate arbiter of the law in relation to this issue in a comprehensive fashion – entering an authoritative decision ending any uncertainty as to the procedure and scope of any right of victim participation at the investigative stage.

34. The Decision also takes a different approach to the modalities and specific instances of participation to that adopted in other situations and in other Chambers. In contrast to the approach taken by this Pre-Trial Chamber in the *Situation in the DRC*, the Decision does not set out at this stage the modalities of participation for those with the procedural status of victim.⁵² Further, a Single Judge in Pre-Trial Chamber II, in addition to recalling certain modalities, provided guidance on the nature and scope of specific proceedings in which he considered victims may participate based on their personal interests, which he considered necessary to ensure the predictability, certainty and effectiveness of the proceedings and the victims' participation in them.⁵³ The Prosecution and applicants are thus faced with a scenario where they receive different information, and appear to face different systems for the assessment and implementation of victim-applications, in different situations.⁵⁴
35. Victim participation is a key feature of this Court, and should be put on a clear, consistent and certain footing from the outset. One function of the Appeals Chamber is to unify the law of the Court, and to ensure that it evolves in a coherent and standardised manner.⁵⁵ The

⁵² *Situation in the DRC*, ICC-01/04-100-tEN, 17 January 2006, paras. 69-75.

⁵³ Uganda Victim Participation Decision, para. 88-89, 96-103.

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

⁵⁵ See e.g. *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 7: one concern of the Appeals Chamber "is to ensure the development of the Tribunal's case-law and the standardisation of the applicable law". See also *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 113(ii): "The fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be

Prosecution submits that this is reflected in the present limb of 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”.⁵⁶ Final determination of these critical issues⁵⁷ by the Appeals Chamber will provide clear guidance to all Chambers and participants. The issues involved in this Decision cut across all situations before the Court. Granting leave to appeal this issue at this stage would therefore materially advance all proceedings,⁵⁸ by giving the Appeals Chamber an opportunity to confirm the procedural framework within which the applications for participation 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. It will also provide clarity to victim applicants.

36. A final ruling of the Appeals Chamber, regardless of whether the Decision is upheld or reversed, will also allow all organs of the Court affected by the Decision to organize their resources, plan their work and conduct their tasks in an organized and efficient manner.
37. In relation to this situation, intervention by the Appeals Chamber will advance proceedings by providing legal certainty and setting a clear procedural framework⁵⁹ for future litigation involving the applicants who have been granted the procedural status of victim in the

achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law”. This includes providing guidance to Pre-Trial and Trial Chambers on the interpretation of the law.

⁵⁶ 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.

⁵⁷ While recognizing that issues of general importance, and the fact that an issue has not yet been considered by the Appeals Chamber, are not in themselves grounds for granting leave to appeal, the Prosecution submits that the importance of the issues raised by the Decision underscore the desirability of prompt consideration of this issue by the Appeals Chamber. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” - *Prosecutor v Kony et al*, ICC-02/04-01/05-20-US-Exp, 19 August 2005, para. 54 (unsealed pursuant to ICC-02/04-01/05-52).

⁵⁸ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor which can be weighed in deciding whether to grant leave - see *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor’s Motion for Certification to Appeal the Trial Chamber’s Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para. 4; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

⁵⁹ To the extent that the current framework set by the Decision is not correct, having this matter addressed by the Appeals Chamber now will materially advance the proceedings as it will ensure that all proceedings are conducted under the correct legal framework, and that any error is pre-empted before it can taint the ongoing proceedings – see Judgment on Extraordinary Review, paras. 14, 19.

Decision, the assessment of their participation in any specific proceedings, and other future applications by victims for participation in this 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”.⁶⁰

38. Further, the Prosecution submits that none of the factors which may militate against granting leave to appeal apply in this case. In particular, given the stage of the proceedings granting leave to appeal is not likely to cause any significant delay.⁶¹ In addition, the issue at hand here is of an abstract, systemic nature – it relates to the general principles or framework to be applied, not their application to a particular set of facts.
39. Finally, the Prosecution notes that the current issue may not be susceptible to full discussion in an appeal under Article 81.⁶² The Prosecution submits that this is an additional reason in favour of leave to appeal being granted at this stage.⁶³
40. 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.

⁶⁰ Judgment on Extraordinary Review, paras. 12 and 17.

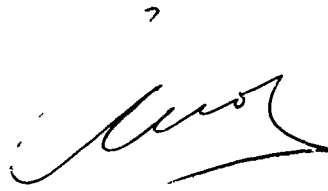
⁶¹ On the relevance of any likely delay to proceedings of granting leave to appeal, see e.g. *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, at paras 7 and 8; *Prosecutor v Mile Mrksic*, IT-95-13/1-PT, Decision Granting Certification To Appeal, 29 May 2003; *Prosecutor v. Hadzihasanovic*, IT-01-47-T, Decision on The Request For Certification to Appeal the Decision Rendered Pursuant to Rule 98bis of the Rules, 26 October 2004.

⁶² 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.

⁶³ The Prosecution recalls that the purpose of article 82(1)(d) is to regulate whether an issue should be appealed at this stage of proceedings, or whether it should be left to be raised (if necessary) as part of a final appeal against judgement - see e.g. *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 6; see further submissions in *Situation in the DRC*, ICC-01/04-103, 23 January 2006, paras. 37-38 and authorities cited therein.

Conclusion

41. For the foregoing reasons, the Prosecution respectfully requests the Single Judge to grant leave to appeal the Decision under Article 82(1)(d).



Luis Moreno-Ocampo
Prosecutor

Dated this 12th day of December 2007
At The Hague, The Netherlands