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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO**

Public

**Application for Leave to Appeal Trial Chamber I's 18 January 2008 Decision on
Victims' Participation**

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Introduction

The Prosecution hereby seeks leave to appeal the Trial Chamber's 18 January 2008 Decision on Victim Participation.

The framework established in the Rome Statute regarding victim participation represents a key innovative feature of this Court and is, in the Prosecution's view, a milestone in international criminal justice¹. It is part of a consistent pattern of evolution of international law, including but not limited to international criminal law, which recognizes victims as actors and not only passive subjects of the law and grants them specific rights². It is a main feature of the Statute and the Rules, which seek to define with as much precision as possible the nature of those rights (right to protection, right to participate, right to express views and concerns at all stages of the proceedings where their personal interests are affected) and the procedures to implement them.

The Prosecution notes that in this same case of the *Prosecutor v. Thomas Lubanga Dyilo*, the confirmation proceedings provided the first – and successful - example of concrete victims' participation, fully respecting the conduct of fair and expeditious proceedings.

The challenge to the Court at this early stage is to apply this innovative framework in each case in a consistent manner, avoiding such varying criteria as to create a general uncertainty for the victims and other participants. As Judge Blattmann in his Dissenting Opinion said, victim participation "is ... a right accorded to victims by the Statute".³

While implementation might vary according to the specific circumstances, as provided in the Statute and the Rules, the Prosecution considers that it is crucial 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. The

¹ Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-103, 23 January 2006, para. 6; Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-143, 24 April 2006, para. 7.

² Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985; the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly resolution 60/147 of 16 December 2005.

³ Separate and Dissenting Opinion of Judge Blattmann, "Decision on victims' participation", ICC-01/04-01/06-1119, 18 January 2008, to the Chamber's Decision, para. 13.

victims rights to participate should not be dependant on case-by-case decisions with no agreed criteria.

The Prosecution respectfully submits that the Decision does not provide for the certainty required by the participants. Regarding the scope and modalities of participation during the trial, the Decision goes beyond the framework established by the Statute and diverts from the jurisprudence stemming from other Chambers.

It is the Prosecution's position that the scope of victims' participation at trial should remain within the boundaries established by the Statute and the existing jurisprudence: it should be allowed only on the basis of a prior determination that the victims' personal interests are affected, and limited to those victims who have an interest linked to the parameters set out in the charges. A different criterion should be applied for the purposes of reparations, since proceedings under Article 75 of the Statute⁴ are open to any victim making claims for reparations. The Prosecution stresses that, to its knowledge this understanding of the scope of victim participation at trial has been shared by all participants in the current proceedings, including the victims' Legal Representatives and the Office of the Public Counsel for Victims.⁵

The Decision also provides for modalities of victims' participation that go further than the expression of views and concerns as defined by article 68 (3) of the Rome Statute. It held that victims can present evidence or request access to Prosecution records. As the Prosecution has consistently argued, those issues directly affect the exercise of its own duties and responsibilities. The Prosecution submits that modalities of participation may not infringe upon the parties' rights or overlap with the exclusive functions of the Prosecution. In this sense, the Prosecution respectfully submits that, victims participating at trial are entitled to advance their views and concerns. Victims' views and concerns can cover a wide range of issues, refer to the charges, the crimes or the accused; or relate to

⁴ In addition, the Prosecution notes that under the terms of Rule 93, a Chamber has the authority to seek the views of any victim on a wide range of issues (the list included in the provision is open ended), if the Chamber considers it appropriate to elicit such views.

⁵ As Judge Blattmann stated in his dissent, "[n]o party or participant has requested the Trial Chamber to grant victim status to persons outside the scope of the confirmation of the charges, nor have they expressed any dissatisfaction whatsoever with the granting of the status of victim being tied to a specific situation or case. For the Chamber to do so could be perceived as to act *ultra petita* and weakens the position of the prosecution, defence and victims" (para. 28).

their own suffering during the crimes charged or their conditions of life. Such views and concerns are not to be limited to matters related to the evidence presented; in fact the very interest of autonomous participation is that views and concerns are not necessarily related to evidence (a victim may have nothing to say in relation to the evidence). But even in cases when victims' views and concerns are related to the evidence presented by the Prosecution, it does not imply that the modalities of victims' participation should be extended to the autonomous tendering of evidence.

The Prosecution submits that victims participating are not entitled to lead evidence pertaining to the guilt or innocence of the accused, an exclusive right of the parties. Similarly, victims have no right under the Statute to access material in the Prosecution's possession or control.

The Prosecution is consequently seeking leave to appeal the following issues which directly arise from the decision:

- Whether the requirements of Article 68 (3) of the Statute, including that of "personal interests" allow for the participation at trial of victims unconnected to the parameters set out by the charges against the accused (the "First Issue");
- Whether victims participating at trial may lead evidence pertaining to the guilt or innocence of the accused (the "Second Issue");
- Whether victims participating at trial have a right to access material in the Prosecution's possession or control (the "Third Issue").

Procedural background

1. On 29 and 30 October 2007 a Status Conference was held in preparation of which the parties and participants had been invited to make submissions in writing on the "role of victims in the proceedings leading up to, and during, the trial"⁶ and later on two

⁶ "Order setting out schedule for submissions and hearings regarding the subjects that require early determination", ICC-01/04-01/06-947, 5 September 2007; "Order amending schedule for hearing", ICC-01/04-01/06-977, 9 October 2007.

additional issues of “common legal representation and the criteria for granting victims participating status”.⁷

2. On 28 September 2007, the legal representatives of victims filed a joint submission,⁸ followed by the defence on 18 October 2007,⁹ and the Prosecution on 19 October 2007.¹⁰ The legal representative of victims a/0001/06 to a/0003/06 filed a separate submission addressing the two additional issues added to the agenda of the October 29-30 Status Conference.¹¹ During the Status Conference on 30 October, the Chamber granted leave to the Office of Public Counsel for Victims (the “OPCV”) to file written submissions on the issues discussed.¹² The OPCV filed its submissions on 9 November 2007.¹³
3. On 18 January 2008, the Trial Chamber rendered its “Decision on victims’ participation” (the “Decision”),¹⁴ including a Separate and Dissenting Opinion by Judge René Blattmann.

Argument

- A. All three issues affect the fair and expeditious conduct of the proceedings or the outcome of trial
4. The Prosecution submits that the Decision, leaving aside any consideration as to its correctness, raises issues capable of affecting the fair and expeditious conduct of the proceedings. It will discuss the manner in which each of the issues¹⁵ for which it

⁷ The latter two issues were added to the agenda by “The Trial Chamber’s Agenda for the Hearing on 29-30 October 2007”, ICC-01/04-01/06-985, 17 October 2007.

⁸ Conclusions conjointes des Représentants légaux des victimes a/0001/06 à a/0003/06 et a/0105/06 relatives aux modalités de participation des victimes dans le cadre des procédures précédant le procès et lors du procès, ICC-01/04-01/06-964, 28 September 2007.

⁹ Argumentation de la Défense sur des questions devant être tranchées à un stade précoce de la procédure: le rôle des victimes avant et pendant le procès, les procédures adoptées aux fins de donner des instructions aux témoins experts et la préparation des témoins aux audiences, ICC-01/04-01/06-991, 18 October 2007.

¹⁰ Prosecution’s submissions of the role of victims in the proceedings leading up to, and during, the trial, ICC-01/04-01/06-993-Conf. This document was erroneously filed confidentially and was re-filed publicly on 23 October 2007, ICC-01/04-01/06-996 and ICC-01/04-01/06-996-Anx.

¹¹ “Conclusions des victimes a/0001/06 à a/0003/06 en vue de l’audience du 29.10.2007”, ICC-01/04-01/06-992, 19 October 2007.

¹² ICC-01/04-01/06-T-58-ENG, page 14.

¹³ Observations du Bureau du conseil public suite à l’invitation de la Chambre de première instance, ICC 01/04- 01/06-1020, 9 November 2007.

¹⁴ ICC-01/04-01/06-1119, 18 January 2008.

¹⁵ According to the Appeals Chamber, 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

requests leave to appeal affect the fair and expeditious conduct of the proceedings or the outcome of trial within the terms of Article 82 (1) (d), below.

5. The Prosecution will refrain from making any arguments pertaining to the correctness of the Decision, which should be reserved for discussion before the Appeals Chamber.¹⁶ The Prosecution stresses that the relevant question here is only whether the issues identified impact on the fair and expeditious conduct of the proceedings or the outcome of trial, and not whether such impact is appropriate or justified. Similarly, the fact that a Chamber may attenuate or minimize such impact and its consequences through recourse to its regulatory powers is a question different from and independent of the *existence* of the impact, which is the relevant criterion for determining whether leave to appeal ought to be granted.¹⁷

The First Issue

6. The Prosecution submits that the First Issue directly arises from the Decision¹⁸, which, as the Chamber recognizes, extends participation potentially to “any victim of any crime falling within the jurisdiction of the Court”.¹⁹
7. The concept of “victims with a right to participate at trial” has a direct impact on its fair and expeditious conduct. Judge Blattmann stated in his Dissenting Opinion that “[t]he right to participate when victims’ interests are affected is the consequence of a legal protected interest of the victim”.²⁰ Changing the scope can, in the view of the Prosecution, affect the whole scheme of participation and affect the fairness and expeditiousness of the proceedings. Further, “the rights of the victims to participate do not overshadow the absolute right of the Accused to a fair and impartial trial and this must always be at the forefront of our judicial activity. I believe the Majority

March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, 13 July 2006 (“Judgment on Extraordinary Review”), para. 9.

¹⁶ See e.g. “Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58”, ICC-02/04-01/05, 19 August 2005, paras. 22-23.

¹⁷ The Prosecution further notes that under the Appeals Chamber’s jurisprudence, a Chamber may certify an issue for appeal on its own volition (Judgment on Extraordinary review, para. 20). Thus, if the Chamber disagrees with the reasons advanced by the Prosecution supporting its application for leave, but is nonetheless of the view that issues in question should be examined by the Appeals Chamber for different reasons, the Chamber should certify the issues on its own initiative.

¹⁸ See paras. 90-92 of the Decision.

¹⁹ Decision, paras. 94-95. The fact that the Chamber intends to tightly regulate this potentially very wide participation (Decision, para. 95) is not determinative of the *existence* of the issues.

²⁰ Separate and Dissenting Opinion of Judge Blattmann to the Chamber’s Decision, para. 13-14.

opinion with regard to the imprecise scope it allows in assessing victims applications upsets this important balance”.²¹ The procedure adopted by the Majority may also “create a tendency to cause delays and legal insecurities”, as it allows each application to be evaluated on a case-by-case basis for every procedural action.²²

8. One manner in which the Decision affects the fairness of the proceedings is by potentially expanding the scope of the Chamber’s intervention beyond the facts and circumstances of the case, as included in the charges.²³ Such an expansion can force the parties to deal with factual and legal issues unrelated to the facts of the case, affecting their resources and potentially compromising their ability to address the core issues. In this sense, the Prosecution respectfully submits that both parties have a right to a trial that is fair and expeditious, and the Chamber has a duty to ensure that such is the case.²⁴ Allowing the trial to lose focus and delve into matters unrelated to the crimes charged necessarily affects this right of the parties, and thereby impacts on the fairness of the proceedings.²⁵
9. Further, the Decision can even lead to the Chamber’s considering and making determinations on the basis of evidence “which is outside the scope of the charges against the accused”²⁶, a possibility that further affects the fairness of the proceedings. This evidence may include prejudicial allegations against the accused which bear no connection to the crimes charged. It may also include the presentation of unsubstantiated legal and factual allegations and materials unrelated to the crimes charged, but that nonetheless adversely impact on the Prosecution’s case.
10. Finally, the Decision also affects the fairness of the proceedings vis-à-vis victims, in different ways:

²¹ Separate and Dissenting Opinion of Judge Blattmann, para. 30.

²² Ibid., para. 31 (emphasis added).

²³ The Prosecution notes that the Chamber’s decision-making authority is expressly circumscribed by the Statute to the “facts and circumstances described in the charges” (Article 74 (2)).

²⁴ See Article 64 (2).

²⁵ The Prosecution respectfully submits that this is an inevitable consequence of the Decision, to the extent that the Chamber will have to examine the facts alleged in the applications for the purposes of determining whether the applicant’s personal interests are affected so that he or she qualifies as a participant. Whereas in cases very removed from the crimes included in the charges this may be done in a swift manner, in cases involving crimes bearing some sort of connection with the events included in the charges (e.g. a crime committed by the same armed group but in a different geographical area), the Chamber will have to unavoidably delve into those facts in order to determine whether the applicable test (Decision, para.95) has been met.

²⁶ Separate Opinion of Judge Blattmann para. 11.

- It fosters uncertainty as to who is allowed to participate, thereby impairing the effective exercise of participation rights.²⁷
- Further, it apparently forces victims to make at least two different applications for participation: an initial application to be filed in order to obtain a general status of participant, and a second one (a “discrete written application”) to intervene in relation to a specific item of evidence or issue.²⁸ The Prosecution notes that presumably a fresh showing must be made in relation to each specific instance of the proceedings in which participation is sought. By so doing, the Decision places an onerous burden on victims to exercise their participatory rights.
- Finally, the expansion of the circle of potential victim participants also impacts the fairness of the proceedings. Victims who had suffered harm as a consequence of the crimes charged will now have to share the allocated and necessarily limited opportunities (including courtroom time) for expressing their views and concerns with other victims who have experienced different events and are facing totally different problems.²⁹

11. The impact of this particular aspect of the Decision on the expeditious conduct of the proceedings is equally apparent. Firstly, by expanding the scope of potential applicants, the Chamber opens the door to a large number of applications for participation. This, in and of itself, has a direct impact of the expeditious conduct of the proceedings. The accumulated experience so far shows that properly processing and analyzing applications for participation in a single situation, including the filing of observations under Rule 89 by the parties, is already a resource-intensive, and extremely time consuming exercise. To illustrate the lengthy procedure attached to

²⁷ Ibid., para. 6.

²⁸ Decision, paras. 95-97; Separate Opinion, para. 22. The Prosecution further notes that the logic of the Decision would appear to imply that there will be two different approaches to the requirement of “personal interests”: an initial and more general scrutiny, sufficient to justify participation; and a second, and more specific examination, pertaining to the concrete instance of participation. The Decision does not provide any guidance as to the scope of these different showings, or their compatibility with Article 68 (3). It only provides some examples of the types of general interests that it will consider (presumably sufficient for the granting of participant status) at para. 97. Whether this approach to the critical requirement of personal interests is compatible with the letter and spirit of Article 68 (3), and the Appeals Chamber’s own jurisprudence, is a matter that should be examined by the Appeals Chamber.

²⁹ For instance, the current situation of victims living in Ituri is different to that of those living in the Kivus.

victim applications, the Prosecution estimates that in the DRC situation the length of time between the filing of applications for victim participation and the corresponding decision on the status has been between one and one and a half years,³⁰ taking as an example the one hundred and forty applications decided upon by the Single Judge in the 24 December 2007 Decision.³¹ Even if the Trial Chamber can increase the speed of the process, it should be clear that the terms of the Decision require both Trial Chamber and parties to engage in demanding tasks, in addition to the functions and responsibilities related to the specific conduct of trial.³²

12. The issue further impacts on the expeditiousness of the proceedings since the Decision appears to lead to multiple determinations of personal interests pertaining to the same victim, including a first determination for the purposes of granting participant status and subsequent determinations pertaining to participation at specific instances of the proceedings. Thus, the emerging system places additional demands on all participants (in the form of applications and responses to such applications) and the Chamber, which will unavoidably impact on the expeditiousness of the proceedings.³³
13. Finally, the Decision, coupled with the ruling that victim applicants are entitled to protection by the Victims and Witness Unit (the "VWU")³⁴ also has clear

³⁰ The first applications within this group were filed on 7 and 19 June 2006, whereas the last applications were filed on 25 April 2007.

³¹ "Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06", Public, ICC-01/04-423, 24 December 2007.

³² The Prosecution notes that further illustration of the demands posed by the existing regime is provided by the fact that the application of a/0047/06 to a/0052/06 is still pending before the Trial Chamber; See "Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06", Public, ICC-01/04-423, 24 December 2007, para. 142.

³³ The Prosecutor notes that the impact of multiple applications on the expeditiousness of the proceedings has already been acknowledged by other Chambers of this Court. See Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", 23 January 2008, Pre-Trial Chamber I, ICC-01/04-438, page 7.

³⁴ Decision, para. 137.

consequences of the expeditious conduct of the proceedings. First, by increasing VWU's workload³⁵, the Decision adds demands to the Court's protection scheme in the case, which will unavoidably impact the efficient conduct of trial. In addition, experience shows that legal representatives may have their own views as to what protective measures should be taken, and may consequently decide to autonomously initiate proceedings. For instance, before the Pre-Trial Chamber a legal representative was of the view that certain *ad hoc* protective measures had to be applied, such as anonymity for the applicants.³⁶ This presentation led to litigation and resulted in deadlines being deferred and an increase in judicial activity.³⁷

The Second Issue

14. The Decision expressly allows victims to tender and examine evidence pertaining to the guilt or innocence of the accused.³⁸ Thus, the issue directly arises from the Decision.
15. This particular aspect of the decision impacts on the fairness of the proceedings in multiple ways: (a) to the extent that the presentation of such evidence is connected to the Chamber's autonomous rights to request evidence³⁹, it can lead to allegations that the Chamber has compromised its appearance of impartiality and alleviated the Prosecution's burden of proof, transferring parts of that responsibility to the victim participants and even to the Chamber itself⁴⁰; (b) it effectively creates a third party, vested with autonomous rights of presentation of evidence⁴¹, affecting the way in which the other parties will execute their mandate; (c) it can affect the Prosecution's case, for instance, by introducing material that steers portions of the trial away from their proper focus into areas which the Prosecution considers to be less significant or outright irrelevant for the purposes of establishing the crimes charged; (e) in a striking difference from the statutory duties placed on the parties, the Decision does

³⁵ The Decision itself recognizes that the demands on VWU are already "considerable" (see para. 137).

³⁶ See "Demande du représentant légal des victimes [EXPURGE]", Public Redacted Version, ICC-01/04-361, 23 July 2007.

³⁷ See "Decision on the Request of the Legal representative of Applicants on application process for victims' participation and legal representation", ICC-01/04-374, 17 August 2007.

³⁸ Decision, para. 108.

³⁹ Decision, para. 108.

⁴⁰ Under Article 66 (2), the onus is on the Prosecutor to prove the guilt of the accused.

⁴¹ In this sense, the Prosecution notes that Article 64 (6) (d) allows the trial Chamber to "order the production of evidence in addition to that [...] presented during the trial by the parties" (emphasis added).

not require from victim participants any prior disclosure of the evidence they intend to lead, which means that neither Prosecution nor Defence will be aware of the material and its nature before it is led; (f) finally, to the extent that victim participants are not subject to the statutory principles and requirements imposed on the Office of the Prosecutor by the Statute, and will most likely not have the same level of resources and expertise, it cannot be excluded that the new right afforded by the Decision leads to the presentation (even inadvertently) of unreliable, highly prejudicial, and/or tainted evidence, which despite the Chamber's best efforts to control proceedings may nonetheless find its way into the Chamber's decision-making process.

16. Affording victim participants an autonomous right to present evidence will also impact on the expeditious conduct of the proceedings. At the outset, there will be delays to trial proceedings if the Trial Chamber must also cater for presentation of evidence on matters of guilt or innocence presented by victim participants (even if tightly regulated) in addition to that tendered by the parties. The impact is even clearer considering that such presentation of evidence will include additional discussions on the admissibility, relevance or probative value of such evidence. Further, both parties may have to request presentation of additional or rebuttal evidence to contradict evidence adduced by victim participants *ex improviso* which they perceive as damaging for their cases.
17. The outcome of trial can also be affected by this particular aspect of the Decision. Expanding the evidentiary base of the trial beyond the universe of material presented by the parties can only have a substantial effect on the trial: depending on whether evidence led by victim participants and admitted by the Chamber supplements the case presented by the Prosecution, or, conversely, damages such case, the outcome of the trial may vary.

The Third Issue

18. This issue also directly arises from the Decision⁴². It affects the “fairness of the proceedings”, which includes also fairness to the Prosecution.⁴³ Granting victim participants an extra statutory right to access material in the Prosecution’s possession goes to the heart of the Prosecution’s independence and its right to exercise control over its evidence, which is only subject to the provisions of the Statute and Rules on disclosure and inspection to the defence.⁴⁴ This unprecedented ruling implies that the Prosecution effectively loses control over its own material, being forced to share it with third parties even against its wishes and with no statutory duty to do so. This newly imposed duty extends to confidential material, which must still be provided “in a suitably redacted form”.⁴⁵
19. This loss of control over the Prosecution’s own evidence, coupled with the new right of victim participants to lead evidence on matters pertaining to the guilt or innocence of the accused, can lead to the filing of material which under the Prosecution’s professional assessment ought not to be presented (e.g. because of its doubtful reliability).⁴⁶
20. The Prosecution stresses that such risks are increased by organized actors with specific interests in the outcome of the Court’s investigations and proceedings. In the DRC, victims live in areas where members of the group to which the accused belongs wield substantial influence. They may readily seek participation in an effort to interfere with ongoing proceedings.
21. The expeditiousness of the proceedings is equally affected by this issue: the decision effectively introduces a whole new process of inspection and provision of material

⁴² See paras. 110-111.

⁴³ See 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, Pre-Trial Chamber II, ICC-02/04-01/05-20, 19 August 2005, para. 31 and authorities cited therein.

⁴⁴ The Prosecution notes that Rule 131(2) of the Rules provides participating victims the right to consult the record of the proceedings, including the index, subject to any restrictions concerning confidentiality and the protection of national security information”; see also Decision para. 105.

⁴⁵ See para. 111.

⁴⁶ It can also lead to the filing of evidence which the Prosecution disclosed to the Defence under Article 67 (2), but which the Defence preferred not to use at trial (e.g. because even though it looked exculpatory on its face, parts of its contents were considered prejudicial to the interests of the accused.). This could happen particularly in the quite frequent case of “mixed” material, such as potentially exonerating materials which also contain incriminatory parts (typically, documents).

(including the duty to provide redacted versions of confidential documents).⁴⁷ This will consume further time and resources of the Prosecution, in parallel to the demands of the ordinary trial related activities⁴⁸ and may lead to litigation between participants as to the scope and modalities of such access.

22. Finally, the Prosecution respectfully submits that to the extent this right to access can lead to the identification and filing of material before the Chamber by victim participants and to the consideration by the Chamber of such material, even against the professional assessment of the Prosecution, the outcome of trial can also be affected by the issue.

B. Immediate resolution of the issues by the Appeals Chamber will materially advance the proceedings

23. The Decision clearly raises issues such that their immediate resolution by the Appeals Chamber “will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”⁴⁹ Further, “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 the proceedings”.⁵⁰ In the instant case, there are clear doubts as to the correctness of the Decision in relation to the three issues identified in this application, stemming from the very existence of a dissent pertaining to one of the Decision’s main pillars, but also, as it will be developed below, from the apparent clashes between parts of the impugned parts of the Decision and the jurisprudence produced by other Chambers of this Court, including the Appeals Chamber.

24. It is respectfully submitted that the fundamental nature of the issues at stake and their demonstrated impact on the fair and expeditious conduct of the proceedings require

⁴⁷ Decision, para. 111.

⁴⁸ For instance, the Prosecution has already explained orally to the Chamber the onerous nature of the process of redactions. On 1 October 2007, counsel for the Prosecution stated the following: “This process, Mr. President, your Honours, and we do know this from respective experience prior to the Confirmation Hearing, is extremely cumbersome, and rightly so, due to the delicateness of the matters concerned, and is resource-intensive for the Prosecution and the Chamber, and is likely to result in the disclosure of hundreds of pages of witness statements that are redacted, potentially heavily redacted [...]”; Tr., p. 29, lines 5-17.

⁴⁹ Judgment on Extraordinary Review, para. 14.

⁵⁰ Judgment on Extraordinary Review, para. 15.

urgent intervention by the Appeals Chamber. The Appeals Chamber must intervene in order to unify the conflicting jurisprudence emanating from various Chambers and Single Judges on critical aspects of victim participation. In this sense, the Prosecution notes that the need for a unified approach to victim participation in order to guarantee legal certainty has been recently expressed by the Single Judge of Pre-Trial Chamber I while granting leave to appeal the issue of whether a procedural status of a victim exists:⁵¹ the Single Judge made reference to the differing interpretations developed by the 10 August 2007 Pre-Trial Chamber II Decision⁵² and the 18 January 2008 Trial Chamber Decision⁵³ and concluded that an “immediate resolution by the Appeals Chamber of the issue raised by OPCD may materially advance the proceedings”.⁵⁴

25. Reliance on different regimes of victim participation would be highly inefficient for the Court as a single institution. Implementing different procedures established by different Chambers would hamper the work of the relevant organs and also run to the detriment of the victim applicants.⁵⁵ Furthermore, when applying a scheme such as that developed by the Trial Chamber, a Chamber will need to consider a large number of applications unrelated to the case. This will have implications not only for the Registry (especially the VPRS, the VWU, and the OPCV), but also for the Prosecution and the Defence, who have the right to present observations on the applications.⁵⁶ Timely intervention by the Appeals Chamber will allow all participants and organs involved in the process to plan their activities in an orderly and efficient fashion.

⁵¹ Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”, public, ICC-01/04-438, 23 January 2008, (hereinafter “23 January 2008 Decision”).

⁵² ICC-02/04-101.

⁵³ ICC-01/04-01/06-1119.

⁵⁴ See 23 January 2008 Decision, ICC-01/04-438, pages 7 and 8.

⁵⁵ For instance, absent defined and uniform criteria of victims and their personal interest, it will become difficult to advise victims (applying in the field or directly to the Registry) on the requirements which are fundamental to the success of their applications. This could delay the process of completing applications.

⁵⁶ Currently approximately 100 applications are pending decision by the Trial Chamber for the case. This number includes only those applications known to the Prosecution, it does not however include further applications that have already been filed with the Chamber or will be filed by the Registry in due course. To enable effective participation of victims in the case in the interest of justice, the applications should undoubtedly be dealt with before the beginning of the trial.

26. In this sense, and without entering into the merits of the relevant decisions, the Prosecution notes the following differences between the Decision and prior jurisprudence:

- *Definition of victims*

27. The Trial Chamber deviates from the four-prong test established by Pre-Trial Chamber I defining the term “victim” as (i) a natural person (ii) who has suffered harm (iii) from a crime falling within the jurisdiction of the Court and encompassed by the charges specifying the case and (iv) that a causal link between the crime and the harm exists.⁵⁷ The Decision rejects the third criteria that the harm suffered as a result of a crime must indeed be included in the charges outlining the case.⁵⁸ Instead, the majority concludes that “Rule 85 of the Rules does not have the effect of restricting participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I, and this restriction is not provided for in the Rome Statute framework”.⁵⁹

28. Other prior jurisprudence applying to the pre-trial stage held that victims must demonstrate that the harm they suffered relates to crimes committed either in the “temporal, geographical, and, as the case may be, personal parameters defining the situation”⁶⁰ or “that there are reasonable grounds to believe” that a victim “has

⁵⁷ See Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, Public Redacted Version, ICC-01/04-01/06-172-tEN, 29 June 2006, at page 6. See also the “Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the *Prosecutor v. Thomas Lubanga Dyilo* and of the investigation in the Democratic Republic of the Congo”, Public Redacted Document, ICC-01/04-01/06-228-tEN, 28 July 2006, page 7 and 9. See also ICC-01/04-438, 23 January 2008, at page 5, footnote 17.

⁵⁸ ICC-01/04-01/06-228-tEN, 28 July 2006, at page 9 the Pre-Trial Chamber held that, “at the case stage, the Applicants must demonstrate that a sufficient causal link exists between the harm they have suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo bears criminal responsibility and for which the Chamber has issued an arrest warrant.”

⁵⁹ See para 93 of the Majority Decision.

⁶⁰ “Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06”, Public, 24 December 2007, ICC-01/04-423, at para 4; “Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, Public Redacted Document, 31 July 2006, ICC-01/04-177-tENG, at pages 13 and 14; “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Public Redacted Version, 17 January 2006, ICC-01/04-101-tEN-Corr, at para 100. *Situation in Uganda*: “Decision on victims’

suffered harm directly linked to the crimes set forth in the warrant of arrest”⁶¹ outlining the case.

29. In his separate opinion, Judge Pikis referred to “victims who suffered harm from the crime or crimes, the subject-matter of investigation, confirmation, the trial, appeal, revision [...] and reduction of sentence [...]”.⁶²
30. Absent a decision from the Appeals Chamber, two different standards now govern the proceedings of victim participation of the case of the *Prosecutor v. Thomas Lubanga*. Throughout pre-trial proceedings including the confirmation hearing, a victim applicant is required to show that the harm suffered resulted from a crime encompassed in the charges, whereas thereafter a victim applicant need only show that the harm he or she suffered resulted from any crime within the jurisdiction of the court.

- *Personal interests*

31. The approach established by the Trial Chamber is limited by the requirement that the interests of the victim are affected in the case against Mr. Thomas Lubanga Dyilo.⁶³ For those purposes, the Chamber will inquire whether (i) there is a real evidentiary link between the victim and the evidence heard during trial thereby affecting the victim’s personal interests and (ii) whether an issue arising during trial affects the personal interest of a victim.⁶⁴ When defining the requirement of “personal interests”, the Decision refers to “wide-ranging interests”, which include an interest in receiving reparations, in being allowed to express views and concerns, in verifying particular

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, Public Redacted Version, 10 August 2007, ICC-02/04-101, at para 83 and 106.

⁶¹ “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*”, Public, 20 October 2006, ICC-01/04-01/06-601-tEN, at page 9; See also “Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the *Prosecutor v. Thomas Lubanga Dyilo* and of the investigation in the Democratic Republic of the Congo”, Public Redacted Document, 28 July 2006, ICC-01/04-01/06-228-tEN, at page 9; “Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the *Prosecutor v. Thomas Lubanga Dyilo*”, Public, 29 June 2006, ICC-01/04-01/06-172-tEN, at page 7;

⁶² Appeals Chamber, *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, 13 June 2007, para. 13 (emphasis added).

⁶³ Majority Decision, para. 95.

⁶⁴ Ibid., para. 95.

facts and establishing the truth, in protecting their dignity at trial and ensuring their safety and an interest in being recognized as victims in the case, “among others”.⁶⁵

32. In its first decision relating to victim participation in the situation Pre-Trial I found 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 facts, to punish the perpetrators of crimes and to request reparations for the harm suffered”.⁶⁶ Most recently, the Single Judge of Pre-Trial Chamber I upheld this definition and further clarified that victims were indeed granted a procedural status in proceedings concerning the investigation of a situation and the pre-trial stage; “according to the Single Judge’s interpretation of article 68 (3) of the Statute, the personal interests of victims are affected at the investigation stage of a situation and the pre-trial stage of a case.”⁶⁷
33. Pre-Trial Chamber II has referred to “the protection and privacy of victims themselves and possibly the preservation of evidence” as the only functions that might affect the personal interests of victims and may be exercised prior to the formation of a case.⁶⁸ At the case level, the requirement has been construed as a natural consequence of the fact that the victim had suffered harm by the crimes charged (e.g. victims of the crimes charged have a personal interest in appearing before the Court to ensure that their suffering is properly appraised.)⁶⁹
34. The Appeals Chamber has construed “personal interests” still differently, providing tangible examples of personal interests only, such as protection and reparations.⁷⁰ It has also stated that an assessment has to be made in each case as to whether “the personal interests asserted by the victims do not in fact fall outside their personal interests and belong instead to the role assigned to the prosecutor”.⁷¹ In addition to the interest in seeking reparations, Judge Song in his dissent distinguished between

⁶⁵ Decision, para. 97.

⁶⁶ 17 January 2006 Decision ICC-01/04-101-tEN-Corr, paras. 63 and 64.

⁶⁷ See 23 January 2008 Decision, ICC-01/04-438, at page 5.

⁶⁸ ICC-02/04-101, 10 August 2007, para. 97.

⁶⁹ “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, Public Redacted Version, ICC-02/04-01/05-252, 13 August 2007, para. 9.

⁷⁰ ICC-01/04-01/06-925, 13 June 2007, para. 28.

⁷¹ *Ibid.*, para. 28.

the particular interest of a victim in seeing the person allegedly responsible for his or her suffering being brought to justice, and the general interest that any member of society can have in seeing offenders held accountable.⁷²

- *Presentation of evidence*

35. So far, neither Pre-Trial Chamber has authorized the presentation of evidence by victim participants⁷³. Rather, Pre-Trial Chamber I, which had stated that the presentation of “material” to the Chamber was possible at the situation level,⁷⁴ expressly ruled that victims remaining anonymous could not present “any point of fact or evidence” during the confirmation hearing.⁷⁵
36. The filing of evidence by victim participants appears to be in tension with the existing jurisprudence stemming from the Appeals Chamber: first, to the extent that the presentation of evidence pertaining to the crimes and responsibility of the accused is a task that fall within the exclusive ambit of the Prosecution under Article 66 (2), then filing of similar evidence by the victim participants would arguably “fall outside their personal interests and belong instead to the role assigned to the Prosecutor”, thereby failing to meet any support in Article 68 (3) of the Statute.⁷⁶
37. In his Separate Opinion, Judge Pikis made the following considerations, which further demonstrate the existence of a tension with this particular aspect of the Decision:
 - “Equality of arms is another element of a fair trial, which in the context of the Statute, putting the burden of proof on the Prosecutor, means that the defendant cannot be required to confront more than one accuser.”⁷⁷

⁷² *Ibid.*, paras. 10 - 13.

⁷³ PTC II only discussed the fact that a victim’s personal interest could be linked to the preservation of evidence in the case. See “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, Public Redacted Version, ICC-02/04-01/05-252, 13 August 2007, para. 97. In regard of an investigation of a situation, Pre-Trial Chamber II merely highlighted the fact that the Chamber, based on Rule 93, could “seek the view of victims or their legal representative” in the broadest sense.

⁷⁴ ICC-01/04-101-tEN-Corr, 17 January 2006, paras. 71 and 72.

⁷⁵ “Décision sur les modalités de participation des victimes a/0001/06, a/0002/06 et a/0003/06 à l’audience de confirmation des charges”, Public, ICC-01/04-01/06-462, 22 September 2006, page 7 and 8.

⁷⁶ *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. The Prosecution will discuss this issue in detail if and when leave to appeal is granted by the Trial Chamber. For the purposes of this Application, it suffices to show the tension between the Decision and the jurisprudence referred to.

⁷⁷ ICC-01/04-01/06-925, 13 June 2007, para. 19.

- “Participation is confined to the expression of the victims’ ‘views and concerns’. It is a highly qualified participation limited to the voicing of their views and concerns. Victims are not made parties to the proceedings nor can they proffer or advance anything other than their ‘views and concerns’. The term ‘views’ in the context of article 68 (3) of the Statute signifies ‘opinion’, in fact an opinion, stance or position on a subject. In the Russian and Spanish version of article 68 (3) of the Statute the word ‘opinion’ is used. ‘[C]oncerns’ signify matters of interest to a person; matters that preoccupy him/her. ‘[P]réoccupations’ is precisely the word used in the French text of the Statute.”⁷⁸
- Victims may not express their views and concerns “in relation to the proof of the case or the advancement of the defence. The burden of proof of the guilt of the accused lies squarely with the Prosecutor (article 66 (2) of the Statute). Provision is made in the Statute (article 54 (1)) for the Prosecutor to seek and obtain information from victims about the facts surrounding the crime or crimes forming the subject-matter of the proceedings. That the judicial process should follow its ordained course is a cause common to all; its sustenance is the responsibility of the Court, the guardian of the judicial process. It is not the victims' domain either to reinforce the prosecution or dispute the defence.”⁷⁹
- *Access to material in OTP's possession*

38. To date, no Chamber of this Court has ever considered, let alone granted, access by any victim participant to material in the Prosecution's possession or control, much less in relation to confidential material. On the contrary, the language from some of the relevant decisions appears to reject the possibility within the context of Article 68 (3).⁸⁰

⁷⁸ ICC-01/04-01/06-925, 13 June 2007, para. 15.

⁷⁹ ICC-01/04-01/06-925, 13 June 2007, para. 16 (emphasis added).

⁸⁰ “Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06”, 19 December 2007, ICC-02/04-112, para. 37.

Application for Stay of the Proceedings

39. In the event leave to appeal is granted, the Prosecution intends to request that suspensive effect be attached to it, pursuant to Article 82 (30 and Rule 156. In order to make that request possible, the Prosecution respectfully requests the Chamber to stay any proceedings pertaining to the implementation of the Chamber's Decision in relation to the three issues submitted for certification in this Application.⁸¹

Conclusion

40. For the above explained reasons, the Prosecution respectfully requests the trial Chamber to grant leave to appeal in relation to the three issues deal with in this Application.



Luis Moreno-Ocampo

Prosecutor

Dated this 28th day of January 2008

At The Hague, The Netherlands

⁸¹ For a similar example, see *Prosecutor v. Katanga*, Single Judge, Decision on the Prosecution Request for Authorization to Redact Statements of Witnesses 4 and 9, ICC -01/04-01/07-160, 23 January 2008, paras. 56 and 59.