

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

Public Document

**Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the
Decision on the Applications for Participation of Victims in the Proceedings in the
Situation**

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf
**Legal Representatives for the
Applicants**
Mr Emmanuel Daoud
Mr Luc Walley
Mr Frank Mulenda
Ms Catherine Bapita Buyangandu
Mr Michel Shebele
Mr Patrick Baudouin
Mr Michael Veraeghe
Mr Sylvestre Bisimwa
Mr Joseph Keta

Ad Hoc counsel for the Defence

Mr Joseph Tshimanga

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta

The Office of Public Counsel for Victims

Ms Paolina Massidda

I, Judge Sylvia Steiner, judge at the International Criminal Court (the “Court”);

NOTING the “*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/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 à a/0241/06 à a/0250/06*” (“the Decision”), issued by the Single Judge, Judge Sylvia Steiner, on 24 December 2007;¹

NOTING the “*Demande du BCPV aux fins d’autorisation d’interjeter appel à l’encontre de la Décision rendue le 24 Décembre 2007 relative aux demandeurs a/0047/06 à a/0052/06*”, filed by the Office of Public Counsel for Victims (“the OPCV”) on 4 January 2008 (“the OPCV’s Request for Leave to Appeal”) submitting that, by not addressing applications a/0047/06 to a/0052/06 on the ground that these applications are pending before the Trial Chamber, the Decision violates article 68(3) of the Statute;²

NOTING the “Prosecution’s Application for Leave to Appeal the Single Judge’s 24 December 2007 “*Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo*” (“the Prosecution’s Request for Leave to Appeal”), filed by the Prosecution on 7 January 2008;³

NOTING the “Request for leave to appeal the “*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*

¹ ICC-01/04-423.

² ICC-01/04-426.

³ ICC-01/04-428.

a/0105/06 à 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 à a/0241/06 à a/0250/06” (“the OPCD’s Request for Leave to Appeal”), filed by the Office of Public Counsel for the Defence (“the OPCD”) on 7 January 2008;⁴

NOTING the “Prosecution’s Response to OPVC’s Application for Leave to Appeal the Single Judge’s Decision of 24 December 2007”, filed by the Prosecution on 10 January 2008;⁵

NOTING the “*Réponse à “Prosecution’s Application for Leave to Appeal the Single Judge’s 24 December 2007 ‘Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo’”*”, filed by the OPCD on 10 January 2008 by which the OPCD does not oppose the granting of leave to appeal in relation to the grounds raised by the Prosecution;⁶

NOTING the “Prosecution’s Response to OPCD’s Request for leave to appeal the Single Judge’s 24 December 2007 Decision on the Applications for Participation in the Proceedings”, filed on 11 January 2008, by which the Prosecution does not oppose the OPCD’s request for leave to appeal;⁷

NOTING the “*Réponse du BCPV aux demandes d’autorisation d’interjeter appel de la décision du 24 décembre 2007 déposées par le Bureau du Procureur et le Bureau du conseil public pour la Défense*”, filed by the OPCV on 11 January 2008, submitting that both

⁴ ICC-01/04-429.

⁵ ICC-01/04-432.

⁶ ICC-01/04-433.

⁷ ICC-01/04-434.

the Prosecution's Request for Leave to Appeal and the OPCD's Request for Leave to Appeal should be dismissed;⁸

NOTING the "*Observations des représentants légaux de a/0071/06 suite à la requête du Procureur et de l'OPCD sollicitant l'autorisation d'interjeter appel de la décision de la chambre préliminaire I sur les demandes de participation à la procédure en République Démocratique du Congo de a/0071/06*", filed by the Legal Representatives of Victim a/0071/06, submitting that the Prosecution's Request for Leave to Appeal and the OPCD's Request for Leave to Appeal should both be rejected on the ground, *inter alia*, that they do not concern issues arising from the Decision, but are merely questions over which there is a difference of interpretation;

CONSIDERING articles 68 and 82(1)(d) of the *Rome Statute* ("the Statute"), rules 85, 89, 91 and 155 of the *Rules of Procedure and Evidence* ("the Rules") and Regulations 65 and 86 of the *Regulations of the Court* ("the Regulations");

CONSIDERING, at the outset, that the Single Judge has already stated that applicants do not have standing to request leave to appeal against any decision issued during the application process,¹⁰ and that therefore, the request by the OPCV must be rejected insofar as the OPCV is acting as legal representative of some of the applicants;

CONSIDERING that, as Pre-Trial Chambers I and II have repeatedly stated,¹¹ for the Chamber to grant leave to appeal under article 82(1)(d) of the Statute, the issue

⁸ ICC-01/04-435.

⁹ ICC-01/04-436.

¹⁰ ICC-01/04-437.

¹¹ See, *inter alia*, the "Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal", issued by Pre-Trial Chamber I on 23 June 2006 (ICC-01/04-01/06-165-Conf-Exp); the "Decision on Defence Motion for Leave to Appeal", issued by Pre-Trial Chamber I on 18 August 2006 (ICC-01/04-01/06-338); the "Decision on Second Defence Motion for Leave to Appeal", issued by Pre-Trial Chamber I on 28

identified by the appellant must: (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria:

- a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;

CONSIDERING that, according to the “Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”¹² (“the Appeals Chamber Judgment”), issued by the Appeals Chamber on 13 July 2006:

- (i) “[o]nly an issue may form the subject-matter of an appealable decision”;¹³
- (ii) “[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”;¹⁴
- (iii) “[n]ot every issue may constitute the subject of an appeal”,¹⁵ but “[i]t must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘[t]he fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”;¹⁶ and

September 2006 (ICC-01/04-01/06-489); and the “Decision on the Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber I's Decision on the Prosecutor's Applications for Warrants of Arrest Under Article 58” issued by Pre-Trial Chamber II on 19 August 2005 (ICC-02/04-01/05-20-US-Exp; unsealed according to Decision ICC-02/04-01/05-52 issued on 13 October 2005), in particular, para. 20.

¹² ICC-01/04-168.

¹³ Appeals Chamber Judgment, para. 9.

¹⁴ Appeals Chamber Judgment, para. 9.

¹⁵ Appeals Chamber Judgment, para. 9.

¹⁶ Appeals Chamber Judgment, para. 10.

- (iv) “[i]dentification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal” insofar as “[t]he issue must be one ‘for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings’”;¹⁷

CONSIDERING that the Prosecution is seeking leave to appeal in relation to the following two issues:

- (i) whether a “procedural status of victim”, within the terms of the Decision, can be granted independent of any finding by the Chamber that the requirements of article 68(3) and rule 89 are satisfied, and without addressing and providing for a definition of the personal interests, or following the steps required by the Appeals Chamber’s jurisprudence (“the first issue raised by the Prosecution”); and
- (ii) whether the Decision lacks sufficient legal and factual reasoning (“the second issue raised by the Prosecution”);¹⁸

CONSIDERING that the OPCD is seeking leave to appeal in relation to the following five issues:

- (i) whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation (“the first issue raised by the Defence”);
- (ii) whether supplementary information or *corrigenda* submitted in connection with the applications should be submitted in a written format, which is

¹⁷ Appeals Chamber Judgment, para. 14.

¹⁸ ICC-01/04-428, para.15.

either signed by the applicants themselves or by a legal representative with a valid power of attorney (“the second issue raised by the OPCD”);

- (iii) whether the decision lacks sufficient reasoning concerning whether the applicants meet the requisite factual and legal criteria to be admitted as victims (“the third issue raised by the OPCD”);
- (iv) whether the Chamber may *proprio motu* re-characterise the legal/procedural basis for the application, without first requiring the consent of the applicants and subsequently according the parties a right to be heard (“the fourth issue raised by the OPCD”); and
- (v) whether, in order to establish moral harm on the basis of harm suffered by a second person, it is necessary to adduce some level of proof concerning the identity of the second person and the applicant’s relationship with this person (“the fifth issue raised by the OPCD”);¹⁹

CONSIDERING that the first issue raised by the Prosecution and the first issue raised by the OPCD are inextricably linked because both issues relate to the manner in which the Single Judge analysed the victims’ personal interests and the appropriate stages of the proceedings under article 68(3) of the Statute, rule 89 of the Rules and regulation 86 of the Regulations;

CONSIDERING that, according to the interpretation of the Single Judge, article 68(3) of the Statute requires the Chamber:

- (i) first, to assess whether the victims’ personal interests are affected at a given stage of the proceedings so as to determine whether that stage is an appropriate stage of the proceedings for them to present their views and concerns (i.e., to participate); and

¹⁹ ICC-01/04-429, para.18.

- (ii) if so, to determine how victims may present their views and concerns at that stage of the proceedings “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair or impartial trial” (i.e., the extent of their participation, which is referred to in the Decision as the ‘modalities of participation’ or the ‘set of procedural rights’ that victims can exercise at the relevant stage of the proceedings);

CONSIDERING that, according to the Single Judge, the analysis of whether victims’ personal interests are affected under article 68(3) of the Statute is to be conducted in relation to “stages of the proceedings”, and not in relation to each specific procedural activity or piece of evidence dealt with at a given stage of the proceedings; and that the investigation of a situation and the pre-trial phase of a case are stages of the proceedings in relation to which the analysis of whether victims’ personal interests are affected under article 68(3) of the Statute is to be conducted;²⁰

CONSIDERING, further, that, in the view of the Single Judge, this interpretation is consistent with the Decision of the Appeals Chamber of 13 June 2007²¹ because, in that decision, (i) the Appeals Chamber does not require victims to show that their personal interests are affected by each procedural activity or piece of evidence which is part of an interlocutory appeal;²² and that (ii) on the contrary, the Appeals Chamber has focused its assessment on whether the personal interests of the victims were affected by the overall interlocutory appeal, it being understood that each

²⁰ Practical illustrations of this reasoning are the following: (1) the fact that the court management system implemented by the Court provides for different records in relation to situation and case proceedings (for instance, the record of the situation in the DRC is distinct from the records of the cases of *The Prosecution v Thomas Lubanga Dyilo* and *The Prosecution v Germain Katanga*); and (2) the fact that the application form issued pursuant to rule 89 of the Rules and regulation 86 of the Regulations specifically requests applicants to identify the “stage of the proceedings in which the victim wishes to participate.”

²¹ ICC-01/04-01/06-925.

²² ICC-01/04-01/06-925, para 24.

interlocutory appeal gives rise to a distinct and separate procedure before the Appeals Chamber;²³

CONSIDERING that, in the view of the Single Judge, if, as submitted by the Prosecution and the OPCD, the analysis under article 68(3) of the Statute and the procedure pursuant to rule 89 of the Rules and regulation 86 of the Regulations were to be conducted in relation to each specific procedural activity or piece of evidence, a situation may arise in which:

- (i) the efficient and effective operation of the Court as a whole could be hampered because every time a natural or legal person intends to participate in relation to any procedural activity or piece of evidence, (a) that person would have to make an application for participation; (b) the Victims' Participation and Reparations Section of the Registry would have to file a report on the application; (c) the parties would have to be given the opportunity to submit their observations on the application; and (d) the Chamber would have to rule on such application prior to conducting the relevant specific procedural activity or discussing the relevant piece of evidence;²⁴
- (ii) victims would be deprived of any procedural status at any of the stages of the criminal proceedings before the Court because their right to participate would be confined to specific procedural activities or pieces of evidence; and
- (iii) the role of victims in criminal proceedings before this Court, which, in the view of the Single Judge constitutes one of the core features of the Statute, would be significantly limited due to the difficulties in proving that the personal interests of victims were affected by a specific procedural activity or piece of evidence (as opposed to an overall stage

²³ ICC-01/04-01/06-925, para. 27.

²⁴ ICC-01/04-438.

of the proceedings, such as the investigation stage of a situation or the pre-trial phase of a case);²⁵

CONSIDERING, further, that, after undertaking the analysis of whether the victims' personal interests are affected at the investigation stage of a situation and at the pre-trial phase of a case, the Single Judge has found that the personal interests of victims are generally affected at these two stages of the proceedings;²⁶ that, consequently, these are appropriate stages of the proceedings for victims' participation in all situations and cases before the Court; that the Single Judge does not need to review her findings on this matter each time a new investigation of a situation is opened or a new case is initiated; and, that, accordingly, victims have procedural status at the investigation stage of a situation and at the pre-trial phase of a case;²⁷

CONSIDERING that such a procedural status will be granted only to those natural and legal persons who, *prima facie*, appear to have suffered direct harm²⁸ as a result of crimes within the jurisdiction of the Court that are either the subject of (i) the investigation of a situation (crimes encompassed by the relevant situation) or (ii) a warrant of arrest or summons to appear, and subsequently a charging document (crimes encompassed by the relevant case).

²⁵ For instance, if the Defence were to make a motion for exclusion of key Prosecution evidence on the ground of the unlawful nature of the search and seizure in which such evidence was gathered, it would be very difficult for an applicant to show that his or her personal interests were affected by such a motion if the evidence were to be considered in isolation, without first placing it in the context of the overall case. Only once the important consequences that the exclusion of the evidence at issue could have for the overall Prosecution case had been taken into account, could the Chamber decide whether the personal interests of the applicant are affected. But in the latter scenario, this is no longer an activity-related analysis; on the contrary, it is a "stage- (pre-trial stage of the case) related analysis.

²⁶ ICC-01/04-101, ICC-02/05-110 and ICC-01/04-417.

²⁷ ICC-01/04-438, p. 5.

²⁸ The only exception to direct harm can be found in 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" (ICC-01/04-177-tENG): "that the causal link required by rule 85 of the Rules with regard to the stage of the case is demonstrated once the victim, and if applicable, the immediate family or dependents of that victim, provide sufficient evidence to establish that that person has suffered harm directly linked to the crimes set out in the arrest warrant or that *that person has suffered harm by intervening to assist the direct victims in the case or to prevent these victims from becoming victims as a result of these crimes being committed*" [emphasis added].

CONSIDERING that, as stated in the Decision on Leave to Appeal the Decision on the Requests of the OPCD ("the 23 January 2008 Decision"):

The granting of the procedural status of victim in situation or case proceedings automatically gives the applicants the right to participate in such proceedings;²⁹ that however, the extent of their participation must be subsequently determined by the Chamber because article 68(3) of the Statute does not pre-establish a set of procedural rights (i.e. modalities of participation) that those granted the procedural status of victim may exercise, but rather leaves their determination to the discretion of the Chamber [...];³⁰

CONSIDERING that, according to the Single Judge's interpretation of article 68(3) of the Statute, when determining the set of procedural rights attached to the procedural status of victim, the Single Judge: (i) need not make a second assessment of the victims' personal interests; and (ii) must ensure that such procedural rights are determined "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial";

CONSIDERING that, in exercising its discretion, once the Chamber makes a decision on the set of procedural rights that are attached to the procedural status of victim at the investigation stage of a situation and the pre-trial phase of a case, such rights belong to all natural and legal persons for whom the procedural status of victim has been granted in relation to those stages of the proceedings;³¹

CONSIDERING that rule 89 of the Rules and regulation 86 of the Regulations, distinguish between two distinct and separate procedures (i.e. the application process which only aims to grant the procedural status of victim at the stage of investigation of a situation or at the pre-trial phase of a case, and the proceedings for

²⁹ The only reason to make at this stage a *prima facie* determination that applicants fulfill the four criteria provided in the definition of victims in rule 85 of the Rules, including the necessary causal link between the alleged harm suffered by the applicants and the crimes which are the subject of the proceedings concerning the investigation of a situation and the pre-trial stage of a case (ICC-01/04-101 and ICC-01/04-177), is to determine who can participate in those proceedings and accordingly grant them procedural status in such proceedings.

³⁰ ICC-01/04-438

³¹ ICC-01/04-438.

the determination of the modalities of participation) as is the case in national jurisdictions in which victims are entitled to participate in criminal proceedings;³² that, as a result, some procedural safeguards that apply in criminal proceedings before the Court, may not be applicable during the application process due to its distinct and specific nature and its limited object and purpose;³³ and that, while the Chamber must rule, in relation to hundreds of existing applications, on an individual basis, as to whether to grant the procedural status of victim, it can determine in one or a few decisions the modalities of participation that are attached to that status;

CONSIDERING, therefore, that the first issue raised by the Prosecution and the first issue raised by the OPCD, which refer to the manner in which the Chamber must conduct its analysis of victims' personal interests and the appropriate stages of the proceedings under article 68(3) of the Statute, rule 89 of the Rules and regulation 86 of the Regulations, are part of the following overarching issue, for which leave to appeal was granted in the 23 January 2008 Decision:

Whether article 68(3) of the Statute can be interpreted as providing for a 'procedural status of victim' at the investigation stage of a situation and the pre-trial stage of a case; and

- (i) if so, whether rule 89 of the Rules and regulation 86 of the Regulations provide for an application process which only aims to grant the procedural status of victim and is thus distinct and separate from the determination of the procedural rights attached to such status; and what are the specific procedural features of the application process? or
- (ii) if not, how applications for participation at the investigation stage of a situation and the pre-trial stage of a case must be dealt with;

CONSIDERING, further, that, in the view of the Single Judge, the second issue raised by the Prosecution and the third issue raised by the OPCD must be dealt with together because they refer to the sufficiency of the factual and legal reasoning of the Decision rendered by the Single Judge;

³² ICC-02/05-110, para. 4 and ICC-01/04-417, para. 4.

³³ ICC-02/05-110, para. 8 and ICC-01/04-417, para. 8.

CONSIDERING that in its “Judgment on appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81””, the Appeals Chamber stated that it is an important component of the right to a fair trial for a Court rendering a decision to give reasons for its decision³⁴ and that:

“[t]he extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion”;³⁵

CONSIDERING that, in the view of the Single Judge, although not every specific factor raised by the Prosecution and the OPCD in relation to each application for participation was referred to in the Decision, the Decision not only addressed the main submissions of the parties relating to each application, it also clearly identified the facts it found relevant in coming to its conclusion and gave sufficient legal reasoning with regard to each application;

CONSIDERING therefore that the second issue raised by the Prosecution and the third issue raised by the OPCD are not issues which arise from the Decision;

CONSIDERING that the second issue raised by the OPCD relates to whether supplementary information or *corrigenda* submitted in connection with the applications should be submitted in a written format, which is either signed by the applicants themselves or by a legal representative with a valid power of attorney; that this is a matter that arose in relation to certain applications that were ruled upon

³⁴ ICC 01/04-01/06-773, para. 20.

³⁵ ICC 01/04-01/06-773, para. 20.

in the Decision; and therefore, in the view of the Single Judge, this is an issue arising out of the Decision;

CONSIDERING, nevertheless, in the view of the Single Judge, regardless of whether the first component of the cumulative appealability criteria provided for in article 82(1)(d) of the Statute is met, a ruling by the Appeals Chamber would not materially advance the proceedings within the meaning of article 82(1)(d) of the Statute because of: (i) the nature of the issue; (ii) the fact that it is solely related to the application process; and (iii) the fact that the concerns raised by the OPCD have already been addressed by the “Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation” issued by the Chamber on 17 August 2007;³⁶

CONSIDERING that, in the view of the Single Judge, the fourth issue raised by the OPCD as to whether the Chamber may *proprio motu* re-characterise the legal/procedural basis for the application, without first requiring the consent of the applicants and, subsequently according the parties a right to be heard is not an issue arising from the Decision because (i) the legal and procedural basis for the application has not been re-characterised by the Decision; (ii) the Decision merely took into consideration the information provided by the applicants themselves in the application form; and (iii) the Prosecution, the OPCD and the Ad Hoc Counsel for the Defence had the opportunity to make observations on the applications;

CONSIDERING that the fifth issue raised by the OPCD refers to whether in order to establish moral harm on the basis of harm suffered by a second person, it is necessary to adduce some level of proof concerning the identity of the second person and the

³⁶ ICC-01/04-374.

applicant's relationship with this person; and that this is an issue arising out of the Decision;

CONSIDERING that, in the view of the Single Judge, the fifth issue raised by the OPCD is inextricably linked to the applicable standard of proof in the application process, which is one of the many aspects included in the overarching issue for which leave to appeal was granted in the 23 January 2008 Decision;

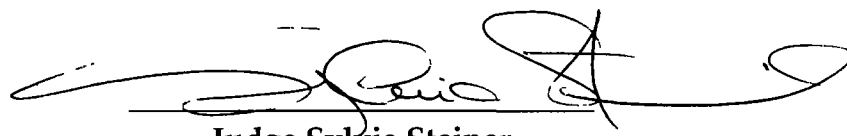
FOR THESE REASONS,

REJECT the OPCV's Request for Leave to Appeal *in limine*;

GRANT the Prosecution and OPCD requests for leave to appeal in relation to the first issue raised by the Prosecution and the first and fifth issues raised by the OPCD;

REJECT the Prosecution and OPCD requests for leave to appeal in relation to the second issue raised by the Prosecution and the second, third and fourth issues raised by the OPCD.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner
Single Judge

Dated this Wednesday 6 February 2008

At The Hague

The Netherlands