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Date: **23 May 2008**

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Document

**Prosecution's Response to Defence Application for Leave to Appeal
the Decision on the Set of Procedural Rights Attached to the
Procedural Status of Victim at the Pre-Trial Stage of the Case**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

The Defence of Mathieu NGUDJOLO CHUI (“the Defence”) has sought leave to appeal the “Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of the Case” (“the Decision”). Many of the issues for which leave was sought do not arise out of the Decision, but rather arose solely out of the prior decision granting the applications of victims to participate. Other issues for which leave to appeal is sought are already before the Appeals Chamber in pending appeals. The Prosecution therefore opposes granting leave to appeal, as the issues either do not arise from the Decision or fail to fulfill the criteria in Article 82(1)(d).

Procedural background

1. On 2 April 2008, the Single Judge issued the “Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08”.¹ In that decision, the Single Judge granted the applications of five victims to participate in the pre-trial phase of the case, and sought the submissions from the parties and from those victims on the set of procedural rights that should be granted to the victims at this stage.²
2. The victims presented their submissions on the appropriate procedural rights on 9 April 2008.³ The Prosecution filed its observations on 14 April 2008,⁴ the defence of Germain KATANGA filed observations on 16 April 2008,⁵ and the Defence filed its observations on 23 April 2008.⁶
3. On 13 May 2008, the Single Judge issued the “Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of the

¹ ICC-01/04-01/07-373 (“Decision Granting Victim Participation”).

² Decision Granting Victim Participation, pp. 12, 14. The victims were also provided with an opportunity to request non-disclosure of identity.

³ ICC-01/04-01/07-383; ICC-01/04-01/07-385.

⁴ ICC-01/04-01/07-392.

⁵ ICC-01/04-01/07-400.

⁶ ICC-01/04-01/07-433.

Case”.⁷ This Decision set out the procedural rights that could be exercised by victims participating in the pre-trial stage of the case, and invited the parties to request any limitations on those rights that they might consider necessary by 20 May 2008.⁸

4. On 19 May 2008, the Defence filed an application for leave to appeal the Decision.⁹
5. The Prosecution hereby responds to the Application for Leave to Appeal, pursuant to Regulation 65(3).

The issues for which leave is sought

6. The Defence has sought leave to appeal three issues which it claims arise out of the Decision:¹⁰
 - The general interpretation of Article 68(3) (“the First Issue”);¹¹
 - The respective roles of the victims and the Prosecutor (“the Second Issue”);¹² and
 - Access by victims to the evidence (“the Third Issue”).¹³
7. The Prosecution submits that the First Issue does not arise from this Decision. The Decision was confined to determining the procedural rights, or modalities of participation, which would be granted to those victims who have been permitted to participate at this stage of the case. The broader issues regarding the interpretation of Article 68(3), and the principles governing participation in general, had been dealt with in the earlier Decision Granting Victim Participation.
8. In respect of the Second Issue, the Prosecution submits that this issue is already under consideration by the Appeals Chamber. In the particular circumstances of

⁷ ICC-01/04-01/07-474 (the “Decision”).

⁸ Decision, para. 170. Pursuant to the terms of the Decision, the Prosecution filed a Request for Limitations on the procedural rights granted under the Decision on 20 May 2008 – ICC-01/04-01/07-485.

⁹ ICC-01/04-01/07-481 (the “Application for Leave to Appeal”).

¹⁰ Application for Leave to Appeal, para. 7.

¹¹ “l’interprétation générale de l’Article 68 (3) du Statut”; Application for Leave to Appeal, paras. 11-25.

¹² “le rôle respectif du Procureur et des victimes”; Application for Leave to Appeal, paras. 26-35.

¹³ “l’accès aux preuves par les victimes”; Application for Leave to Appeal, paras. 36-47.

this case – including the fact that this issue will be resolved by the Appeals Chamber in another pending appeal; and the proximity of the confirmation hearing, which is scheduled to commence on 27 June 2008 – intervention by the Appeals Chamber would not materially advance the proceedings.

9. The Prosecution further submits that the Third Issue does not meet the criteria for leave to appeal under Article 82(1)(d). The Decision does not affect the expeditious conduct of the proceedings, and any potential impact on the fairness of the proceedings can be adequately addressed through confined limitations on the relevant procedural rights or on a case-by-case basis. For the same reasons, the immediate resolution of this issue would also not materially advance the proceedings.
10. The Defence itself has noted that a number of issues in the Decision are very closely linked with issues presently pending before the Appeals Chamber in other cases and situations.¹⁴

The First Issue does not arise from the present Decision

11. “An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.¹⁵ The Prosecution submits that the First Issue, as set out in the Application for Leave to Appeal, does not arise from this Decision.
12. The Decision is the second in a series of decisions regarding the participation of victims in the confirmation hearing and the procedures leading up to that hearing. The prior Decision Granting Victim Participation set out the framework of victim participation, granted five victims the right to participate, and sought submissions from the parties and the victims on the procedural rights that they should be permitted to exercise.

¹⁴ Application for Leave to Appeal, para. 9.

¹⁵ *Situation in the DRC*, ICC-01/04-168, para. 9; see e.g. ICC-01/04-01/07-484, 20 May 2008, p. 5.

13. In granting the right to participate, the prior decision recalled findings that (a) the analysis of whether a victims' personal interests are affected is only to be conducted in relation to each stage of the proceedings, and not in relation to each procedural activity; (b) the pre-trial phase of a case is such a stage of the proceedings; (c) victims' personal interests are affected at the pre-trial stage; and (d) the participation of victims at such a stage of the proceedings is appropriate.¹⁶ It further expressly recalled that in determining the set of procedural rights, "the Single Judge (i) need not make a second assessment of the victims' personal interests".¹⁷ No party sought leave to appeal that prior decision.
14. The impugned Decision, in contrast, is confined to determining the procedural rights to be granted to those victims who are permitted to participate at this stage of the case, pursuant to the submissions solicited in the Decision Granting Victim Participation. Thus the First Issue, defined by the Defence as the general interpretation of Article 68(3),¹⁸ does not arise from the Decision; it had been determined in the Decision Granting Victim Participation.¹⁹ In particular, arguments raised by the Defence regarding the effective interpretation of personal interests,²⁰ were not at issue in this Decision.

The immediate resolution of the Second Issue would not, in these particular circumstances, materially advance the proceedings

15. The Second Issue is framed in general as covering the relationship between the respective roles of the victim-participants and the Prosecutor. The Defence

¹⁶ Decision Granting Victim Participation, pp. 6-7.

¹⁷ Decision Granting Victim Participation, p. 12.

¹⁸ Application for Leave to Appeal, paras. 7, 11.

¹⁹ Even if the Single Judge considers that some aspects of these issues may arise from the impugned Decision, as well as from the prior decision, the Prosecution notes that the Defence had the opportunity to seek leave to appeal these issues approximately a month and a half ago. The Defence chose not to seek leave to appeal this issue at that point, but rather waited until a late point in the proceedings, when granting leave to appeal would almost inevitably delay the confirmation hearing. In these circumstances, the Prosecution submits that the immediate resolution of the issues at this time (as opposed to a month and a half ago, when they first arose) may not materially advance the proceedings. See e.g. *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004 ; see also *Prosecutor v Rebic*, IT-95-14-R77.2, Decision on Request of the Accused Markica Rebic for Certification of Appeal to Challenge Decision on Amendment of the Indictment, 25 October 2005; *Prosecutor v Popovic et. al.*, IT-05-88-T, Decision on Joint Defence Request for Certification to Appeal Rule 65 *ter* Oral Decision, 22 June 2007.

²⁰ Application for Leave to Appeal, paras. 12-14.

identifies this as arising out of the Decision in relation to the ruling that victims have the right “to make submissions on all issues relating to the admissibility and probative value of the evidence on which the Prosecution and the Defence intend to rely at the confirmation hearing”.²¹

16. As noted by the Defence, this issue has been held to fulfill the criteria of fairness and expeditiousness by Trial Chamber I in the case of *The Prosecutor v Lubanga*.²² As a result, the issue of whether victims may make submissions on the admissibility and relevance (i.e. probative value) of evidence is currently pending before the Appeals Chamber.²³ The parties’ appeal briefs and responses in that appeal were filed over two months ago.²⁴
17. In these limited circumstances, the Prosecution submits that immediate resolution of this issue by the Appeals Chamber at this stage and in the context of this case may not materially advance the proceedings. The issue is already fully before the Appeals Chamber in another case,²⁵ and the Appeals Chamber is likely to render a determination on this issue in the context of that case well before it would be in a position to do so in any appeal against the present Decision.²⁶ In contrast to the advanced state of the Appeals Chamber’s consideration of this issue in the *Lubanga* case, the confirmation hearing in this case is scheduled to commence on

²¹ Application for Leave to Appeal, para. 26, quoting Decision, para. 134. The Decision also grants the related right “to examine such evidence at the confirmation hearing”. The Prosecution understands this to be purely incidental to the right to make submissions on admissibility and probative value, and to allow the victims to physically have access to the evidence as it is presented in Court in order to facilitate such submissions.

²² Application for Leave to Appeal, para. 29. The Prosecution notes, however, that some of the references to the decision of Trial Chamber I relate to the impact of the right to present evidence, which was granted by the Trial Chamber in that case but denied in this Decision – see e.g. Application for Leave to Appeal, para. 33.

²³ See *Prosecutor v Lubanga*, ICC-01/04-01/06-1191, 27 February 2008, para. 54(c), granting leave to appeal the issue of “whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence” (emphasis added).

²⁴ *Prosecutor v Lubanga*, ICC-01/04-01/06-1219 OA9, 10 March 2008; ICC-01/04-01/06-1220 OA10, 10 March 2008; ICC-01/04-01/06-1233 OA10, 19 March 2008. The Appeals Chamber recently provided a schedule for victims to present their views and concerns on the relevant appeal, and the briefing schedule is thus expected to be closed by 30 May 2008; see *Prosecutor v Lubanga*, ICC-01/04-01/06-1335 OA9 OA10, 16 May 2008.

²⁵ *Prosecutor v Lubanga*, ICC-01/04-01/06-1191, 27 February 2008, para. 54(c).

²⁶ For example, even if leave to appeal was granted on Friday 30 May 2008, the document in support of appeal would be due on 12 June 2008 and the response to the document in support of appeal would not be due until 23 June 2008. In addition, it is likely that victims would apply before the Appeals Chamber to present their views and concerns on this further appeal, which would further delay its resolution.

27 June 2008.²⁷ If leave to appeal is granted, this hearing will almost inevitably have to be further delayed.

**The Third Issue does not significantly affect the fair
and expeditious conduct of the proceedings**

18. The Prosecution submits that the third issue, granting the victims access to the evidence filed by the parties in the record of the case, does not significantly affect the fair and expeditious conduct of the proceedings; nor would its immediate resolution by the Appeals Chamber materially advance the proceedings.
19. The Prosecution firstly submits that the issue identified by the Defence does not significantly affect the fair conduct of the proceedings. In relation to the arguments raised regarding third party access to evidence,²⁸ the access granted to the victims is limited to that evidence which the parties have filed in the record of the case.²⁹ To the extent that such evidence is not already publicly available, the Decision expressly recalls that the legal representative of victims is required to respect the confidentiality of information.³⁰ This purported impact on the fairness of the proceedings thus does not arise from the Decision.
20. In relation to the arguments regarding persons with the dual status of victim and witness having access to evidence,³¹ the Prosecution submits that any potential impact on the fairness of the proceedings can be adequately mitigated within the framework of the Decision. For example, the Single Judge could limit the access to confidential evidence to the legal representatives (rather than to the victims themselves, who might at some point become a witness). In addition, this matter can be addressed on a case-by-case basis. In light of these considerations, the potential for such a situation to arise does not, in itself, significantly affect the fair conduct of the proceedings.

²⁷ As recalled by the Single Judge in the Decision, para. 187.

²⁸ Application for Leave to Appeal, paras. 38-39.

²⁹ Decision, para. 132: "the right to have access to the evidence proposed by the Prosecution and the Defence and contained in the record of the case" (emphasis added).

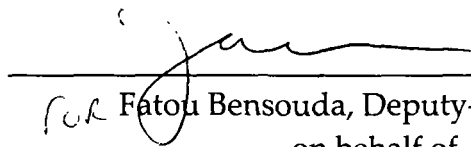
³⁰ Decision, para. 18.

³¹ Application for Leave to Appeal, paras. 40-42.

21. The Prosecution further submits that this issue will not affect the expeditious conduct of the proceedings. The Decision only grants the victims the right to access evidence which has been filed by a party in the record of the case, maintained by the Registry.³² Thus, in contrast to the decision in the *Lubanga* case to which the Defence refers,³³ this Decision does not create new obligations or rights of disclosure or inspection.
22. Finally, the Prosecution submits that the immediate resolution of this issue by the Appeals Chamber would not materially advance the proceedings. The issues raised by the Defence could all adequately be addressed through limitations on the procedural rights granted, as provided for in the Decision.³⁴ As the Prosecution has previously submitted,³⁵ where a party has an adequate avenue to address an issue before the first instance chamber, its immediate resolution by the Appeals Chamber is unlikely to materially advance the proceedings.

Relief sought

23. For the reasons set out above, the Prosecution requests that the Single Judge deny the Application for Leave to Appeal in its entirety.


 Fatou Bensouda, Deputy-Prosecutor
 on behalf of
 Luis Moreno-Ocampo, Prosecutor

Dated this 23rd day of May, 2008

At The Hague, The Netherlands

³² Decision, para. 132. See also Rule 121(10).

³³ Application for Leave to Appeal, paras. 43-44.

³⁴ See Decision, para. 170. See e.g. para. 20, above.

³⁵ *Prosecutor v Lubanga*, ICC-01/04-01/06-1336, 19 May 2008, para. 16.