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PRE-TRIAL CHAMBER I

Before: **Judge Anita Ušacka, Single Judge**

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

Public Document

Request for Leave to Appeal the 3 July 2008 Pre-Trial Chamber I's Decision on the applications for participation

Source: **Office of Public Counsel for the Defence**

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

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1. Procedural History

1. The Office of Public Counsel for the Defence (OPCD) was appointed by the Honourable Pre-Trial Chamber on 23 May 2007 and 17 July 2007 respectively to file observations in connection with the applications to participate in the situation phase filed by a/0106/06, a/0107/06, a/0108/06, a/0109/06,a/0110/06,a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06,a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06,a/0225/06,a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, a/0241/06 to a/0250/06, and a/0163/06 to a/0187/06.

2. On 3 July 2008, the Honourable Single Judge issued her 'Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06' (the Decision),[1] in which the Single Judge granted "the procedural status of victim at the investigation stage in the DRC to Applicants a/0163/06, a/0164/06, a/0165/06, a/0166/06,

3. a/0167/06, a/0168/06, a/0170/06, a/0171/06, a/0172/06, a/0173/06, a/0174/06, a/0175/06, a/0176/06, aO/177/06, a/0178/06, a/0179/06, a/0180/06, a/0181/06, a/0182/06, a/0183/06, a0184/06, a0185/06, a/0186/06, a/0187/06, a/0231/06, a/0232/06, a/0233/06, a/0242/06, a/0247/06, a/0248/06, a/0249/06 and a/0250/06".

4. The OPCD respectfully observes that the Decision diverges from past jurisprudence concerning victim participation in the situation phase in regard to two key aspects.

5. Firstly, the Single Judge recognized that any *prima facie* assessment as to whether the applicants suffered harm as the result of a crime falling under the Rome Statute, must necessarily verify whether the threshold elements for a crime under the Statute have been met; for example, that the alleged crime occurred in connection with an armed conflict, or a widespread or systematic attack against a civilian population.[2] The Single Judge nonetheless noted that "explicit factual references to the contextual

[1] ICC-01/04-505
[2] At paragraph 28 and footnote 53.

elements of crimes within the jurisdiction of the Court are often not present in the applications".[3]

6. The Single Judge therefore opined that the information contained within the application form should be "viewed in a light most favourable to the Applicants, from which the Single Judge may directly infer the material, moral and contextual elements of the crimes within the jurisdiction of the Court".[4]

7. Secondly, throughout the text of the decision, the Honourable Single Judge expressly attributes certain alleged offences to a particular individual and named militia, for example, "Applicant a/0163/06 appears *prima facie* to have suffered material harm (economic loss) as a result of the alleged destruction of the Applicant's hotel, and the use of beds, mattresses, and other items in setting up Thomas Lubanga's UPC military camp", [5] and "Applicant a/0231/06 appears prima facie to have suffered physical and moral harm (emotional suffering) as a result of her forced recruitment (conscription) into the UPC as a child aged 13, allegedly by members of the UPC militia, as well as being given as a wife to a UPC member, giving birth to a child and not being able to reintegrate into her community."[6]

8. In accordance with article 82(1)(d) of the Rome Statue, the OPCD hereby respectfully requests leave to appeal in relation to the following issues:
   - whether viewing the application form in the light most favourable to the applicants, and drawing inferences in favour of the applicants, reverses the burden of proof and violates the principle of *in dubio pro reo*; and
   - whether the reference to specific individuals and militia, in the context of *prima facie* factual findings issued in a public decision during the investigations phase, compromises the integrity and impartiality of the Prosecutor's investigations, and contravenes the presumption of innocence.

[3] At paragraph 28.
[4] At paragraph 29.
[5] At paragraph 39.
[6] At paragraph 92.

2. Criteria for leave to appeal

2.1 The first issue significantly affects the fairness and expeditiousness of the proceedings

9. At paragraph 30, the Honourable Single Judge "emphasises, however, that any preliminary determination that an Applicant has alleged facts from which one may infer, prima facie, the contextual elements of crimes within the jurisdiction of the Court are merely based on this preliminary analysis. Thus, a decision to grant an Applicant a procedural status in the proceedings in no way predetermines any factual findings that could be made by a Chamber in any judgment on the merits."

10. The OPCD firstly respectfully disputes the Single Judge's characterisation of her findings as a 'preliminary determination'. A preliminary finding is one which will be automatically reviewed at a later stage of the proceedings – for example, a decision concerning the existence of alleged crimes for the purposes of issuing an arrest warrant, will automatically be reviewed in accordance with the Chamber's duty to consider whether the higher evidential threshold has been met for the confirmation of the charges. In contrast, decisions granting applicants the 'procedural status of victim' continue throughout the situation phase, and, if the events do not eventually form the subject of a specific prosecution, will never be reviewed. Unless the decisions are overturned on appellate review, the factual findings of the Single Judge may constitute the only, and thus final pronouncement of the ICC on these alleged events.

11. The OPCD further submits that the Single Judge does not address the consequences of such an approach upon the rights of the Defence during the situation phase itself, in particular, vis-à-vis the ability of ad hoc counsel for the Defence (in the present circumstances), to contest – in an adversarial manner - whether the criteria to be granted the right to participate have been met.

12. In this regard, the OPCD respectfully submits that the approach of the Single Judge significantly impacts upon the fairness of the proceedings by improperly shifting the burden of proof onto the Defence, in contravention of the stipulation in article 67(1)(i) that the Defence shall have the right "not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal". This right is drafted broadly such that it is not limited to allegations adduced by the prosecution, but extends to

any issues of proof, including the Chamber's factual assessment as to whether an applicant meets the definition of victim under rule 85.

13. Whilst the concrete examples cited by the Single Judge refer to threshold elements of the alleged offences, the legal findings at paragraph 29 implies that this approach applies to the Single Judge's analysis of the application *in toto*: "in decision upon the applications, the Single Judge will follow the practice of the Chamber: […]; and the third element taken into consideration will be any information from the application itself, viewed in a light most favourable to the Applicants, from which the Single Judge may directly infer the material, moral, and contextual elements of the crimes within the jurisdiction of the Court". Indeed, it would appear from the decision that the Single Judge automatically accepted the applicants' assertions that the events should be attributed to Thomas Lubanga Dyilo and the UPC notwithstanding firstly, the failure of the applicants to provide any explanation as to why they had believed that the alleged events were perpetrated by this specific person or militia (as opposed to either other militia, or by random criminal elements),[7] and secondly, the fact that in many cases, the information provided by the applicants directly contradicted their assertion that the events had been perpetrated by the UPC/Thomas Lubanga Dyilo.[8]

14. In any case, threshold elements are considered as intrinsic elements of the alleged offence, and as such, must be established in the same manner as other elements of the offence, and must also be subject to the same safeguard against reversals of the onus of proof. The OPCD refers to the findings of the ICTY Appeals Chamber that "the existence of an armed conflict or its character has to be regarded, in accordance with the principle of *in dubio pro reo*, as ordinary elements of a crime under customary international law when applying Articles 2 and 3 of the Statute to the conduct at issue in this case. Again, this result is rooted in the inalienable principle of individual guilt."[9]

15. The OPCD further notes that the Honourable Single Judge has cited no statutory provisions or case law in support of an approach whereby in case of doubt, the Chamber will adopt the version most favourable to the applicants (a veritable

[7] As noted in the OPCD's observations of 25 June 2007, several of the applicants were not in the locality when the alleged events occurred. They therefore would not possess any personal knowledge as to the identity of the person or group responsible (paras 82 and 84 and footnote 110).
[8] The OPCD refers to its observations at footnote 39 of its 4 October 2007 Observations concerning a/0163/06.
[9] Appeals Judgement, Prosecutor v. Martinovic and Naletilic, 5 May 2006, at para 120.

inversion of the principle of *in dubio pro reo*).[10] To the contrary, regulation 86(7) envisages that in circumstances in which the Chamber does not possess sufficient information from the application form itself to verify whether the criteria for participation have been met, the Chamber may request additional information from *inter alia* the Prosecutor. This approach is also not supported by domestic law or the practice of human rights court.[11]

16. It is thus arguable that to introduce by judicial fiat such a ‘victim’ oriented approach into the court evidences a lack of impartiality – a judicial predisposition in favour of persons who assert that they are victims. The OPCD respectfully submits that such an approach cannot but introduce unfairness into the forum of criminal proceedings. In this regard, the Trial Chamber has recognized that a system of victim participation which could have the effect of shifting the burden of proof, significantly affects the fairness of the proceedings. [12]

17. In practice, the approach of the Single Judge will mean that in order to contest the applications, the OPCD will be required to adduce arguments or proof which would establish that the elements of the offence are not met. For example, if the applicant asserts that their house was ‘pillaged’ by militia, the OPCD would have to verify firstly, whether there were any reported attacks on that date, and secondly, whether the attacks were perpetrated by organized armed groups. In most cases, this will prove an impossible task, since it is virtually impossible to assert a negative fact, and to prove in an evidential vacuum that something did not occur. This will render the right of the Defence to respond to requests to participate completely ineffective.

18. Moreover, if the Single Judge were to construe the application form in the light most favourable to the applicants, in a scenario in which the applicants has provided inconsistent information, the Single Judge would inevitably rely on the information which favours the applicant meeting the criteria to be granted victim status. Apart

[10] The OPCD observes in this regard that the phrase, ‘to interpret in the light most favourable to’, is employed by the ad hoc Tribunals to connote the principle of *in dubio pro reo.* See “Decision on Defence Motion for Extension of Time’, Prosecutor v. Stakic, 26 April 2004 at para 4; Trial Judgement, Prosecutor v. Blagojevic, 17 January 2005, at footnote 2057.
[11] The OPCD refers to its submissions at paragraphs 9-18 of its Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e) ICC-01/04-382 31 August 2007.
[12] ‘Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' participation of 18 January 2008’, 26 February 2008, ICC-01/04-01/06-11, at para 42.

from the fact that this approach differs from the approach adopted by the Single Judge in the pre-confirmation phase,[13] it will also inevitably have the consequence of increasing the number of applicants, who are admitted to participate in the proceedings, and will thus significantly affect the expeditiousness of the proceedings.[14]

2.2 The second issue significantly affects the fairness and expeditiousness of the proceedings

19. According to the jurisprudence issued by the ICC thus far, it is not necessary for applicants to attribute the alleged harm to a specific perpetrator. The express citations of the person and militia identified by the alleged victims as being responsible for the alleged crimes is therefore both unnecessary, and highly prejudicial to the interests and reputation of the person and militia so identified in a public decision.

20. The Appeals Chamber has recently stated that the reference to the rights of the accused in article 68(3) encompasses the rights of future suspects.[15] In this regard, article 66(1) of the Rome Statute provides that "[e]veryone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law". Notably, Statute employs the broad term 'everyone': the presumption of innocence thus applies to all persons irrespective of whether they are the subject of an arrest warrant or charges for the particular events in questions.

21. The principle of presumption of innocence imposes an obligation on all Court authorities not to make any pronouncements concerning the culpability of a person, except in accordance with the limited provisions within the Statute which expressly permit the issuance of factual findings prior to the issuance of a final judgment, and which are ultimately amenable to review in accordance with the standard of beyond

[13] "[T]he Single Judge observes that the person making the applications has provided the Single Judge with inconsistent dates of the alleged events during which his siblings were allegedly killed. In this respect, the Single Judge recalls that the application is assessed on the merits of its intrinsic coherence", 'Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case"' ICC-01/04-01/07-579, 10 June 2008, at para 92.
[14] See 'Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' participation of 18 January 2008', 26 February 2008, ICC-01/04-01/06-11, at para 27.
[15] "The Appeals Chamber is mindful that in the situation phase of the proceedings a suspect or group of suspects has yet to be identified by the Prosecutor. The application therefore of criteria (iv) above, namely, "that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial" will be with a view to safeguarding the rights of future suspects." Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007, ICC-02/05-138, 18 June 2008, at para 52.

reasonable doubt. In this regard, there are no legal provisions which permit the Pre-Trial Chamber to render factual findings in relation to a particular individual during this phase, nor are there any procedural safeguards which would enable an individual so-named to contest such findings, and thus, assert their innocence. In this connection, the OPCD observes that international tribunals have expressly terminated criminal proceedings against persons who have died, in light of the fact that it would be impossible for the accused to properly instruct a counsel to defend himself against the allegations, and to subsequently appeal a conviction.[16]

22. The OPCD therefore submits that the presumption of innocence should apply with more force with respect to persons who do not possess any legal remedy to directly challenge the findings of the Pre-Trial Chamber issued during the situation phase. Indeed, it has been suggested that the "presumption of innocence should indeed be stronger in respect of a person against whom not even a *prima facie* case has been confirmed. First, it would be totally illogical for the judge reviewing the charges to presume that the suspect is guilty. Secondly, if the presumption of innocence were not applicable before the confirmation of charges, irreparable damage could be done to the rights of the individual prior to confirmation (for example, through a campaign depicting the suspect as a criminal or by the adoption of asset-freezing measures). Thus, any subsequent protection would prove ineffective".[17] Accordingly, jurisdictions, which permit alleged victims to participate during the investigative phase also recognise that the public issuance of decisions concerning the alleged existence of victims could taint the investigative process, and prejudice the rights of future defendants.[18] These jurisdictions therefore set out the principle of confidentiality of investigations.[19]

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[16] Special Court for Sierra Leone, Prosecutor v Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa (Case No. SCSL-04-14-T), 'Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues', 21st May 2007, at paras 16-17: 'A judgement in criminal proceedings … is indeed the exclusive legal privilege and prerogative attached to the persona or the individual who was the subject matter of the Prosecution that stands abated following his death. The Chamber notes that this legal position is quite consistent with the fundamental principle of individual criminal responsibility, the right of the Accused to a fair trial and the right to an appeal, if convicted. It is, therefore, the Chamber's view that […] if the deceased […] were convicted of the crimes alleged against him, he would by reason of death, be unable to exercise effectively his right of appeal against conviction and would be unable to properly instruct counsel as to the conduct of his trial or appeal.'

[17] S. Zappala, Human Rights in International Criminal Proceedings (Oxford University Press 2005) pp.84-85.

[18] As held by the Cour de Cassation « Attendu qu'en l'état de ces énonciations dont il résulte que les prévenus ont été poursuivis pour avoir divulgué le contenu demeuré confidentiel de pièces issues d'une information en cours, mesure justifiée par les impératifs de protection des droits d'autrui, au nombre desquels figure la présomption d'innocence, par la préservation d'informations confidentielles, ainsi que par la garantie de l'autorité et l'impartialité du pouvoir judiciaire, la cour d'appel a justifié sa décision au regard de l'article 10 de la Convention européenne des droits de l'homme » (Cour de cassation chambre criminelle Audience publique du mardi 19 juin

23. The OPCD further notes that the Pre-Trial Chamber I has also held in the Thomas Lubanga Dyilo case that the rights of the accused, as set out in article 67(1) of the Statute, also apply to suspects and to pre-confirmation proceedings.[20] Under article 67(1) of the Rome Statute, the defendant has the right to effectively participate in the proceedings against him,[21] and to be heard in relation to any measures which may impact on his rights. As noted by the OPCD in its observations, the OPCD does not benefit from instructions from the persons named as being responsible, nor does the OPCD have the capacity to either challenge jurisdictional aspects of the allegations or conduct investigations in relation to the alleged facts. The factual findings therefore constitute an inquiry *in absentia*.

24. In this regard, it has been observed in the context of the relationship between truth commission findings and the due process requirements of trials that:

2001 N° de pourvoi:99-85188) http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007070155&fastReqId=1474164206&fastPos=3

See also the following extract from judgement of the European Court of Human Rights in Dupuis et al. v. France « La Cour relève que les juridictions internes ont fondé leurs décisions sur la violation du secret professionnel ou de l'instruction. L'ingérence avait donc notamment pour but de garantir le respect du droit d'une personne qui, n'ayant pas encore été jugée, était présumée innocente. Elle avait aussi pour but une bonne administration de la justice en évitant toute influence extérieure sur le cours de celle-ci. Ces buts correspondent à la protection de « la réputation et des droits d'autrui » et à la garantie de « l'autorité et l'impartialité du pouvoir judiciaire », dans la mesure où cette dernière garantie a été interprétée comme englobant les droits dont les individus jouissent à titre de plaideurs en général (*Ernst et autres c. Belgique*, no 33400/96, § 98, 15 juillet 2003). » Judgement of 7 June 2007, at para. 72.

[19] In accordance with article 11 of of the Code of Criminal Procedure, « Sauf dans le cas où la loi en dispose autrement et sans préjudice des droits de la défense, la procédure au cours de l'enquête et de l'instruction est secrète » Code de procédure pénale, entrée en vigueur le 2 mars 1959, Modifié par Loi n°2000-516 du 15 juin 2000 - art. 96 JORF 16 juin 2000, version consultée le 2 juillet 2008, http://www.legifrance.gouv.fr/affichCode.do;jsessionid=0154B441FBE0B2111B7EEC33218EB16D.tpdjo01v_3?cidTexte=LEGITEXT000006071154&dateTexte=20080702

Similarly, in accordance with article 57 of the code d'instruction criminelle belge, "Sauf les exceptions prévues par la loi, l'instruction est secrète. Toute personne qui est appelée à prêter son concours professionnel à l'instruction est tenue au secret. Celui qui viole ce secret est puni des peines prévues à l'article 458 du Code pénal".Code d'instruction criminelle belge, entrée en vigueur le 17 novembre 1808, L 1998-03-12/39, art. 9, 016, in force 2 October 1998, http://www.ejustice.just.fgov.be/loi/loi.htm

[20] Decision on the final system of disclosure and the establishment of a timetable ICC-01/04-01/06-102

[21] See in addition, the ECHR case of Ocalan v. Turkey, in which the Court stressed the importance of this right, stating that "as a result of the position he occupied in the armed organisation concerned (the PKK), the applicant was one of the people best able to assess the relevance to the Defence of the substantial body of evidence that had been adduced by the prosecution. He was much better placed and better informed than his lawyers to determine who within the PKK bore responsibility for which acts and to what degree. It should be noted that the prosecution attributed to the applicant moral responsibility for several hundred acts of violence that were not physically carried out by him. It is reasonable to suppose that had he been permitted to study the prosecution evidence directly and for sufficient time, he would have been able to identify arguments relevant to his Defence other than those his lawyers had raised themselves without the benefit of his instructions. Case Of Öcalan V. Turkey (Application No. 46221/99) Judgement of 12 March 2003 at para. 161.

The legitimacy of a decision- either to name names or to withhold them - depends on whether prosecutions and trials (and with them a more exhaustive exploration of the truth) are available after the truth commission issues its report. If the possibility of trials is open, it is perhaps a good idea to allow the courts to rule on matters of personal criminal liability after a fair trial takes place - a fair trial necessitating the withholding of names in the truth commission report. If, on the other hand, the report is likely to be the last opportunity to air these matters, an honest deference to truth suggests the need to disclose reliable information about the behaviour of certain individuals because they can hide behind the impunity given to them by amnesties and pardons. Even in that case, however, some measure of due process is necessary: at the very least, the truth commission is required to give them a chance to rebut the incriminating information. If names are going to be named, it is also important that the truth commission deal honestly and impartially with the information and be perceived by the public as having done so. Because the Truth Commission for El Salvador was widely seen as having received many more names than it published, the duty should have been incumbent upon it to be more clear and forthright as to the criteria by which some names were published while other names were suppressed. Possibly improving upon that experience, the South African Truth and Reconciliation Commission is charged not only with investigating and disclosing the circumstances of each case, but also with identifying the perpetrators. At the same time, however, the statute that created the Commission requires that persons accused of human rights violations be given a chance to respond before their names find their way to the final report.[22]

25. It was also confirmed by the South African Supreme Court that truth commission factual inquiries should endeavour to comply with the principles of procedural fairness, in particular, the principle of *audi alteram partem*. Given the gravity of the allegations, any persons detrimentally implicated by the factual findings should be

[22] J Mendez, Accountability for Past Abuses, Human Rights Quarterly, (1997) 19: 2, 255-282.

accorded an opportunity to submit representations to or to give evidence before the commission.[23]

26. In terms of the impact of the aforementioned on the fairness of the proceedings, the OPCD observes that the Single Judge has held in the Darfur Situation that issues arising from the fact that the procedural safeguards which apply to the pre-trial and trial stages are not present during the situation phase significantly affect the fairness of the proceedings.[24]

27. As regards the criterion of expeditiousness, the OPCD observes that the Honourable Single Judge in the Thomas Lubanga Dyilo case has held that an issue related to the regime under which the Defence "can get notice and participate as far as possible in the decision-making process" concerning Prosecution applications for protective measures, is "directly related to the expeditious conduct of the proceedings".[25] In line with this reasoning, the OPCD submits that in light of the fact that the decision deprives the person and militia publicly referred to of the right to be heard, it impacts on the expeditious conduct of the proceedings.

28. The OPCD further observes that if the events referred to in the applications were to eventually form the subject of proceedings, the defence would need to rebut both the public perception of guilt, and the judicial pre-conceptions of the Pre-Trial Chamber as regards these specific applications. In this regard, the ICTY has held that the

[23] Du Preez and Another v Truth and Reconciliation Commission (S. African Supreme Court, Appellate Division) [1998] 1 LRC 86, per Corbett J: "I am of the view that likewise in the present case the commission and the Committee are under a duty to act fairly towards persons implicated to their detriment by evidence or information coming before the Committee in the course of its investigations and/or hearings. As I have indicated, the subject-matter of inquiries conducted by the Committee is 'gross violations of human rights'. Many of such violations would have constituted criminal conduct of a serious nature, or at any rate very reprehensible conduct. The Committee is charged with the duty of establishing, inter alia, whether such violations took place and the identity of persons involved therein. The Committee's findings in this regard and its report to the commission may accuse or condemn persons in the position of the appellants. Subject to the grant of amnesty, the ultimate result may be criminal or civil proceedings against such persons. Clearly the whole process is potentially prejudicial to them and their rights of personality. They must be treated fairly. […][P]ersons detrimentally implicated should be afforded the opportunity subsequently to submit representations to or to give evidence before the commission."
The Judge expressly relied (at p. 99) on the findings of Lord Denning MR in the case of *Re Pergamon Press Ltd* [1970] 3 All ER 535, concerning the due process protections which apply to investigative inquiries, which could "expose persons to criminal proceedings of civil actions" (at 539).
[24] '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', ICC-02/05-118, 23 January 2008, at pp. 6-7.
[25] Decision of 23 June 2006 at para 56.

principle of a fair and expeditious trial can be compromised by factual pre-determinations, which absorb the time and resources of the Defence in rebuttal.[26]

2.3 A decision of the Appeals Chamber in relation to these issues would materially advance the proceedings.

29. As noted above, this decision constitutes the first time that a Judge or Chamber addressing victim applications in the situation phase has attributed the alleged events to a particular person, and expressly drawn evidential inferences in favour of the applicants. At the same time, it is likely that these issues will continue to arise in connection with all future decisions pertaining to victim participation at the situation phase, and, as regards the first issue, in connection with applications to participate at other phases of the proceedings.

30. In light of the impact on the ability of the Defence to exercise the right to be heard, and to respond to the substance of the applications, and the potentially grave repercussions concerning the reputation and presumption of innocence of the person and militia named in the decision, "an immediate resolution […] would provide legal certainty; that an "authoritative determination" by the Appeals Chamber which "map[s] a course of action along the right lines" on the issue will move the proceedings forward and "ensure that the proceedings follow the right course"; and that, therefore, an immediate resolution by the Appeals Chamber [..] may materially advance the proceedings". [27]

4. Relief Sought

31. For the reasons set out above, the OPCD respectfully requests the Honourable Single Judge to grant leave to appeal in relation to the following issues:
    - whether viewing the application form in the light most favourable to the applicants, and drawing inferences in favour of the applicants, reverses the burden of proof and violates the principle of *in dubio pro reo*; and

[26] Prosecutor v. Mejakic, Decision on the Prosecution Motion for Judicial Notice Pursuant to Rule 94(B), 1 April 2004, p.6; Prosecutor v. Milosevic, Final Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 16 December 2003 pp.6-7.
[27] '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', ICC-02/05-118, 23 January 2008 at pp. 7-8.

- whether the reference to specific individuals and militia, in the context of *prima facie* factual findings issued in a public decision during the investigations phase, compromises the integrity and impartiality of the Prosecutor's investigations, and contravenes the presumption of innocence.

Xavier-Jean Keïta
Principal Counsel of OPCD

Dated this Wednesday, 9 July 2008

At The Hague, The Netherlands