

**Cour
Pénale
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Criminal
Court**

No.: ICC-01/04

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PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**Public Document**

**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**

The Office of the Prosecutor

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Background

1. The Applicants filed Applications for Participation in the Proceedings No. 01/04-1/dp to 01/04-6/dp and a Memorandum in Support of Applications No. 01/04-1/dp to 01/04-6/dp *ex parte* on 26 May 2005. Pursuant to the Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp, delivered by the Chamber on 21 July 2005, the Prosecution filed a reply on 15 August 2005 (“the Reply”).
2. On 17 January 2006, the Pre-Trial Chamber rendered its “Décision sur les Demandes de Participation à la Procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6” (“the Decision”). The Decision rejected the arguments offered by the Prosecution in its Reply and granted the applications.
3. The Prosecution seeks leave to appeal the Decision under Article 82(1)(d) and Rule 155.¹

Summary

4. The Prosecution submits that the Decision fulfils all of the criteria for leave to appeal under Article 82(1)(d), as it involves an issue that affects the fair and expeditious conduct of these proceedings, and immediate resolution of the issue by the Appeals Chamber will materially advance these proceedings.
5. The Decision finds for the first time that there exists a class of “situation victims,” within the purview of Article 68(3), as distinct from a victim who has been affected personally by a “case” and the accused of such a case. The Decision therefore potentially allows any person who claims to have suffered prejudice as a result of an international criminal act in the DRC since 1 July 2002 to participate in investigative proceedings, regardless of whether the person demonstrates any connection to the actual focus of the investigation at the time, or any future case. Given the massive scale of alleged criminality in the DRC, this ruling could result in tens of thousands, or hundreds of thousands of individuals, having the right to participate in the investigation stage. In addition, the Decision concludes that it is appropriate for a Pre-Trial Chamber to conclude, without the benefit of any application by the Prosecution for an arrest warrant or request for confirmation of charges, that there are “grounds to believe” that crimes within the jurisdiction of the Court have occurred. The Chamber reasons that such a

¹ The Prosecution notes that it has not had the opportunity to adequately consult the official English version of the Decision when preparing this submission. The English version was only provided the day of the filing, despite the fact that the Decision itself states that it has been done both in French and English.

finding is authorized as a means of determining whether a victim's personal interests are affected within a situation, and finds on that basis "grounds to believe" that at least six crimes within the jurisdiction of the Court have been committed, without regard to whether those specific crimes are within the focus of investigation conducted by the Office of the Prosecutor and without the ability to use investigative tools to reach these conclusions.

6. The Prosecution reiterates its general position on the issue of victim participation in the particular context of the ICC, as advanced in its Reply: the existence of a body of procedural rights afforded to victims by the Court's basic documents is a major development that the Prosecution strongly supports. The Prosecution recognises that the opportunity for victims to make their independent voice heard in the Court's process is an important element of these rights. It is critical to ensure that this participation is implemented in a manner which is consistent with the Court's legal framework and performed in a way that does not expose victims and other persons to risks to their well-being and safety. Further, victim participation should not result in a modification of the nature and scope of the authority and functions attributed to each organ of this Court by the Statute and the Rules. The fundamental principles of the Statute, including the balance between the different organs of the Court and the intervention of all procedural participants before it in a manner consistent with the fair and effective implementation of the governing legal provisions, must be the guiding parameters governing the interpretation of the Court's basic documents.
7. The Prosecution recognizes the value and importance of the Chamber's Decision, and the detailed consideration given by the Chamber to the relevant matters raised by it. However, the Decision, it is respectfully submitted, contains various elements capable of compromising basic principles of the Statute, and in particular the Court's duty to effectively and impartially exercise jurisdiction over crimes of international concern.

Scope of this submission

8. An application for leave to appeal need not discuss the merits of the appeal.² The correctness of the Decision is a question that cannot be properly discussed before this

² PTC-II, ICC-02/04-01/05, "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", dated 19 August 20-05, at paras 15 and 22.

Chamber, but must be reserved for consideration by the Appeals Chamber of the Court.³ Accordingly, the Prosecution will confine its submissions related to the Decision to the question of whether the specific requirements of Article 82(1)(d) are met. The Prosecution nonetheless can anticipate that its appeal will cover, *inter alia*, the scope of victim participation, as envisioned by the Decision, the set of supplementary functions and powers with which the Pre-Trial Chamber has vested itself, the test for determining that the victims' personal interests are affected, within the terms of Article 68(3), the method of examination developed by the Chamber for the purposes of making Rule 85 determinations, and the consequences of the Decision for the efficient functioning of the Court's ability to conduct focussed and efficient investigations and trial, including its ability to protect persons and sensitive information and to guarantee an objective and impartial investigation and prosecution of crimes within its jurisdiction. Some of the issues that will be raised in the appeal will be discussed in this submission, but only in relation to the Decision's impact on the fairness and expeditiousness of the proceedings, and the need to allow for timely intervention of the Appeals Chamber.⁴

The Decision fulfils the criteria for granting leave to appeal under Article 82(1)(d)

9. The Prosecution respectfully submits that, as it will demonstrate below, the Decision involves a range of issues which affect the fair and the expeditious conduct for the proceedings,⁵ within the terms of Article 82(1)(d). Because this showing is sufficient for the purposes of establishing that leave to appeal ought to be granted, the Prosecution

³ *Ibid.*, para. 23.

⁴ The Prosecution has carefully considered the interpretation of Article 82(1)(d) set out by Pre-Trial Chamber II in its decision of 19 August 2005. It respectfully disagrees with important elements of that decision. In particular, the Prosecution believes that the PTC-II decision did not properly consider the implications of structural differences between the ICC and other international criminal tribunals (namely the Pre-Trial Chamber, and its potential for judicial decisions at a much earlier stage, which may have broad implications and are further removed from the context of any particular trial), and also erred in the interpretation of certain legal authorities. The Prosecution will not make detailed submissions setting out its concerns with that decision as (1) this Pre-Trial Chamber, as an independent Chamber of the Court, is not bound to follow that decision, and (2) the Prosecution submits that this application fulfils the requirements of Article 82(1)(d) even on PTC-II's narrower interpretation. The Prosecution does, however, reserve its position on the interpretation of Article 82(1)(d).

⁵ While this decision affects both the fair and the expeditious conduct of the proceedings, Article 82(1)(d) arguably only requires that a party show that the decision affects either the fair or the expeditious conduct. The Court is obliged to ensure fair and expeditious proceedings (e.g. Articles 64(2) and (3)(a)); once proceedings are not fair (or not expeditious), they are no longer "fair and expeditious".

ICTY and ICTR case law interpreting substantively the same provision (Rules 73(B) and 72(B)(ii), which were modeled on Art 82(1)(d)) have confirmed that once a decision affects the fair conduct of proceedings, or the expeditious conduct of proceedings, it has fulfilled the test of affecting the "fair and expeditious conduct of proceedings" – see e.g. *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004 at para 5, *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003; *Prosecutor v Blagojevic et al*, IT-02-60-PT, Decision on Joint Defence Motions for Certification of Decision on Joint Defence Motions for Reconsideration, 10 February 2003.

need not develop any arguments as to whether the Decision could affect the outcome of any future trial.⁶ The Prosecution further submits that immediate resolution by the Appeals Chamber will materially advance the proceedings.

10. Before developing these arguments, the Prosecution must stress that the Decision does not deal with merely procedural issues, but with matters that go to the core of the Court's functions, such as the scope of the authority and functions of the Pre-Trial Chamber, the Court's ability to protect confidential information, to provide for the protection of victims and witnesses, including those victims that may face risks due to their participation in the Court's process, the degree to which the integrity and impartiality of the investigation must be protected from influences not permitted by the Statute, and the scope of the right of victims to meaningfully participate in the Court's process. That a decision aimed at establishing the delicate balance between these fundamental interests will impact on the fairness and expeditiousness of the proceedings is a natural consequence of the importance of the issues at hand. Such a crucial, constitutional decision cannot but influence the fairness and expeditiousness of ongoing proceedings.
11. The Prosecution notes that the Decision itself recognizes its far-reaching consequences: victim participation is seen as a vehicle to clarify details and identify the alleged perpetrators during the investigation, punish the persons responsible for the crimes and establish compensation,⁷ i.e. all matters that go to the core of the Court's investigative activities and its criminal process.

The victim participation set out in the Decision will significantly affect the fair conduct of proceedings

12. The Prosecution submits that a decision that impacts on the fundamental rights and obligations of a participant affects the fairness of the proceedings, within the context of Article 82(1)(d). This includes decisions which adversely affect the balance between

⁶ The language of Article 82(1)(d) is clear. the decision must involve an issue that would significantly affect "the fair and expeditious conduct of the proceedings *or* the outcome of trial". The Prosecution is not ruling out the possibility that the Decision have an impact on the outcome of any future trial held in the DRC situation. However, this impact would also stem from the consequences to the fairness and expeditious conduct of the proceedings that the decision entails; for instance, the Decision could lead to particular charges being dismissed at the trial stage on the basis that, due to flaws in the pre-trial process tainting its integrity and fairness, a fair trial pertaining to those charges is no longer possible.

⁷ Decision, paras. 63 and 72.

the participants, but is not limited to mere balance between the participants present:⁸ a Chamber might proceed on an arbitrary basis, or otherwise impinge on the rights of the participants, but do so equally; such proceedings could not be described as “fair” just because all participants are mistreated equally. The fair conduct of future proceedings can be affected by decisions taken during the investigative and pre-trial phase.⁹ A decision need not be unfair to a participant before the Chamber at this point to render future proceedings unfair, if that decision impacts on, or fails to properly respect, the rights and interests of a future participant. The Prosecution submits that considerations on the fairness of the proceedings *vis-à-vis* future accused persons are of particular significance in this context. The crucial question is the impact that the current decision will have on the fairness of the various proceedings that will develop in the situation.

13. The Decision affects the fairness of ongoing and future pre-trial proceedings held before the Pre-Trial Chamber in various ways: *first*, the Decision, by allowing external factors into the investigative process, endangers the integrity of the investigation, and thus the fairness of any proceedings stemming from it, thereby opening the door for future allegations that the inquiry was subject to undue influence and bias; moreover, the Decision can lead to exposure of victims and witnesses, thereby affecting their safety, well-being and privacy; *second*, the broad scope of victim participation envisioned in the Decision creates a serious imbalance between victims and any future accused persons; *third*, by forcing itself to make an unnecessary determination at this stage as to the existence of crimes within the jurisdiction of the Court and the emerging prejudice allegedly suffered by the Applicants, the Chamber engages in inquiry and fact-finding activities not provided for in the Statute, and capable of giving rise to allegations of prejudgment.

(a) *Detriment to the impartiality and integrity of the investigation and related proceedings*

⁸ “the principle of equality of arms falls within the fair trial guarantee under the Statute” – *Prosecutor v Tadic*, IT-94-I-A, Judgement, 15 July 1999 at para 44; “The right to a fair trial is a general concept encompassing several more specific rights. ... The right to a fair trial implies the principle of equality of arms.” - Zappala *The Rights of the Accused* in Cassese, Gaeta and Jones (ed) (2002) 1319 at 1328-29

⁹ Given the nature of judicial involvement in the investigation phase of the other tribunals, there is little jurisprudence on this point. However, see *Prosecutor v. Mile Mrksic*, IT-95-13/1-PT, Decision Granting Certification To Appeal, 29 May 2003.

The unique structure of the ICC requires the Chamber to recognize the impact that its decisions can have on the fairness and the conduct of subsequent proceedings - “there cannot be a really *fair* trial, if this fairness has not been practiced and guaranteed appropriately in the phases prior to trial.” - Machesiello *Proceedings before the Pre-Trial Chambers* in Cassese, Gaeta and Jones (ed) (2002) 1231 at 1232.

14. A vital aspect of the fairness of the proceedings is not only the independence and impartiality of the Chamber, but also the independence and impartiality of the Prosecution during the conduct of the investigation, and the requirement that the investigation be carried out in an independent and objective manner, with equal care being given to incriminating and exonerating circumstances (Article 54(1)(a)). These statutory requirements of objectivity and independence demand that the investigation be insulated from any influence not permitted by the Statute and therefore, capable of improperly tainting its objectivity and integrity.¹⁰
15. Further, the duties shared both by Prosecution and Pre-Trial Chamber *vis-à-vis* the protection of victims and witnesses during the investigation require the development and maintenance of an adequate protective system, preventing undue access to sensitive information. These particular requirements fully apply to any proceedings stemming from, or connected with the investigation, the fairness of which ought also to be judged by the manner in which these proceedings protect the privacy, security and well-being of victims and witnesses.
16. The Decision appears to recognize some of these considerations (see *inter alia* Decision, at paras. 59 and 60). At the same time, it provides for an important role for victims *vis-à-vis* the outcome of the investigation, by stating that their personal interests are involved since it is at this investigation stage that the alleged criminals must be identified before they can be charged (Decision, at para. 72). Further, the Decision opens the door for direct – and unregulated – presentation of evidentiary or documentary material (“*pièces*”) by victims to the Chamber during the investigative stage,¹¹ thereby allowing for consideration by the Chamber of material collected *outside* the framework of the investigation conducted by the Prosecution in compliance with the requirements

¹⁰ Article 42(1) states that the staff of the Office of the Prosecutor “shall not ... act on instructions from any external source”. This means that “the Office of the Prosecutor operates in its own right and cannot be instructed by any other organ or the Court or any external source, to select or prioritise specific targets, - Bergsmo and Harhoff “Article 42” in Triffterer (ed) at [7].

¹¹ See Decision, paras. 59 and 71, and page. 49. The Prosecution notes that “*pièces*” is used six times in the French version of the Decision. In the English version, this is translated as “documents” on three occasions (paragraphs 71, 76, and the operative part of the decision at page 49), and as “material” on the other three occasions (paragraphs 15, 59 and 72). *Vocabulaire juridique* (5^e éd) (Presses Universitaires de France, Paris 2004) includes in the definition of “*pièces*” “tout élément (not. de preuve), tout objet (matériel, fabriqué)” (at p. 671), and *Dahl’s Law Dictionary – Dictionnaire Juridique Dahl* (2nd ed / 2^e éd) (Dalloz, Paris: 2001) translates “*pièces*” as “written evidence” (at pp. 245-246). As the French version of the Decision is authoritative, the Prosecution considers that it must take the broader reading of “*pièces*” as meaning any material, including evidentiary material.

and safeguards of Article 54(1). The absence in this process of the protections and guarantees offered by the statutory provisions governing the collection of evidence can very easily lead to consideration by the Chamber of unreliable and prejudicial material, and even of material that is forged or fabricated. In addition, the Chamber, it is respectfully submitted, lacks the investigative tools made available to the Prosecution by the Statute and thus has no means of fully testing the reliability of any such submitted material. At a minimum, the Chamber, through the receipt of such material, is on the road to duplicating the efforts of the Prosecution, or evaluating and assessing different material than that which the Prosecution has collected.

17. Further, the broad scope of the rights of participation envisioned by the Decision poses other significant dangers in terms of the integrity and impartiality of the investigation. Only to provide a few examples: whereas the Chamber concludes that in principle victims should not participate in closed session proceedings, it reserves its right to determine otherwise in light of their interests (Decision, at para. 74); the Chamber concludes that access to non-public documents in the case-file will not be available to victims “for the time being” (Decision, at para. 76 and the *dispositif*);¹² victims are in principle allowed to participate in Article 56(3) evidence gathering activities (Decision, at para. 73); they also have a right to request from the Pre-Trial Chamber “special procedures”, which the Chamber does not define. The Decision, accordingly, provides for multiple possible “points of entry” to the investigation and the information collected in it. The negative consequences of undue access to investigative material by third parties should be apparent: *inter alia* potential disclosure of sensitive information, destruction of evidence or endangering persons.

18. These dangers are heightened by the fact that the Decision allows for a broad category of persons to participate in the proceedings and does not provide for any safeguards to prevent that the process of participation be abused with the aim to obstruct or impede the investigation and prosecution of crimes within the jurisdiction of the Court. In the instant case, the intervention by a well-regarded non-governmental organization may assuage fears of an improperly motivated request for participation. However, two considerations should be clear: first, the right to participation must be granted in a

¹² The lack of detail in the Decision as to how the Chamber intends to conduct these determinations is an additional factor of concern. The Prosecution notes, for instance, that the Decision, as it stands, enables the Chamber to allow for participation in a closed session hearing where sensitive matters such as the scheme for victim and witness protection put in place in a given investigation will be discussed, even over the objections of the Prosecution.

consistent and non-discriminatory manner; second, the risks of fabricated request for participation aimed at infiltrating the Court's investigative activities are apparent and should not be underestimated. It is completely unclear, for instance, how the Chamber will be in a position to timely detect and weed out fabricated presentations orchestrated by rogue organizations. In some instances, even good faith presentations can lead to subsequent leaks of protected information; for instance, in the event of an inter-ethnic conflict, the Chamber may, even inadvertently, allow for access to sensitive information to victims belonging to the same ethnic group to which the persons under investigation belong. Further, under the broad interpretation of victim and of when a victim's personal interests are affected in the Decision, and given the complexity of the situation in the DRC, persons who may be potential accuseds in one case may well be accepted as victims in the broader context of the situation.

19. The Prosecution respectfully submits that the system adopted in the Decision, due to the inherent limitations of the Chamber, the lack of adequate guidelines or regulations, and the broad forms of victim participation envisioned, does not provide sufficient safeguards *vis-à-vis* the dangers described above. It is submitted that, in light of the seriousness and weight of these dangers, including the risks of jeopardizing the privacy, safety and well-being of victims and witnesses, the Decision is capable of severely damaging the fairness of ongoing and future proceedings.

(b) *Prejudice to the rights of the defence*

20. The Chamber has established a system broadly enabling victims unrelated to any allegations against any future accused person to participate in the investigation. Under the terms of the Decision, these victims are entitled to provide their views, concerns and material affecting the current DRC investigation (Decision at para. 70). Their participation may include participation under evidence gathering procedures under Article 56(3) or procedures related to the Chamber's exercise of its functions under Article 57(3)(c) (Decision, at paras. 73 *et seq*). Victims are also provided with an opportunity to request undefined "special procedures" (Decision, at para. 73), and with a right to be informed of all Court proceedings, among other rights to access relevant material (Decision, at para. 76).¹³

¹³ The Decision leaves open the possibility for victims to apply for, or be granted, access to non-public documents in the situation file, by stating that they are not granted such access "for the moment" – para 76 of the Decision

21. The breadth and scope of these rights effectively place victims in a unique position to influence the outcome of pre-trial proceedings by means of their representations and interventions, including their ability to place evidentiary material before the Chamber. In this sense, the Prosecution notes that the system created by the Decision appears to be closer to a *partie civile* system (but, in a striking difference, not limited to particular crimes being investigated) than to a model of participation confined to the presentation of views and concerns, within the terms of Article 68 (3). Particularly relevant is that whereas in proceedings conducted after an individual case has been formed, interventions by victims will be counterbalanced by those of counsel representing the arrested person or the person who has appeared pursuant to a summons, this will not happen in the context of an investigation, where typically no individuals are identified as potential accused persons and accordingly afforded procedural rights of participation. Consequently, the Decision can be criticized as seriously affecting the balance between victims and accused persons during the proceedings: it vests situation victims with a range of procedural rights that no person under investigation enjoys under the Statute or the Rules. By so doing, the Decision creates an imbalance between victims and the defence capable of affecting the fairness and integrity of the proceedings.
22. Whereas the Chamber appears to be aware of the problem, it is respectfully submitted that the Decision provides no satisfactory solution: the Chamber merely states that it must arrange for the victims to take part in a way that respects the rights of the defence, and notes that the Chamber has appointed a special counsel to represent the interests of the defence (Decision, at para. 70). The Prosecution submits that while the system of *ad hoc* counsel may be appropriate for confined and specific procedures (such as Article 56 evidence gathering steps) it is inadequate for the purposes of effectively reacting to the type of participation envisaged by the Decision throughout the entire investigative stage, *in lieu* of defence counsel instructed by a person charged with a crime. The Prosecution will develop these arguments further in its appeal brief, if this Chamber grants this application for leave to appeal.

(c) The Chamber's use of a "grounds to believe" test for the purposes of entering a Rule 85 determination

23. Perhaps one the most striking features of the Decision is the adoption of a particular test for the purpose of enabling the Chamber to determine whether, on a case-by-case basis, a person who seeks participation at the investigative stage as a victim qualifies as such,

within the specific terms of Rule 85. This test requires the Chamber to verify the existence of a crime within the jurisdiction of the Court, to which the alleged prejudice must be linked. This particular aspect of the test is connected to the manner in which the Chamber has interpreted the victims' "personal interests", within the terms of Article 68(3), on the one hand; and on the other, to the obvious fact that during the investigation Pre-Trial Chambers are ordinarily not yet in possession of allegations brought by the Prosecution, in the form of arrest warrant applications or any request for confirmation of charges, indicating the existence of crimes within the jurisdiction of the Court.

24. According to the Decision, the Chamber will determine in each case whether there are "grounds to believe" that the person has suffered prejudice stemming from the commission of a crime within the jurisdiction of the Court, which has allegedly been committed within the temporal and territorial limits of the situation in question (see *inter alia* Decision, at para. 100). For these purposes, the Chamber will first resort to the statements of the applicants, and then to the submissions made by the Prosecution and the *ad hoc* counsel. Subsequently, the Chamber will resort to "other sources" such as UN official reports. On the basis of this material, the Chamber will make its determination. The Chamber follows just this process in its Decision, in concluding on the basis of victims' unsworn representations and UN reporting that there are grounds to believe the existence of at least six crimes within the jurisdiction of the Court. These findings are made in the Decision without the benefit of the investigative tools granted to the Prosecution, and under a standard imported from an arguably irrelevant statutory provision, Article 55(2) (entitled "Rights of Persons During an Investigation").
25. The procedure briefly described above is a particularly complex and sensitive issue within the Decision. The Prosecution will provide detailed submissions on the appropriateness of this test to the Appeals Chamber, if leave to appeal is granted. At this stage, the Prosecution need only highlight the reasons why the adoption, and application, of this particular test affects the fairness of the proceedings, within the terms of Article 82(1)(d). The Prosecution initially notes that the test attributes to the Chamber inquiry functions that are not contemplated in the Statute or in the Rules of Procedure and Evidence. Under the scheme envisaged by the Decision, the Chamber is not a mere recipient of information and submissions made by the parties, but it is free to resort to – undefined – "other sources" in order to gather any additional material that the Chamber considers necessary for the purposes of making its determination. Secondly,

the Chamber is expected to make findings of fact as to the existence of crimes within the jurisdiction of the Court, applying a “grounds to believe” standard.

26. The Prosecution notes that to the extent that the allegations brought by the applicants overlap factually with the scope of the Prosecution’s investigative efforts, the Chamber may be entering a finding of fact pertaining to the same crimes upon which it will be subsequently called to make a “reasonable grounds” determination for the purposes of issuing an arrest warrant under Article 58 of the Statute. Even if the crimes are not exactly the same, but are interrelated, the Chamber may be entering findings on issues it will be required to determine later, such as involvement of an armed group in a given geographical area, existence of an extended attack on a civilian population or membership of certain individuals in a particular group. By acting in this particular manner, the Chamber exposes itself to the criticism that at the time it makes a determination for the purposes of Rule 85, it is simultaneously *prejudging*, at a minimum, whether the crimes in question have been committed, thereby potentially affecting the integrity of any subsequent determination under Article 58. This arguable *prejudgement* will frequently also cover particular features of the crimes, such as the nature of an armed conflict and/or the existence of the required contextual element for crimes against humanity.¹⁴ Depending on how far the Chamber’s initial conclusions under the adopted test reach, the Chamber may extend this criticism to other relevant factors for the purposes of Article 58 determinations, such as identity of potential perpetrators, or factors pertaining to the future necessity of arrest.
27. It is respectfully submitted that the Chamber’s structural limitations increase the dangers explained above. Pre-Trial Chambers of this Court are not investigative chambers. They were not intended to perform investigative functions beyond their specific instances of intervention at the investigation stage, and accordingly they are not equipped with the necessary tools and resources to efficiently gather and analyse material as it is required in inquiry activities, including determining the reliability of sources. Consequently, by engaging in inquiry and fact-finding activities such as those contemplated in the Decision, the Chamber may not only be reaching premature and inappropriate factual conclusions, but also doing so on the basis of information the reliability of which it can only test in an extremely limited fashion.

¹⁴ In this sense, the Prosecution notes that the Decision refers to Article 8(2)(c) and (e) as possible basis for jurisdiction, as well as to Article 7 of the Statute. See, *inter alia*, para. 123.

28. Accordingly, it is respectfully submitted that the combination of inquiry and fact finding functions entailed in the test adopted by the Chamber is capable of affecting, at a minimum, the fairness of any Article 58 proceedings conducted by the Chamber after its determinations as to the applicability of Rule 85, but potentially also of other related proceedings, such as those envisioned by Article 61.

The victim participation set out in the Decision will significantly affect the expeditious conduct of proceedings

29. The Prosecution submits that the expeditious conduct of proceedings means the timely and efficient conduct of proceedings.¹⁵ This principle requires that decisions at all stages not unnecessarily delay the overall determination of responsibility.¹⁶ Any decision which compromises the efficient conduct of the ongoing proceedings in the case or situation at hand, or which delays the investigation and prompt determination of responsibility for the crimes under investigation, affects the expeditious conduct of the proceedings.¹⁷ This could include a delay to a trial,¹⁸ or a pre-trial process that causes the investigatory or pre-trial phase to be unduly long or inefficient or otherwise affects the expeditious nature of later proceedings.¹⁹

¹⁵ Expeditious proceedings is intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003: “the Court’s obligation to do justice expeditiously and effectively, as well as fairly.” (para 6); “we can only do justice that is expeditious, fair and efficient” (para 25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003, where in relation to each of the two grounds the Chamber noted that the issue “will significantly affect the efficient and expeditious conduct of the proceedings”, Jones and Powles, *International Criminal Practice* at para 8.5.60.

¹⁶ Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place.

¹⁷ The prompt determination of responsibility is not just an interest of the defence, but also of the prosecution, victims, and the international community as a whole. See e.g. *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, at para 8; and Terrier, *Powers of the Trial Chamber in Cassese, Gaeta and Jones (ed) (2002) 1259 at 1264-65*

¹⁸ *Prosecutor v Milosevic*, IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004, at paras 56, 64-65 and 70; *Prosecution v Brima, Kamaru and Kanu*, SCSL-2004-16-T, Decision on Joint Defence Application for Leave to Appeal against the ruling of Trial Chamber II of 5 April 2005, 15 June 2005 at para 21-22; *Prosecutor v Kallon*, SCSL-2003-07-PT, Decision on the Defence Application for Leave to Appeal, 10 December 2003 at para 34. A Trial Chamber may “limit the amount of time that each party has to present evidence in the interests of an expeditious trial and the efficient administration of justice” - Jones and Powles, *International Criminal Practice* (2003: OUP) at para 8.5.60.

¹⁹ *Prosecutor v Blagojevic et al*, IT-02-60-PT, Decision on Accused Nikolic's Motion to Order the Prosecution to File Copies of All Witness Statements whom the Prosecution Intends to Call for Trial and Copies of all Exhibits the Prosecution Intends to Tender at Trial, 10 February 2003.

30. The Decision to allow participation of victims in the broad terms of the Decision seriously affects the expeditious and efficient conduct of the investigation and of any and all cases that flow from it.
31. If the approach set out in the Decision is consistently applied, then the Chamber can potentially allow any person who claims to have suffered prejudice as a result of an attack (or other potentially international criminal act) in the DRC since 1 July 2002 to participate in the investigation. As already stated at the beginning of this document, given the massive scale of alleged criminality in the DRC, this could result in tens of thousands of individuals having the right to participate at the investigation stage. The impact of dealing with this near-limitless class of victims participating in the investigation could not fail to have a grave impact on the expeditious conduct of the investigation and the proceedings, and the effective administration of international justice. The Court does not work with unlimited resources. Virtually unlimited participation of victims in the investigation will gravely impact on the ability of the whole Court to conduct proceedings in an expeditious and efficient manner.
32. The Decision creates a serious burden for all organs of the Court, with an apparent detrimental impact on the efficiency of pre-trial proceedings. To begin with, the Decision will impact on the Prosecution, which works with finite resources and must be allowed to conduct its investigation of crimes in an expeditious manner in order to fulfil its mandate. The Prosecution will be required, as a matter of process and fairness, to consider and respond to the views put forward by all victim participants, which will already have a severe impact on the expeditious conduct of the investigation and proceedings. In addition, the Prosecution will necessarily have to address issues related to the victims' access to specific hearings and materials filed with the Chamber, to the presentation of material by victims to the Chamber, and to any specific measures requested by them. As new groups of victims are granted the right to participate, the Prosecution will be forced to respond to constantly changing array of issues. This will further divert resources from a methodical and objective investigation to address subjective submissions and requests of individual victims.
33. Even more apparent are the detrimental consequences for the expeditiousness of the proceedings that the new role that the Decision attributes to the Chamber will entail: the Chamber will be required to deal with petitions coming from potentially thousands of victims, to decide litigation on matters such as the scope of their intervention, to decide

on each particular case whether an individual applicant qualifies as a victim, within the terms of Rule 85, including engaging in the fact-finding functions that the Decision requires, and to determine in those cases in which the Chamber is acting under Article 56(3) or 57(3)(c) whether the victims' personal interests require them to intervene in the proceedings (a determination that necessarily will have to be made on a case-by-case basis). The Prosecution notes that the Chamber may also be faced with challenges brought by arrested persons related to the involvement of victims during the investigative stage. This burden adds to the already heavy set of duties and functions with which the Chamber is tasked under the Statute and the Rules.

34. In addition, to the extent that the Decision permits the Chamber to receive material presented by victims, the Chamber will have to set up a system to process, manage and store that material. The Decision does not provide any guidance as to how and with which resources the Chamber intends to perform these or other activities, including enabling timely access by the defence to the material. Further, the lack of any guidelines or regulations as to how far the alleged right of victims to present material to the Chamber goes can lead to the transformation of the Chamber into a recipient of evidence during the investigation, acting in parallel to the Prosecution's evidence-gathering functions. Depending on the intensity of the flow of material, the Chamber may find itself very soon entangled in evidence management activities exceeding its capacity and infrastructure.
35. The Registrar will be required to perform numerous functions pertaining, *inter alia*, to notice, provision of legal advice, and organization of legal representation, as provided for in Rules 16, 90, 92 and Regulation 86 *vis-à-vis* all victims that claim that they have suffered harm in the context of the entire situation that has been referred to the Court. Depending on how Rule 17 is interpreted, the Victims and Witness Unit may be called to extend its efforts to cover those victims that have successfully requested participation in the investigation. Because victims at this point, under the Decision, are being defined with respect to the situation, without regard to any case or the focus of the Prosecution's investigation, this system could dilute the effectiveness of measures and expose witnesses who are at higher risk by virtue of being related to the focus of the Prosecution's investigation within the broader situation.
36. While this may not have been the intent of the Decision, these are its ongoing implications. Allowing the participation of such a wide range of persons as victims

during the investigation – especially with such a low requirement for the link of personal interests being affected, and the right to initiate hearings – in the manner set out in the decision could fatally compromise the expeditious conduct of the investigation, preparation of cases against suspects, and the ultimate hearing of trials.

Immediate resolution will materially advance the proceedings

37. The purpose of restricting interlocutory appeals is not to deny a party the ability to appeal an issue and have an error corrected (this being a fundamental right). The purpose is to regulate whether an issue is best dealt with by an appeal now, or whether it should be left to be considered as part of a final appeal.²⁰ The purpose is to avoid delays by ensuring that errors that can properly be dealt with as part of the final appeal are reserved until that point. The Prosecution thus submits that in considering whether immediate resolution by the Appeals Chamber would materially advance the proceedings for the purposes of Article 82(1)(d), the Chamber should consider whether the issues at bar can be corrected by the Appeals Chamber in the context of a final appeal,²¹ and whether an interlocutory appeal would delay, rather than promote the expeditious resolution of, the instant proceedings (including consideration of what stage of proceedings the issue is raised at).²²

38. Leave to appeal ought to be granted if resolution of the issues will materially advance the ongoing proceedings that will flow from the current Decision, across the situation.²³ However the Prosecution submits that the Chamber should also consider the likely recurrence of the issue: an issue is riper for early consideration by the Appeals Chamber

²⁰ *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004 at para 6; *Prosecutor v. Slobodan Milosevic Contempt Proceedings Against Kosta Bulatovic (Order of 17 September 2003)*, IT-02-54-R77.4, Order on Defence Motion Seeking Reconsideration of Order on Contempt Concerning Witness Kosta Bulatovic and Alternatively Motion Requesting Certification, 3 May 2005. See also *Prosecutor v Halilovic*, IT-01-48-PT, Separate Opinion of Judge O-Gon Kwon Appended To Trial Chamber Decision Dated 12 January 2005, 14 January 2005 at para 5.

²¹ i.e. whether resolution of the issue by the Appeals Chamber at this stage would avoid the risk of a lengthy trial that was later nullified: *Prosecutor v Bagosora*, ICTR-98-41-T, Decision of 11 September 2003 at para 9.

²² For example *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, at paras 7 and 8; *Prosecutor v. Mile Mrksic*, IT-95-13/1-PT, Decision Granting Certification To Appeal, 29 May 2003; *Milosevic contempt proceedings* decision of 3 May 2005, above at note 20; *Prosecutor v Hadzihasanovic*, IT-01-47-T, Decision on The Request For Certification to Appeal the Decision Rendered Pursuant to Rule 98bis of the Rules, 26 October 2004

²³ Rather than being restricted to the specific hearing in which the issue was raised. This was implicitly recognized in para 49 of the PTC-II decision. See also *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecution's Application for Certification under Rule 73(B) concerning Rule 70, 29 August 2002; *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecution's Application for Certification under Rule 73(B) concerning the Evidence of an Investigator, 20 June 2002; *Prosecutor v. Ntahobali*, ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions For Certification To Appeal The "Decision on Defence Urgent Motion To Declare Parts of The Evidence Of Witnesses RV And QBZ Inadmissible", 18 March 2004 at para 26.

if it is likely to recur, in this situation²⁴ (which will materially advance these proceedings) or in others²⁵ (where consideration by the Appeals Chamber favours the efficient use of judicial resources).

39. The Prosecution respectfully submits that timely intervention by the Appeals Chamber will advance the proceedings in multiple ways:

(a) *Firstly*, to the extent that the Decision is, as demonstrated, capable of affecting the fairness of the proceedings, timely intervention of the Appeals Chamber will avert the danger that pre-trial proceedings held under of the Decision are later nullified, in whole or in part, by subsequent decisions in the same case.

(b) *Secondly*, if the Prosecution appeal is allowed and the Decision is overturned or modified in its scope, intervention by the Appeals Chamber will foster judicial economy by avoiding unnecessary implementation of the onerous terms of the Decision, in relation to the Applicants in this particular instance and in relation to any further applications filed in this situation. The proceedings will be advanced by avoiding unnecessary hearings, as well as delays and inefficiencies inherent in the requirement of additional participants in properly convened hearings.

(c) *Thirdly*, timely intervention by the Appeals Chamber will provide the required certainty about the scale of victim participation at an early stage, thereby allowing all organs of the Court affected by the Decision to effectively plan and conduct their tasks in an organized manner.

40. Because of the early stage in the progress of this situation, granting leave to appeal will not cause any delay to any ongoing proceedings. Rather, as outlined above, granting leave to appeal the Decision at this time will avoid substantial potential delays as the investigation and subsequent proceedings develop.

41. The Prosecution further notes that the current decision is not susceptible of being cured as part of a final appeal, a reason strongly militating in favour of leave to appeal being granted. A broad decision such as this that affects participation across an entire *situation* cannot be properly addressed as part of a final appeal in any particular *case*; and such structural, situation related issues could not be cured by a remedy granted in

²⁴ *Milosevic* decision of 29 August 2002 and *Milosevic* decision of 20 June 2002, above at note 23.

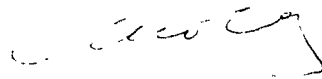
²⁵ *Prosecutor v Mrskic*, IT-95-13/1-PT, Decision Granting Certification To Appeal, 29 May 2003. This is recognized as an "additional argument" in PTC-II decision, at para 54.

any one case. In this sense, it must be stressed that the Chamber's decision establishes a *system* of participation applicable to all investigative activities conducted by the Prosecution within the framework of the DRC situation.

42. To the extent that it purports to establish a general system of victim participation in the investigation, the Decision raises matters of fundamental importance not only for these proceedings, but also for other proceedings, present and future, before this and other Pre-Trial Chambers. While recognizing that issues of general importance, and the fact that an issue has not yet been considered by the Appeals Chamber, are not in themselves grounds for granting leave to appeal, the Prosecution submits that the importance of the issues raised by the Decision, given the novel structures facilitating participation of victims, and the desirability of grounding that participation on solid statutory interpretations in this and in future cases, give further emphasis to the desirability of prompt consideration of this issue by the Appeals Chamber. It is in the interests of the Court as a whole, including this Chamber, that the Decision be fully scrutinized by the highest judicial body of the Court and that its correctness or incorrectness be determined after careful consideration of all arguments pertaining to it. On the basis of these considerations, the Prosecution respectfully submits that the Chamber ought to give the Appeals Chamber the opportunity to exercise its review functions in relation to the Decision and the important matters raised by it.

Conclusion

43. For the foregoing reasons, the Prosecution respectfully requests the Chamber to:
- (a) Consider this application for leave to appeal to have been properly filed within the time-limits set forth in Rule 155;
 - (b) To grant leave to appeal the Chamber's 17 January 2006 Decision.



Luis Moreno-Ocampo
Prosecutor

Dated this 23rd day of January 2006

At The Hague, The Netherlands

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