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PRE-TRIAL CHAMBER I

Before: Judge Anita Ušacka, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Decision on the OPCD's Application for Leave to Appeal the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08"

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

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Mr Joseph Keta
Mr Jean Luis Gilissen

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**
Ms Paolina Massidda, Principal Counsel

The Office of Public Counsel for the Defence
Mr Xavier-Jean Keïta, Principal Counsel

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**
Ms Fiona McKay

Other

I, Judge Anita Ušacka, judge at the International Criminal Court (“the Court”);

NOTING the “Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08”¹ (“the Impugned Decision”) issued by the Single Judge on 4 November 2008;

NOTING the “Request for Leave to Appeal the ‘Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08’” (“the Request for Leave to Appeal”),² filed by the Office of Public Counsel for the Defence (“the OPCD”) on 10 November 2008;

NOTING the “*Réponse des victimes a/0189/06, a/0193/06, a/0196/06, a/0197/06, a/0198/06, a/0201/06, a/0202/06, a/0204/06, a/0205/06, a/0207/06, a/0208/06, a/0211/06, a/0212/06, a/0216/06, a/0217/06, a/0218/06, a/0223/06, a/0334/07, a/0335/07, a/0336/07, a/0337/07 à la demande du Bureau du Conseil Public pour la Défense de pouvoir interjeter appel de la ‘Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08’*”,³ filed by the Legal Representative of Victims a/0189/06, a/0193/06, a/0196/06, a/0197/06, a/0198/06, a/0201/06, a/0202/06, a/0204/06, a/0205/06, a/0207/06,

¹ ICC-01/04-545.

² ICC-01/04-546.

³ ICC-01/04-548.

a/0208/06, a/0211/06, a/0212/06, a/0216/06, a/0217/06, a/0218/06, a/0223/06, a/0334/07, a/0335/07, a/0336/07, a/0337/07 on 13 November 2008;

NOTING the “*Réponse du BCPV, représentant légal des victimes a/0190/06, a/0191/06, a/0192/06, a/0195/06, a/0206/06, a/0215/06 et a/001/08 à la demande d’autorisation d’interjeter appel de la Décision du 4 novembre 2008 déposée par le Bureau du conseil public pour la Défense*”⁴ filed by the Office of Public Counsel for Victims (“the OPCV”) on 14 November 2008;

NOTING article 82(1)(d) of the Rome Statute (“the Statute”);

I. Introduction

1. On 4 November 2008, the Single Judge issued the Impugned Decision, in which she granted the procedural status of victim in the Situation in the Democratic Republic of the Congo to thirty applicants, and rejected six applications on various grounds.⁵

II. The Request for Leave to Appeal and the Responses

A. The Request for Leave to Appeal

2. By way of background, in two separate submissions, dated 12 June 2008⁶ and 18 July 2008⁷, respectively, the OPCD raised concerns deriving, first, from a Human Rights Watch Report “concerning the falsification of victim applications and the provision of financial inducements to applicants”, and second, from certain applications which, it submitted, presented indicia of unreliability.

⁴ ICC-01/04-549.

⁵ ICC-01/04-545, p. 38-39.

⁶ ICC-01/04-500-Conf.

⁷ ICC-01/04-521-Conf.

3. The OPCD submitted various proposals aimed at providing a remedy in connection with these concerns.⁸
4. In its Request for Leave to Appeal the Impugned Decision, the OPCD takes issue with the fact that the decision did not directly address the proposals of the OPCD.
5. The OPCD therefore requests leave to appeal the following matter, which it submits arises from the decision:

whether it would be appropriate to impose any of the procedural safeguards proposed by the OPCD [in its submissions of 12 June and 18 July 2008] in relation to the role of intermediaries in the application process.⁹

B. *Response of the Legal Representative of Victims a/0189/06, a/0193/06, a/0196/06, a/0197/06, a/0198/06, a/0201/06, a/0202/06, a/0204/06, a/0205/06, a/0207/06, a/0208/06, a/0211/06, a/0212/06, a/0216/06, a/0217/06, a/0218/06, a/0223/06, a/0334/07, a/0335/07, a/0336/07, a/0337/07*

6. The Legal Representative of victims a/0189/06, a/0193/06, a/0196/06, a/0197/06, a/0198/06, a/0201/06, a/0202/06, a/0204/06, a/0205/06, a/0207/06, a/0208/06, a/0211/06, a/0212/06, a/0216/06, a/0217/06, a/0218/06, a/0223/06, a/0334/07, a/0335/07, a/0336/07, a/0337/07 submits that the question raised by the OPCD does not constitute an issue within the requirements of article 82(1)(d) of the Statute, but is merely “a question over which there is disagreement or a divergence of views”.¹⁰
7. Moreover, the Legal Representative suggests, the OPCD does not demonstrate how the question raised affects the fairness and expeditiousness of the

⁸ See, e.g. ICC-01/04-521-Conf., para. 7; ICC-01/04-500-Conf, paras. 13, 17, 20, 22, 23 and 24.

⁹ ICC-01/04-546, para. 15.

¹⁰ ICC-01/04-548, p. 4.

proceedings, nor has the OPCD raised any new arguments to which the Single Judge has not already responded in her decision of 4 November 2008. To the contrary, the Legal Representative suggests, the Single Judge's approach of taking the context as described by the victims into account in order to grant them victim status complies with the principle of *in dubio pro reo* and does not affect guarantees of fair trial.¹¹

8. Finally, according to the Legal Representative, the OPCD's argument that, at this stage, it is the only party able to challenge the intervention of intermediaries is not convincing and does not establish the necessity of an immediate resolution by the Appeals Chamber such as would materially advance the proceedings.¹²

C. *Response of the OPCV*

9. In the view of the OPCV, the OPCD has merely resubmitted its arguments regarding the role of intermediaries, despite the fact that the Single Judge considered and rejected them in her decision of 4 November 2008.¹³ Therefore, according to the OPCV, the OPCD's request appears to be a request for reconsideration rather than a request for leave to appeal.¹⁴ In this regard, the OPCV submits that the OPCD's requests do not identify an issue susceptible to interlocutory appeal, which constitutes a condition *sine qua non* for the Single Judge to grant a request for leave to appeal pursuant to article 82(1)(d) of the Statute.¹⁵
10. Citing previous jurisprudence of the Court, the OPCV submits that, given the limited objective of the process by which procedural status is conferred on

¹¹ ICC-01/04-548, p. 4.

¹² ICC-01/04-548, p. 4.

¹³ ICC-01/04-549, para. 10.

¹⁴ ICC-01/04-549, para. 11.

¹⁵ ICC-01/04-549, para. 14.

victim applicants to participate in the investigation phase of a situation, the Court's analysis of the applications need not be undertaken in such depth.¹⁶

11. Additionally, the OPCV observes that some of the suggestions put forth by the OPCD fail to distinguish between the different roles afforded to victims as opposed to witnesses.¹⁷ Therefore, according to the OPCV, the arguments of the OPCD find no basis in the statute or in the jurisprudence of the Court, in the sense that they aim to establish the need to introduce additional criteria and supplementary conditions in order to verify the truthfulness of the information provided by the applicants.¹⁸
12. Finally, in the view of the OPCV, the OPCD has not shown how the questions raised in its Request for Leave to Appeal would affect the fair and expeditious conduct of the proceedings, nor how an immediate ruling by the Appeals Chamber would materially advance the proceedings.¹⁹

III. Analysis of the Request for Leave to Appeal

A. *Legal Criteria Pursuant to Article 82(1)(d)*

13. For the Chamber to grant leave to appeal under article 82(1)(d) of the Statute, the issue identified by the appellant must: (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria:
 - a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and

¹⁶ ICC-01/04-549, para. 22.

¹⁷ ICC-01/04-549, para. 27.

¹⁸ ICC-01/04-549, para. 22.

¹⁹ ICC-01/04-549, para. 32.

- b. an immediate resolution by the Appeals Chamber may materially advance the proceedings.²⁰

14. In addition, this Chamber has followed the criteria originally set forth by Pre-Trial Chamber II concerning the purpose of appeals made pursuant to article 82(1)(d) of the Statute:

Pre-Trial Chamber II states in its decision that the Prosecutor's Application must be examined in the light of the following three principles: the restrictive character of the remedy provided for in article 82 (1) (d) of the Statute; the need for the applicant to satisfy the Chamber as to the existence of specific requirements stipulated by this provision; the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal.²¹

B. *Analysis*

15. At the outset, the Single Judge recalls that the Appeals Chamber has defined an "issue" which may form the subject of an interlocutory appeal as follows:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. . . . This conflict of opinion does not define an appealable subject.²²

16. In the instant case, the Single Judge considers that the question raised by the OPCD, "whether it would be appropriate to impose any of the procedural safeguards proposed by the OPCD",²³ was already submitted to the Single Judge in the context of the OPCD's observations of 12 June 2008²⁴ and 18 July 2008.²⁵ Thus, the matter was duly considered by the Single Judge and was addressed in her decision of 4 November 2008.²⁶

²⁰ See *inter alia* "Decision on the Prosecution for Reconsideration and, in the alternative, Leave to Appeal", 23 June 2006, ICC-01/04-01/06-165-Conf-Exp; "Decision on Defence Motion for Leave to Appeal", 18 August 2006, ICC-01/04-01/06-338; "Decision on Second Defence Motion for Leave to Appeal", 28 September 2006, ICC-01/04-01/06-489.

²¹ ICC-01/04-135-tEN, para. 19, citing ICC-02/04-01/05-20-US-Exp para. 15, unsealed pursuant to Decision ICC-02/04-01/05-52; *see also* ICC-01/04-168, para. 19 and ICC-01/04-535, para. 17.

²² ICC-01/04-168, para. 9.

²³ ICC-01/04-546, para. 15.

²⁴ ICC-01/04-500-Conf, paras. 12-15, 23.

²⁵ ICC-01/04-521-Conf, paras. 17, 21-22.

²⁶ ICC-01/04-545, para. 25.

17. In the view of the Single Judge, as framed by the OPCD above, the question identified constitutes a mere divergence of opinion regarding the determination made in the Impugned Decision. In this respect, the Single Judge notes that, rather than demonstrating whether or not the question identified constitutes an issue within the meaning of article 82(1)(d) of the Statute, many of the arguments advanced by the OPCD in this regard simply restate arguments previously submitted and therefore pertain to the merits of the underlying decision.²⁷
18. Thus, the Single Judge considers that the OPCD's Request for Leave fails to identify an "issue" within the meaning of article 82(1)(d) of the Statute, and the matter is therefore not subject to interlocutory appeal.

FOR THESE REASONS,

REJECT the request for leave to appeal the "Decision Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08" filed by the OPCD.

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



**Judge Anita Ušacka,
Single Judge**

Dated this Friday, 28 November 2008
At The Hague, The Netherlands

²⁷ See, e.g. ICC-01/04-546, paras. 9-12.