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**International
Criminal
Court**



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PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN DARFUR, SUDAN

Public Document

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ade Omofade

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta

Legal Representatives of the Applicants

Ms Wanda M. Akin
Mr Raymond M. Brown

I, Akua Kuenyehia, Judge at the International Criminal Court ("the Court");

NOTING the applications for participation in the proceedings a/0021/07,¹ a/0023/07 to a/0033/07² and a/0035/07 to a/0038/07³ (collectively referred to as "the Applications") seeking recognition of the right to participate as victims in the proceedings in the Situation in Darfur, Sudan and the Report prepared by the Registrar pursuant to regulation 86(5) of the *Regulations of the Court* for Pre-Trial Chamber I on the Applications filed confidentially and *ex parte* on 10 July 2007 in the record of the investigation in the Situation in Darfur, Sudan ("the Report");⁴

NOTING the decision of 23 July 2007⁵ issued by the Single Judge⁶ authorizing the Prosecution and the Office of Public Counsel for the Defence ("the OPCD") to file their observations on the Applications within 30 days of notification;

NOTING the "Request for Access to the Report of the Registry, and an Extension of Page limit", filed on 31 July 2007, in which the OPCD requested, *inter alia*, that the Single Judge order the Registry to transmit the Report to the OPCD;⁷

NOTING the "Decision suspending the time limit for the submission of observations on the applications for participation in the proceedings", issued on 2 August 2007, whereby the time limit for the transmission of the Applications was suspended, until otherwise decided by the Single Judge;⁸

¹ ICC-02/05-84 Conf-Exp-Anx 3.

² ICC-02/05-84 Conf-Exp-Anx 4 – 14.

³ ICC-02/05-84 Conf-Exp-Anx 15 – 18.

⁴ ICC-02/05-84 Conf-Exp.

⁵ ICC-02/05-85.

⁶ ICC-02/05-73.

⁷ ICC-02/05-87-Conf.

⁸ ICC-02/05-88.

NOTING the "Request on Behalf of Applicants a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07", filed on 8 August 2007, in which the Legal Representatives of the Applicants ("the Legal Representatives"), requested (a) that the Report not be transmitted to the Prosecution and the OPCD or, alternatively, that a redacted version of the Report be transmitted to them and (b) that an unredacted version of the Report be transmitted to the Legal Representatives;⁹

NOTING the "Decision on the Requests of the OPCD and the Legal Representatives of the Applicants Regarding the Transmission of the Report of the Registry under Rule 89 of the Rules of Evidence and Procedure", issued by the Single Judge¹⁰ on 21 August 2007, denying the requests filed by the OPCD on 31 July 2007 and the Legal Representatives on 8 August 2007 and ordering that the Report not be transmitted to the Prosecution, the OPCD and the Legal Representatives of the Applicants;¹¹

NOTING the "Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e)"¹² ("Request of 21 August 2007"), filed on 21 August 2007, in which the OPCD requested the Single Judge to order the Legal Representatives to provide supporting documentation concerning a number of matters;

NOTING the "Decision on the time limit to submit observations on applications for participation as victims a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 and on the extension of page limit" ("Decision of 22 August"), issued by the Single Judge on 22 August 2007, rejecting the extension of page limit and authorizing the

⁹ ICC-02/05-90.

¹⁰ ICC-02/05-92.

¹¹ ICC-02/05-93.

¹² ICC-02/05-94-Conf.

Prosecution and the OPCD to submit observations on the Applications within 30 days of notification;¹³

NOTING the "Request for the Single Judge to order the Prosecutor to disclose exculpatory materials"¹⁴ ("Request of 24 August 2007"), filed on 24 August 2007, in which the OPCD requests that the Prosecution be ordered to search for and disclose to the OPCD material falling within the ambit of article 67(2) of the *Rome Statute* ("the Statute");

NOTING the "Notification to the Single Judge of the Prosecutor's intention to file a consolidated response to the OPCD's 'Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e)' and 'Request for the Single Judge to order the Prosecution to disclose exculpatory materials'",¹⁵ filed by the Prosecution on 30 August 2007, regarding its intention to file a consolidated response by 11 September 2007 to the OPCD's requests of 21 August 2007 and 24 August 2007;

NOTING the filing of the Prosecution's Consolidated Response to the OPCD's requests of 21 August 2007 and 24 August 2007 ("the Prosecution Response"), filed on 11 September 2007, whereby the Prosecution objects to the OPCD's requests submitted on 21 August 2007 and 24 August 2007, subject to observations made by the Prosecution in paragraphs 9 and 23;¹⁶

NOTING articles 67(2), 68(3) and 75 of the Statute, rules 76, 77, 89 and 121 of the *Rules of Procedure and Evidence* ("the Rules") and regulations 77 and 86 of the *Regulations of the Court* ("the Regulations");

¹³ ICC-02/05-96.

¹⁴ ICC-02/05-97.

¹⁵ ICC-02/05-98.

¹⁶ ICC-02/05-99-Conf.

I. Introduction

1. In its Requests, the OPCD raises a number of issues which, in the Single Judge's view, must be addressed considering the object and purpose of the application process. Accordingly, the Single Judge will make some preliminary remarks on this subject as well as on the main features of article 68(3) of the Statute.

2. At the outset, the Single Judge recalls that in the Chamber's decisions of 17 January 2006,¹⁷ 22 June 2006 and 28 July 2006, it held that (a) the stage of investigation of a situation and the pre-trial stage of a case are appropriate stages of the proceedings for victim participation as provided for in article 68(3) of the Statute; and (b) that, therefore, there is a procedural status of victim in relation to situation and case proceedings before the Pre-Trial Chamber.¹⁸ Moreover, the Chamber has also stated that (a) article 68(3) of the Statute grants discretion to the Chamber to determine the modalities of participation which are attached to such procedural status; and (b) that the Chamber must exercise its discretion to delineate the modalities of participation "in a manner which is not prejudicial to or inconsistent with the rights of the accused".¹⁹

3. The Chamber reached these conclusions after finding (a) that the personal interests of victims are generally affected by the outcome of the investigation of a situation and the pre-trial stage of a case;²⁰ (b) that an assessment of the personal interests of the victims in specific proceedings carried out during these two stages of the proceedings is only to be conducted for the determination of the specific set of

¹⁷ ICC-01/04-100-Conf-Exp-tEN-Corr.

¹⁸ ICC-01/04-100-Conf-Exp-tEN-Corr, paras. 55 to 64; ICC-01/04-01/06-162-Conf-Exp-tEN and ICC-01/04-170-Conf-Exp-tEN.

¹⁹ ICC-01/04-100-Conf-Exp-tEN-Corr; ICC-01/04-01/06-162-Conf-Exp-tEN and ICC-01/04-170-Conf-Exp-tEN. See also ICC-01/04-01/06-462-tEN.

²⁰ ICC-01/04-100-Conf-Exp-tEN-Corr, para. 63; ICC-01/04-01/06-162-Conf-Exp-tEN and ICC-01/04-170-Conf-Exp-tEN. As the Chamber further stated: "The right to present their views and concerns and to file material pertaining to the ongoing investigation stems from the fact that the victims' personal interests are affected because it is at this stage that the persons allegedly responsible for the crimes from which they suffered must be identified as a first step towards their indictment. The close link between the personal interests of the victims and the investigation is even more important in the regime established by the Rome Statute, given the effect that such an investigation can have on future orders for reparations pursuant to article 75 of the Statute." (ICC-01/04-100-Conf-Exp-tEN-Corr, para. 72).

procedural rights attached to the procedural status of victim;²¹ and (c) that it is with regard to the determination of the modalities of participation that the Chamber must ensure that they are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²²

4. In light of the foregoing, it is the Single Judge's view that in situation and case proceedings before the Pre-Trial Chamber – as in proceedings before national jurisdictions which provide for a procedural status for victims²³ – the fact that one or several natural or legal persons may be entitled to the procedural status of victim is not, *per se*, prejudicial to the Defence.

5. The Single Judge considers that the process to decide upon applications for the procedural status of victim in situation and case proceedings before the Pre-Trial Chamber (“the application process”) is a specific procedural feature provided for in rule 89 of the Rules and regulation 86 of the Regulations. Its object and purpose is limited to the determination of whether such procedural status should be granted to applicants. Hence, the application process is prior to, distinct and separate from, the determination and exercise of the modalities of participation by those to whom the procedural status of victim has been granted.

6. Furthermore, in the view of the Single Judge, the application process is not related to questions pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witnesses as it only aims at determining whether the procedural status of victim should be granted to applicants. Hence, it can be distinguished from criminal proceedings before the Court, which include the investigation of a situation, the initiation of a case and the pre-trial, trial and appeal stages of a case, which are governed by specific articles, rules and regulations.

²¹ ICC-01/04-100-Conf-Exp-tEN-Corr, paras. 64 and 75. See also ICC-01/04-01/06-162-Conf-Exp-tEN and ICC-01/04-170-Conf-Exp-tEN.

²² ICC-01/04-100-Conf-Exp-tEN-Corr, para. 70; ICC-01/04-01/06-162-Conf-Exp-tEN and ICC-01/04-170-Conf-Exp-tEN. See also ICC-01/04-01/06-462-tEN.

²³ This is the case, for instance, in Brazil, articles 268-271 of the *Code of Criminal Procedure*, Italy, articles 74 to 89 of the *Code of Criminal Procedure*, Spain, article 110 of the *Code of Criminal Procedure*, France, article 85 of the *Code de procédure pénale*, and Belgium, article 63 of the *Code d'instruction criminelle*.

Moreover, the Single Judge considers that the application process is not related to questions pertaining to the award of reparations, which are the subject of the proceedings provided for in article 75 of the Statute and rule 94 of the Rules.

7. Considering that the OPCD Requests presently before the Single Judge are only in respect of the application process and not in respect of the reparation proceedings nor of the specific modalities of participation in the investigation of a situation or pre-trial stage of a case, the Requests will be considered in light of rule 89 of the Rules and regulation 86 of the Regulations and the previous decisions of the Chamber concerning this process.

8. The Single Judge considers that rule 89 of the Rules and regulation 86 of the Regulations establish a number of specific features which are justified by the specific object and purpose of the application process. For instance, in the context of the application process, the "grounds to believe" (situation stage) and "reasonable grounds to believe" (pre-trial phase of a case) standards embraced by the 17 January 2006, 22 June 2006 and 28 July 2006 decisions only require that applicants demonstrate that the elements established by rule 85 of the Rules are met *prima facie*.²⁴ It is for this reason that the Chamber has emphasized that its analysis of the applications "will not consist in assessing the credibility of the [applicants'] statement[s] or engaging in a process of corroboration *stricto sensu*."²⁵ This has been further explained by Pre-Trial Chamber II in the following terms: "[s]imilarly to the method followed by Pre-Trial Chamber I, the Single Judge will therefore assess each statement by applicant victims first and foremost on the merits of its intrinsic coherence, as well as on the basis of information otherwise available to the

²⁴ As the Chamber stated in its 17 January 2006 decision: "In the light of this distinction, the Chamber considers that, during the stage of investigation of a situation, the status of victim will be accorded to applicants who seem to meet the definition of victims set out in rule 85 of the Rules of Procedure and Evidence in relation to the situation in question. At the case stage, the status of victim will be accorded only to applicants who seem to meet the definition of victims set out in rule 85 in relation to the relevant case." (ICC-01/04-100-Conf-Exp-tEN-Corr, para. 66).

²⁵ ICC-01/04-100-Conf-Exp-tEN-Corr, para. 101.

Chamber."²⁶ The Single Judge will refer to other specific features of the application process in addressing the OPCD Requests in the next sections.

II. Request of 21 August 2007

9. In its Request of 21 August 2007, the OPCD asks that the Single Judge order the Legal Representative to:

- i. inform the Chamber and the parties as to whether the applicants or their relatives have filed any complaints in relation to the events set out in their applications forms before national, regional or international judicial entities other than the ICC;
- ii. in the event that the applicants or their relatives have provided prior statements (written or oral testimony) in relation to the events set out in their applications to national, regional or international judicial entities, or immigration/asylum authorities, provide copies of such statements to the Chamber and the parties;
- iii. disclose to the Chamber and the parties the conditions under which the applicants have been granted residence/asylum in the United States of America;
- iv. disclose to the Chamber and the parties the interpretation qualifications of the persons identified as interpreters in the application forms;
- v. if the persons listed as interpreters do not possess any relevant qualifications in this field, request that the applicants resubmit their applications to the Court in a language which the applicants understand;
- vi. if the applicants are illiterate, request that the applicants resubmit their applications with a declaration that the contents of the application have been read to them in a language which they understand;

²⁶ ICC-02/04-101, para. 15.

- vii. disclose to the Chamber and the parties documentation concerning the identity and role of the persons listed as witnesses during the application process; and
- viii. if the persons listed as witness have a potential conflict of interest in light of their professional affiliation to the counsel representing the applicants, request that the applicants resubmit their applications, witnessed by another person who has no potential conflict of interest.²⁷

A. Items (i) and (ii)

10. In relation to items (i) and (ii), the OPCD's rationale is that the Chamber should impose on the applicants the burden of demonstrating that they have genuinely attempted to exhaust all appropriate domestic remedies or that they are not in a position to do so,²⁸ because otherwise the principle of complementarity would be frustrated.²⁹ The OPCD further argues that "international and regional human rights mechanisms stipulate as a condition of admissibility that the applicants must not have submitted the same claim to another treaty body or regional mechanism" in order to "avoid unnecessary duplication at the international level".³⁰

11. The Single Judge considers that the OPCD's assertion regarding the principle of complementarity highlights the fundamental misunderstanding which underlies the OPCD's Request. In the view of the Single Judge, the complementarity principle is applicable to the ongoing proceedings relating to the investigation in the Situation in Darfur, Sudan. However, it is inapplicable to the application process because the object and purpose of the application process is confined to the determination of whether the procedural status of victim can be granted to applicants in such ongoing proceedings.

²⁷ ICC-02/05-94-Conf, para. 68.

²⁸ ICC-02/05-94-Conf, paras. 28 and 29.

²⁹ ICC-02/05-94-Conf, para. 33.

³⁰ ICC-02/05-94-Conf, para. 35.

12. Moreover, the Single Judge finds that, according to rule 89 of the Rules and regulation 86 of the Regulations, the exhaustion of domestic remedies is not a condition to be fulfilled by applicants, unlike what is provided for in article 35 of the European Convention on Human Rights and article 46 of the American Convention on Human Rights.

B. Items (iii) to (viii)

13. In relation to items (iii) to (viii), the OPCD bases its request on regulation 86(2)(e) of the Regulations, which the OPCD claims "clearly place[s] an onus on the applicants" to provide additional information to supplement their applications.³¹

14. In the view of the Single Judge, the limited object and purpose of the application process explains why (a) regulation 86(2)(e) of the Regulations only requires that the applicants use standard forms and that their applications contain the enumerated items, including any relevant supporting documentation, "to the extent possible"; and (b) that the Chamber's "only obligation under rule 89(1) of the Rules is to order the Registry to provide the Prosecution and the Defence with copies of the applications, such that they may make observations on the Applications within a time limit set by the Chamber."³²

15. Hence, rule 89 of the Rules does not require the Chamber to provide, or to order the applicants to provide, to the Prosecution or the Defence, for the purpose of submitting their observations, information extrinsic to the applications themselves. This is consistent with the fact that the role of the OPCD in the application process³³

³¹ ICC-02/05-94-Conf, para. 7.

³² ICC-01/04-374, para. 35.

³³ ICC-02/04-85, p. 3. As the Chamber has already stated, the OPCD has been entrusted by regulation 77(4) of the Regulations with "the power of representing and protecting the rights of the defence during the initial stages of the investigation".

is confined by rule 89(1) of the Rules to the submission of observations on the applications.³⁴

16. This interpretation of rule 89 of the Rules is without prejudice to the Chamber's power, pursuant to regulation 86(7) of the Regulations, to request, whenever necessary, additional information from applicants before deciding on an application. In this regard, the Chamber, in its Decision of 17 August 2007,³⁵ outlined the information which should be provided by applicants for the Chamber to decide upon an application, stating that:

The Chamber considers that an application is complete if it contains the following information: (i) the identity of the applicant; (ii) the date of the crime(s); (iii) the location of the crime(s); (iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court; (v) proof of identity; (vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim; (vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship; (viii) a signature or thumb-print of the Applicant on the document, at the very least, on the last page of the application.³⁶

17. The Single Judge considers that, in light of the above and of the Chamber's 17 August 2007 Decision, none of the items listed under (iii) to (viii) in the OPCD Request of 21 August 2007, including information concerning the conditions under which the applicants have been granted asylum, the qualification of interpreters, the applicants' prior statements, the identity and role of persons listed as witnesses during the application process and the resubmission of an application if a witness has a conflict of interest, are necessary for the Chamber's decision on the applications.

³⁴ As the OPCD has acknowledged in previous filings, in order to avoid endangering the future strategy of the Defence, once a case arises or causing conflicts of interests, its "strictly limited remit [is] defined by regulation 77." See, in particular, ICC-01/04-01/06-823-tENG, para. 4.

³⁵ This decision was also referenced in the Situation in Darfur, Sudan on 21 August 2007 in ICC-02/05-92.

³⁶ ICC-01/04-374, para. 12.

III. Request of 24 August 2007

18. In its Request of 24 August 2007, the OPCD asks the Single Judge to order the Prosecutor to search for and disclose information which would suggest the following:

- i. that the intensity of hostilities in the villages (and their immediate environs) cited in the application did not meet the requisite threshold for an armed conflict during the period of time cited in the applications;
- ii. that the villages mentioned in the applications or their environs may have been inhabited by persons affiliated with armed groups;
- iii. that the persons mentioned in the applications may have had links to armed groups; [and]
- iv. that the persons mentioned in the applications may have committed criminal acts or any other information which would impact on their credibility.³⁷

19. In the Request of 24 August 2007, the OPCD argues that in submitting its observations, it is necessary for the OPCD to obtain information extrinsic to the Applications. Furthermore, the OPCD argues that this extrinsic information *could* contain information which *could* be exculpatory to a future, but as yet undetermined, accused. Thus, the purported legal basis for requesting these items is article 67(2) of the Statute and rule 77 of the Rules, which pertain to the Prosecution's obligation to disclose potentially exculpatory information to the Defence.

20. As explained above, the application process is not related to questions pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witnesses. Hence, article 67(2) of the Statute is not applicable in the context of the application process. Moreover, the Single Judge

³⁷ ICC-02/05-97, para. 45.

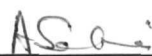
emphasizes that the role of Applicants in the application process can by no means be confused with that of witnesses in criminal proceedings.³⁸

21. The Single Judge also recalls that, as it has already stated, the Prosecution's obligation under rule 77 of the Rules is limited to permitting the Defence to inspect only those books, documents, photographs and tangible objects (a) on which the Prosecution intends to rely at the confirmation hearing or trial; (b) which are material to the preparation of the defence for the purpose of the confirmation hearing or the trial; or (c) which have been obtained from or belonged to the suspect or accused person.³⁹ Hence, the Single Judge considers that this rule is also not applicable in the context of the application process.

FOR THESE REASONS,

REJECT the OPCD's Request of 21 August 2007 and the OPCD's Request of 24 August 2007.

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



Judge Akua Kuenyehia
Single Judge

Dated this Monday 3 December 2007

At The Hague, The Netherlands

³⁸ In the Application process, Applicants make requests to be granted the procedural status of victim in situation and case proceedings. Such requests constitute the object of the Application process. Witnesses in criminal proceedings are a mean of evidence to prove the factual allegations on which the requests for the conviction or acquittal of the defendant are based.

³⁹ ICC-01/04-01/06-102, paras. 107 to 118.