

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

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Ms Fatou Bensouda, Deputy Prosecutor
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I, **Sylvia Steiner**, judge at the International Criminal Court ("the Court"),

NOTING the applications for participation in the proceedings a/0163/06 to a/0187/06¹ (collectively referred to as "the Applications") seeking recognition of the right to participate as victims in the proceedings in the Situation in the Democratic Republic of the Congo ("the DRC") 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 on 3 July 2007 in the record of the investigation in the Situation in the DRC ("the Report");²

NOTING the decision of 17 July 2007,³ issued by the Single Judge 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 "Decision suspending the transmission of the '*Rapport à la Chambre préliminaire I sur les demandes de participation a/0163/06 à a/0187/06*'",⁴ issued by the Single Judge on 19 July 2007;

NOTING the "Request of the Legal Representative of Victims a/0107/06 to a/0109/06, a/0128/06 to a/0187/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06 to a/0214/06, a/0220/06 to a/0222/06, a/0224/06 to a/0230/06 and a/0234/06 to a/0241/06",⁵ filed on 23 July 2007 whereby the Legal Representative requested the Single Judge to:

- (a) order the OPCD to hand over the unredacted copies of the applications for participation already submitted and any other indicia which might

¹ ICC-01/04-356-Conf-Exp-Anx2-Anx26.

² ICC-01/04-356-Conf-Exp.

³ ICC-01/04-358.

⁴ ICC-01/04-360-Conf.

⁵ ICC-01/04-362-Conf-Exp.

provide clues to their identity, and order the Registrar to provide it with the redacted versions in their place;

- (b) ensure that any applications for participation of victims represented by the Legal Representative which are transmitted in the future be redacted;
- (c) order that the report of the Registry not be transmitted to the Prosecution and the OPCD. In the alternative, that the report be transmitted to them in redacted form, in order not to put the safety of the applicants and the Legal Representative at risk;
- (d) transmit to the Legal Representative a copy of the report of the Registry, without which he would find it impossible to defend his clients' interests, since the Prosecution and the OPCD would have access to information which is not available to the Legal Representative and which may have an impact on the applicants' interests in the course of the proceedings;
- (e) ensure that the identity of the Legal Representative remains confidential and/or redacted from public documents;
- (f) allow the Legal Representative to be heard by the Pre-Trial Chamber on any issue concerning the protection and safety of the applicants prior to the issuance of any decision likely to affect their safety and protection;⁶

NOTING the "Response to *Demande du représentant légal des victimes (expurgé)*",⁷ filed by the OPCD on 26 July 2007;

NOTING the "Prosecution's Observations on the '*Demande du représentant légal des victimes (expurgé)*'",⁸ filed by the Prosecution on 27 July 2007;

⁶ ICC-01/04-362-Conf-Exp, para. 22.

⁷ ICC-01/04-363-Conf.

⁸ ICC-01/04-367-Conf.

NOTING the “Decision suspending the time limit for the submission of observations on applications for participation in the proceedings”,⁹ issued by the Single Judge on 31 July 2007;

NOTING the “Decision on the time limit to submit observations on applications a/0163/06 to a/0187/06 for participation as victims”,¹⁰ issued by the Single Judge on 22 August 2007;

NOTING the “*Transmission au Bureau du Procureur et au Bureau du Conseil public pour la Défense d’informations supplémentaires sur des demandes de participation, en application de la décision de la Chambre préliminaire I du 22 août 2007*”,¹¹ filed on 28 August 2007;

NOTING the “Request for Single Judge to order the Prosecutor to disclose exculpatory materials”¹² (“the Request of 28 August 2007”), filed on 28 August 2007 in which the OPCD requests that the Prosecution be ordered to search for and disclose to the OPCD any material falling within the ambit of article 67(2) of the *Rome Statute* (“the Statute”);

NOTING the “Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e)”¹³ (“the Request of 31 August 2007”), filed on 31 August 2007 in which the OPCD requests that the Single Judge order the Legal Representative to provide supporting documentation concerning a number of matters;

⁹ ICC-01/04-368.

¹⁰ ICC-01/04-375.

¹¹ ICC-01/04-377-Conf-Exp.

¹² ICC-01/04-378 + ICC-01/04-378-Conf-Exp-AnxA and AnxB.

¹³ ICC-01/04-381-Conf + ICC-01/04-381-Conf-AnxA, AnxB and AnxC.

NOTING the "Prosecutor's 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 Prosecutor to disclose exculpatory materials'",¹⁴ filed on 18 September 2007, whereby the Prosecution objects to the OPCD's requests submitted on 28 August 2007 and 31 August 2007, subject to the observations made by the Prosecution in paragraphs 20 and 37;

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");

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 2006,¹⁵ 22 June 2006 and 28 July 2006, it held that (a) the stage of investigation into 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, accordingly, there is a procedural status of victim in relation to situation and case proceedings before the Pre-Trial Chamber.¹⁶ 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

¹⁴ ICC-01/04-396-Conf.

¹⁵ ICC-01/04-100-Conf-Exp-tEN-Corr.

¹⁶ 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.

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”.¹⁷

3. The Chamber reached these conclusions after finding (a) that the personal interests of victims are generally affected by the outcome of the investigation into a situation and the pre-trial stage of a case;¹⁸ (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 procedural rights attached to the procedural status of victim;¹⁹ 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.²⁰

4. In light of the foregoing, the Single Judge recalls 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” (“the Darfur Decision on the OPCD’s Requests”) where the Single Judge considered that “in situation and case proceedings before the Pre-Trial Chamber – as in proceedings before national jurisdictions which provide for a procedural status for victims²¹ – the fact that one or

¹⁷ 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.

¹⁸ 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).

¹⁹ 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.

²⁰ 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.

²¹ 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*.

several natural or legal persons may be entitled to the procedural status of victim is not, *per se*, prejudicial to the Defence.”²²

5. In the Darfur Decision on the OPCD’s Requests, the Single Judge also considered 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.”²³

6. Furthermore, the Single Judge considered that “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. 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.”²⁴

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

²² ICC-02/05-110, para. 4.

²³ ICC-02/05-110, para. 5.

²⁴ ICC-02/05-110, para. 6.

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 stage 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*.²⁵ 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*.”²⁶ 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 Chamber.”²⁷ 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 28 August 2007

9. In its Request of 28 August 2007, the OPCD asks the Single Judge to order the Prosecutor to search for and disclose information which would suggest the following:

²⁵ 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).

²⁶ ICC-01/04-100-Conf-Exp-tEN-Corr, para. 101.

²⁷ ICC-02/04-101, para. 15.

- 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;
- iv. that the persons mentioned in the Applications may have committed criminal acts;
- v. any other information which would impact on their credibility.²⁸

10. In the Request of 28 August 2007, the OPCD argues that in submitting its observations, it is necessary for the OPCD to obtain information extrinsic to the Applications. It adds 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.

11. 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, as mentioned in the Darfur Decision on the OPCD's Requests, the Single Judge re-emphasizes that "the role of Applicants in the application process can by no means be confused with that of witnesses in criminal proceedings."²⁹

²⁸ ICC-01/04-378, para. 43.

²⁹ See ICC-02/05-110, para. 20. In the Application process, Applicants request to be granted the procedural status of victim in situation and case proceedings. Such requests are the subject of the Application process.

12. The Single Judge also recalls that, as she 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.³⁰ Hence, the Single Judge considers that this rule is also not applicable in the context of the application process.

III. Request of 31 August 2007

13. In its Request of 31 August 2007, the OPCD asks the Single Judge to order the Legal Representative to:

- i. disclose any information concerning a possible pre-existing medical condition;
- ii. disclose whether the applicants may have been investigated or convicted in national proceedings;
- iii. disclose whether the applicants have a relationship with other persons who have previously filed applications before the Court, and if so, the pseudonym of these related applicants and the link between them;
- iv. disclose whether the interpreters or witnesses have any kind of relationship with the applicant, or if they have submitted an application to participate as a victim before the ICC;

Witnesses are used in criminal proceedings to substantiate the factual allegations on which the requests for the conviction or acquittal of the accused are based.

³⁰ ICC-01/04-01/06-102, paras. 107 to 118.

- v. disclose to the Chamber and the parties the interpretation qualifications of the persons identified as interpreters in the application forms.³¹

14. The OPCD bases its request on regulation 86(2)(e) of the Regulations, which it claims “clearly place[s] an onus on the applicants” to provide additional information to supplement their Applications.³²

15. 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.”³³

16. 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.³⁴ This is consistent with the fact that the role of the OPCD in the application process³⁵ is confined by rule 89(1) of the Rules to the submission of observations on the applications.³⁶

17. 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,

³¹ ICC-01/04-381-Conf, para. 81.

³² ICC-01/04-381-Conf, para. 9.

³³ ICC-01/04-374, para. 35. See also ICC-02/05-110, para. 14.

³⁴ ICC-02/05-110, para. 15.

³⁵ ICC-02/05-85, 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”.

³⁶ 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. 5.

whenever necessary, additional information from applicants before deciding on an application. In this regard, the Chamber, in its Decision of 17 August 2007,³⁷ 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.³⁸

18. The Single Judge considers that, in light of the above, of the Darfur Decision on the OPCD's Requests and of the Chamber's 17 August 2007 Decision, none of the items listed under (i), (ii), (iii), (iv) and (v) in the OPCD Request of 31 August 2007, including information concerning a pre-existing medical condition, the possible criminal background of the applicant, the applicant's relationship with other applicants, the status of persons listed as interpreters or witnesses during the application process and the qualification of interpreters are necessary for the Single Judge's decision on the Applications.

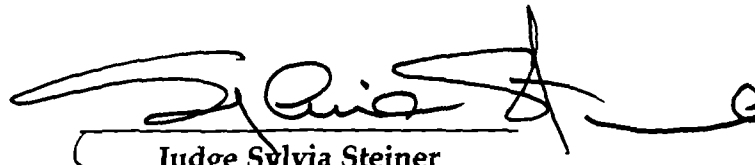
FOR THESE REASONS,

³⁷ This decision was also referenced in the Situation in Darfur, Sudan on 21 August 2007 in ICC-02/05-92.

³⁸ ICC-01/04-374, para. 12. See also ICC-02/05-110, para. 16.

REJECT the OPCD's Request of 28 August 2007 and the OPCD's Request of 31 August 2007.

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



Judge Sylvia Steiner
Single Judge

Dated this Friday 7 December 2007

At The Hague, The Netherlands