

**Cour
Pénale
Internationale**



**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

Request for leave to appeal the ' Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07'

The Office of the Prosecutor

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1. Introduction

1. On 23 May 2007, the Honourable Single Judge issued a decision,¹ which authorised the filing of 5 applications to be recognised as victims in the record of the Darfur situation, and granted the Prosecution and the Office of Public Counsel for the Defence (OPCD) the right to respond to these applications 15 days from notification.
2. On 8 June 2007, the OPCD filed its confidential observations, in which it respectfully requested the Pre-Trial Chamber to dismiss the applications *in limine litis*, due to the fact that the OPCD does not have the means to obtain materially relevant and exculpatory information from national authorities, the legal representatives of the applicants, and the Prosecution, and is further precluded from challenging the jurisdictional aspects of their applications.
3. In the event that the applications were found to be admissible *per se*, the OPCD requested that the applicants not be admitted as victims at this stage of the proceedings because firstly, their personal interests are not affected by the current proceedings, secondly, their participation would be inappropriate and would prejudice the rights of the Defence and fairness of the proceedings, thirdly, none of the applicants met the evidential threshold to be considered as a victim, and finally, none of the applicants met the legal criteria to be considered as a victim before the ICC.
4. On 23 July 2007, the Honourable Single Judge issued a Decision authorising the filing of observations on applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for participation in the proceedings,² in which the Single Judge ordered the Registry to transmit the applications to participate as victims to the Office of Public Counsel for the Defence (OPCD), and granted the OPCD the right to file observations in relation to these applications within 30 days of notification of the applications.
5. On 21 August 2007, the OPCD filed a confidential request for the Single Judge to order the production of relevant supporting documentation, pursuant to regulation 86(2)(e).

¹ Decision authorising the filing of observations on applications for participation in the proceedings a/0011/06 to a/0015/06 ICC-02/05-74

² ICC-02/05-85

6. On 24 August 2007, the OPCD filed a request that the Chamber order the Prosecutor to disclose any information which would affect the credibility or contradict the assertions (including dates and location of alleged events) contained within the applications.

7. In the alternative, the OPCD argued that if the Chamber rejected this request, the application to participate in the situation phase should be dismissed *in limine*, in light of the prejudice to the rights of the Defence and the principle of equality of arms.

8. On 24 September 2007, the OPCD filed its confidential observations in relation to applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07.

9. On 3 December 2007, the Honourable Single Judge issued 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 Decision”), which dismissed the requests of the OPCD.

10. On 6 December 2007, the Honourable Single Judge filed the Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, in which the Single Judge granted the procedural status of victim to Applicants a/011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07, and a/0038/07, “allowing them to participate in the proceedings at the investigation stage of the Situation of Darfur, Sudan”.³ The Single Judge denied the procedural status of victim to Applicants a/0014/06, a/0021/07, a/0028/07, a/0030/07, a/0031/07, a/0032/07, a/0033/07, and a/0035/07, and thereby rejected their request to participate at this stage.

11. In accordance with article 82(1)(d) of the Statute, the OPCD hereby requests leave to appeal this decision, on the grounds that it raises issues, which significantly impact on the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeals Chamber would materially advance the proceedings.

³ Page 23 of the Decision.

2. Subject matter of the appeal

12. In order to constitute an appealable issue for the purposes of article 82(1)(d) of the Statute, it is necessary to identify a subject or topic, the resolution of which has been necessary for the judicial determination in question (the impugned decision).⁴

13. The OPCD notes that the Honourable Single Judge did not render an assessment as to whether and how the personal interests of the applicants were affected by specific proceedings within the situation phase. The Single Judge justified this approach by concluding that “the assessment of the personal interests of the victims in specific proceedings taking place during the investigation of a situation and the pre-trial stage of a case is only to be conducted for the determination of the specific set of procedural rights attached to the procedural status of victim”.⁵ The Honourable Single Judge also expressly adopted the reasoning of Pre-Trial Chamber I, to the effect that “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 [...]”.⁶

14. Whilst the assessment of the personal interests of the applicant, and the question as to whether it is appropriate for the applicants to participate in the particular stage of the proceedings, are separate inquiries, the OPCD submits that the two conclusions of the Single Judge are linked to the same issue: namely, whether it is possible to grant a general right to participate during the investigations stage, or whether such a right would render the requirements of the appropriateness of participation and the impact of the proceedings on the personal interests of the applicant, nugatory.⁷

15. Although the Honourable Single Judge noted that it had already been stated in the decision of 3 December 2007 that “the stage of a investigation of a situation and the pre-trial stage of a case are appropriate stages of the proceedings for victim

⁴ Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC/01/04-168 at para. 9.

⁵ At paragraph 13.

⁶ At paragraph 14 of the Decision.

⁷ According to article 31 of the Vienna Convention on the Law of Treaties, a legal provision must primarily be interpreted in accordance with its ordinary meaning. It is also a fundamental canon of statutory construction that courts must give effect to every word in a statute, not disregard them: *Kilburn v. Socialist People’s Libyan Arab Jamahiriya*, 376 F.3d 1123, 1127 (D.C. Cir. 2004).

The OPCD further observes that in the Appeals Chamber’s decision of 13 June 2007, the Appeals Chamber held that “[e]ven when the personal interests of victims are affected within the meaning of article 68 (3) of the Statute, the Court is still required, by the express terms of that article, to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings and to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007 ICC-01/04-01/06-925

participation”, according to the text of the decision, the Single Judge had only “recalled” the findings of the Pre-Trial Chamber in the DRC situation.⁸ In light of the fact that decisions issued in a situation or case cannot be considered as binding on the parties in another situation or case,⁹ the Single Judge’s reference to this case law, without express endorsement or approval, cannot be considered to constitute an actual legal finding for the purposes of the Darfur situation. Moreover, this decision was only issued in connection with applicants a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07,¹⁰ and thus did not relate to the OPCD’s submissions concerning whether it was appropriate for applicants a/0011/06 to a/0015/06 to participate in the situation phase.

16. In terms of the substance of the applications, the Single Judge stated that “the Appeals Chamber has indicated that in making a decision, the Pre-Trial Chamber need not individually recite each and every factor before it, but “it must identify which facts it found to be relevant in coming to its conclusion””.¹¹ The Single Judge also concluded that “under rule 89(4) of the Rules, the Single Judge is required to ensure that the proceedings are conducted expeditiously and that in doing so, the Single Judge may consider applications in such a manner as to ensure the effectiveness of the proceedings. The Single Judge will therefore provide only the essential information on each applicant in this decision”.¹² The factual findings of the Single Judge are therefore framed solely as conclusions, rather than as an analysis of the observations of the parties.

17. In terms of the Honourable Single Judge’s reference to the observations of the OPCD as to whether the applicants met the legal and factual criteria to be recognised as victims, the decision cites the ultimate conclusions set out in the OPCD’s observations, but does not refer to or elaborate on the factual and legal submissions underpinning these conclusions.

18. For example, with respect to applications a/0028/07, a/0029/07, a/0030/07, a/0031/07, a/0032/07, a/0033/07, a/0035/07, a/0036/07, a/0037/07, and a/0038/07, the OPCD referred to internal information and inconsistencies within the applications, the

⁸ “[t]he Single Judge recalls that in the Chamber’s decisions of 17 January 2006, 22 June 2006 and 28 July 2006, it held that [...]”. Whereas the Single Judge proceeds to expressly endorse the Pre-Trial Chamber’s findings concerning the existence of a procedural status of victim, which is not per se prejudicial to the Defence, the Single Judge does to expressly pronounce on the propriety of the applicants’ participation in the dispositive findings of the decision.

⁹ See M. McAuliff deGuzman, ‘Applicable Law: article 21(2)’ Commentary on the Rome Statute of the International Criminal Court (ed. O. Triffterer Nomos Verlagsgesellschaft 1999) at page 445.

¹⁰ See page 2 of Decision of 3 December 2007.

¹¹ At paragraph 4 of the Decision.

¹² At paragraph 9 of the Decision.

Commission of Inquiry Report which was submitted to the United Nations, and NGO reports containing interviews with people from that village,¹³ which all indicated that the attacks referred to by the applicants on a certain village occurred outside of the temporal jurisdiction of the ICC. Similarly, information within the passports of a/0023/07, a/0021/07, a/0026/07, and a/0038/07 contradicted their assertion that they were present in a particular location in Darfur at the time of an alleged attack.¹⁴ In terms of the Single Judge's finding that a/0038/07 suffered harm as the result of arbitrary detention,¹⁵ as noted by the OPCD,¹⁶ there was no information within the application concerning the location of this event; it cannot, therefore, be presumed that it occurred within the territorial jurisdiction of the Court.

19. In terms of the legal criteria to be admitted as a victim, the Honourable Single Judge deferred rendering a determination on the issue as to whether a person could be admitted as a victim, based on "emotional suffering as a result of attacks on villages and a town in Darfur, Sudan, which occurred while the Applicant was residing outside Sudan".¹⁷ However, it is not clear why this finding did not apply to other applicants who were not present in Darfur at the time of the alleged offences, such as a/0024/07 and a/0015/07.¹⁸ It is also not clear from the Single Judge's use of the general term 'family members',¹⁹ as to what degree of proximity is required to found a claim.

20. Despite the fact that these arguments are directly relevant to the assessment as to whether the applicants met the requisite criteria to be admitted as victims, the Decision of the Single Judge does not address these issues.

21. The OPCD therefore submits that the decision raises the following appealable issues:

- i. Whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of a specific proceedings on

¹³ Observations on applications a/0021/07, a/0023/07, to a/0033/07, and a/0035/07 to a/0038/07, 24 September 2007 at paragraphs 37- 40.

¹⁴ Observations on applications a/0021/07, a/0023/07, to a/0033/07, and a/0035/07 to a/0038/07, 24 September 2007 at paragraphs 48-51.

¹⁵ Paragraph 48 of the Decision.

¹⁶ Observations on applications a/0021/07, a/0023/07, to a/0033/07, and a/0035/07 to a/0038/07, 24 September 2007 at paragraph 48.

¹⁷ Paragraph 30 of the Decision.

¹⁸ See paragraph 72 of Observations on applications a/0021/07, a/0023/07, to a/0033/07, and a/0035/07 to a/0038/07, 24 September 2007, and paragraph 64 of Observations on applications a/0011/06 to a/0015/06, 8 June 2007.

¹⁹ For example, paragraph 40 refers to the killings of a/0013/06's family members – the persons referred to in the application (the uncle of a/0013/06, and three children of this uncle) were not direct family members.

the personal interests of the applicants, and an assessment as to the propriety of their participation; and

- ii. Whether the decision lacks sufficient reasoning concerning whether the applicant's meet the requisite factual and legal criteria to be admitted as victims.

3. Issue 1: Whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of a specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation.

3.1 Impact on the fairness of the proceedings

22. The OPCD respectfully submits that the clear terms of article 68(3) require the Chamber to issue a reasoned determination firstly, as to whether there are specific proceedings within the investigations phase which impact on the personal interests of the applicants, and secondly, whether it would be appropriate for the victims to participate in such proceedings.

23. The OPCD further submits that the jurisprudence of the Appeals Chamber appears to confirm that an assessment as to the right of victims to participate in the proceedings cannot be made in the abstract,²⁰ but must be tailored to the specific factual circumstances and legal regime applicable to the Darfur situation.

²⁰ The Appeals Chamber has held, within the context of an interlocutory appeal, that "[i]t is apparent that the requirement under article 68 (3) that victim participation shall be permitted "at stages of the proceedings determined to be appropriate by the Court" mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration." Decision of 13 February 2007 at para. 40.

The Appeals Chamber also noted that in granting the applicants the right to participate in the pre-confirmation phase proceedings, "the subject matter and nature of any interlocutory appeal would, at that stage, have been unknown. Hence it would be impossible for the Pre-Trial Chamber, in effect, to deem it to be appropriate for victims to participate in that stage of the proceedings or to determine that their interests would be affected by that particular interlocutory appeal" (at para 43).

Finally, the Appeals Chamber stated that in order to assist the Court to render its determination, the applicants are required to "include a statement [...] in relation to whether and how their personal interests are affected [...] as well as why it is "appropriate" for the Appeals Chamber to permit their views and concerns to be presented. (at para. 40).

Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo" ICC-01/04-01/06-824, 13 February 2007.

This finding was upheld in a later appellate decision Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925 at para. 23.

Olasolo Stahn and Gibson have also opined that "it is clear from the procedural norms of the ICC that victims' participation is a procedure-specific concept. The question of whether victims may participate in proceedings and

24. Thus, in the Thomas Lubanga Dyilo case, Honourable Judge Pikis stated that the “prerequisite to victims’ participation is the existence of viable proceedings and the effect they may have on their personal interests. If the proceedings (the appeal) are inadmissible, as they are in the present case, no right to participate could arise. Inevitably, the application must be dismissed.”²¹

25. The OPCD therefore respectfully submits that this issue impacts on the fairness of the proceedings, as the promulgation of seemingly, inconsistent jurisprudence of the Court impacts upon the certainty of the proceedings, and thus, the principle of legality.

26. The OPCD further submits that the term ‘appropriate’, if given its plain meaning,²² requires a situation and proceeding specific assessment as to whether it would be right, in the sense of fair,²³ to permit their participation in light of the particular circumstances at hand. To render an abstract determination on the propriety of participation thus denies the parties the right to present concrete submissions concerning the particular factual and legal aspects of the Darfur situation.

27. In this regard, in connection with its observations on the applications, the OPCD raised concerns concerning *inter alia*:

- the *de facto* legal immunity of the applicants;²⁴
- as a non-State Party related situation, whether and to what extent the victim participation provisions were applicable if they were not reflective of customary international law;²⁵

in which form they may do so cannot be answered in general, but must be determined individually”: Participation of Victims in Pre-Trial Proceedings of the ICC, Carsten Stahn, Héctor Olásolo and Kate Gibson, Journal of International Criminal Justice, Volume 4, Number 2 Pp. 219-238.

²¹ Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925 at paragraph 22.

²² Suitability or rightness

²³ In a separate, concurring appellate opinion, Judge Pikis stated that the rights of the accused and the need to ensure a fair and impartial trial, are also elements to be considered in connection with the Chamber’s determination as to whether participation would be appropriate: “The manner of presentation of victims’ views and concerns is subject to an important proviso. It must not be inconsistent with a) the rights of the accused and b) a fair and impartial trial. This is also a consideration relevant to the determination of the appropriateness of the stage at which such views and concerns may be presented.” (at paragraph 17)

“The stage at which the views and concerns of victims may be presented must be at an interval of the proceedings that would be appropriate, regard being had to the norms of a fair and impartial trial and the rights of the accused evaluated within the context of the Statute.” (at paragraph 20).

Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*” ICC-01/04-01/06-824, 13 February 2007

²⁴ These submissions pertained to the residence of the applicants in a non-State party, and the fact that neither the applicants, nor the persons involved in the application process in the capacity of witnesses or interpreters, have signed confidentiality agreements, or agreements to comply with any subsequent orders or decisions of the Court. See paragraphs 18-20 of Request for the Single Judge to order the production of relevant supporting documentation pursuant to regulation 86(2)(3), 21 August 2007; Observations on applications a/0021/07, a/0023/07, to a/0033/07, and a/0035/07 to a/0038/07, 24 September 2007 at paragraph 7; and Observations on applications a/0011/06 to a/0015/06, 8 June 2007, at paragraphs 5-9.

- the lack of viable mechanisms for participation in the Darfur situation;²⁶
- and the limited ability of the OPCD or *ad hoc* counsel for the Defence to challenge the applications during the situation phase.²⁷

28. The OPCD respectfully submits that these concerns were directly linked to the integrity of the proceedings,²⁸ the principle of legality,²⁹ the impartiality of the proceedings,³⁰ the principle of equality of arms and the right to adversarial proceedings.³¹

29. Irrespective of the Single Judge's ultimate determination of the merits of these submissions, the OPCD respectfully submits that in deciding whether victim participation in the Darfur situation was appropriate, it was necessary to address these issues. As such, by adopting the generic conclusion of the Pre-Trial Chamber that victim participation at the situation stage was appropriate, the criterion of appropriateness was effectively denuded of meaning, which thereby decreased (and thus significantly impacted on) the fairness protections for the parties.

3.2 Impact on the expeditiousness of the proceedings

30. In the Thomas Lubanga Dyilo case, in a separate opinion, Honourable Judge Song noted that the question as to whether it was appropriate to participate also

²⁵ See Observations on applications a/0021/07, a/0023/07, to a/0033/07, and a/0035/07 to a/0038/07, 24 September 2007, at paragraph 7 and footnote 10.

²⁶ See paragraph 7 of Observations on applications a/0021/07, a/0023/07, to a/0033/07, and a/0035/07 to a/0038/07, 24 September 2007; and Observations on applications a/0011/06 to a/0015/06, 8 June 2007 at paragraphs 35-38.

²⁷ Observations on applications a/0011/06 to a/0015/06, 8 June 2007 at paragraphs 40-42; Observations on applications a/0021/07, a/0023/07, to a/0033/07, and a/0035/07 to a/0038/07, 24 September 2007 at paragraphs 10-11.

The Single Judge has confirmed that *ad hoc* counsel for the Defence and the OPCD are precluded from raising submissions in relation to jurisdiction or admissibility, in connection with the offences referred to by the applicants (at paragraph 25 of the Decision), and that the OPCD may not request information from the Prosecution or the applicants in relation to the context of the offences (pages 12 and 13 of the Decision).

²⁸ It is submitted that the fact that the applicants residing in a non-State party cannot be sanctioned for false or fraudulent statements or contravening protective orders impacts on the integrity of the proceedings, and the mandate of the Court to establish the truth.

²⁹ In light of the fact that the Government of Sudan has not ratified the Rome Statute and the Security Council does not possess any legislative powers, it is submitted that the application of legal provisions which Sudan has not ratified and which are not reflective of customary international law, would contravene the principle of legality. See Observations on applications a/0021/07, a/0023/07, to a/0033/07, and a/0035/07 to a/0038/07, 24 September 2007, at paragraph 7 and footnote 10.

³⁰ The OPCD submitted observations concerning the impact of a public finding concerning the existence of alleged offences, which have been attributed by the applicants to specific groups (the Sudanese military and/or the Janjaweed, on the impartiality of the proceedings, particularly in light of the fact that these groups do not have a right to respond: Observations on applications a/0021/07, a/0023/07, to a/0033/07, and a/0035/07 to a/0038/07, 24 September 2007 at paragraphs 7-9.

³¹ Observations on applications a/0021/07, a/0023/07, to a/0033/07, and a/0035/07 to a/0038/07, 24 September 2007 at paragraph 10.

encompasses a specific consideration of the impact of participation on the expeditiousness of the proceedings.³²

31. Accordingly, the OPCD respectfully submits that issuing a generic determination that it is appropriate to participate at this stage, abrogates the duty of the Chamber to factor the impact of participation on the expeditiousness of the proceedings.

32. The OPCD further observes that in assessing the impact of an issue on the proceedings, it is necessary to consider the proceedings before the Court *in toto*.³³ As such, the OPCD also respectfully submits that if there are no viable proceedings in which the applicants may participate, or which require a formal determination of applicants' status, issuing a general decision, which may never be implemented in practice, impacts on the expeditiousness of proceedings as it diverts the time and resources of the Court from focussing on other proceedings, in particular, the concrete rights of victims in specific case-related proceedings. It might also divert the time and resources of the Office of the Prosecutor from assessing victim complaints which are submitted to the Prosecution *via* articles 15 and 53 of the Statute, rather than through the channels of article 68(3) applications.

3.3 That a resolution of the issue would materially advance the proceedings

33. The OPCD observes that the issue as to whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation, has implications for all future victim applications, at all stages of the proceedings. In this connection, the OPCD observes that the Honourable Single Judge has previously held that in light of the fact that several applications for protective measures were pending, an immediate decision by the Appeals Chamber in relation to the procedure and

³² "If the Victims now were allowed to make submissions on the admissibility, it is likely that the proceedings would be further delayed, in particular in view of the fact that the Appellant still is not represented by counsel. As both the Appellant and the Prosecutor have made extensive submissions on the admissibility of the appeal, which seem to cover all angles of the question, further submissions by the Victims are not likely to add substantially to it. On balance, the participation of the Victims at this stage of the proceedings therefore would be inappropriate." Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, Separate Opinion of Judge Song at paragraph 23.

³³ "The term "proceedings" as encountered in the first part of article 82(1)(d) is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto": Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 at paragraph 12.

criteria for protective measures would materially advance the proceedings.³⁴ The ICTR has also held that the enumeration of a legal principle, which is likely to be applied through the proceedings, constitutes an issue the resolution of which would materially advance the proceedings.³⁵

34. As such, the OPCD respectfully submits that an immediate resolution of this issue would ensure that all future victim applications are processed and adjudicated in accordance with the correct legal principles, and would eliminate the necessity of revising the status of victims, if they have been incorrectly or prematurely accorded this status.

4. Issue 2: Whether the decision lacks sufficient reasoning concerning whether the applicant's meet the requisite factual and legal criteria to be admitted as victims.

4.1 Impact on fairness

35. As noted above, the submissions of the OPCD on the applications raised several specific observations, which were directly relevant to the Chamber's assessment as to whether the applicants met the criteria to be considered as victims; for example, submissions to the effect that some of the alleged offences occurred outside the temporal jurisdiction of the Court, or that the passports of the applicants suggested that they were not in Darfur during the time periods when they allege to have been victims of attacks on villages in Darfur.

36. In concluding that notwithstanding these observations, the applicants suffered harm as the result of offences under the jurisdiction of the Court, it is not clear from the decision as to whether the Single Judge found the arguments of the OPCD to be irrelevant or unfounded, or whether the Honourable Single Judge based her findings on other information, which was not provided to the parties, which explained the inconsistencies in the applications.

37. The OPCD also submitted several legal arguments concerning the directness of the harm, and the conditions under which an applicant can claim to have suffered harm as

³⁴Decision on Second Defence Motion for Leave to Appeal, 28 September 2006, ICC-01/04-01/06-489 at page 13.

³⁵ Decision on Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, Prosecutor v. Nzirorera, 9 October 2007.

a result of events occurring to other persons, or the destruction of property belonging to other persons.

38. Whilst the Single Judge need not address each and every argument, there is an obligation to indicate “with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.”³⁶ Moreover, a “decision must set out which of the relevant facts and legal arguments that were before the Pre-Trial Chamber were found to be persuasive for the determination it reached.”³⁷ In reaching a factual determination, the decision should also “indicate which of the facts before [the Chamber] led it to reach such a conclusion”.³⁸

39. The OPCD also notes that in its decision of 14 December 2006,³⁹ the Appeals Chamber also cited with approval a decision of the ICTY Appeals Chamber to the effect that “as a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision”.⁴⁰

40. In this regard, the OPCD submits that the fact that the Honourable Single Judge ordered that the Reports of the Registrar should not be transmitted to the parties, does not obviate the obligation of the Single Judge to indicate whether the factual conclusions are based on information contained within these Reports or other extrinsic materials which were not communicated to the parties. As concluded by the Appeals Chamber, “the *ex parte* character of the proceedings itself did not reduce the need for the Impugned Decision to be properly reasoned, but made the provision of proper reasoning more necessary because the appellant could not rely on the context in which

³⁶ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” ICC-01/04-01/06-773 at paragraph 20.

³⁷ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” ICC-01/04-01/06-774, 14 December 2006, at paragraph 33.

³⁸ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” ICC-01/04-01/06-773 at paragraph 21.

³⁹ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” ICC-01/04-01/06-773 14 December 2006, at paragraph 20.

⁴⁰ “Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic’s Provisional Release” of 1 November 2005 in the case of Prosecutor v. Milutinovic et al (Case No. IT-05-87-AR65.1) at paragraph 11.

the Impugned Decision was made to determine how the Pre-Trial Chamber reached its decision.”⁴¹

41. Whilst the degree of reasoning depends on the proceedings in question, the OPCD respectfully submits that in light of the novelty and complexity of victim participation at the ICC, the first decision in the Darfur situation to grant such participation should set out with clarity and a higher degree of elaboration the reasons underpinning why certain applicants have been recognised as applicants, whereas others have been denied.

42. In this regard, in the DRC situation, the Honourable Single Judge has explicitly acknowledged the utility, and the fairness entailed by providing reasoning to the applicants: “[w]hile the absence of notification of rule 89 (1) observations will prevent applicants from knowing the specific challenges made in the parties’ observations, the Chamber’s decision on their applications will indicate any further information required or the reasons for which the applications were rejected. Hence, notification of the Chamber’s decision will place applicants in a position to re-apply under rule 89(2) of the Rules to correct any deficiencies.”⁴²

43. Sufficiency of reasons also promotes the transparency of the proceedings, and in particular, the right of the Defence to fair, impartial, and public proceedings. To the extent that it is not presently apparent from the decision as to the specific source of information on which the Honourable Single Judge based the conclusions, sufficiency of reasons also impacts on the right of to be heard.⁴³

44. In this connection, the OPCD further observes that the OPCD was ordered by the Honourable Single Judge to file its observations on a confidential basis, and that its request, to subsequently file public, redacted versions of its observations, was rejected.⁴⁴ In contrast, the Prosecution filed a public version of its observations,⁴⁵ and

⁴¹ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” ICC-01/04-01/06-773 at paragraph 22.

⁴² Decision on the Requests of the OPCV, ICC-01/04-418 10 December 2007 at paragraph 17.

⁴³ The OPCD observes that the Honourable Single Judge in the Thomas Lubanga Dyilo case concluded that the right to be heard on a matter before the Chamber in which the party has an interest affect both the fairness and expeditiousness of the proceedings. Decision on Second Defence Motion for Leave to Appeal, ICC-01/04-01/06-489, 28 September 2006, at pages 11 and 12.

⁴⁴ See Request for an extension of Page Limit, ICC-02/05-77, 8 June 2006, and the corresponding Decision on Confidentiality Matters and Extension of Page Limit, ICC-02/05-79, 8 June 2007.

Similarly, in the DRC situation, the OPCD also requested the authorisation of the Chamber to file a public, redacted version of its observations, which had been previously been vetted by either the Victims and Witnesses unit, or the Chamber itself: ‘Response to ‘Demande du représentant légal des victimes a/0231/06 à a/0233/06 et a/0242/06 à a/0250/06, ICC-01/04-330’ ICC-01/04-336, 12 June 2007.

This request was not granted: Decision on matters of confidentiality and the Request for extension of the page limit, ICC-01/04-342, 19 June 2007.

legal representatives of the applicants have issued public press statements concerning the allegations.⁴⁶

45. The OPCD therefore submits that in circumstances, in which the public have not had access to potential counter-arguments concerning whether the applicants should be granted victim status (in redacted format), it is necessary for the decision to address the key, relevant submissions of the OPCD to ensure that justice is not only done, but that it is patently seen to be done.

4.2 Impact on the Expeditionousness of the Proceedings

46. The OPCD respectfully submits that the inclusion of a greater degree of factual and legal reasoning would facilitate the ability of the parties to prepare future observations in a focussed and efficient manner, would assist potential applicants to complete their applications in an expeditious manner, and would in itself, act as a screen against completely unfounded applications, which delay the proceedings.

47. The OPCD further observes that the Honourable Single Judge, in the Thomas Lubanga Dyilo case, has previously held that the issue as to whether a decision lacks factual reasoning in light of the particularities of the process, can constitute an issue which impacts on the fair and expeditious proceedings.⁴⁷

4.3 An immediate resolution would materially advance the proceedings

48. As noted above, a clear and detailed decision concerning the legal and factual scenarios in which an applicant would meet the criteria to be recognised as a victim, would provide significant guidance for all concerned, and would facilitate the adjudication of future applications in this situation.

5. Relief sought

49. For the reasons outlined above, the OPCD respectfully requests the Honourable Single Judge to grant leave, pursuant to article 82(1)(d) of the Statute, to appeal the

⁴⁵ Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 in the Situation in Darfur, the Sudan, 8 June 2007, ICC-02/05-81

⁴⁶ Darfur victims sue Sudanese government in ICC, Sudan Times, 18 October 2006, <http://www.sudantribune.com/spip.php?article18196>

⁴⁷ Decision on Second Defence Motion for Leave to Appeal, 28 September 2006, ICC-01/04-01/06-489, 28 September 2006, at page 12.

following issues, which derive from the Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07:

- i. Whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of a specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation; and
- ii. Whether the decision lacks sufficient reasoning concerning whether the applicant's meet the requisite factual and legal criteria to be admitted as victims.



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Dated this Wednesday, 12 December 2007

At The Hague