

**Cour
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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

Prosecution's Response to OPCD's Request for leave to appeal the "Decision on the request 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"

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Introduction

1. On 3 December 2007, the Single Judge of Pre-Trial Chamber I issued the “Decision on the request 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” (“Decision”).¹
2. On 10 December 2007, the Office of Public Counsel for the Defence (“OPCD”), pursuant to Article 82(1)(d), filed a “Request for leave to appeal the ‘Decision on the request 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’” (“Application”).²
3. Pursuant to Regulation 65(3), the Prosecution hereby responds to the Application.
4. The Prosecution considers that the OPCD has, in part, met the requirements for leave to be granted under Article 82(1)(d). Consequently, in relation to those aspects the Prosecution does not oppose the Application. However, the Prosecution opposes the Application in relation to one aspect of the Application for which the Prosecution submits that the requirements for leave to be granted under Article 82(1)(d) are not met.
5. The Prosecution takes this position on the basis of its independent examination of the issues raised in the Application in light of the requirements of Article 82(1)(d). These requirements do not involve consideration of, or in any way reflect the Prosecution’s position on, the merits of the Decision. If leave to appeal is granted, then the Prosecution will advance its position on the merits of the Decision before the Appeals Chamber. In that case, the Prosecution’s substantive position and arguments will depend, in part, on – and may differ from – the grounds of appeal proposed, and arguments employed, by the OPCD.

¹ ICC-02/05-110.

² ICC-02/05-112.

Discussion

a) General procedural considerations

(i) Standing of OPCD to file the Application

6. The Prosecution does not deny that, in this instance, the OPCD has standing to file the Application. The Single Judge authorised the OPCD to submit observations on a number of victims' applications pursuant to Rule 89(1),³ and did not question the standing of OPCD to file the requests which were the basis of the Decision.⁴

(ii) Definition of an issue under Article 82(1)(d) and issues identified in the Application

7. Under Article 82(1)(d), leave to appeal may be granted if the decision "involves an issue which affects the fair and expeditious conduct of the proceedings ... and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings." The Appeals Chamber has confirmed that "[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination".⁵

8. In the Application, the OPCD identified two issues in relation to which leave to appeal is sought. Issue 1 is the question "whether the application process is a distinct procedure, unrelated to the modalities of participation in the criminal proceedings before the Court, and thus, not per se prejudicial to the defence".⁶ Issue 2 is the question "whether the Chamber is only obliged to provide the Prosecution and the Defence with copies of the applications [for victim status], and is thus not obliged to provide or order the applicants to provide information extrinsic to the applications themselves".⁷

³ ICC-02/05-74; ICC-02/05-85. See also ICC-02/05-96, a decision issued by the Single Judge on 22 August 2007, among other things authorizing OPCD to submit observations on the victims applications within 30 days of notification.

⁴ See also the "Prosecution's Consolidated Response to the OPCD's 'Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 89(2)(e)' and 'Request for the Single Judge to order the Prosecutor to disclose exculpatory materials'" (ICC-02/05-99-Conf).

⁵ *Situation in the DRC*, 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, para. 9 (emphasis added), as recognized in the Application, para. 10.

⁶ Application, paras. 24-38.

⁷ Application, paras. 39-55.

9. In the Prosecution's view, Issue 2 comprises two aspects, each of which constitutes a distinct but related issue for the purposes of granting leave to appeal and which must be examined separately. The first of these issues ("Issue 2.1") is "whether the Chamber is only obliged to provide the Prosecution and the Defence with copies of the applications, and is thus not obliged to provide information extrinsic to the applications themselves"; while the second ("Issue 2.2") is "whether the Chamber is obliged to order the applicants to provide additional information extrinsic to the applications". The Prosecution submits that these issues are logically distinct, and that the OPCD offers brings different arguments in support of each, which in turn must be addressed separately.

(iii) *Scope of any resulting appeal*

10. In its Application, the OPCD stated that "it is not possible for the OPCD to address the first component of the request concerning disclosure from the Prosecution in isolation. As such, any appeal on this issue can only be raised in connection with the Single Judge's ultimate decision concerning whether it is appropriate and non-prejudicial for the applicants to participate as victims in the situation phase".⁸ The Prosecution submits that this statement cannot be read to extend the effect of the Application to a substantive issue in the Decision or in a subsequent ruling by the Single Judge. If the OPCD wishes to appeal such a substantive issue, it must, pursuant to Article 82(1)(d) seek leave to do so.⁹

b) Issue 1: Whether the application process is a distinct procedure, unrelated to the modalities of participation or the criminal proceedings before the Court, and thus, not per se prejudicial to the Defence

11. The Prosecution agrees with OPCD that this issue arises from the Decision.¹⁰ Although the Prosecution does not agree with all of the arguments set out by OPCD in

⁸ Application, para. 22.

⁹ On 12 December 2007, OPCD filed a "Request for leave to appeal the 'Decision on the Applications for Participation in the Proceedings of Applicants a/00/11/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07'" (ICC-02/05-113). In the view of the Prosecution, the decision in relation of which OPCD seeks leave to appeal may be the "ultimate decision concerning whether it is appropriate and non-prejudicial for the applicants to participate as victims in the situation phase". The Prosecution contends that any appeal in relation to that decision is limited to the issues for which leave has been sought and granted.

¹⁰ In the view of the Prosecution, this issue arises from paras. 5-7 and 20 of the Decision.

its Application, the Prosecution submits that, for the following reasons, the issue meets the requirements of Article 82(1)(d), warranting examination by the Appeals Chamber.

12. The Prosecution agrees that this issue affects the fair conduct of the proceedings. In this context, the Prosecution notes in particular the arguments advanced by the OPCD to the effect that a) a Chamber may not use the fact that its conclusion was correct to deny its impact on the issue arising from the decision on the fairness of the proceedings;¹¹ and b) the application procedure *per se* can affect the fairness of the proceedings, and must be implemented in a manner that is not prejudicial to or inconsistent with the fairness of the proceedings.¹²
13. However, the Prosecution disagrees with the OPCD's arguments pertaining to the impact on the fairness of the proceedings of any public perception following judicial findings on victim applications based on a lower threshold of proof,¹³ and the impact of the designation of the applicants as victims on their future ability to testify as witnesses.¹⁴ In spite of these disagreements, the Prosecution is of the view that, for the above reasons, the Application does meet the fairness requirement in relation to Issue 1.
14. The Prosecution further agrees that this issue affects the expeditious conduct of the proceedings. In particular, granting applicants the status of victims only would require them to resubmit an application for the purposes of participating in the proceedings and make additional showings, for example in relation to their personal interests.¹⁵
15. The Prosecution also supports the arguments advanced by the OPCD to the effect that an immediate resolution by the Appeals Chamber may materially advance the proceedings. In particular, the Prosecution agrees that the issue has implications for all future victim applications, at all stages of the proceedings, and that the proceedings

¹¹ See Application, paras. 27-28.

¹² See Application, para. 29. See further arguments advanced by OPCD in this context in paras. 30, 32 and 33.

¹³ See Application, para 34.

¹⁴ See, Application, para. 35.

¹⁵ See, Application para. 36. In this context, see also arguments advanced by the Prosecution in the "Prosecution's Application for Leave to Appeal the 6 December 2007 Decision on Applications for Participation in the Proceedings", filed on 12 December 2007 (ICC-02/05-114, paras. 25-31), in which the Prosecution discusses the impact of a similar issue on the expeditious conduct of the proceedings. Arguments to that effect advanced by the Prosecution includes that the system put in place requires additional time – and resource-intensive litigation and management resources from the Registry; and that the absence of procedural guidance as to the concrete role played by victims affects the predictability and efficiency of the proceedings, and thereby it expeditiousness.

will be materially advanced by the Appeals Chamber being afforded the opportunity to provide comprehensive guidance on this issue.¹⁶

- c) Issue 2: Whether the Chamber is obliged to provide the Prosecution and the Defence only with copies of the applications, and is thus not obliged to provide or order the applicants to provide information extrinsic to the applications

16. As stated above, Issue 2 is actually comprised of two separate issues, which the Prosecution submits should be examined independently as to whether or not they satisfy the requirements of Article 82(1)(d).

- (i) *Issue 2.1: whether the Chamber is obliged to provide the Prosecution and the Defence only with copies of the applications, and is thus not obliged to provide information extrinsic to the applications themselves*

17. In the view of the Prosecution, it is not entirely clear from the Decision what is encompassed by the phrase “information extrinsic to the application”, and therefore what information provided by the applicants will eventually be transmitted to the parties.¹⁷ The relevant parts of the Decision read as follows:¹⁸

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.” [...] Hence, rule 89 of the Rules does not require the Chamber to provide [...] to the Prosecution or the Defence, for the purpose of submitting their observations, information extrinsic to the applications themselves.

18. If the Single Judge intends that all supporting material spontaneously provided by an applicant together with the application form, and all material provided by applicants following an order of the Court pursuant to Regulation 86(7), shall be included in or

¹⁶ See, Application, paras. 37-38. In this context, see also arguments advanced by the Prosecution in the “Prosecution’s Application for Leave to Appeal the 6 December 2007 Decision on Applications for Participation in the Proceedings”, filed on 12 December 2007 (ICC-02/05-114, paras. 32-40), in which the Prosecution discusses in more detail how the immediate resolution by the Appeals Chamber of a similar issue would materially advance the proceedings.

¹⁷ In order to examine Issue 2.1, any clarification by the Single Judge to that effect would be beneficial.

¹⁸ Decision, paras. 14-15. See also “Decision on the Application for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07 to a/0033/07 and a/0035/07 to a/0028/07” (ICC-02/05-111, para. 20, item (a)).

considered as part of the application,¹⁹ and shall therefore be transmitted to the parties, then the Prosecution contends that this issue does not arise from the Decision. In that case, a party responding under Rule 89(1) will have access to all the information that a Chamber has before it when taking a decision on a victim's application for participation in the proceedings.

19. However, if the ruling of the Single Judge is interpreted to provide only the application forms without all the supporting material either presented by the applicants spontaneously or upon the request by a Chamber, then Issue 2.1 of the Application does arise from paragraphs 14 and 15 of the Decision. In that event, the Prosecution further contends that, for the following reasons, the issue meets the requirements of Article 82(1)(d), warranting examination by the Appeals Chamber.
20. The Prosecution agrees with the argument of the OPCD that the right of a party to be informed of the case and to respond to the material on which a Decision is to be based would significantly affect the fair conduct of the proceedings.²⁰
21. The Prosecution also agrees that the issue affects the expeditious conduct of the proceedings.²¹
22. The Prosecution further concurs that an immediate resolution by the Appeals Chamber may materially advance the proceedings. In particular, the Prosecution agrees that the issue has implications for all future victim applications, at all stages of the proceedings, and that the proceedings will be materially advanced by the Appeals Chamber being afforded the opportunity to provide comprehensive guidance on this issue.²²

¹⁹ The Prosecution notes that the passage of the Decision cited above requires that "applications contain the enumerated items, including any relevant supporting documentation" (emphasis added)

²⁰ See Application, paras. 49-52.

²¹ See OPCD's argument in Application, paras. 53-54.

²² See, Application, para. 55 making reference to its submissions in paras. 37-38. In this context, see also the arguments adduced in paras. 44-45 of the Application to the effect that, to a limited extent, the Decision is taking an approach that is conflicting with prior jurisprudence of the Court. In the view of the Prosecution, the proceedings will be materially advanced if the Appeals Chamber is allowed to complete its role as the ultimate arbiter of the law in relation to this issue in a comprehensive fashion – entering an authoritative decision ending any uncertainty as to its interpretation.

- (ii) *Issue 2.2: whether the Chamber is obliged to order the applicants to provide additional information extrinsic to the applications*

23. The OPCD stated that “the decision of the Single Judge imposed a rigid bar against permitting the OPCD to receive the assistance of the Chamber, and limits the right of the OPCD to comment on extrinsic materials which might be directly relevant to the allegations set out in the applications”.²³ The OPCD argued that, instead, “[w]hether the Chamber should in fact grant the OPCD’s request should be determined on a case by case basis.”²⁴
24. The Prosecution is of the view that Issue 2.2 does not arise from the Decision and therefore does not constitute an issue within the meaning of Article 82(1)(d). The decision does not impose a rigid bar against permitting the OPCD to receive the assistance of the Chamber. In her decision, the Single Judge found that “rule 89 of the Rules does not require the Chamber [...] to order the applicants to provide [...] information extrinsic to the applications themselves. [...] 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”.²⁵
25. The Prosecution acknowledges that if the parties are barred from receiving access to some of the material which is before the Single Judge, and which could assist the parties in responding to an application, then the parties are also *de facto* barred from receiving the assistance from a Chamber to obtain material to which they do not have access. However given that the Decision accepts that parties may request that the Single Judge order the provision of additional information on a case-by-case basis, this

²³ Application, para. 52. Concerning the alleged limitations on OPCD to comment on extrinsic materials, the Prosecution is of the view that this matter goes to the question of whether or not the parties will be provided with information extrinsic to the applications themselves and therefore falls within, and is covered by, the first aspect of Issue 2 of the Application.

²⁴ *Ibid.*

²⁵ Decision, paras. 15-16 (emphasis added). Hence, the Single Judge did not exclude that a Chamber may grant a request by a party to order that the applicants provide additional information, on a case by case basis, under Regulation 86(7). To the contrary, the Single Judge appears to have considered whether to order the various categories of information requested by the OPCD, and to have rejected those requests on the merits (see in particular Decision, para. 17). Regulation 87(7) does not expressly confer a party the power to request a Chamber to order an applicant to provide additional material. However, according to the Appeals Chamber, “[i]t may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it” (*Situation in the Democratic Republic of the Congo, Judgment on Extraordinary Review*, ICC-01/04-168 OA3, 13 July 2006, para. 20).

is an issue that does not arise independently. This *de facto* impact will be resolved by addressing the question whether the parties have full access to material provided by the applicants, and is therefore covered by issue 2.1.

Conclusion

26. For the reasons referred to above, the Prosecution respectfully requests the Chamber to consider:

- a. granting the Application for leave to appeal with respect to Issue 1 and Issue 2.1 (i.e. the first aspect of Issue 2); and to
- b. denying the Application for leave to appeal with respect to Issue 2.2 (i.e. the second aspect of Issue 2).



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Dated this 13th day of December 2007
At The Hague, The Netherlands