

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-02/05

Date: 17 December 2007

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 Single Judge's 6 December 2007 Decision on the Applications for Participation in the Proceedings

The Office of the Prosecutor

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Introduction

1. On 6 December 2007, the Single Judge of Pre-Trial Chamber I issued 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” (“Decision”).¹
2. On 12 December 2007, the Prosecution filed a request for leave to appeal the Decision pursuant to Article 82(1)(d) (“Prosecution Application”).² On the same day, the Office of Public Counsel for the Defence (“OPCD”) also filed a request for leave to appeal the Decision pursuant to Article 82(1)(d) (“OPCD Application”).³
3. Pursuant to Regulation 65(3), the Prosecution hereby responds to the OPCD Application.
4. The Prosecution considers that the OPCD Application satisfies, in part, 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 satisfied.
5. The Prosecution takes this position on the basis of its independent examination of the issues raised in the OPCD 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 *Situation in Sudan, Darfur*, ICC-02/05-111, 6 December 2007. On 14 December 2007, the Single Judge issued a “Corrigendum to 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” (ICC-02/05-111-Corr). The Prosecution notes that, for the purposes of the present filing, the amendments affected by this corrigendum do not have a substantial impact on the Decision.

² *Situation in Sudan, Darfur*, ICC-02/05-114, 12 December 2007.

³ *Situation in Sudan, Darfur*, ICC-02/05-113, 12 December 2007.

Discussion

6. 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”.⁴
7. The OPCD Application identifies two issues in relation to which leave to appeal is sought:
 - a. 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 (“Issue 1”);⁵
 - b. Whether the decision lacks sufficient reasoning concerning whether the applicants meet the requisite factual and legal criteria to be admitted as victims (“Issue 2”).⁶

a) 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

8. This issue largely coincides with the issue raised by the Prosecution in its own application for leave to appeal the Decision. While the Prosecution and the OPCD have framed the Single Judge’s determination slightly differently, there is no dispute between the parties regarding the appealability of the manner in which the Single Judge granted the applications of certain victims. The Prosecution and OPCD agree that the Decision appears to grant the procedural status of victim on the basis of a prior and very general

⁴ *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).

⁵ OPCD Application, paras. 22-34.

⁶ OPCD Application, paras. 35-48.

interpretation of personal interests,⁷ and without considering in real terms the appropriateness of the participation or the impact on a fair and impartial trial.⁸

9. The Prosecution agrees with OPCD that Issue 1 arises from the Decision and that it satisfies the requirements of Article 82(1)(d), warranting examination by the Appeals Chamber.⁹ The Prosecution therefore does not oppose that leave to appeal be granted for Issue 1.

b) Issue 2: whether the Decision lacks sufficient reasoning concerning whether the applicants meet the requisite factual and legal criteria to be admitted as victims

10. The Prosecution notes that, on two occasions in the past, the lack of factual reasoning underlying a decision has been considered by another Single Judge of this Chamber to involve an appealable issue which fulfils the criteria for granting leave to appeal.¹⁰
11. In the view of the Prosecution, Issue 2 is comparable to these issues, in that here, the Decision set forth ultimate conclusions, without identifying the factual basis or factual reasoning on which those conclusions rested.¹¹
12. Moreover, the OPCD submits that the Decision lacks legal specificity, given that, among other things, “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’”.¹²
13. The Single Judge concluded that applicants a/0015/06 and a/0024/07 suffered harm in the form of emotional suffering alongside with other suffering, in particular economic loss.¹³ It must be assumed that the Single Judge gave this conclusion some weight when granting these applications. However, the Single Judge did not set out the legal criteria

⁷ See OPCD Application, paras. 14-15; Prosecution Application, paras. 1-3.

⁸ See OPCD Application, paras. 14, 29; Prosecution Application, para. 1.

⁹ See Prosecution application, paras. 14-40.

¹⁰ See *Prosecutor v Lubanga*, ICC-01/04-01/06-489, 28 September 2006, p. 4-6 and 11-14 (the issue was “whether the Decision lacked factual reasoning in light of the fact that it was issued during ex parte proceedings for non-disclosure of identity of Prosecution witnesses under rule 81(4) of the Rules”); *Prosecutor v Lubanga*, ICC-01/04-01/06-514, 4 October 2006, pp. 9, 10, 13 and 14 (the issue was “whether the part of Decision based on rule 81(2) of the Rules lacks factual reasoning in light of the fact that it was issued during ex parte proceedings on requests for redactions so as not to prejudice further investigations”).

¹¹ See for example, Decision, para. 48.

¹² OPCD Application, para. 19. See also para. 37.

¹³ See Decision, paras. 41 and 43.

relevant to the concept of emotional suffering and did not provide information on how it applied the relevant legal provisions to the facts of the case.¹⁴

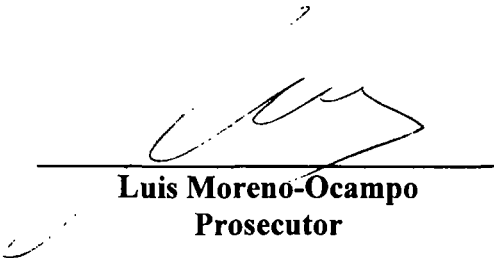
14. As a consequence, the Prosecution agrees that Issue 2 does arise from the Decision.¹⁵

The Prosecution also agrees that Issue 2 satisfies the requirements of Article 82(1)(d), warranting examination by the Appeals Chamber. As the Appeals Chamber has stated, “the right to a reasoned decision is an element of the right to a fair trial”.¹⁶ Moreover, the Prosecution agrees that the issue affects the expeditious conduct of the proceedings,¹⁷ and that its immediate resolution would materially advance the proceedings.¹⁸

15. The Prosecution, therefore, does not oppose that leave to appeal be granted for Issue 2.

Conclusion

16. For the reasons referred to above, the Prosecution respectfully requests the Chamber to consider granting the Application for leave to appeal with respect to Issues 1 and 2.



Luis Moreno-Ocampo
Prosecutor

Dated this 17th day of December 2007
At The Hague, The Netherlands

¹⁴ As to the degree of factual and legal reasoning required, see *Prosecutor v. Lubanga*, ICC-01/04-01/06-773 OA5, 14 December 2006, paras. 20, 32-33; *Prosecutor v. Lubanga*, ICC-01/04-01/06-774 OA6, 14 December 2006, para. 30.

¹⁵ In the view of the Prosecution, the issue does not arise from the fact that the factual and legal arguments advanced by the OPCD (*Situation in Darfur, Sudan*, ICC-02/05-80-Conf, 8 June 2007; *Situation in Darfur, Sudan*, ICC-02/05-103-Conf, 24 September 2007) were not accepted. However it does arise, among other things, from the way in which the Decision does not elaborate on or give any indication of why it has dismissed the arguments presented by the OPCD.

¹⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06-773 OA5, 14 December 2006, para. 20; *Prosecutor v. Lubanga*, ICC-01/04-01/06-774 OA6, 14 December 2006, para. 30. However, the Prosecution does not agree with the submission of the OPCD that the fact that the Prosecution filed its observations publicly, while the OPCD did not, has any impact on the fairness of the proceedings (see OPCD Application, paras 44-45).

¹⁷ See OPCD Application, para. 46.

¹⁸ See OPCD Application, paras. 48 and 41.