

**Cour
Pénale
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**International
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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

**Prosecution's Response to OPCD's Request for leave to appeal the Single Judge's
24 December 2007 Decision on the Applications for Participation in the Proceedings**

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Introduction

1. On 24 December 2007, the Single Judge of Pre-Trial Chamber I issued the “ Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 à a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 à a/0241/06 et a/0250/06.”¹
2. On 7 January 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, it is not possible to determine with certainty whether Issue 5 arises from the decision. The determination on whether the issue arises from the Decision or not hinges on a prior interpretation of the terms of the same Decision by the Single Judge.
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, the Prosecution will advance its position on the merits of the Decision before the Appeals Chamber.

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

¹ *Situation in the DRC*, ICC-01/04-423, 24 December 2007.

² *Situation in the DRC*, ICC-01/04-428, 7 January 2008.

³ *Situation in the DRC*, ICC-01/04-429, 7 January 2008.

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 five 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 victims 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 (“Issue 1”);⁵
- b. Whether supplementary information or corrigenda submitted in connection with the applications should be submitted in a written format, which is either signed by the applicants themselves or by a legal representative with a valid power of attorney (“Issue 2”);⁶
- c. Whether the decision lacks sufficient reasoning concerning whether the applicants meet the requisite factual and legal criteria to be admitted as victims (Issue 3);⁷
- d. Whether the Chamber may *proprio motu* re-characterise the legal/procedural basis for the application, without first requiring the consent of the applicants and subsequently according the parties a right to be heard (Issue 4);⁸ and
- e. Whether, in order to establish moral harm on the basis of harm suffered by a second person, it is necessary to adduce some level of proof concerning the identity of the second person and the applicant’s relationship with this person (Issue 5).⁹

a) Issue 1: Whether it is possible to grant victims a general right to participate, or whether victims participation is conditioned upon a

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. 9, 22-32 and 64-65.

⁶ OPCD Application, paras. 10-12, 33-44 and 64-65.

⁷ OPCD Application, paras. 13-14, 45-55 and 64-65.

⁸ OPCD Application, paras. 15-16, 56-57 and 64-65.

⁹ OPCD Application, paras. 17, 59-63 and 64-65.

specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation

8. The decision to grant the procedural status of victim without analyzing their personal interests, and without considering in real terms the appropriateness of the participation or the impact on a fair and impartial trial is an appealable issue and satisfies the requirements of Article 82(1)(d), warranting examination by the Appeals Chamber.¹⁰ Therefore, the Prosecution does not oppose that leave to appeal be granted for Issue 1.

b) Issue 2: Whether supplementary information or corrigenda submitted in connection with the applications should be submitted in a written format, which is either signed by the applicants themselves or by a legal representative with a valid power of attorney

9. The supplementary information that was received by the VPRS and that was transmitted to the OPCD and the Prosecution has in part been presented orally and in a manner which does not allow the parties to verify that it emanates from the applicants or its accuracy.¹¹ Hence, Issue 2 does arise from the Decision.¹²
10. The Prosecution is of the view that Issue 2 satisfies the requirements of Article 82(1)(d), warranting examination by the Appeals Chamber.¹³
11. The Prosecution therefore does not oppose that leave to appeal be granted for Issue 2.

c) Issue 3: Whether the decision lacks sufficient reasoning concerning whether the applicants meet the requisite factual and legal criteria to be admitted as victims

¹⁰ See OPCD Application, paras. 9 and 21-42. See also Prosecution Application, paras. 21-42.

¹¹ This has been confirmed by the Single Judge. See Decision, para. 12.

¹² In the view of the Prosecution, Issue 2 would not arise from the Decision if the Single Judge had not give the unsigned information or that provided orally any significant weight for the purposes of her conclusions. Due to the absence of any factual reasoning (see Issue 3), this possibility cannot be excluded. However, the fact that the Single Judge explicitly stated in her decision of 24 August 2007 that this supplementary information is "related to the applications" and is "part of the applications" and ordered that it be transmitted to the OPCD and the Prosecution (ICC-01/04-376) allows for the conclusion that the Single Judge found the information to be relevant and that she based the Decision in part on information presented orally or in a manner which does not allow the parties to verify that it emanates from the applicants as well as its accuracy.

¹³ In the view of the Prosecution, the OPCD's arguments to the effect that all information must be authorized by the applicant or participant and its accuracy must be verifiable (paras. 39 and 41) and that there must be a consistent approach in receiving applications and supporting information (para. 38) demonstrate that Issue 2 has a significant impact on the fairness of the proceedings. Moreover, the Prosecution is of the view that the arguments included in the Application also meet the requirements of the expeditiousness of the proceedings (see in particular paras. 42 and 43) and that an immediate resolution of the issue will materially advance the proceedings (see paras. 64-65).

12. The Prosecution does not oppose the applicant's contention that the Decision fails to sufficiently elaborate on its legal findings, and that the factual findings are framed as conclusions, rather than as an analysis of the observations of the parties.¹⁴

13. The Prosecution thus agrees that Issue 3 does arise from the Decision and satisfies all limbs of Article 82(1)(d), warranting examination by the Appeals Chamber. The Prosecution, therefore, does not oppose that leave to appeal be granted for Issue 3.

d) Issue 4: Whether the Chamber may proprio motu re-characterise the legal/procedural basis for the application, without first requiring the consent of the applicants and subsequently according the parties a right to be heard

14. The Prosecution notes that instead of dismissing the applications made on behalf of deceased persons pursuant to its own ruling,¹⁵ the Decision re-characterised the applications.¹⁶ Eventually, the Single Judge instructed VPRS to assign an application number to a third person that acted on behalf of the deceased persons,¹⁷ thereby treating him as a victim applicant in his own right.¹⁸

15. This issue does affect the fairness of the proceedings, especially as the Single Judge did not put the parties on notice that this approach might be adopted, thereby effectively depriving the parties of an opportunity to submit observations on the admission of a third person as a victim participant.¹⁹ Further, the manner in which this issue was disposed of may lead to further litigation in the future as to whether such admission was properly granted, thereby affecting the expeditiousness of the proceedings.

16. For these reasons, the Prosecution agrees that Issue 4 satisfies all the requirements of Article 82(1)(d) warranting examination by the Appeals Chamber and, therefore, does not oppose that leave to appeal be granted for Issue 4.²⁰

¹⁴ OPCD Application, para. 14. See also Prosecution Application, para. 18.

¹⁵ Decision, para. 24.

¹⁶ Decision paras. 25, 115-116 and 136.

¹⁷ Decision, para. 136.

¹⁸ The Prosecution agrees with the OPCD that Issue 4 arises as the Single Judge did not require the third person to submit a new application on his own behalf (Application, para. 16).

¹⁹ See OPCD Application paras. 16 and 56.

²⁰ See OPCD Application, paras. 56-57 and 64-65.

- e) Issue 5: Whether, in order to establish moral harm on the basis of harm suffered by a second person, it is necessary to adduce some level of proof concerning the identity of the second person and the applicant's relationship with this person

17. In the view of the Prosecution, the OPCD slightly mischaracterised the findings of the Single Judge with respect to applications a/0130/06 and a/0131/06.²¹ Applications a/0130/06 and a/0131/06 were both submitted by a third person acting on behalf of two children who are alleged to be his deceased sons.
18. With respect to Issue 5, the Prosecution notes that there is some tension between different sections of the Decision. The Single Judge considered application a/0131/06 to be incomplete,²² and yet this application appears to have nevertheless been taken into consideration by the Single Judge for the purposes of the moral harm suffered by the person who submitted the application.²³
19. In deciding on the request to grant leave to appeal, the Single Judge has the opportunity to clarify whether her decision was based on the findings regarding the moral harm of the person who submitted both applications only on the death of the person who is subject to application a/0130/06.
20. If the decision was not based on these findings, then issue 5 arises and satisfies all the requirements of Article 82(1)(d) because admitting victim applications without a possibility to verify the existence of an alleged crime or the basis on which the applicant has suffered moral harm does significantly affect the fairness of the proceedings.²⁴ The Prosecution also agrees that the issue affects the expeditious conduct of the proceedings,²⁵ and that its immediate resolution would materially advance the proceedings.²⁶ Consequently, and to the extent that issue does arise from the decision, the Prosecution does not oppose leave to appeal being granted.

²¹ See OPCD Application, para. 17.

²² Decision, para. 32.

²³ Decision, para. 116 and dispositiv, p. 58, first paragraph.

²⁴ See in particular paras. 59 and 61 of the OPCD Application.

²⁵ See OPCD Application, para. 63.

²⁶ See OPCD Application, paras. 64-65.

Conclusion

21. 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 Issues 1, 2, 3 and 4 as well as with respect to Issue 5 to the extent that Issue 5 arises from the Decision; and
- b. denying the Application for leave to appeal with respect to Issue 5 if the Single Judge determines that it does not arise from the Decision.



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Prosecutor

Dated this 11th day of January 2007
At The Hague, The Netherlands