

**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

**Decision on the Requests for Leave to Appeal the Decision on the Application for
Participation of Victims in the Proceedings in the Situation**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
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**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

Legal Representatives of Victims

Ms Wanda M. Akin
Mr Raymond M. Brown

I, Judge Akua Kuenyehia, judge at the International Criminal Court (the “Court”);

NOTING 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”¹ (“the Decision”), issued by the Single Judge on 6 December 2007;

NOTING the “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’”² (“the OPCD Request”), filed by the Office of Public Counsel for the Defence (“the OPCD”) on 12 December 2007;

NOTING the “Prosecution’s Application for Leave to Appeal the Single Judge’s 6 December 2007 Decision on Applications for Participation in the Proceedings”³ (“the Prosecution Request”), filed by the Prosecution on 12 December 2007;

NOTING the “Response of the Legal Representatives of Victims to the Prosecution’s Application and the OPCD’s 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””⁴ (“the Legal Representatives’ Response”), filed by the Legal Representatives of the Victims on 17 December 2008;

NOTING the “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

¹ ICC-02/05-111-Corr.

² ICC-02/05-113.

³ ICC-02/05-114 and ICC-02/05-114-Anxl.

⁴ ICC-02/05-116.

Proceedings”⁵ (“the Prosecution Response”), filed by the Prosecution on 17 December 2007;

NOTING articles 68 and 82(1)(d) of the *Rome Statute* (“the Statute”), rules 85, 89, 91 and 155 of the *Rules of Procedure and Evidence* (“the Rules”) and Regulations 65 and 86 of the *Regulations of the Court* (“the Regulations”);

CONSIDERING that, as Pre-Trial Chambers I and II have repeatedly stated,⁶ for the Chamber to grant leave to appeal under article 82(1)(d) of the Statute, the issue identified by the appellant must: (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria:

- a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;

CONSIDERING that, according to the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”⁷ (“the Appeals Chamber Judgment”), issued by the Appeals Chamber on 13 July 2006:

⁵ ICC-02/05-117.

⁶ See, *inter alia*, the “Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal”, issued by Pre-Trial Chamber I on 23 June 2006 (ICC-01/04-01/06-165-Conf-Exp); the “Decision on Defence Motion for Leave to Appeal”, issued by Pre-Trial Chamber I on 18 August 2006 (ICC-01/04-01/06-338); the “Decision on Second Defence Motion for Leave to Appeal issued by Pre-Trial Chamber I on 28 September 2006 (ICC-01/04-01/06-489); and the “Decision on the Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58”, issued by Pre-Trial Chamber II on 19 August 2005 (ICC-02/04-01/05-20-US-Exp; unsealed according to Decision ICC-02/04-01/05-52 issued on 13 October 2005), in particular, para. 20.

⁷ ICC-01/04-168.

- (i) “[o]nly an issue may form the subject-matter of an appealable decision”;⁸
- (ii) “[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”;⁹
- (iii) “[n]ot every issue may constitute the subject of an appeal”,¹⁰ but “[i]t must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”;¹¹ and
- (iv) “[i]dentification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal” insofar as “[t]he issue must be one “for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings””;¹²

CONSIDERING that the Prosecution is seeking leave to appeal in relation to the issue of “whether a “procedural status of victim” can be granted in the proceedings, independent of victims who are granted the right to participate within the terms of Article 68(3) and Rule 89, and provides for a definition of the personal interests diverting from the Appeals Chamber’s jurisprudence”¹³;

CONSIDERING that the OPCD is seeking leave to appeal in relation to the following two issues:

- (a) whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination

⁸ Appeals Chamber Judgment, para. 9.

⁹ Appeals Chamber Judgment, para. 9.

¹⁰ Appeals Chamber Judgment, para. 10.

¹¹ Appeals Chamber Judgment, para. 10.

¹² Appeals Chamber Judgment, para. 14.

¹³ ICC-02/05-114, para. 12.

concerning the impact of a specific proceedings on the personal interest of the applicants, and an assessment as to the propriety of their participation;

- (b) whether the decision lacks sufficient reasoning concerning whether the applicant's meet the requisite factual and legal criteria to be admitted as victims;

CONSIDERING that the issue raised by the Prosecution and the first issue raised by the OPCD are inextricably linked because both issues relate to the manner in which the Single Judge analysed the victims' personal interests and the appropriate stages of the proceedings under article 68(3) of the Statute, rule 89 of the Rules and regulation 86 of the Regulations;

CONSIDERING that, according to the interpretation of the Single Judge, article 68(3) of the Statute requires the Chamber:

- (i) first, to assess whether the victims' personal interests are affected at a given stage of the proceedings so as to determine whether that stage is an appropriate stage of the proceedings for them to present their views and concerns (i.e., to participate); and
- (ii) if so, to determine how victims may present their views and concerns at that stage of the proceedings "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair or impartial trial" (i.e. the extent of their participation, which is referred to in the Decision as the 'modalities of participation' or the 'set of procedural rights' that victims can exercise at the relevant stage of the proceedings);

CONSIDERING that, according to the Single Judge, the analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted in relation to "stages of the proceedings", and not in relation to each specific procedural activity or piece of evidence dealt with at a given stage of the proceedings; and that the investigation of a situation and the pre-trial phase of a case are stages of the proceedings in relation to which the analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted;¹⁴

CONSIDERING, further, that in the view of the Single Judge, this interpretation is consistent with the Decision of the Appeals Chamber of 13 June 2007¹⁵ because, in that decision, (i) the Appeals Chamber does not require victims to show that their personal interests are affected by each procedural activity or piece of evidence which is part of an interlocutory appeal;¹⁶ and that (ii) on the contrary, the Appeals Chamber focused its assessment on whether the personal interests of the victims were affected by the overall interlocutory appeal, it being understood that each interlocutory appeal gives rise to a distinct and separate procedure before the Appeals Chamber;¹⁷

CONSIDERING that, in the view of the Single Judge, if, as submitted by the Prosecution and the OPCD, the analysis under article 68(3) of the Statute and the procedure pursuant to rule 89 of the Rules and regulation 86 of the Regulations were to be conducted in relation to each specific procedural activity or piece of evidence, a situation may arise in which:

¹⁴ Practical illustrations of this reasoning are the following: (1) the fact that the court management system implemented by the Court provides for different records in relation to situation and case proceedings (for instance, the record of the situation in the DRC is distinct from the records of the cases of *The Prosecution v Thomas Lubanga Dyilo* and *The Prosecution v. Germain Katanga*); and (2) the fact that the application form issued pursuant to rule 89 of the Rules and regulation 86 of the Regulations specifically requests applicants to identify the "stage of the proceedings in which the victim wishes to participate."

¹⁵ ICC-01/04-01/06-925.

¹⁶ ICC-01/04-01/06-925, para. 24.

¹⁷ ICC-01/04-01/06-925, para. 27.

- (i) the efficient and effective operation of the Court as a whole could be hampered because every time a natural or legal person intended to participate in relation to any procedural activity or piece of evidence, (a) that person would have to make an application for participation; (b) the Victims Participation and Reparations Section of the Registry would have to file a report on the application; (c) the parties would have to be given the opportunity to submit their observations on the application; and (d) the Chamber would have to decide on such application prior to conducting the relevant specific procedural activity or discussing the relevant piece of evidence;¹⁸
- (ii) victims would be deprived of any procedural status at any of the stages of the criminal proceedings before the Court because their right to participate would be confined to specific procedural activities or pieces of evidence; and
- (iii) the role of victims in criminal proceedings before this Court, which, in the view of the Single Judge constitutes one of the core features of the Statute, would be significantly limited due to the difficulties in proving that the personal interests of victims were affected by a specific procedural activity or piece of evidence (as opposed to an overall stage of the proceedings, such as the investigation stage of a situation or the pre-trial phase of a case);¹⁹

CONSIDERING further that, after undertaking the analysis of whether the victims' personal interests are affected at the investigation stage of a situation and the pre-

¹⁸ ICC-02/05-118.

¹⁹ For instance, if the Defence were to make a motion for exclusion of key Prosecution evidence on the basis of the unlawful nature of the search and seizure in which such evidence was gathered, it would be very difficult for an applicant to show that his or her personal interests were affected by such a motion if the evidence were to be considered in isolation, without first placing it in the context of the overall case. Only once the important consequences that the exclusion of the evidence at issue could have for the overall Prosecution case had been taken into account, could the Chamber decide whether the personal interests of the applicant were affected. But in the latter scenario, this is no longer an activity-related analysis; on the contrary, it is a "stage- (pre-trial stage of the case) related analysis.

trial phase of a case, the Single Judge has found that the personal interests of victims are generally affected at these two stages of the proceedings;²⁰ that consequently these are appropriate stages of the proceedings for victim participation in all situations and cases before the Court; that the Single Judge does not need to review her findings on this matter each time a new investigation of a situation is opened or a new case is initiated; and that, accordingly, victims have procedural status at the investigation stage of a situation and at the pre-trial phase of a case;²¹

CONSIDERING that such a procedural status will be granted only to those natural and legal persons who, *prima facie*, appear to have suffered direct harm²² as a result of crimes within the jurisdiction of the Court that are either the subject of (i) the investigation of a situation (crimes encompassed by the relevant situation) or (ii) a warrant of arrest or summons to appear, and, subsequently, a charging document (crimes encompassed by the relevant case).

CONSIDERING that, as already stated in the “Decision on Request for leave to appeal 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 23 January 2008 Decision”):

The granting of the procedural status of victim in situation or case proceedings automatically gives the applicants the right to participate in such proceedings;²³ that

²⁰ ICC-01/04-101, ICC-02/05-110 and ICC-01/04-417.

²¹ ICC-02/05-118, p. 5.

²² The only exception to direct harm can be found in the “Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo* and of the investigation in the Democratic Republic of the Congo” (ICC-01/04-177-tENG): “that the causal link required by rule 85 of the Rules with regard to the stage of the case is demonstrated once the victim, and if applicable, the immediate family or dependents of that victim, provide sufficient evidence to establish that that person has suffered harm directly linked to the crimes set out in the arrest warrant or that *that person has suffered harm by intervening to assist the direct victims in the case or to prevent these victims from becoming victims as a result of these crimes being committed*”.[emphasis added]

²³ The only reason to make at this stage a *prima facie* determination that applicants fulfill the four criteria provided in the definition of victims in rule 85 of the Rules, including the necessary causal link between the alleged harm suffered by the applicants and the crimes which are the subject of the proceedings concerning the investigation of a situation and the pre-trial stage of a case (ICC-01/04-101 and ICC-01/04-177), is to determine who can participate in those proceedings and accordingly grant them procedural status in such proceedings.

however, the extent of their participation must be subsequently determined by the Chamber because article 68(3) of the Statute does not pre-establish a set of procedural rights (i.e. modalities of participation) that those granted the procedural status of victim may exercise, but rather leaves their determination to the discretion of the Chamber [...];²⁴

CONSIDERING that, according to the Single Judge's interpretation of article 68(3) of the Statute, when determining the set of procedural rights attached to the procedural status of victim, the Single Judge: (i) need not make a second assessment of the victims' personal interests; and (ii) must ensure that such procedural rights are determined "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial";

CONSIDERING that, in exercising its discretion, once the Chamber makes a decision on the set of procedural rights that are attached to the procedural status of victim at the investigation stage of a situation and the pre-trial phase of a case, such rights belong to all natural and legal persons for whom the procedural status of victim has been granted in relation to those stages of the proceedings;²⁵

CONSIDERING that rule 89 of the Rules and regulation 86 of the Regulations, distinguish between two distinct and separate procedures (i.e. the application process which only aims to grant the procedural status of victim at the stage of investigation of a situation or at the pre-trial phase of a case, and the proceedings for the determination of the modalities of participation) as is the case in national jurisdictions in which victims are entitled to participate in criminal proceedings;²⁶ that, as a result, some procedural safeguards that apply in criminal proceedings before the Court, may not be applicable during the application process due to its distinct and specific nature and its limited object and purpose;²⁷ and that, while the

²⁴ ICC-02/05-118.

²⁵ ICC-02/05-118.

²⁶ ICC-02/05-110, para. 4 and ICC-01/04-417, para. 4.

²⁷ ICC-02/05-110, para. 8 and ICC-01/04-417, para. 8.

Chamber must rule, in relation to hundreds of existing applications, on an individual basis, as to whether to grant the procedural status of victim, it can determine in one or a few decisions the modalities of participation that are attached to that status;

CONSIDERING, therefore, that the issue raised by the Prosecution and the first issue raised by the OPCD, which refer to the manner in which the Chamber must conduct its analysis of victims' personal interests and the appropriate stages of the proceedings under article 68(3) of the Statute, rule 89 of the Rules and regulation 86 of the Regulations, are part of the following overarching issue, for which leave to appeal was granted in the 23 January 2008 Decision:

Whether article 68(3) of the Statute can be interpreted as providing for a 'procedural status of victim' at the investigation stage of a situation and the pre-trial stage of a case; and

- (i) if so, whether rule 89 of the Rules and regulation 86 of the Regulations provide for an application process which only aims to grant the procedural status of victim and is thus distinct and separate from the determination of the procedural rights attached to such status; and what are the specific procedural features of the application process? or
- (ii) if not, how applications for participation at the investigation stage of a situation and the pre-trial stage of a case must be dealt with;

CONSIDERING, that the second issue raised by the OPCD is whether the decision lacks sufficient reasoning concerning whether the applicant's meet the requisite factual and legal criteria to be admitted as victims;

CONSIDERING that in its "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", the Appeals Chamber stated that it is an important component of the right to a fair trial for a Court rendering a decision to give reasons for its decision²⁸ and that:

²⁸ ICC 01/04-01/06-773, para. 20.

"[t]he extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates 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";²⁹

CONSIDERING that, in the view of the Single Judge, although not every specific factor raised by the OPCD in relation to each application for participation was referred to in the Decision, the Decision not only addressed the main submissions of the OPCD relating to each application, it also clearly identified the facts it found relevant in coming to its conclusion and gave sufficient legal reasoning with regard to each application;

CONSIDERING, therefore, that the second issue raised by the OPCD is not an issue which arises from the Decision;

FOR THESE REASONS,

GRANT the Prosecution and OPCD requests for leave to appeal in relation to the issue raised by the Prosecution and the first issue raised by the OPCD;

REJECT the OPCD Request for leave to appeal in relation to its second issue.

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



Judge Akua Kuenyehia
Single Judge

Dated this Wednesday 6 February 2008

At The Hague, The Netherlands

²⁹ ICC 01/04-01/06-773, para. 20.