

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/05

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THE APPEALS CHAMBER

Before: Judge Navi Pillay, Presiding Judge
Judge Philippe Kirsch
Judge Georgios M. Pikis
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: Mr Bruno Cathala

SITUATION IN DARFUR, SUDAN

Public Document

**Response of Legal Representatives of Victims to the "OPCD appeal brief on 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'" and
Alternative Request for Permission to Participate in the Appeal**

The Office of the Prosecutor

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I. Background

1. On 27 June 2007 applicants a/0011 to a/0015/07 filed applications for participation in the proceedings in the Situation in Darfur, Sudan.
2. On 23 May 2007, the Single Judge of Pre-Trial Chamber I issued a "Decision authorising the filing of observations on applications a/0011 to a/0015/07"¹.
3. On 10 July 2007 applicants a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 filed applications for participation in the proceedings in the Situation in Darfur, Sudan.
4. On 23 July 2007, the Single Judge of Pre-Trial Chamber I 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.
5. On 21 August 2007, the Office of Public Counsel for the Defence (the "OPCD") filed a "Request for the Single Judge to order the production of relevant supporting documentation pursuant to regulation 86(2) (e)" of the Regulations of the Court³.
6. On 24 August 2007, the OPCD filed a request asking the Single Judge of Pre-Trial Chamber I to order the Prosecutor to disclose to the OPCD any information in its' possession which would affect the credibility or contradict the assertions (including dates and location of alleged events), contained in the applications, or, in

¹ See the "Decision authorising the filing of observations on applications a/0011/06 to a/0015/06 for participation in the proceedings" (Pre-Trial Chamber I), No. ICC-02/05-74, 23 May 2007.

² See the "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" (Pre-Trial Chamber I), No. ICC-02/05-85, 23 July 2007.

³ 1 See the "Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e)", No. ICC-02/05-94-Conf, 21 August 2007. See also the "Public Redacted Version of Request for the Single Judge to order Regulation 86(2)(e)", No. ICC-02/05-95, 21 August 2007.

the alternative, to dismiss the applications *in limine*, in light of the prejudice to the rights of the Defence and the principle of equality of arms⁴.

7. On 3 December 2007, the Single Judge of Pre-Trial Chamber I 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"⁵, rejecting both requests.

8. 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"⁶, granting the status of victims in the situation of Darfur, Sudan, to applicants a/0011/06, 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.

9. On 10 December 2007, the OPCD filed the "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""⁷.

⁴ See the "Request for the Single Judge to order the Prosecutor to disclose exculpatory materials", No. ICC-02/05-97, 24 August 2007.

⁵ See 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" (Pre-Trial Chamber I), No. ICC-02/05-110, 3 December 2007.

⁶ See 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" (Pre-Trial Chamber I), No. ICC-02/05-III-Corr, 6 December 2007. See the "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", No. ICC-02/05-III-Corr, 14 December 2007.

⁷ See the "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", No. ICC-02/05-112, 10 December 2007.

10. On 13 December 2007, the Prosecution filed the "Prosecution's Response to OPCD's 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""⁸.

11. On 17 December 2007, the Legal Representatives filed 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""⁹.

12. On 23 January 2007, the Single Judge of Pre-Trial Chamber I issued 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""¹⁰, granting the OPCD leave to appeal the Single Judge's decision dated 3 December 2007 on the following issue:

"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

⁸ See the "Prosecution's Response to OPCD's 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", No. ICC-02/05-115, 13 December 2007.

⁹ See 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, a/002107, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07""", No. ICC-02/05-116, 17 December 2007.

¹⁰ See 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" (Pre-Trial Chamber I), No. ICC-02/05-118, 23 January 2008.

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."

13. On 4 February 2008, the OPCD filed the "OPCD appeal brief on 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"¹¹.

14. On 13 February 2008, the Legal Representatives filed the "Request of the Legal Representatives for Clarifications on Victims' Participation in the Interlocutory Appeal filed by the OPCD under article 81(2)(d) of the Rome Statute".

15. The Legal Representatives of the victims authorised to participate in the situation in Darfur, Sudan, hereby respectfully submit this response to the OPCD's appeal brief and, in the alternative, respectfully request authorization to participate in the OPCD appeal.

II. The Right of Victims to participate in proceedings when their personal interests are affected

16. The Rome Statute grants victims of crimes falling under the jurisdiction of the Court explicit rights to submit observations and to have their views and concerns presented and considered "*where [their] personal interests are affected*" in accordance with article 68 (3) of the Rome Statute. This article does not draw a distinction

¹¹ See the "OPCD appeal brief on 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", No. ICC-02/05-119, 4 February 2008.

between the different stages of the proceedings before the Court, therefore the article fairly can be construed to allow victims to submit observations at all stages, *i.e.*, in the investigation of a situation, in the case stage and appeals proceedings.

17. An examination of the preparatory works for the drafting of the Rome Statute and of the Rules of Procedure and Evidence¹² lead to the same conclusion reached by the Single Judge¹³ in the Situation in the Democratic Republic of Congo in the 17 January 2006 Decision that victims have rights to participate in all phases of the proceedings, and therefore also at the appeal stage.

18. This approach was adopted on several occasions and shared by several delegations during the discussion of the then Part 5 of the Rules on Investigation and Prosecution.¹⁴ The Working Group dealing with the issue decided that a comprehensive discussion on the participation of victims in the proceedings was necessary. Prior to this, an International Seminar on the access of Victims to the International Criminal Court was held in Paris in April 1999, where the paradigm for the discussions of the Preparatory Commission was fashioned out.¹⁵

19. Pursuant to article 68(3) of the Rome Statute, victims can participate in the proceedings only “[w]here their personal interests [...] are affected.” This criterion is met particularly at the appeals stage since the decisions of the Appeals Chamber, the final judicial decision making body for the International Criminal Court, materially affects the quality and scope of victim participation at the Court.

¹² See UN Doc. PCNICC/1999/DP.2, 1st February 1999, p. 7.§

¹³ The same reasons lead Pre-Trial Chamber I to allow VPRS1 and VPRS 6 and a/0001/06 to a/0003/06 to participate to the investigation stage. See the “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6” (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January, 2006. See also 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”, No. ICC-01/04-177-tEN, 31 July 2006.

¹⁴ See UN Doc. PCNICC/1999/DP.2, 1st February 1999, p. 7.

¹⁵ See UN Doc. PCNICC/1999/WGRPE/INF.1, 6 July 1999.

20. This position finds support from the broad definition of victims under rule 85 of the Rules which does not specify any limitation for participation, but merely links the term “victim” to the commission of a crime falling under the jurisdiction of the Court.

21. Therefore, the Legal Representatives contend that the personal interests of the victims are affected in general during all stages since their participation, particularly at the appeals stage, shapes the Court’s jurisprudence on victims’ participatory rights.

22. Indeed, in every aspect of these proceedings, the victims have a legitimate interest in maintaining confidentiality and security. Provision of the information requested by the OPCD undoubtedly will provide paths for breeches of confidentiality and has the substantial likelihood to impair security.

23. The Legal Representatives therefore submit that the Rome Statute and the Rules of Procedure and Evidence provide for a right of victims to participate in “*the proceedings before the Court*”, including but not limited to the investigation, the case and appeals stages.

III. Specific submission in response to the OPCD’s requests regarding the application procedure

24. The Legal Representatives respectfully request that the Appeals Chamber deny the OPCD’s appeal respecting the request for the production of relevant supporting documentation pursuant to regulation 86(2)(e) of the Regulations of the Court.

- i. The Rules and Regulations of the Court do not require victims to supply extrinsic information with the standard application form*

25. The Defence argues that the procedure for granting victim participation pursuant to article 68(3) and rule 89 should be revised to require that applicants provide a causal link between the harm suffered and the alleged crime by supplying the Registry with extrinsic material to substantiate the claims made in their applications.

26. Pre-trial Chamber I, in the “Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6” of 17 January 2006¹⁶, established the requirements for victim participation at the situation stage.

27. The Chamber established that rule 85(a) requires that (a) the victim be a natural person; (b) he or she must have suffered harm; (c) the crime from which the harm ensued must be within the jurisdiction of the Court; and (d) there must be a causal link between the crime and the harm suffered.

28. Referring to participation at the situation phase, the Chamber further stated that “it is not necessary to determine in any great detail at this stage the precise nature of the causal link”¹⁷, and the “the determination of a single instance of harm is sufficient”¹⁸.

29. The Legal Representatives note that the Single Judge decided in the “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” of 14 December 2007 that “the elements established by rule 85 of the Rules are met *prima facie*”¹⁹.

¹⁶ See the “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, No. ICC-01/04-100-Conf-Exp-tEn-Corr. dated 17 January 2006.

¹⁷ See the “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, No. ICC-01/04-100-Conf-Exp-tEn-Corr, para. 94.

¹⁸ See the “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, No. ICC-01/04-100-Conf-Exp-tEn-Corr, para. 82.

¹⁹ See the “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”, No. ICC-02/05-111-Corr, 14 December 2007, para. 5.

30. Furthermore, neither the rules nor the regulations require extrinsic information to the standard form. Regulation 86(2) states, “the standard forms or other applications described in sub-regulation 1 shall contain, *to the extent possible*, the following information”²⁰ (emphasis added). Subsection 2 lists eight types and forms of documents that *may* be requested to corroborate the facts detailed in the standard form.

31. Regulation 86(7) provides that, “Before deciding on an application, the Chamber *may request*, if necessary with the assistance of the Registrar, additional information from, inter alia, States, the Prosecutor, the victims or those acting on their behalf or with their consent”²¹ (emphasis added).

32. According to regulation 86, the Chamber is *not required* to request additional information and may indeed review the standard form and determine whether an applicant may participate in the proceedings based, solely, on the information provided on and with the standard form. Therefore, the Appeals Chamber should deny the OPCD request that the victims should provide “relevant supporting documentation” to the Registry.

ii. The Rules and Regulations of the Court do not require applicants to exhaust domestic remedies

33. In the “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” of 14 December 2007, the Single Judge noted that “according to rule 89 of the Rules and regulation 86 of the Regulations, the exhaustion of domestic remedies is not a condition to be fulfilled by applicants,

²⁰ See Regulations of the Court ICC-BD/01-01-04, 86(2).

²¹ See Regulations of the Court ICC-BD/01-01-04, 86(7).

unlike what is provided for in article 35 of the *European Convention on Human Rights* and article 46 of the *American Convention on Human Rights*"²².

34. The Legal Representatives refer to paragraphs 16-22 and note that the application procedure was adopted through painstaking research and investigation in the years preceding the finalization and adoption of the Rome Statute. The OPCD should not be permitted to reverse years of comprehensive discussions and decision-making through an appeal.

IV. Submission respecting participation in the OPCD appeal

35. The Legal Representatives note the similarity between the "Request from the OPCV Acting as Legal Representative for Clarifications on Victim Participation in the Interlocutory Appeal filed by the OPCD under article 81(2) of the *Rome Statute*" of 6 February 2008 in the Situation in the Democratic Republic of Congo and the "Request of the Legal Representatives for Clarifications on Victims' Participation in the Interlocutory Appeal filed by the OPCD under article 81(2)(d) of the Rome Statute" of 13 February 2008 in the Darfur Situation.

36. The Legal Representatives also note the "Decision of the Appeals Chamber on the OPCV's request for clarification and the legal representatives' request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor" of 13 February 2008 in the Situation in the Democratic Republic of the Congo.

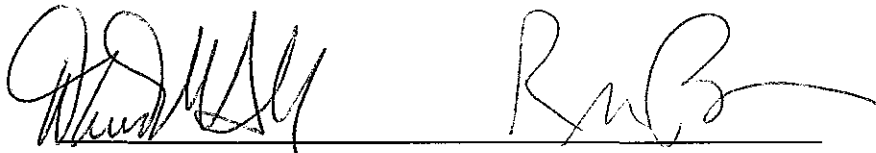
37. If the Appeals Chamber declines to consider the merits of the Legal Representatives response to the OPCD appeal set forth above, the Legal

²² See the "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", No. ICC-02/05-111-Corr, 14 December 2007, para. 23.

Representatives here respectfully urge the Appeals Chamber to reach a resolution similar to the one reached in its Decision of 13 February 2008 in the DRC Situation and set forth, pursuant to the provisions of article 68(3) of the Rome Statute and rule 89(1) of the Rules of Procedure and Evidence, an order that applications for participation in this appeal be filed pursuant to a schedule to be determined by the Appeals Chamber. In the alternative, the Legal Representatives respectfully request that the Appeals Chamber accept the instant submission as the response of the Legal Representatives to the OPCD appeal.

FOR THE FOREGOING REASONS,

The Legal Representatives respectfully request that the Appeals Chamber deny the Defence appeal; or, in the alternative, set forth an order allowing the Legal Representatives to file applications for participation in this appeal pursuant to a schedule to be established by the Appeals Chamber.

The image shows two handwritten signatures in black ink. The signature on the left is more complex and stylized, while the one on the right is simpler, appearing to be 'RMB'.

Wanda M. Akin and Raymond M. Brown
Legal Representatives

Done in English

Dated this 15th day of February 2008

At Newark (U.S.A.)