

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/05
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THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

SITUATION IN DARFUR, SUDAN

Public

**Prosecution's Response to OPCD's Document in Support of Appeal against
the 6 December 2007 Decision on the Victims' Applications
for Participation in the Proceedings**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia, Senior Appeals Counsel
Mr Essa Faal, Senior Trial Attorney

Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta

Legal Representatives of Victims

Ms Wanda M. Akin
Mr Raymond M. Brown

Introduction

1. The issue certified for this appeal concerns the manner in which applications by victims to participate in the investigation of the situation are to be addressed and victim participation is to be realised under Article 68(3). The Prosecution, having appealed the same Decision, does not oppose the appeal on this issue.

Procedural History

2. The Prosecution recalls and refers to the procedural history set out in its Response to OPCD's Appeal, filed on 15 February 2008,¹ and its Appeal Brief, filed on 18 February 2008.²
3. 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".³
4. Both the Prosecution and OPCD sought leave to appeal the Decision,⁴ which on 6 February 2008 the Single Judge granted in respect of one issue each.⁵
5. On 18 February 2008, the Prosecution⁶ and OPCD⁷ each filed their Documents in Support of Appeal ("Appeal Briefs"). The Prosecution hereby files its response to OPCD's Appeal Brief, pursuant to Regulation 65(5).

The Issue on Appeal, Scope of Appeal Brief, and Existence of Overlapping Appeals

6. The issue for which OPCD was granted leave to appeal was "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 interest of the applicants, and an assessment as to the propriety of their participation".⁸

¹ ICC-02/05-123 OA, 15 February 2008, paras. 1-8 ("Prosecution's Response to the First OPCD Appeal").

² ICC-02/05-125 OA, paras. 1-5 ("Prosecution Appeal Brief").

³ ICC-02/05-111, 6 December 2007 (the "Decision"). 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).

⁴ ICC-02/05-113, 12 December 2007; ICC-02/05-114, 12 December 2007.

⁵ ICC-02/05-121 ("Decision Granting Leave").

⁶ ICC-02/05-125 OA ("Prosecution Appeal Brief").

⁷ ICC-02/05-126 OA ("OPCD Appeal Brief").

⁸ Decision Granting Leave, pp. 4-5, 11.

7. The Prosecution was also granted leave to appeal against the Decision in respect of a similar issue relating to the assessment of victims applications for participation in the proceedings and the criteria to be applied.⁹ In addition, the OPCD has previously been granted leave to appeal the manner of assessing victims' applications, which led to the grant of a "procedural status of victim" ("the First OPCD Appeal").¹⁰
8. As the Prosecution has already submitted,¹¹ the respective issues for which leave to appeal was granted are similar in scope and intrinsically linked. Furthermore, two of the appeals are against the same Decision. Therefore, the Prosecution maintains its requests that the Appeals Chamber consider treating the First OPCD Appeal, the Prosecution Appeal and the current appeal jointly, and entering a consolidated and comprehensive judgement, as this would assist all parties and participants by providing clarity and certainty regarding how the different elements of the system are intended to operate together.

Response to OPCD's Arguments on Appeal

9. The issue in this appeal, in essence, concerns the system for assessing and potentially granting applications by victims to participate in proceedings during the situation, including: whether a procedural status can be granted based on the findings in the Decision; whether personal interests can be assessed in a generalised manner and in the absence of specific proceedings; and whether appropriateness can be determined in relation to an entire investigation, as opposed to proceedings within that investigation. In support of its Appeal, OPCD raises five primary arguments,¹² each of which the Prosecution will discuss in turn below.

⁹ The Prosecution sought, and was granted, leave to appeal the similar 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" (Decision Granting Leave, pp. 4, 11), in relation to which the Single Judge noted 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" (Decision Granting Leave, p. 5).

¹⁰ ICC-02/05-118, 23 January 2008. In this Decision Granting Leave, the Single Judge noted that the issue for which leave was granted to the Prosecution (and the first issue for OPCD) was part of the same "overarching issue" as OPCD had previously been granted leave to appeal— p. 10.

¹¹ Prosecution's Response to the First OPCD Appeal, paras. 9-12; Prosecution Appeal Brief, paras. 7-8.

¹² OPCD Appeal Brief, para. 10.

The criteria of “personal interests” and “appropriate” in Article 68(3) must be interpreted in an effective manner, and each criterion should be given independent legal effect (paras. 12-16)

10. OPCD submits that the requirements in Article 68(3) of “personal interests” and “appropriate” must be interpreted in an effective manner.¹³ OPCD further argues that the approach taken in the Decision results in victims being granted the right to participate based only on fulfilling the definition of victim under Rule 85(a); and that this is in contravention of the jurisprudence of the Appeals Chamber.¹⁴ Rather, OPCD argues that each element of Article 68(3) constitutes a distinct component of the Chamber’s assessment.¹⁵
11. The Prosecution does not oppose this ground of appeal, consistent with its position described in its main Appeal Brief of 18 February 2008 that victims may only be granted any status in proceedings including the right to participate after all the criteria in Article 68(3) and Rule 89 have been considered and satisfied on a case-by-case basis.¹⁶

The criterion of “personal interests” must be assessed in light of the particular circumstances of each applicant, in connection with the particular issues being addressed by the Chamber (paras. 17-24)

12. OPCD argues that the purpose of participation is not revenge but to provide an opportunity for victims to present views and concerns on issues affecting their “judicially recognisable personal interests”; and that as not all victims’ personal interests will be affected in the same manner, the right to participate must be adjusted accordingly.¹⁷ Personal interests may be affected differently, depending on, for example, the location of the victim and the manner in which they suffered any harm. OPCD reiterates that a victim’s personal interests must be affected by the issue being directly considered by the Chamber.¹⁸
13. The Prosecution does not oppose this ground of appeal, to the extent that it argues that the personal interests of victims must be affected by the issues being addressed in specific

¹³ OPCD Appeal Brief, para. 12.

¹⁴ OPCD Appeal Brief, para. 13-14.

¹⁵ OPCD Appeal Brief, para. 15-16.

¹⁶ See e.g. Prosecution Appeal Brief, paras. 14-18.

¹⁷ OPCD Appeal Brief, para. 17-19.

¹⁸ OPCD Appeal Brief, para. 22-24.

proceedings before the Chamber,¹⁹ rather than a generalised interest in the ultimate outcome of an investigation or case.

14. The OPCD also queries whether victims who “did not personally suffer harm” or were not present during the commission of the crimes have an interest in clarifying the facts or identifying the perpetrator.²⁰ To the extent that a victim claims to have suffered “moral harm”, the Prosecution submits that their personal interests could also be affected by proceedings. However the manner in which they have suffered may be a factor to take into account when assessing whether and how proceedings impact on a victim’s personal interests on a case-by-case basis, which further demonstrates the error of a generalised finding that every victim’s interests are generally and necessarily affected.

The “personal interests” of the applicants are not affected in a “general manner” by the judicial proceedings which occur during the investigative stage (paras. 25-32)

15. OPCD submits that the power of judges to grant participation is limited by the powers the judges themselves may exercise, and that Chambers may only adjudicate based on the charges brought by the Prosecutor, and not on extraneous allegations raised by victims.²¹ The OPCD further submits that victims do not have an independent fact-finding role, or a mechanism to themselves mount *de facto* prosecutions.²²
16. The Prosecution does not oppose this ground, consistent with its position that victims may only express their views and concerns on particular proceedings before the Chamber which affect their personal interests.²³

¹⁹ See e.g. Prosecution Appeal Brief, paras. 32-35; see also paras. 17-18, 22-23, 30.

²⁰ OPCD Appeal Brief, para. 19.

²¹ OPCD Appeal Brief, para. 26-28, 32.

²² OPCD Appeal Brief, para. 28-30, 32.

²³ See e.g. Prosecution Appeal Brief, paras. 32-35; see also paras. 17-18, 22-23, 30. The Prosecution has independently sought leave to appeal the issue of whether victims may present evidence relating to the guilt or innocence of the accused in separate proceedings – see *Prosecutor v Lubanga*, ICC-01/04-01/06-1136, 28 January 2008 (the second issue). The Trial Chamber recently granted leave to appeal this issue (*Prosecutor v Lubanga*, ICC-01/04-01/06-1191, 27 February 2008), and the Prosecution will thus provide full submissions on the scope of the “views and concerns” of victims and their ability to present evidence in that separate appellate proceeding.

The Appeals Chamber, as noted by OPCD, has previously stated that:

“whether the personal interests of victims are affected ... will require careful consideration on a case-by-case basis” and that “an assessment will need to be made in each case as to whether the interests asserted by victims, do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.”

Further, Judge Pikis has clarified that:

“participation [is] limited to the voicing of their views and concerns. Victims are not made parties to the proceedings nor can they proffer or advance anything other than their ‘views and concerns’”,

The criterion of "appropriate" requires the Chamber to consider the particular circumstances of the proceedings in question, and the applicants in question (paras. 33-37)

17. OPCD submits that the investigation is not a single indivisible stage of the proceedings, but rather constitutes several distinct proceedings which impact on the interest of participants differently.²⁴ Thus, OPCD argues that the Pre-Trial Chamber must ensure that each proceeding affects the personal interests of victims, in a manner similar to the Appeals Chamber's practice.²⁵ OPCD further argues that the Chamber must avoid a situation where the defence is faced by two prosecutors, as the views and concerns expressed by victims cannot fall within the domain of the Prosecutor.²⁶
18. The Prosecution does not oppose this ground. The Prosecution recalls that the stage of proceedings in which the participation of victims may, or may not, be appropriate refers to a point within those proceedings;²⁷ and that the Appeals Chamber has previously considered even an interlocutory appeal to have different stages, which may affect the personal interests of victims differently.²⁸

The unique features of the situation phase militate against the general propriety of participation under article 68(3) (paras. 38-48)

19. OPCD finally submits that there is no permanent procedural status of victim during the investigation, that such a status would create a fundamental imbalance in the proceedings, and that the presentation of views and concerns must be triggered by an action of a party or the Chamber.²⁹ OPCD also raises concerns about Pre-Trial Chambers entering factual findings relating to victim statuses in the absence of a properly resourced and instructed

and that victims may not express views and concerns

"in relation to the proof of the case or the advancement of the defence. The burden of proof of the guilt of the accused lies squarely with the Prosecutor ... It is not the victims' domain either to reinforce the prosecution or dispute the defence."

²⁴ OPCD Appeal Brief, para. 34.

²⁵ OPCD Appeal Brief, para. 35-36.

²⁶ OPCD Appeal Brief, para. 37.

²⁷ See further Prosecution Appeal Brief, paras. 38, 42-45. This interpretation of "stage of the proceedings" is supported by the Appeals Chamber's jurisprudence, which in turn builds on the language of the Statute: contrast Article 74(1) and Regulations 55(2) and 77(4) (each of which refer to "stage" as a particular point within an investigation or trial) with Article 39(4) and Regulation 12 (referring to pre-trial or trial "phase").

²⁸ *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, paras. 26-27. See further Prosecution Appeal Brief, paras. 16-17, 34, 43.

²⁹ OPCD Appeal Brief, para. 39-41.

defence,³⁰ and argues that granting procedural status in the manner that the Decision did is not in the interests of judicial economy.³¹

20. While not opposing this ground of appeal, the Prosecution does not agree with all of the Appellant's arguments or share the Appellant's positions in their entirety.
21. The Prosecution concurs that, as a general matter, no judicial inquiry into crimes other than those pleaded by the Prosecution should be undertaken by Chambers of the Court. However, the Prosecution notes that the Statute itself requires the Court to make determinations of whether someone qualifies as a victim at the situation level at least for the purposes of any intervention within the context of Articles 15 (*proprio motu* powers of the Prosecutor) or 53(2) (decision not to investigate), potentially before the Prosecution has led any specific evidence before any Chamber and while the defence is in a similar position to the present proceedings.³²
22. The Prosecution does not agree with the OPCD's position on the implications of a victim having applied for participation on disclosure obligations and the future credibility of that individual if they are subsequently called to testify as a witness.³³ It notes however that such issues may arise again in future proceedings, emphasising the importance of clear guidance on victim participation from the Appeals Chamber.

³⁰ OPCD Appeal Brief, 42-45.

³¹ OPCD Appeal Brief, 46.

³² See further Prosecution's Response to the First OPCD Appeal, paras. 24-25; *Situation in the DRC*, ICC-01/04-103, 23 January 2006, paras. 23-28; *Situation in Uganda*, ICC-02/04-85, 28 February 2007, paras. 34-37.

³³ OPCD Appeal Brief, 46.

Relief Sought

23. For the reasons referred to above, the Prosecution respectfully requests that the Appeals Chamber

(a) grant the appeal;

(b) overturn the Decision; and

(c) direct the Pre-Trial Chamber to only grant a victim-applicant participation on the basis that their personal interest are specifically affected, in connection with identified proceedings before the Chamber, and specifying the modalities of their participation in those proceedings.



Luis Moreno-Ocampo
Prosecutor

Dated this 29th day of February 2008
At The Hague, The Netherlands