

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

Before: Judge Anita Ušacka, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

**Prosecution's Response to OPCD's "Request for Leave to Appeal the 3 July 2008
Pre-Trial Chamber I's Decision on the applications for participation"**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Other

Procedural background

1. On 3 July 2008, the Single Judge of Pre-Trial Chamber I (“Single Judge”) issued the “Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06” (“Decision”),¹ in which the Single Judge granted the “procedural status of victim at the investigation stage in the DRC” to 32 victims.
2. On 9 July 2008 the Office of Public Counsel for the Defence (“OPCD”) filed the “Request for Leave to Appeal the 3 July 2008 Pre-Trial Chamber I’s Decision on the applications for participation” (“Application”), in which it seeks leave to appeal the Decision on the following two issues:
 - whether viewing the application form in the light most favourable to the applicants, and drawing inferences in favour of the applicants, reverses the burden of proof and violates the principle of *in dubio pro reo* (“First Issue”); and
 - whether the reference to specific individuals and militia, in the context of *prima facie* factual findings issued in a public decision during the investigations phase, compromises the integrity and impartiality of the Prosecutor’s investigations, and contravenes the presumption of innocence (“Second Issue”).
3. The Prosecution hereby files its response to the Application for Leave to Appeal, pursuant to Regulation 65(3).

¹ ICC-01/04-505.

Arguments

4. The Prosecution submits that the Application meets the requirements for leave to appeal to be granted in part. While the Prosecution agrees that the First Issue arises from the Decision and meets the requirements under Article 82(1)(d), it submits that the Second Issue does not arise from the Decision.² As a result, the Prosecution does not oppose leave to be granted with respect of the First Issue, but opposes leave to be granted with respect to the Second Issue.
5. The Prosecution takes this position on the basis of its independent examination of the issues raised in the 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 and when leave to appeal is granted, 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 the grounds of appeal proposed, and arguments employed, by the OPCD.

The First Issue arises from the Decision and fulfils the criteria of Article 82(1)(d)

6. The OPCD argues that the first issue arises from the Single Judge's finding that the information contained in the application for participation in the proceedings should be "viewed in a light most favourable to the Applicants, from which the Single Judge may directly infer the material, moral and contextual elements of the crimes within the jurisdiction of the Court".³ The OPCD further argues this finding reverses the burden of proof,⁴ and violates the principle of *in dubio pro*

² 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 stated 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." (*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 OA3, 13 July 2006, para. 9 (emphasis added)).

³ Application, para. 6. Decision, para. 29.

⁴ Application, paras. 12 and 14.

reo.⁵ The OPCD submits that the Single Judge's finding creates "a judicial predisposition in favour of persons who assert that they are victims" and that that "[i]n practice ... the OPCD will be required to adduce arguments or proof which would establish that the elements of the offence are not met".⁶

7. The Prosecution agrees that the First Issue arises from the Decision, to the extent that it provides that the Chamber shall consider "any information from the application itself, viewed in a light most favourable to the Applicants, from which the Single Judge may directly infer the material, moral and contextual elements of the crimes within the jurisdiction of the Court."⁷ Although the Prosecution does not concur with all of the arguments presented by the OPCD,⁸ the Prosecution also agrees that the first issue may significantly affect the fair and expeditious conduct of the proceedings,⁹ and that an immediate resolution by the Appeals Chamber of the First Issue may materially advance the proceedings.¹⁰
8. As a result, the Prosecution does not oppose the Application in relation to the First Issue.

The Second Issue does not arise from the Decision.

9. The Prosecution submits that the OPCD has misinterpreted the Decision and that the Second Issue does not arise. Contrary to the contention by the OPCD, the Decision does not attribute certain offences to a particular individual and named militia.¹¹ Throughout the text of the Decision, the Single Judge makes *prima facie* determinations with respect to the crimes as a consequence of which the applicants have suffered harm. The Single Judge does not, however, attribute

⁵ Application, paras. 14-15 and 18.

⁶ Application, paras. 16-17.

⁷ Decision, para. 29.

⁸ In particular, the Prosecution considers that the question of whether viewing the applications from the light most favourable to the applicants, and drawing inferences in favour of the applicants has the effect of reversing the burden of proof and violating the principle of *in dubio pro reo*, is an arguments on the merits of the issue and will be argued if, and when, leave to appeal has been granted.

⁹ Application, paras. 9-18.

¹⁰ Application, paras. 29-30.

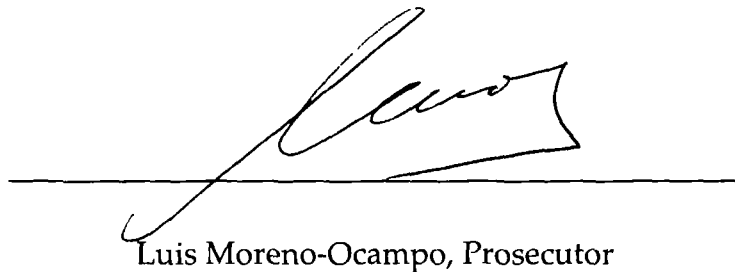
¹¹ Application, para. 7.

these crimes to any individual or named militia.¹² On the contrary, the Decision expressly states that it is *alleged* that the crimes in question are attributed to certain individuals or named militia, without making a specific finding accepting that allegation.¹³ The examples adduced by the OPCD¹⁴ - even where the Single Judge uses slightly different syntax to refer to the individual and the group alleged to be responsible for the crimes in question¹⁵ - are no different.

10. As a result, the Prosecution opposes the Application in relation to the Second Issue.

Relief sought

11. The Prosecution respectfully requests that the Single Judge consider the above arguments.



Luis Moreno-Ocampo, Prosecutor

Dated this 14th day of July, 2008

At The Hague, The Netherlands

¹² As to the *prima facie* standard applied by the Single Judge, see Decision, para. 27.

¹³ See Decision, paras. 39, 43, 45, 47, 52, 55, 57, 59, 61, 65, 67, 69, 71, 73, 76, 81, 83, 85, 87, 90, 92, 94, 96, 98, and 102.

¹⁴ Application, para. 7, which refers to the example of applicant a/0163/06 (Decision para. 39) and applicant a/0231/06 (Decision para. 92).

¹⁵ See example a/0163/060 at para. 39 of the Decision.