

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04
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PRE-TRIAL CHAMBER I

Before: Judge Anita Ušacka, Single judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

Public

**Decision on the OPCD's request for leave to appeal the 3 July 2008 decision on
applications for participation**

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

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Mr Joseph Keta
Ms Carine Bapita Buyangandu

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda, Principal Counsel

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta, Principal Counsel

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

I, Judge Anita Ušacka, judge at the International Criminal Court (the “Court”);

NOTING 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”¹ (“the Decision of 3 July 2008”) issued by the Single Judge on 3 July 2008;

NOTING the “Request for Leave to Appeal the 3 July 2008 Pre-Trial Chamber I’s Decision on the applications for participation”² (“the Request for Leave”) filed by the Office of Public Counsel for the Defence (“the OPCD”) on 9 July 2008;

NOTING the “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’”³ filed by the Prosecution on 14 July 2008;

NOTING the “*Réponse de la Représentante Légale des Victimes a/0231/06, a/0232/06, a/0233/06, a/0242/06, a/0247/06, a/0248/06, a/0249/06, et a/0250/06 à la demande d’autorisation du Bureau du Conseil Public pour la Défense d’interjeter appel de la Décision rendue le 3 juillet 2008 par la Chambre Préliminaire I sur les demandes de participation*”⁴ filed by the Legal Representatives of victims a/0231/06, a/0232/06, a/0233/06, a/0242/06, a/0247/06, a/0248/06, a/0249/06, and a/0250/06 on 14 July 2008;

¹ ICC-01/04-505.

² ICC-01/04-511.

³ ICC-01/04-512.

⁴ ICC-01/04-513.

NOTING the “*Réponse du BCPV, représentant legal de la victime a/0184/06, à la demande d’autorisation d’interjeter appel de la Décision du 3 juillet 2008 déposée par le Bureau du conseil public pour la Défense*”⁵ filed by the Office of Public Counsel for Victims (“the OPCV”) on behalf of victim a/0184/06 on 14 July 2008;

NOTING article 82(1)(d) of the Rome Statute (“the Statute”);

I. Introduction

1. On 3 July 2008, the Single Judge decided on 50 applications for the procedural status of victim in the investigation phase of the Situation in the Democratic Republic of Congo (“the DRC Situation”).⁶ These applications were notified to the Chamber on different dates: 25 July 2006⁷, 23 and 24 April 2007⁸, and 3 July 2007.⁹ Of these 50 applications, 32 applicants were granted a procedural status in the investigation phase of the DRC Situation. On 9 July 2008, the OPCD requested leave to appeal the Decision of 3 July 2008, in respect of two issues, discussed in detail below.

II. The Request for Leave to Appeal and the Responses

A. The Request for Leave to Appeal

2. The OPCD requested leave to appeal as to two issues:

[1] 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*; and

[2] 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

⁵ ICC-01/04-514.

⁶ ICC-01/04-505.

⁷ ICC-01/04-171-Conf-Exp to ICC-01/04-176-Conf-Exp.

⁸ ICC-01/04-326-Conf-Exp-Anx2 and ICC-01/04-327-Conf-Exp-Anx 1 to 20.

⁹ ICC-01/04-356-Conf-Exp.

the integrity and impartiality of the Prosecutor's investigations, and contravenes the presumption of innocence.¹⁰

3. As to the first issue, the OPCD argued that since the Single Judge's decision was not a preliminary decision, but rather a final decision as to whether an applicant may have a procedural status in the proceedings, by analysing the applications in a light most favourable to the applicants, the Single Judge reversed the burden of proof in contravention of article 67(1)(h) of the Statute. In the view of the OPCD, the approach of the Single Judge required the Defence to demonstrate how the elements of the crimes have not been met and to provide evidence to demonstrate that a fact was not established. In addition, the OPCD argued that the Single Judge applied a different standard in relation to the analysis of contextual elements of the crimes than to the factual elements. Because of these factors, the OPCD argued that the Decision of 3 July 2008 infringed on the fairness of the proceedings. In addition, because the approach adopted by the Single Judge could allow a greater number of applicants to participate in the proceedings, the issue, according to the OPCD, also affected the expeditious conduct of the proceedings.

4. As to the second issue, the OPCD argued that the Single Judge infringed on the presumption of innocence by including the perpetrator or the group whom the applicant names as allegedly responsible. Thus, in the view of the OPCD, the fairness of the proceedings was compromised because of "factual predeterminations"¹¹ by the Single Judge. The OPCD then argued that since the Decision of 3 July 2008 deprived the persons and/or militias identified of the right to be heard, the Decision impacted the expeditious conduct of the proceedings.

5. As to both issues, the OPCD argued that a decision of the Appeals Chamber would materially advance the proceedings, because this decision was the first time such practices were applied, and may continue to be applied for decisions

¹⁰ ICC-01/04-511, para. 8.

¹¹ ICC-01/04-511, para. 28.

on the applications in the future. On the basis of these concerns, the OPCD concluded that an authoritative decision by the Appeals Chamber would ensure that the proceedings follow the right course.

B. The Prosecution's Response

6. On 14 July 2008, the Prosecution and the Legal Representatives for Victims a/0184/06, a/0231/06, a/0232/06, a/0233/06, a/0242/06, a/0247/06, a/0248/06, a/0249/06, and a/0250/06 filed responses to the Request for Leave.¹²

7. The Prosecution argued that the Single Judge should grant the Request for Leave as to the first issue raised by the OPCD, but should deny the Request as to the second. As to the first issue, the Prosecution indicated that it did not agree with the arguments advanced by the OPCD, but that in view of the Prosecution, the first issue met the requirements of article 82(1)(d) of the Statute.

8. As to the second issue, the Prosecution argued that the issue did not arise from the Decision of 3 July 2008, because in the Decision, the Single Judge only made a *prima facie* determination, and not a factual finding. The Prosecution noted that the Decision of 3 July 2008 expressly stated that the crimes are alleged to be attributed to certain individuals, but the Single Judge did not make any specific findings accepting such allegations.

C. Response of the Legal Representatives of Victims a/0231/06, a/0232/06, a/0233/06, a/0242/06, a/0247/06, a/0248/06, a/0249/06, and a/0250/06

9. The Legal Representatives requested that the Single Judge deny leave to appeal. As to the first issue, concerning the criteria of article 82(1)(d) of the Statute, the Legal Representatives noted that the purpose for a decision on victim applications is to determine a "procedural status" before the Court, and not for a

¹² ICC-01/04-512 ; ICC-01/04-513 ; and ICC-01/04-514.

determination that a person is a victim *vis á vis* a specific party. For these reasons, the Legal Representatives considered that there was no impact on the burden of proof in the decision. The Legal Representatives also argued that under the Statute and the Rules, the Chamber has discretion concerning how to determine whether an applicant meets the criteria under rule 85 of the Rules. The Legal Representatives recalled that the Single Judge's assessment of the contextual elements at the application phase neither affected the guilt or innocence of a person nor the proper progress of the investigation.

10. The Legal Representatives further recalled that the threshold for testing the veracity of the applications is low at the situation stage, and argued that therefore the Single Judge's approach is consistent with a broad interpretation of the principle of *in dubio pro reo*. Thus, the Legal Representatives did not agree that the decision prejudiced the rights of the accused or affected the guarantees of a fair and impartial trial.

11. As to the second issue raised by the OPCD, the Legal Representatives also noted that the reason that the Single Judge referred to specific individuals and/or groups because the applicants themselves referred to those groups. The Single Judge only stated that at the investigation stage, there were "grounds to believe" that the injury to the applicants was the result of a crime within the jurisdiction of the Court.

D. Response of the OPCV, on behalf of applicant a/0184/06

12. In its response, the OPCV argued that the OPCD's Request for Leave to Appeal of the OPCD did not meet the requirements of article 82(1)(d) of the Statute.

13. In respect of the first issue, the OPCV noted, *inter alia*, that the principle *in dubio pro reo* invoked by the OPCD was not applicable when evaluating applications for participation at the situation stage, during which no suspect has yet been

identified. In this respect, the OPCV reiterated that the procedure to determine the procedural status of victim has been previously specified: the single objective is to determine if the applicants can be authorised to participate at the procedural stage as victims, and does not affect in any way the guilt or innocence of suspects before the Court. Further, the procedure to determine a procedural status in the proceedings does not place the applicants requesting the status in opposition to the Defence or the Prosecution, but instead merely concerns the Chamber. As such, the sole role of the Single Judge, according to the OPCV, was to determine if the applications met the criteria set out in rule 85 of the Rules.

14. The OPCV also recalled that with regard to the limited objective of the procedure, it is not incumbent on the Defence or the Prosecutor to contest the truth of the allegations of the applicants. Contrary to the arguments of the OPCD, no evidentiary burden is imposed on the Defence with this procedure. Rather, according to rule 89 of the Rules, the Defence and Prosecutor have the right to present observations on all of the requested applications for participation, leaving to the Chamber to determine if the criteria of rule 85 of the Rules were met. On these bases, the OPCV concluded that resolution of the first issue would in no way materially advance the proceedings.

15. As to the second issue, the OPCV recalled that on the application form, Section D asks applicants to identify who they believe is responsible for the alleged crimes. Thus, in the view of the OPCV, the Single Judge's decision does nothing more than present this information, *prima facie*. In this respect, the OPCV argues that the OPCD does not demonstrate how this issue could affect the fair conduct of the proceedings, or how immediate resolution of the issue by the Appeals Chamber could materially advance the proceedings, pursuant to article 82 (1) (d) of the Statute.

III. Analysis of the Request for Leave to Appeal

A. Legal Criteria Pursuant to Article 82(1)(d)

16. As Pre-Trial Chambers I and II have repeatedly stated¹³, 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. an immediate resolution by the Appeals Chamber may materially advance the proceedings.

17. In addition, this Chamber has followed¹⁴ the criteria originally set forth by Pre-Trial Chamber II concerning the purpose of appeals made pursuant to article 82(1)(d) of the Statute:

Pre-Trial Chamber II held that when dealing with an application for leave to appeal, it must be guided by three principles: (a) the restrictive character of the remedy provided for in article 82(1)(d) of the Statute; (b) the need for the applicant to satisfy the Chamber as to the existence of the requirements set out in this provision; and (c) the irrelevance of or non-necessity for the Chamber to address arguments relating to the merit or substance of the appeal.¹⁵

¹³ 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), the "Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions", issued by Pre-Trial Chamber I on 14 December 2007 (ICC-01/04-01/07-108), and the "Decision on the Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber I'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 pursuant to Decision ICC-02/04-01/05-52 issued on 13 October 2005), in particular para 20.

¹⁴ ICC-01/04-135-tEN.

¹⁵ ICC-02/04-112, para. 16, citing ICC-02/04-01/05-20-US-Exp para. 15, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005; and ICC-01/04-168, para. 19.

B. The First Issue

18. The first issue for which the OPCD requests leave to appeal was as follows:

(1) 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*.¹⁶

19. Firstly, in the view of the Single Judge, the issue identified by the OPCD in its Request for Leave does not arise from the Decision of 3 July 2008, insofar as the first issue arises not from the impugned decision, but rather from general principles related to the application process which were set forth in previous decisions by the Chamber, some of which are already the subject of several pending appeals.¹⁷

20. The Single Judge recalls that the OPCD's main argument in its Request for Leave was that the approach of the Single Judge – in relation to the burden of proof in deciding on the applications – in her decision of 3 July 2008 differed significantly from the existing practice of the Chamber. While the Single Judge notes that she is not required, pursuant to article 21(2) of the Statute, to apply the principles and rules of law as interpreted in previous decisions, nevertheless, the Single Judge recalls that although the Decision of 3 July 2008 further explained the method by which the Chamber assesses applications for a procedural status in the investigation phase of a situation,¹⁸ the Single Judge still applied the existing standard for the burden of proof for such decisions, namely that the “applicants demonstrate that the elements established by rule 85 of the Rules are met *prima facie*.”¹⁹ The Single Judge notes that the application of this burden of proof is apparent throughout the Decision of 3 July 2008.

¹⁶ ICC-01/04-511, para. 8.

¹⁷ See ICC-01/04-438 and ICC-01/04-444.

¹⁸ ICC-01/04-505, paras. 26-28, *adopting* ICC-01/04-417, para 8; ICC-01/04-444, p 10; and ICC-02/05-121, p 8.

¹⁹ ICC-01/04-417, para. 8. *See also* ICC-01/04-444, p. 10; and ICC-02/05-121, p. 8.

21. The OPCD also argued the Single Judge's approach "whereby in case of doubt, the Chamber will adopt the version most favourable to the applicants" was also new to the Decision of 3 July 2008. Nevertheless, the Single Judge recalls that in previous decisions on applications for a procedural status in the proceedings, many applications have lacked explicit or express references to the moral, material or contextual elements of the crimes listed in article 5 of the Statute, but such elements have been directly inferred, in favour of the applicants, from the information provided in the applications.²⁰ The reasons for this approach were provided in the Decision of 3 July 2008.²¹

22. In the view of the Single Judge, the OPCD's arguments in its Request for Leave in respect of the first issue also demonstrate a misunderstanding as to the jurisprudence of the Chamber in respect of the application process. Therefore, even though the first issue does not arise from the Decision, the Single Judge will also provide explanation as to why the arguments of the OPCD in respect of the principle of *in dubio pro reo* also does not affect the fair and expeditious conduct of the proceedings.

23. In the view of the Single Judge, the OPCD's argument that the Decision of 3 July 2008 modified the application of the principle of *in dubio pro reo* in respect of the decisions applications is misguided. This is so in part because this principle, which is essential to the criminal proceedings before the Court, has previously been held to be *inapplicable* to the application process for the following reasons:

[T]he application process is not related to questions pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witnesses as it only aims at determining whether the procedural status of victim should be granted to applicants. Hence, it can be distinguished from criminal proceedings before the Court, which include the investigation of a situation, the initiation of a case and the pre-trial, trial and appeal stages of a case, which are governed by specific articles, rules and regulations. Moreover, the Single Judge considers that the application process is not related to questions

²⁰ ICC-01/04-505, para. 30.

²¹ ICC-01/04-505, para. 30.

pertaining to the award of reparations, which are the subject of the proceedings provided for in article 75 of the Statute and rule 94 of the Rules.²²

24. Thus, in the view of the Single Judge, the first issue identified by the OPCD is “merely a question over which there is disagreement or conflicting opinion”²³ on the established jurisprudence of the Chamber. Thus, it is neither an “issue” within the meaning of the Appeals Chamber Judgment of 13 July 2006²⁴, nor an issue dealt with in the relevant decision, as explained above. In addition, even if the first issue arose from the Decision of 3 July 2008, the arguments raised by the OPCD would not affect the fair and expeditious conduct of the proceedings for the reasons specified.

b. The Second Issue

25. The second issue for which the OPCD requests leave to appeal is as follows:

(ii) 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.²⁵

26. At the outset, the Single Judge notes that the phrase “*prima facie* factual finding” as used by the OPCD in the second issue does not appear anywhere in the Decision of 3 July 2008.

27. In addition, the Single Judge also notes that in fact, these two phrases -- “*prima facie*” and “factual finding” -- are opposites. The Latin phrase *prima facie* as used in the Decision of 3 July 2008 means: “at first sight; on first appearance, but subject to further evidence or information.”²⁶ In contrast, a “finding of fact” or

²² ICC-01/04-417, para. 6.

²³ ICC-01/04-168 OA3, para. 9.

²⁴ ICC-01/04-168 OA3.

²⁵ ICC-01/04-511, para. 8.

²⁶ *Black’s Law Dictionary*, 7th Ed. (1999).

"factual finding" is: "a determination by a judge... of a fact supported by the evidence in the record, usually presented at the trial or hearing."²⁷ Thus, the first is an assertion which is still subject to proof, and the second is an assertion which has been determined by a Judge to have been proven.

28. Finally, the Single Judge notes that the phrase "*prima facie*" was used in the Decision on 70 occasions. However, the phrase "factual finding" was used in the Decision only once, in which the Single Judge stated:

[A] decision to grant an Applicant a procedural status in the proceedings in no way predetermines any factual findings that could be made by a Chamber in any judgment on the merits.²⁸

29. Thus, the Single Judge fully agrees with the Prosecution that "the OPCD has misinterpreted the Decision and that the Second Issue does not arise"²⁹ from the Decision.

FOR THESE REASONS

REJECTS the request for leave to appeal of the OPCD in its entirety.

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



Judge Anita Ušacka
Single judge

Dated this Wednesday, 4 September 2008
At The Hague, The Netherlands

²⁷ *Black's Law Dictionary*, 7th Ed. (1999).

²⁸ ICC-01/04-505, para. 30.

²⁹ ICC-01/04-512, para. 9.