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TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Chile Eboe-Osuji

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

**Prosecution's Response to the Legal Representatives for Victims' "Application for
Leave to Appeal the 'Decision on common legal representation' pursuant to
Article 82(1)(d)"**

Sources: Office of the Prosecutor

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

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Unrepresented Victims

**Unrepresented Applicants
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Introduction

1. The Prosecution requests Trial Chamber IV (“Chamber”) to deny the Application for Leave to Appeal¹ the “Decision on common legal representation” (“Decision”)² submitted by the Legal Representatives for Victims a/1646/10 and a/1647/10 and Applicants a/6000/11, a/6001/11 and a/6002/11 (“Legal Representatives”). The Legal Representatives do not have standing to seek leave to appeal the Decision pursuant to Article 82(1)(d) of the Rome Statute (“Statute”).

I. Background

2. On 25 May 2012, Trial Chamber IV rendered the Decision confirming the Registrar's choice to appoint Ms. Cisse and Mr. Dieckmann as common legal representatives of victims in the present case.
3. On 30 May 2012, the Legal Representatives filed an Application for Leave to Appeal the Decision, pursuant to Article 82(1)(d) .

II. Prosecution’s Submissions

The Applicant is not a party to the proceedings and therefore lacks standing under Article 82 (1) (d)

4. The Applicant is not a party to the proceedings and therefore it has no standing to seek leave to appeal the Decision under Article 82(1)(d). The terms of Article 82(1) and Rule 155 are clear: only “either party” or “a party” (i.e., Prosecution and Defence) may appeal a decision under these provisions. Non-parties unrelated to the proceedings may appeal other decisions only if it is expressly authorised in the relevant provisions. The Statute expressly limits the right to seek leave to appeal to the parties,³ and does not extend it to other participants, including victim participants and

¹ ICC-02/05-03/09-339

² ICC-02/05-03/09-337

³ Article 82 states that “[e]ither party” may appeal one of the decisions contained therein, and Rule 155 refers to “[w]hen a party wishes to appeal a decision” (emphasis added). Consistent with limiting the right to initiate appeals to the parties, Article 81 limits appeals against acquittals, convictions or against sentence to the

their legal representatives. Legal Representatives enjoy full rights to lodge appeals only in relation to orders for reparations entered under Article 75.⁴ Further, the jurisprudence of this Court has indicated that the Prosecution and Defence are the “parties” for the purposes of certain provisions, including Article 82(1)(d)⁵. Therefore, the application made on behalf of victim participants a/1646/10 and a/1647/10 must necessarily fail.

5. In relation to applicants a/6000/11, a/6001/11 and a/6002/11, it necessarily follows that if victim participants lack standing to file an application for leave to appeal, the same is true of victim applicants. An applicant for victim status or his or her legal representative cannot be afforded greater rights than a victim who has been granted participant status.⁶ In a decision of 10 December 2007, in the Situation in the Democratic Republic of the Congo, the Single Judge explicitly ruled that applicants (or the Office of public Council for Victims, which was designated by the Registrar to temporarily act on behalf of the unrepresented victim applicants) are not entitled “to

Prosecutor and the convicted person. More specifically, an applicant is not able to seek leave to appeal the decision of a chamber on their application for participation (Decision, para. 16). In the instant matter, the Request and Decision in question were incidental to the applications for participation. If an applicant is unable to appeal the ultimate decision, they can hardly appeal a procedural decision incidental thereto.

³ On the distinction between “parties” and “participants”, see *Prosecutor v Lubanga*, ICC-01/04-01/06-996-AnxI, 23 October 2007. See also Jorda and de Hemptinne, “The Status and the Role of the Victim” in Cassese et al (eds), *The Rome Statue of the International Criminal Court: A Commentary*, Vol. II, p. 1406: the victim “has no right of appeal and cannot, on that basis, present his arguments against the accused to the Appeals Chamber”. See also Roth and Henzlin, “The Appeal Procedure of the ICC”, in Cassese et al (op. cit.), p. 1551: “Victims, civil parties and third parties affected by a decision cannot normally be considered as parties, in the strictest sense of the word, to an appeal against an interim decision under Article 82, unless such decisions affect their civil rights as envisaged by Article 82(4)/Article 75.”

⁴ Article 82(4).

⁵ ICC-01/04-01/06-1432OA9OA10, para.93, where the Appeals Chamber, when dealing with an appeal concerning the participation of victims during the proceedings, decided that the term “parties” in Article 69 of the Statute refers to the defence and the prosecution only. Note that even potential suspects are not parties to the proceedings with locus standi until an arrest warrant or summons to appear has been issued against them: ICC-01/09-43, para.9. The Prosecution notes that in ICC-01/04-01/07-675OA7, the Majority of the Appeals Chamber found that the Registrar’s observations regarding the Prosecutor’s document in support of appeal were legitimately made in light of the relevant provisions (articles 43(6) and 68(4) and regulation 24bis(1)), and the subject-matter of that appeal (system of witness protection in the ICC). However, at no point did the Majority find that the Registrar was a “party”. Judge Pikis, in his dissenting opinion (para.4), further indicated that: “in accordance with the introductory statement of paragraph one of article 82, an appeal under its provisions may be raised by either party to the proceedings, that is, the Prosecution and the defence. The counter-party to the appeal, the respondent, is the other party to the proceedings. The Registrar is not a party to or a participant in the proceedings. [...] Nowhere in the Statute is a right conferred upon the Registrar or the Registry to participate as of right in any proceedings before the Court.”

⁶ In dismissing a request by the OPCV to access documents in the situation record related to certain applicants, the Single Judge noted that the OPCV was requesting on behalf of applicants access which has not even been granted to persons who have the procedural status of victim (Situation in the Democratic Republic of the Congo, ICC-01/04-418, 10 December 2007, para. 6).

request leave to appeal the decision of the Chamber on the merits of their application”.⁷

6. Therefore, in relation to both victim participants a/1646/10 and a/1647/10, and victim applicants a/6000/11, a/6001/11 and a/6002/11, the Legal Representatives do not have standing to seek leave to appeal the Decision pursuant to Article 82(1)(d).

The Application fails to meet the basic legal requirements set forth in Article 82 (1) (d)

7. The Prosecution notes that, leaving the issue of standing aside, the Application does not even attempt to make the showing required under Article 82(1)(d). Rather, the Application, ignoring the clear legal requirements of Article 82(1)(d), is confined to a recitation of arguments pertaining to the merits of the Decision. The Prosecution recalls that the correctness of a decision is not a matter that can be discussed in the context of an application for leave to appeal. Instead, the burden on the party seeking leave to appeal is to demonstrate that the relevant decision involves an appealable issue, i.e. an issue affecting the fair and expeditious conduct of the proceedings or the outcome of trial the resolution of which is required to materially advance the proceedings (Article 82(1)(d)).

⁷ Situation in the Democratic Republic of the Congo, ICC-01/04-418, 10 December 2007, para. 16.

III. Relief Sought

8. For the reasons outlined above, the Prosecution requests the Single Judge to deny the Legal Representatives' Application for Leave to Appeal.



Luis Moreno -Ocampo
Prosecutor

Dated this 4th day of June 2012

At The Hague, The Netherlands