

No.: ICC-01/04-535
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**Public Decision on the OPCD's request for leave to appeal the 3 July
2008 decision on applications for participation**

Headline

DRC—Single Judge (Pre-Trial Chamber I) rejects request of Office of Public Counsel for the Defence for leave to appeal decision granting victim status at investigation phase of the situation.

Brief Summary

On 4 September 2008, the Single Judge (Pre-Trial Chamber I) rejected the request of the Office of Public Counsel for the Defence (OPCD) for leave to appeal her 3 July 2008 decision¹ granting 32 of the 58 applicants the procedural status of victim in the investigation phase of the situation in the Democratic Republic of the Congo.

In this decision, the Single Judge found that neither of the two issues identified by the OPCD in its request had been dealt with in the impugned decision.

According to the Single Judge, the first issue—namely, viewing the application form in the light most favourable to applicants and drawing inferences in favour of applicants when determining victim status—is one that arises from general principles relating to the application process. These are issues already subject to several pending appeals. In the impugned decision, the Single Judge applied the existing standard for the burden of proof when determining victim status pursuant to rule 85(a) of the Rules of Procedure and Evidence².

In the Single Judge's view, the second issue—namely, that the reference to specific individuals and militia in the context of *prima facie* factual findings issued in a public decision during the investigation phase compromises the integrity and impartiality of the Prosecution's investigations and contravenes the presumption of innocence—was based on a misinterpretation of the impugned decision.

Full Summary

On 4 September 2008, the Single Judge (Pre-Trial Chamber I) rejected the request of the Office of Public Counsel for the Defence (OPCD) for leave to

¹ 3 June 2008 Decision Pre-Trial Chamber I Decision (ICC-01/04-505).

² Rule 85(a) of the Rules of Procedure and Evidence.

appeal her 3 July 2008 decision³ granting 32 of the 58 applicants the procedural status of victim in the investigation phase of the situation in the Democratic Republic of the Congo.

In this decision, the Single Judge found that neither of the two issues identified by the OPCD arose from the impugned decision. Thus, the OPCD's request did not meet the criteria for interlocutory appeal under article 82(1)(d) of the Statute⁴.

Before assessing the merits of the OPCD's request, the Single Judge, relying on the jurisprudence of Pre-Trial Chambers I and II, noted that, for the Chamber to grant leave to appeal under article 82(1)(d), the issues identified by the appellant must (i) have been dealt with in the relevant decision; and (ii) meet the two cumulative criteria for interlocutory appeal set out in article 82(1)(d). Furthermore, when dealing with an application for leave to appeal, the Chamber must be guided by the following three principles originally set forth by Pre-Trial Chamber II, namely: the restrictive character of the remedy provided for in article 82(1)(d); the need for the applicant to satisfy the Chamber as to the existence of the requirements set out in this provision; and the irrelevance of or non-necessity for the Chamber to address arguments relating to the merits or substance of the appeal (paras.16-17).

The first issue for which the OPCD requested leave to appeal was as follows:

- “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*”.

In the view of the Single Judge, this is not an issue which arises from the impugned decision. Rather, it is an issue which arises from general principles relating to the application process set forth by the Chamber. Some of these issues are already the subject of several pending appeals (para. 19).

The Single Judge did not find grounds to support the OPCD's argument that the burden of proof applied in the impugned decision when examining applications differed significantly from the existing practice of the Chamber. Though the impugned decision further explained the method by which the Chamber assesses applications for the procedural status of victim at the investigation phase of a situation, the Single Judge had 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*” (para. 20).

Furthermore, the Single Judge did not support the OPCD's argument that her approach—namely, that “whereby in case of doubt, the Chamber will adopt the version most favourable to the applicants”—was new to the impugned decision.

³ 3 June 2008 Decision Pre-Trial Chamber I Decision (ICC-01/04-505).

⁴ Article 82(1)(d) of the ICC Statute

In previous decisions, many applications have lacked explicit reference to the moral, material or contextual elements of the crimes listed in article 5⁵. However, such elements have been directly inferred, in favour of the applicants, from the information provided in the applications (para. 21).

In the Single Judge's view, the OPCD's argument that the impugned decision modified the application of the principle of *in dubio pro reo* in respect of deciding on applications was misguided. The principle of *in dubio pro reo*, essential to criminal proceedings before the Court, has previously been held to be inapplicable to the application process, as explained in the Chamber's 7 December 2007 decision⁶ (para. 23).

The second issue for which the OPCD requested leave to appeal was as follows:

- "that the reference to specific individuals and militia, in the context of *prima facie* factual findings issued in a public decision during the investigation phase, compromises the integrity and impartiality of the Prosecutor's investigations, and contravenes the presumption of innocence".

At the outset, the Single Judge noted that the phrase "*prima facie* factual finding" does not appear anywhere in the impugned decision (para. 26). Furthermore, the two phrases are opposites. The term "*prima facie*", meaning at first sight, indicates an assertion which is still subject to proof. In contrast, a "factual finding" is an assertion which has been determined by a judge to be proven (para. 27).

On this ground, the Single Judge agreed with the Prosecution that the OPCD had misinterpreted the impugned decision and that the second issue did not arise from it (para. 29).

⁵ Article 5 of the ICC Statute.

⁶ 7 December 2007 Pre-Trial Chamber I Decision (ICC-01/04-417)