

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/05

Date: 13 February 2008

THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

SITUATION IN DARFUR, SUDAN

Public Document

**Request of the Legal Representatives for Clarifications on
Victims' Participation in the Interlocutory Appeal filed by the OPCD under article
81(2)(d) of the Rome Statute**

The Office of the Prosecutor

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Legal Representatives for the Victims

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I. BACKGROUND

1. On 31 May 2007 the Legal Representatives of victims a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/071 (the “Legal Representatives”) filed a power of attorney to the Principal Counsel of the Office of Public Counsel for Victims (the “OPCV” or the “Office”) granting her, *inter alia*, the power to make “*written submissions before the Chamber on notice to the legal representatives*”¹.

2. On 10 July 2007 applicants a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 filed applications for participation in the proceedings in the Situation in Darfur, Sudan.

3. On 23 July 2007, the Single Judge of Pre-Trial Chamber I issued a “Decision authorising the filing of observations on applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for participation in the proceedings”².

4. On 21 August 2007, the Office of Public Counsel for the Defence (the “OPCD”) filed a “Request for the Single Judge to order the production of relevant supporting documentation pursuant to regulation 86(2)(e)” of the Regulations of the Court³.

¹ See the “Request on behalf of applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06, a/0015/06”, No. ICC-02/05-76, 31 May 2007.

² See the “Decision authorising the filing of observations on applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for participation in the proceedings” (Pre-Trial Chamber I), No. ICC-02/05-85, 23 July 2007.

³ See the “Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e)”, No. ICC-02/05-94-Conf, 21 August 2007. See also the “Public Redacted Version of Request for the Single Judge to order Regulation 86(2)(e)”, No. ICC-02/05-95, 21 August 2007.

5. On 24 August 2007, the OPCD filed a request asking the Single Judge of Pre-Trial Chamber I to order the Prosecutor to disclose to the OPCD any information in its possession which would affect the credibility or contradict the assertions (including dates and location of alleged events), contained in the applications, or, in the alternative, to dismiss the applications *in limine*, in light of the prejudice to the rights of the Defence and the principle of equality of arms⁴.

6. On 3 December 2007, the Single Judge of Pre-Trial Chamber I issued the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor"⁵, rejecting both requests.

7. 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"⁶, granting the status of victims in the situation of Darfur, Sudan, to applicants a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07 and a/0038/07.

8. On 10 December 2007, the OPCD filed the "Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting

⁴ See the "Request for the Single Judge to order the Prosecutor to disclose exculpatory materials", No. ICC-02/05-97, 24 August 2007.

⁵ See the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor" (Pre-Trial Chamber I), No. ICC-02/05-110, 3 December 2007.

⁶ See 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" (Pre-Trial Chamber I), No. ICC-02/05-111-Corr, 6 December 2007. See the "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", No. ICC-02/05-111-Corr, 14 December 2007.

Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor""⁷.

9. On 13 December 2007, the Prosecution filed the "Prosecution's Response to OPCD's Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor""⁸.

10. On 17 December 2007, the Legal Representatives filed the "Response of the Legal Representatives of Victims to the Prosecution's Application and the OPCD's Request for Leave to Appeal 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""⁹.

11. On 23 January 2007, the Single Judge of Pre-Trial Chamber I issued the "Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory

⁷ See the "Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", No. ICC-02/05-112, 10 December 2007.

⁸ See the "Prosecution's Response to OPCD's Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", No. ICC-02/05-115, 13 December 2007.

⁹ See the "Response of the Legal Representatives of Victims to the Prosecution's Application and the OPCD's Request for Leave to Appeal the "Decision on the Applications for Participation in the proceedings of Applicants a/0011/06 to a/0015, a/002107, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07""", No. ICC-02/05-116, 17 December 2007.

Materials by the Prosecutor”¹⁰, granting the OPCD leave to appeal the Single Judge’s decision dated 3 December 2007 on the following issue:

“whether article 68(3) of the Statute can be interpreted as providing for a ‘procedural status of victim’ at the investigation stage of a situation and the pre-trial stage of a case; and (i) if so, whether rule 89 of the Rules and regulation 86 of the Regulations provide for an application process which only aims to grant the procedural status of victim and is thus distinct and separate from the determination of the procedural rights attached to such status; and what are the specific procedural features of the application process? Or (ii) if not, how applications for participation at the investigation stage of a situation and the pre-trial stage of a case must be dealt with.”

12. On 4 February 2008, the OPCD filed the “OPCD appeal brief on the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor””¹¹.

13. The Legal Representatives of the victims authorised to participate in the situation in Darfur, Sudan, respectfully submit the following observations to the Appeals Chamber.

¹⁰ See the “Decision on Request for leave to appeal the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor” (Pre-Trial Chamber I), No. ICC-02/05-118, 23 January 2008.

¹¹ See the “OPCD appeal brief on the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”, No. ICC-02/05-119, 4 February 2008.

II. OBSERVATIONS ON THE PARTICIPATION OF THE VICTIMS AUTHORISED TO PARTICIPATE AND OF APPLICANTS IN THE INTERLOCUTORY APPEAL LODGED BY THE OPCD

14. The personal interests of the victims authorised to participate in the proceedings in the situation in Darfur, Sudan, in accordance with the Single Judge's decision of 3 December 2007, are directly affected by the appealable issue pursuant to article 68(3) of the Rome Statute. Indeed, the appeal proceedings will have a direct impact on the status of the said victims, especially since the scope of the appealable issue as defined by the Single Judge in her decision of 23 January 2008 is significantly broader than the one requested by the OPCD in its application of 10 December 2007¹².

15. Accordingly, the Legal Representatives submit that the participation in the interlocutory appeal of the victims authorised to participate in the situation in Darfur, Sudan, is appropriate, insofar as they are directly affected by the outcome of the proceedings.

16. Consequently, in view of regulation 24(2) of the Regulations of the Court, which provides that "[v]ictims or their legal representatives may file a response to any document when they are permitted to participate in the proceedings in accordance with article 68, paragraph 3, and rule 89, sub-rule 1, subject to any order of the Chamber", the Legal Representatives argue that they may respond to the document in support of the appeal filed by the OPCD on 4 February 2008.

¹² See the "Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", No. ICC-02/05-112, 10 December 2007.

17. In its “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*””, the Appeals Chamber held that “*in order for victims to participate in an appeal under article 82(1)(b) of the Statute, an application seeking leave to participate in the appeal must be filed*”, even though the victims had been authorised to participate in the proceedings which led to the interlocutory appeal of the Defence¹³. This reasoning was reiterated by the Appeals Chamber in its decision dated 13 June 2007¹⁴ which also concerned an appeal lodged under article 82(1)(b) of the Rome Statute.

18. However, the Legal Representatives note that the interlocutory appeal in question is lodged under article 82(1)(d) of the Rome Statute and accordingly does not fall within the scope of the judgment of 13 February 2007 or the decision of 13 June 2007. The Legal Representatives also note that, to date, the Appeals Chamber has never ruled on appeals brought under article 82(1)(d) of the Rome Statute since such requests were all rejected by Pre-Trial Chambers I and II¹⁵.

19. The Legal Representatives consider that the interpretation of the relevant provisions of the texts of the Court allows victims who had been authorised to participate in the situation in Sudan, Darfur, to also participate in the interlocutory appeal lodged by the OPCD.

¹³ See the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*”” (Appeals Chamber), No. ICC-01/04-01/06-824, 13 February 2007, para. 38.

¹⁴ See the “Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007” (Appeals Chamber), No. ICC-01/04-01/06-925, 13 June 2007, para. 23.

¹⁵ See, *inter alia*, the “Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges” (Pre-Trial Chamber I), No. ICC-01/04-01/06-915, 24 May 2007, and, more generally, the applications for leave to appeal the decisions of Pre-Trial Chambers I and II granting victim status in a situation.

20. The Legal Representatives further submit that the issue to be resolved on appeal also affects the personal interests of the applicants whose status is pending before the relevant Chamber¹⁶. Indeed, the appealable issue relates to how the applications for participation should be dealt with in the event that the Appeals Chamber were to decide that article 68(3) of the Rome Statute cannot be interpreted as providing for the procedural status of victim at the investigation stage of a situation and at the pre-trial stage of a case.

21. Article 68(3) of the Rome Statute explicitly grants victims of crimes within the jurisdiction of the Court the right to submit observations and to present their views and concerns where their personal interests are affected. An analysis of the numerous articles and rules governing victims' participation in the proceedings before the Court reveals that victims' participation is not limited to certain stages of the proceedings¹⁷. Article 68(3) of the Rome Statute does not differentiate between applicants and victims authorised to participate in the proceedings before the Court, thus covering both categories of persons, insofar as their personal interests are affected by the proceedings at stake.

22. This interpretation is supported by the broad definition given to the term victim in rule 85 of the Rules of Procedure and Evidence. This provision, in fact, does not contain any restriction with regard to participation, only linking the term "*victim*" to the commission of any crime within the jurisdiction of the Court.

¹⁶ Applicants a/0021/07, a/0028/07, a/0030/07 to a/0033/07 and a/0035/07 represented by the Legal Representatives have not yet been authorised to participate in the proceedings, since the assessment of their applications has been deferred by the relevant Chamber.

¹⁷ See UN Doc. PCNICC/1999/DP.2, 1 February 1999, p. 7. See also the remarks by Costa Rica, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999 and by Colombia, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999. For a review of the *travaux préparatoires*, see BITTI (G.) and FRIMAN (H.), "Participation of Victims in the Proceedings", in LEE (R.S.) (ed.), *The International Criminal Court: Elements of Crimes and the Rules of Procedure and Evidence*, Transnational Publishers Inc., New York, 2001, pp. 456-474.

23. Accordingly, the Legal Representatives consider that as the applicants' personal interests are directly affected by the appealable issue, they should also have the opportunity to present their views and concerns to the Appeals Chamber pursuant to article 68(3) of the Rome Statute. The Legal Representatives consider that the participation of the applicants in the interlocutory appeal is appropriate, insofar as that they are directly affected by the outcome of the proceedings.

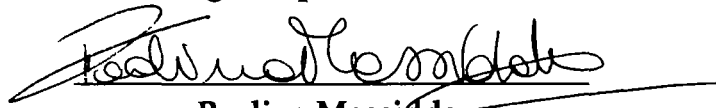
FOR THE FOREGOING REASONS,

The Legal Representatives respectfully request the Appeals Chamber, in case the Appeals Chamber's interpretation of the relevant provisions of the texts of the Court were to differ from the Legal Representatives' interpretation, to specify the procedure to be followed by victims already authorised to participate in the situation in Darfur, Sudan, to participate in the appeal lodged by the OPCD against the decision of the Single Judge of Pre-Trial Chamber I of 3 December 2007.

In addition, the Legal Representatives respectfully request the Appeals Chamber to authorise those applicants whose applications are pending before the Pre-Trial Chamber I to file observations on the appealable issue within a time limit to be determined by the Chamber. Should the Appeals Chamber consider that the applicants must file an application for participation in the interlocutory appeal lodged by the OPCD against the decision of the Single Judge of Pre-Trial Chamber I of 3 December 2007, the Legal Representatives respectfully request the Chamber to specify the procedure to be followed to this end.

Finally, the Legal Representatives respectfully request the Appeals Chamber to consider whether the time-limit for the filing of the response by the Legal Representatives in accordance with regulation 24 (2) of the Regulations of the Court should be suspended pending a determination by the Appeals Chamber on the present request for clarification.

**Ms Wanda M. Akin
Mr Raymond M. Brown
Legal Representatives**



**Paolina Massidda,
Principal Counsel
Office of Public Counsel for Victims**

Dated this 13th day of February 2008

At Newark (U.S.A.) and The Hague (The Netherlands)