

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05
Date: 23 January 2008

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN DARFUR, SUDAN

**Public Document
URGENT**

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"

The Office of the Prosecutor

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No.: ICC-02/05

1/8

23 January 2008

I, Akua Kuenyehia, Judge at the International Criminal Court (“the Court”);

NOTING 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”¹ issued on 3 December 2007 (“the Decision of 3 December 2007”), whereby the Single Judge rejected the requests of the Office of Public Counsel for the Defence (“the OPCD”) of 21 August 2007² and of 24 August 2007³;

NOTING 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”⁴ (“the OPCD Request for Leave to Appeal”) filed by the OPCD on 10 December 2007;

NOTING 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”⁵ (“the Prosecution Response”) filed by the Prosecution on 13 December 2007;

NOTING articles 68 and 82(1)(d) of the Rome Statute (“the Statute”), rules 85, 89 and 155 of the Rules of Procedure and Evidence (“the Rules”), and regulations 65 and 86 of the Regulations of the Court (“the Regulations”);

¹ ICC-02/05-110.

² ICC-02/05-94-Conf.

³ ICC-02/05-97.

⁴ ICC-02/05-112.

⁵ ICC-02/05-115.

CONSIDERING that, as Pre-Trial Chambers I and II have repeatedly stated,⁶ 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. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;

CONSIDERING that, according to the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”,⁷ issued by the Appeals Chamber on 13 July 2006 (“the Appeals Chamber Judgment”)

- (i) “[o]nly an issue may form the subject-matter of an appealable decision”;⁸
- (ii) “[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”;⁹
- (iii) “[n]ot every issue may constitute the subject of an appeal”,¹⁰ but “it must be one apt to ‘significantly affect’, i.e. in a material way, either

⁶ See *inter alia* “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); “Decision on Defence Motion for Leave to Appeal”, issued by Pre-Trial Chamber I on 18 August 2006 (ICC-01/04-01/06-338); “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); “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 II’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.

⁷ ICC-01/04-168.

⁸ Appeals Chamber Judgment, para. 9.

⁹ Appeals Chamber Judgment, para. 9.

a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’;¹¹ and

- (iv) “[i]dentification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal” insofar as “the issue must be one ‘for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings’”;¹²

CONSIDERING that the OPCD is seeking leave to appeal in relation to the following two issues:

- (i) whether the application process is a distinct procedure, unrelated to the modalities of participation or the criminal proceedings before the Court, which is not *per se* prejudicial to the Defence;¹³ and
- (ii) whether the Chamber is only obliged to provide the Prosecution and the Defence with copies of the application, and is thus not obliged to provide or order the applicants to provide information extrinsic to the applications themselves;¹⁴

CONSIDERING that, in the view of the Single Judge, the two issues identified by the OPCD are inextricably linked because, according to the Decision, the specific procedural features of the application process provided for in rule 89 of the Rules and regulation 86 of the Regulations – including the fact that the Chamber is only obliged to provide the Prosecution and the Defence with copies of the applications – are the result of its distinct and specific nature, object and purpose;

¹⁰ Appeals Chamber Judgment, para. 9.

¹¹ Appeals Chamber Judgment, para. 10.

¹² Appeals Chamber Judgment, para. 14.

¹³ ICC-02/05-112, para. 21.

¹⁴ ICC-02/05-112, para. 21.

CONSIDERING further that, according to the Single Judge's interpretation of article 68(3) of the Statute, the personal interests of victims are affected at the investigation stage of a situation¹⁵ and the pre-trial stage of a case;¹⁶ that these are appropriate stages of the proceedings for victims' participation; and that accordingly, victims have a procedural status in proceedings concerning the investigation of a situation and the pre-trial stage of a case;

CONSIDERING that, in the view of the Single Judge, the granting of the procedural status of victim in situation or case proceedings automatically gives the applicants the right to participate in such proceedings;¹⁷ that however, the extent of their participation must be subsequently determined by the Chamber because article 68(3) of the Statute does not pre-establish a set of procedural rights (i.e. modalities of participation) that those granted the procedural status of victim may exercise, but rather leaves their determination to the discretion of the Chamber; and that according to article 68(3) of the Statute, the Chamber must determine such procedural rights "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial";

CONSIDERING that once, in exercising its discretion, the Chamber decides on the set of procedural rights that are attached to the procedural status of victim, such rights belong to all applicants for whom the procedural status of victim has been granted;

¹⁵ ICC-01/04-101, ICC-02/05-110 and ICC-01/04-417.

¹⁶ ICC-01/04-177, ICC-02/05-110 and ICC-01/04-417.

¹⁷ The only reason to make at this stage a *prima facie* determination that applicants fulfill the four criteria provided in the definition of victims pursuant to rule 85 of the Rules, including the necessary causal link between the alleged harm suffered by the applicants and the crimes which are the subject of the proceedings concerning the investigation of a situation and the pre-trial stage of a case (ICC-01/04-101 and ICC-01/04-177), is to determine who can participate in those proceedings and accordingly grant them a procedural status in such proceedings.

CONSIDERING further that the Single Judge's interpretation of article 68(3) of the Statute, rule 89 of the Rules and regulation 86 of the Regulations ensures the expeditiousness of the proceedings because it avoids a situation in which every time a natural or legal person intends to participate in any specific procedural activity in situation or case proceedings, (i) this person must make an application for participation; (ii) the parties must be given the opportunity to submit their observations on the application; and (iii) the Chamber must decide on such application prior to conducting the specific procedural activity;

CONSIDERING that the Single Judge is of the view that in this context the overarching issue is 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;

CONSIDERING therefore that, in the view of the Single Judge, this is an issue arising out of the Decision;

CONSIDERING that, according to the interpretation of the Single Judge, article 68(3) of the Statute, rule 89 of the Rules and regulation 86 of the Regulations provide for two distinct and separate procedures (i.e. the application process and the

proceedings for the determination of the modalities of participation), as is the case in national jurisdictions in which victims are entitled to participate in criminal proceedings;¹⁸ and that, as a result, some of the procedural safeguards that apply in criminal proceedings before the Court may not be applicable during the application process due to its distinct and specific nature and its limited object and purpose;¹⁹

CONSIDERING therefore that the issue would significantly affect the fair conduct of the proceedings;

CONSIDERING that in the view of the Single Judge the issue would significantly affect the expeditiousness of proceedings because of the risk of consecutive multiple applications under rule 89 of the Rules and regulation 86 of the Regulations, which would lead to a resource-intensive process for the parties as well as hamper the efficient and effective operation of the Court as a whole;

CONSIDERING further that the Decision, the 10 August 2007 Pre-Trial Chamber II Decision²⁰ and the 18 January 2008 Trial Chamber Decision²¹ interpret the relevant provisions of the Statute, the Rules and the Regulations in a significantly different manner; and that a number of applications for the granting of procedural status of victim are currently pending before Pre-Trial Chamber I in the proceedings relating to the investigation into the DRC situation;

CONSIDERING therefore that an immediate resolution of this issue would provide legal certainty; that an “authoritative determination” by the Appeals Chamber which “map[s] a course of action along the right lines” on the issue will move the

¹⁸ ICC-02/05-110, para. 4 and ICC-01/04-417, para. 4.

¹⁹ ICC-02/05-110, para. 8 and ICC-01/04-417, para. 8.

²⁰ ICC-02/04-101.

²¹ ICC-01/04-01/06-1119.

proceedings forward and “ensure that the proceedings follow the right course”;²² and that, therefore, the Single Judge is of the view that an immediate resolution by the Appeals Chamber of the issue raised by the OPCD may materially advance the proceedings;

FOR THESE REASONS,

GRANT the OPCD’s Request for leave to appeal in relation to 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.”

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



Judge Akua Kuenyehia
Single Judge

Dated this Wednesday 23 January 2008

At The Hague, The Netherlands

²² ICC-01/04-168, para. 15.