

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/05

Date: 7 October 2008

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single Judge

**SITUATION IN UGANDA
IN THE CASE OF
THE PROSECUTOR
*v. JOSEPH KONY, VINCENT OTTI, OKOT ODHLAMBO, DOMINIC ONGWEN***

Public document

Decision on the Defence Request for leave to appeal dated 24 September 2008 and extension of time-limit for submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07

No.: ICC-02/04-01/05

1/9

7 October 2008

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

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

Counsel for the Defence
Mr Michiel Pestman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**
Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I, Judge Mauro Politi, judge at the International Criminal Court (the “Court”);

NOTING the “Decision designating a Single Judge on victims’ issues”, dated 22 November 2006,¹ whereby Pre-Trial Chamber II (the “Chamber”) designated Judge Mauro Politi as Single Judge responsible for all issues arising in connection with victims’ participation in the proceedings in respect of the situation in Uganda (the “Situation”) and in the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (the “Case”);

NOTING the Single Judge’s “Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06”, dated 1 February 2007 (the “1 February 2007 Decision”), stating *inter alia* that the appointment of counsel for the defence was needed for the purpose of allowing the proper development of the procedure enshrined in rule 89(1) of the Rules of Procedure and Evidence (the “Rules”), irrespective of the fact that none of the warrants of arrest issued in the Situation had yet been executed;²

NOTING the Single Judge’s decisions in the Situation³ and in the Case⁴ “on legal representation, appointment of counsel for the defence, criteria for redactions of applications for participation, and submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07” dated 17 September 2008 (the “Decisions”), whereby Mr Michiel Pestman was appointed as counsel for the Defence, entrusted with representing and protecting the interests of the Defence

¹ ICC 02/04-01/05-130.

² ICC-02/04-01/05-134, paragraph 15.

³ ICC 02/04-154.

⁴ ICC-02/04-01/05-312.

within the context and for the purposes of the proceedings on the applications for participation in the Situation and in the Case addressed by the Decisions;

NOTING the “Request for leave to appeal the Decisions on representation, appointment of counsel for the defence, criteria for redactions of applications for participation, and submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07 and Request that the appeal have suspensive effect in accordance with Article 82(3) of the Statute” filed by the Defence on 24 September 2008 (the “Defence Request”)⁵;

CONSIDERING that the Defence appears to seek leave to appeal the following issues, which in its view affect the fairness and the expeditiousness of the proceedings:

- (i) Whether a counsel for the defence may be appointed within the context of a situation to represent and protect the interests of the defence;
- (ii) Whether a counsel for the defence may be appointed within the context of a case when the persons against whom warrants of arrest have been issued are neither before the Court nor available for contacts by the defence;

CONSIDERING that, in support of his Request, the Defence brings a number of arguments that may be summarized as follows: (i) the purpose of an investigation into a situation being to determine whether “persons should be charged with the commission of crimes falling within the jurisdiction of the Court”, at the stage of a situation there would be no “persons, i.e. suspects or accused, whose interests need to be represented and protected”; (ii) as regards defence representation in the Case, the appointed counsel “has not been able to contact” the persons whose arrest is

⁵ ICC-02/04-01/05-313.

sought in order to obtain their consent to be represented or to determine whether a possibility of “conflict of interest exists or is likely to arise”, a scenario which would lead to a violation of the Code of Professional Conduct for counsel; and (iii) advancing the proceedings without the presence of the four persons sought by the Court would violate “the prohibition on hearings in absentia”;

NOTING article 82(1) (d) and 82 (3) of the Statute of the Court (the “Statute”), rule 89, 155(1) and 155 (2) of the Rules, and regulations 35, 76, 77 (4) and 77 (5) of the Regulations;

CONSIDERING that article 82(1)(d) of the Statute restricts the possibility of leave to appeal to decisions “that involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”;

CONSIDERING that in its decision on interlocutory appeals dated 19 August 2005 the Chamber 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 enshrined in this provision; and (c) the irrelevance or non-necessity for the Chamber to address arguments relating to the merits or substance of the appeal;⁶

CONSIDERING further the judgment, dated 13 July 2006, in which the Appeals Chamber stated that the object of the remedy provided for in article 82(1)(d) is to

⁶ ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 15.

“pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial” (the “13 July 2006 Decision”);⁷

NOTING that, in the 13 July 2006 Decision, the Appeals Chamber stated that “only an ‘issue’ may form the subject-matter of an appealable decision” and defined an issue as an “identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”;⁸

CONSIDERING that the subject-matter of the Defence Request appears to satisfy the requirements set forth by the 13 July 2006 Decision;

CONSIDERING that leave to appeal shall not be granted, unless the Single Judge is satisfied that the issues raised by the Defence would affect in a “material way” either *current* and *future* proceedings in terms of fairness and expeditiousness, or the outcome of the trial;⁹

CONSIDERING that one of the fundamental principles underlying the Statute is that the interests of the defence shall be adequately protected at all stages of the proceedings, with a view to preserving their fairness at all times;

CONSIDERING in particular that, according to regulations 76 and 77 of the Regulations of the Court (the “Regulations”), a counsel for the defence may be appointed from the Office of Public Counsel for the defence to represent and protect the rights of the defence during the initial stages of the investigation into a situation;

⁷ ICC-01/04-168, para. 19.

⁸ *Ibid.*, para. 9.

⁹ *Ibid.*, para. 12.

CONSIDERING that, under rule 89 (1) of the Rules, copies of the victims' applications for participation shall be provided to both the Prosecutor and the Defence;

CONSIDERING further that, when a unique investigative opportunity arises, article 56(2)(d) mandates the Pre-Trial Chamber "to take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence", and empowers it to authorize counsel "to attend and represent the interests of the defence" even "where there has not yet been ... an arrest" of the person/persons sought;

CONSIDERING that one of the fundamental aspects of fairness as construed by the Chamber, as well as by international human rights bodies, "concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour";¹⁰

CONSIDERING that the role given to counsel for the defence is to be read as instrumental to the specific phase of the proceedings at stake and that there are instances in which the absence of contact between counsel and the person represented does not *per se* prevent the former from being able to make a point and thus contribute to the overall fairness of the proceedings;

CONSIDERING that, furthermore, the view taken by the Defence would result in the defence being deprived of the right to voice its concerns at the situation stage, or anytime an arrest warrant has been issued but the person sought remains at large, thus *inter alia* depriving provisions like article 56, rule 89 and regulations 76 and 77 of any meaningful content;

¹⁰ ICC-02/04-01/05-20, para. 30.

CONSIDERING, accordingly, that the appointment of counsel for the defence in respect of both the Situation and the Case irrespective of the specific circumstances of the persons whose arrest is sought, far from affecting the fairness of the proceedings, is meant to ensure that none of such circumstances will result in the interests of the defence being neglected;

CONSIDERING that failure by the defence to demonstrate that the “fairness” tenet of the first limb of the first requirement of article 82(1)(d) of the Statute is met *per se* exempts the Single Judge from the need to assess the alleged significant impact on the expeditiousness of the proceedings;¹¹

NOTING the Defence’s request that the appeal have suspensive effect on the Decisions;

CONSIDERING that, in view of the considerations hereabove, there is no need for the Single Judge to address such request;

NOTING that the Decisions granted the Prosecutor and the Defence until Friday 10 October 2008 to submit their observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07;

CONSIDERING that, as a result of the Defence Request, the time-limit allowed to submit the observations might prove inadequate;

¹¹ ICC-02/04-01/05-90, para. 38; ICC-01/04-135-tEN, paras. 28, 61.

CONSIDERING that, accordingly, it appears appropriate to grant an extension of such time-limit;

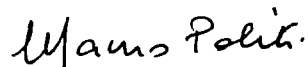
FOR THESE REASONS, HEREBY

REJECT the Defence request for leave to appeal the Decisions;

DISMISS *in limine* the Defence request that the appeal have suspensive effect;

GRANT the Prosecutor and the Defence until Monday 20 October 2008 to submit their observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07.

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



Judge Mauro Politi
Single Judge

Dated this Tuesday 7 October 2008

At The Hague

The Netherlands