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N°.: **ICC-02/04-01/05**

Date: 5 March 2007

PRE-TRIAL CHAMBER II

Before : Judge Mauro Politi, Single Judge

Registrar : Mr Bruno Cathala

SITUATION IN UGANDA

IN THE CASE OF

THE PROSECUTOR

***V. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO, RASKA LUKWIYA,
DOMINIC ONGWEN***

Public document

**Defence observations on applications for participation in the proceedings 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**

The Office of the Prosecutor
Mr Luis Moreno Ocampo
Ms Fatou Bensouda
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The ad hoc Counsel for the Defence

Ms Michelyne C. St-Laurent

BACKGROUND

1. On 1 February 2007, the Honourable Judge Politi of Chamber II, the single judge, rendered the “Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on application 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” (“the *Decision of 1 February 2007*”).
2. In this *Decision of 1 February 2007*, the single judge appointed the undersigned as ad hoc Counsel for the Defence and asked her to submit her observations in respect of the application for participation in the proceedings from the following applicants : 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, by 26 February 2007.
3. On 19 February 2007, the applicant received notification of 2 CD-ROMs containing documents entitled “Redacted Victims Applications” from *Court Management – Court Records*, via the DHL courier service.
4. On 23 February 2007, the Honourable Single Judge rendered the “Decision on the “Defence Application for an extension to the time limit to respond to the “Defence Observations on the Applications for Participation in the Proceedings a/0010/06, a/0064/06 to a/0070/06, a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06””, granting the ad hoc Counsel for the Defence until 6 March 2007 to make her Observations given that she received notification of the documents at such a late stage.
5. On the same day, 23 February 2007, the applicant received a further notification from *Court Management – Court Records*, via the DHL courier service, namely the document entitled : “Redacted Application a/0100/06”.
6. In this submission, the applicant is filing her “Defence Observations on the Applications for Participation in the Proceedings a/0010/06, a/0064/06 to a/0070/06, a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” (“*Observations of the ad hoc Counsel for the Defence*”).

APPLICABLE LAW

7. Articles 5, 11, 21, 68 and 126 of the Rome Statute of the International Criminal Court (“the Statute”), which support the *Observations of the ad hoc Counsel for the Defence*, stipulate that:

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes::
 - a) The crime of genocide;
 - b) Crimes against humanity;
 - c) War crimes;
 - d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect

to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 11

Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 21

Applicable law

1. The Court shall apply:
 - a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Article 68

Protection of the victims and witnesses and their participation in the proceedings

[...]

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

[...]

Article 126

Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

8. Rules 85 and 89 of the Rules of Procedure and Evidence (“the Rules”) set out the requisite criteria for “victim status”:

Rule 85

Definition of victims

For the purposes of the Statute and the Rules of Procedure and Evidence:

a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Rule 89

Application for participation of victims in the proceedings

1. In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

2. The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.

3. An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.

4. Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

9. Rule 85 of the Rules and the case law¹ of the International Criminal Court (“the ICC”) sets out four criteria which are necessary for victim status to be awarded:

1. the criterion of “natural person”
2. the notion of harm
3. do the crimes fall under the jurisdiction of the Court?
4. the causal link between the crimes that fall under the jurisdiction of the Court and the harm suffered

10. Regulation 86 of the Regulations of the Court states that:

Regulation 86

Participation of victims in the proceedings under rule 89

1. For the purposes of rule 89 and subject to rule 102 a victim shall make a written application to the Registrar who shall develop standard forms for that purpose which shall be approved in accordance with regulation 23, sub-regulation 2. These standard forms shall, to the extent possible, be made available to victims, groups of victims, or intergovernmental and non-governmental organizations, which may assist in their dissemination, as widely as possible. These standard forms shall, to the extent possible, be used by victims.

¹ “Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6”, ICC-01/04, 17 January 2004; “Decision on the applications for participation in the proceedings a/0001/06, a/0002/06 et a/0003/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo* and of the investigation in the Democratic Republic of the Congo, ICC-01/04, 31 July 2004.

2. The standard forms or other applications described in sub-regulation 1 shall contain, to the extent possible, the following information:

a) The identity and address of the victim, or the address to which the victim requests all communications to be sent; in case the application is presented by someone other than the victim in accordance with rule 89, sub-rule 3, the identity and address of that person, or the address to which that person requests all communications to be sent,

b) If the application is presented in accordance with rule 89, sub-rule 3, evidence of the consent of the victim or evidence on the situation of the victim, being a child or a disabled person, shall be presented together with the application, either in writing or in accordance with rule 102,

[...]

d) A description of the incident, including its location and date and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the harm as described in rule 85,

[...]

7. Before deciding on an application, the Chamber may request, if necessary with the assistance of the Registrar, additional information from, inter alia, States, the Prosecutor, the victims or those acting on their behalf or with their consent. If information is received from States or the Prosecutor, the Chamber shall provide the relevant victim or victims with an opportunity to respond.

[...]

(emphasis added)

SUBMISSIONS

11. The ad hoc Counsel for the Defence is appointed in order to represent and protect the interests of the Defence in any case relating to victim applications for participation in the proceedings in the context of the present case.

12. Although no brief has been filed in the present case, and in view of the forms submitted by the applicants, they are asking for their status as victims to be recognised in order to participate “in investigations, the pre-trial phase, the trial and the appeals phase”.

13. The ad hoc Counsel for the Defence submits that only provision a) of rule 85 of the Rules applies in this particular case because the applications are submitted by physical persons only.

14. The ad hoc Counsel for the Defence reiterates that the four criteria established in the case law for victim status to be recognised are as follows :

1. the criterion of “natural person”
2. the notion of harm
3. do the crimes fall under the jurisdiction of the Court?
4. the causal link between the crimes that fall under the jurisdiction of the Court and the harm suffered

15. The ad hoc Counsel for the Defence acknowledges that prima facie all the applicants fulfil the first and second criteria of a natural person and the concept of harm suffered.

16. The ad hoc Counsel for the Defence also acknowledges that all the applicants fulfil the criteria of crimes pursuant to article 5 of the Statute of the ICC.

Jurisdiction *ratione temporis*

17. However, the ad hoc Counsel for the Defence submits that, in accordance with articles 11 and 26 of the Statute, the crimes charged must have been committed 60 days after the ratification of the Rome Statute by Uganda, in other words from 1 September 2002.

18. The ad hoc Counsel for the Defence submits that having read the redacted form submitted by applicant a/0089/06, the dates on which the events occurred seem to be between 1998 and 2001.

19. In addition, having read the redacted forms of applicants a/0067/06, a/0068/06, a/0069/06, a/0101/06, the crimes were allegedly perpetrated in 2002 and there is no mention of the month. As a result, it is impossible to verify whether this falls within the jurisdiction *ratione temporis* of the Statute since Uganda ratified the Statute on 14 June 2002.

20. As a result, at this stage the ad hoc Counsel for the Defence requests that the applications of the following applicants be denied: a/0089/06, a/0067/06, a/0068/06, a/0069/06 and a/0101/06.

Nexus between the applicants and the accused persons

21. The ad hoc Counsel for the Defence submits that the applicants have established *prima facie* the causal link between the crimes that fall under the jurisdiction of the Court and the harm suffered, apart from the jurisdiction *ratione temporis* of certain applicants and subject to the territorial and temporal jurisdiction to be specified in the forthcoming documents containing the charges.

22. Nonetheless, the ad hoc Counsel for the Defence submits that it is necessary to make a distinction between “the situation” and the “cases” at the trial. The situation being the “situation” on Ugandan territory, the “case”, as in the present case, begins once a warrant of arrest has been issued and the identity of the accused persons is known. As a result, at the case stage, the ad hoc Counsel for the Defence reiterates the comments of the ICC Pre-Trial Chamber I in the situation in the Democratic Republic of the Congo, that *at the stage of the case, the status of victim will be accorded only to applicants who seem to meet the definition of victims set out in rule 85 of the Rules of Procedure and Evidence in relation to the situation in question.*²

23. The same Pre-Trial Chamber states that as soon as a warrant of arrest is issued, the examination criterion is more restrictive. Thus, according to article 58 (1) (a) of the Statute, the Chamber shall issue a warrant of arrest if it is satisfied that “[t]here are reasonable grounds to believe” that the person concerned has committed a crime.³ (emphasis added)

² Idem, ICC-01/04, 17 January 2004, par.66

³ Idem, ICC-01/04, 17 January 2004, par.98

24. The ad hoc Counsel for the Defence submits that it is necessary for the exact nature of the causal link and nexus with the accused persons to be determined in a thorough manner at this stage.
25. In the present case, the ad hoc Counsel for the Defence submits that the references to the exact dates and locations in the forms submitted by the applicants have been redacted.
26. The ad hoc Counsel for the Defence also submits that in the absence of any charging documents issued for the accused persons, which state the locations and exact dates of events, she reserves the right to challenge, modify and amend at a later stage these observations regarding the request of the applicants.
27. In the account of the events described by applicants a/0098/06, a/0103/06 and a/0124/06, there is no identification of either the armed group responsible or the persons responsible.
28. Furthermore, in the present case Pre-Trial Chamber II issued 5 warrants of arrest on 8 July 2005.
29. As a result, the ad hoc Counsel for the Defence submits that there is no nexus between applicants a/0098/06, a/0103/06 and a/0124/06 and the accused persons in the present case and requests that these applications be denied.

Representatives of the applicants

30. In addition, none of the representatives of applicants a/0010/06, a/0064/06, a/0081/06, a/0082/06, a/0084/06, a/0087/06, a/0097/06, a/0100/06, a/0104/06, a/0111/06, a/0113/06, a/0116/06, a/0127/06 and a/0121/06, were able to provide the physical evidence requested by the form, namely a birth certificate or other documentation which proves their link with the victims.
31. The ad hoc Counsel for the Defence submits that to allow the representatives of the victims, without evidence of the link which unites them with the victims or alleged victims, to act in their name might result in hundreds if not thousands of people being able to make themselves representatives of persons who are minors, abandoned or orphaned who have no connection with the case and/or are not victims under the terms of article 85 in order to derive substantial benefits from this.
32. Subject to the proof requested by the form, the ad hoc Counsel for the Defence requests that this be denied.

Rights of the accused persons to a fair and impartial trial

33. Article 61, which sets out the procedure for confirming the charges, stipulates that if the charges are confirmed by the "Pre-Trial Chamber", the Presidency shall then constitute a "Trial Chamber" which shall be responsible for the conduct of subsequent proceedings.

34. Article 68 refers to the Court only and states that there is no obligation for the applicants to be heard by the Chamber to which the case has been referred (Trial Chamber).

35. Articles 58 et 61 recognise that preliminary decisions regarding the guilt of the accused could affect the impartiality of the Chamber (Trial Chamber) or at least the appearance of impartiality.

36. The ad hoc Counsel for the Defence respectfully submits that, at this stage, the Defence may only challenge victim participation in part.

37. The ad hoc Counsel for the Defence submits that the applicants are a third party to the proceedings and that their narration of the facts incriminating the accused persons, in the absence of the latter, and filed before this Chamber, goes against the presumption of innocence of the accused persons and their right to a fair and impartial trial.

38. Furthermore, the ad hoc Counsel for the Defence is unable to consult the accused persons, whom she does not know, about the facts set out by the applicants.

39. The ad hoc Counsel for the Defence submits that the accused have a right to the presumption of innocence.

40. The ad hoc Counsel for the Defence submits that any accused person has a right to a fair and impartial trial.

41. As a result, the ad hoc Counsel for the Defence requests that the Chamber which shall hear the trial be made up of judges who have no link with this victim participation application.

42. Therefore, the ad hoc Counsel for the Defence submits to the honourable Chamber that it is in the interests of justice that at the trial stage, that is after the documents containing the charges have been filed, that the accused persons should, through their counsel, be allowed to file additional observations on the victim participation application.

43. Moreover, the ad hoc Counsel for the Defence submits that the document PIDS-011-2005 F issued by the International Criminal Court, which is entitled "Victims before the Court", states that: "Victims can play a part [...] Where the victims' personal interests are affected, by presenting their views and concerns before the Court at all stages of proceedings, in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Victims may do this from the earliest stages of the proceedings [...] through to the trial and appeal stages".

44. The ad hoc Counsel for the Defence respectfully submits that this document, which is available to all, including the general public, interferes in the forthcoming decision regarding the present victim application to take part in this stage of the proceedings.

45. The ad hoc Counsel for the Defence submits that this official document, which is issued by the International Criminal Court, is a clear and precise indication to all, including the judges, that victims may participate at all stages in the proceedings.

46. In light of this document, the ad hoc Counsel for the Defence notes that the guiding principle of the International Criminal Court, which allows victims to take part in all stages in the proceedings, no longer allows the Defence to submit arguments against victim participation at all stages in the proceedings, and even worse, it interferes, or at the very least can influence the Judge who will have to render a decision on that precise point.

CONCLUSION

The ad hoc Counsel for the Defence respectfully submits:

- That she is not challenging the applicability of article 68(3) of the Statute at the investigations stage, nor the possibility in law for the victims to participate in this stage in the proceedings;
- That she is challenging the status of victim for the following applicants who have a legal representative:

a/0010/06,a/0064/06,a/0081/06,a/0082/06,a/0084/06,a/0087/06,a/0097/06,a/0097/06,a/00100/06,a/104/06,a/00111/06,a/00113/06,a/00116/06,a/00121/06,a/0127/06 subject to the representatives providing physical evidence of a link with the applicants;

- That she is challenging the participation of applicants a/0010/06, a/0064/06, a/0081/06, a/0082/06, a/0084/06, a/0087/06, a/0097/06, a/0100/06, a/0104/06, a/0111/06, a/0113/06, a/0116/06, a/0127/06 and a/0121/06 subject to the representatives providing physical evidence of the link with the applicants;
- That she is not challenging the causal link between the harm suffered and the crimes committed in Uganda; the ad hoc Counsel for the Defence reserves the right to challenge at a later stage the territorial and temporal jurisdiction of the Court in the case of Kony et al;
- That she is challenging, at this stage, applicants a/0098/06, a/0103/06, a/0124/06 who have no causal link or nexus with the accused persons;
- That she is challenging the jurisdiction *ratione temporis* of applicant a/0089/06;
- That she is challenging at this stage the jurisdiction *ratione temporis* of the following applicants : a/0067/06 , a/0068/06, a/0069/06 and a/00101/06, given that the exact dates of the events which occurred in 2002 have been redacted;

- That the decision of the Pre-Trial Chamber must not be final as far as the participation of applicants and the harm suffered is concerned;
- That the Pre-Trial Chamber grant leave for her or the legal representative of the accused persons to challenge the participation of some applicants and the harm suffered at a later stage;
- That she or the legal representative of the accused persons reserves the right to modify and amend at a later stage these observations regarding the application of the applicants in the interests of justice;
- The ad hoc Counsel for the Defence respectfully submits that the Chamber which shall hear the trial be made up of judges who have no link with the present victim application for participation;

Hereby respectfully submitted,

Conseil de la Défense

Done on 5 March 2007

At Paris, France