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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 ODHIAMBO AND DOMINIC ONGWEN

Public Document

**Response of the Legal Representative of Victims to the Defence Application for
Leave to Appeal the Decision of 14 March 2008 and Observations on the Response
of the Prosecutor to that Application**

Source: The Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. PROCEDURAL BACKGROUND

1. On 1 February 2007, the Single Judge rendered a *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, by which he ordered the Office of Public Counsel for Victims (“OPCV” or “the Office”) to provide the Applicants with any support and assistance which may be necessary or appropriate at the stage of the proceedings prior to the decision on their status in the context of the situation in Uganda and the case of *The Prosecutor v. Joseph Kony et al.*¹

2. On 10 August 2007, the Single Judge of Pre-Trial Chamber II rendered a *Decision on victims’ 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, granting victim status in the context of the investigation of the situation in Uganda to Applicants a/0101/06 and a/0119/06 and victim status in the case of *The Prosecutor v. Joseph Kony et al* to Applicants a/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06.² That decision also ordered the Office, *inter alia*, to continue to provide support and assistance to victims and applicants.³

3. On 14 March 2008, the Single Judge rendered a *Decision on victims’ applications for participation* a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06, granting victim status to Applicants a/0065/06, a/0068/06, a/0093/06, a/0096/06, a/0117/06, a/0120/06 and a/0123/06 in the context of the investigation of the situation in Uganda and

¹ See the *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 (Pre-Trial Chamber II), ICC-02/04-01/05-134, 1 February 2007, para. 13.

² See the *Decision on victims’ 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, (Pre-Trial Chamber II), ICC-02/04-101 and ICC-02/04-01/05-252, 10 August 2007.

³ *Ibid.*, para 164.

victim status to Applicants a/0094/06, a/0095/06, a/0103/06, a/0117/06, a/0120/06, a/0121/06, a/0123/06 and a/0124/06 in the case of *The Prosecutor v. Joseph Kony et al*⁴ (“the Decision”). That Decision also ordered the Office, *inter alia*, to continue to provide support and assistance to victims and applicants.⁵

4. On 25 March 2008, Ad Hoc Counsel for the Defence filed a “Defence Application for Leave to Appeal the Decision on victims’ applications for participation issued on 14 March 2008” (“the Defence Application”), seeking leave to appeal the Decision.⁶

5. On 31 March 2008, the Principal Counsel of the Office requested the Single Judge to appoint her as legal representative for the victims authorised to participate in the situation stage until a common legal representative is chosen by the victims, and to grant her leave to file a response to the Defence Application.⁷

5. On 31 March 2008, the Prosecution filed its response to the Defence Application (“the Prosecution’s Response”).⁸

6. On 2 April 2008, the Principal Counsel of the OPCV filed an application seeking leave to file observations on the Prosecution’s Response.⁹

⁴ See the *Decision on victims’ applications for participation* a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06 (Pre-Trial Chamber II), ICC-02/04-124-Conf-Exp and ICC-02/04-01/05-281-Conf-Exp, 14 March 2008 (“the Decision”).

⁵ *Ibid.* p. 73.

⁶ See the “Defence Application for Leave to Appeal the Decision on victims’ applications for participation issued on 14 March 2008”, ICC-02/04-128-tENG and ICC-02/04-01/05-285-tENG, 25 March 2008 (“the Defence Application”).

⁷ See the “Request for leave to file a response to the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la “Decision on victims’ applications for participation” rendue le 14 mars 2008””, ICC-02/04-130 and ICC-02/04-01/05-288, 31 March 2008.

⁸ See the “Prosecution’s Response to Defence’s Request for Leave to Appeal the Single Judge’s 14 March 2008 Decision on the Applications for Participation in the Proceedings”, ICC-02/04-129 and ICC-02/04-01/05-287, 31 March 2008 (“the Prosecution’s Response”).

⁹ See the “Request for leave to file observations to the ‘Prosecution’s Response to Defence’s request for Leave to Appeal the Single Judge’s 14 March 2008 Decision on the Applications for Participation in the Proceedings’”, ICC-02/04-131 and ICC-02/04-01/05-289, 2 April 2008.

7. On 4 April 2008, the Single Judge appointed the Principal Counsel of the Office as legal representative of the victims authorised to participate in the situation and in the case of *Kony et al* ("the Legal Representative") and authorised her to respond to the Defence Application and to file observations on the Prosecution's Response.¹⁰

8. Accordingly, the Legal Representative submits the following observations on the Defence Application and the Prosecution's Response.

I. MAIN SUBMISSION

9. The Legal Representative submits that the Defence Application is inadmissible at this stage of the proceedings and that, accordingly, the arguments set out by the Prosecutor in his Response to the said Application cannot be considered by the Single Judge, since the Response is thus moot.

10. The Legal Representative submits that the Decision flows directly from the previous decision on victim participation. Thus, in his decision of 10 August 2007, the Single Judge deferred a decision on applications a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06, to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06 "until adequate proof of identity and/or the relevant report by VPRS is submitted".¹¹

11. In the Decision, the Single Judge states that he "will [...] review the applications for which a decision has been deferred because of deficiencies affecting the proof of the identity of the applicant".¹² He moreover makes it clear that he will review the applications on the basis of the criteria set out in his previous decision of 10 August 2007.

¹⁰ See the *Decision on the OPCV's Requests for leave to file a response to the Defence's Application dated 25 March 2008 and to file observations on the Prosecution's Response to such Application* (Pre-Trial Chamber II), ICC-02/04-132 and 02/04-01/05-290, 4 April 2008.

¹¹ *Ibid.*, p. 62.

¹² See the Decision, *supra*, footnote 4, para. 8.

12. It is thus apparent that the Decision is restricted to reviewing the applications for participation in light of the further documents filed by the applicants, in accordance with the previous decision of 10 August 2007, which is undoubtedly why Ad Hoc Counsel for the Defence relies mainly on what is said in that decision in order to support her submissions.¹³

13. Accordingly, the Legal Representative submits that the Application for leave to appeal on the merits should have been filed by Ad Hoc Counsel for the Defence following notification of the decision of 10 August 2007, which contains the substantive matters relating to the issues raised in the Defence Application. Ad Hoc Counsel for the Defence was apparently notified of the said decision on 13 August 2007 and, in accordance with rule 155 of the *Rules of Procedure and Evidence*, should therefore have filed her application within 5 days of such notification, that is, by 20 August 2007.

II. IN THE ALTERNATIVE

14. In the alternative, should the Single Judge consider the Defence Application to be admissible, the Legal Representative submits the following observations on the Application and on the Prosecution's Response.

A. CRITERIA OF ARTICLE 82(1)(d) OF THE *ROME STATUTE*

15. The Legal Representative submits that the criteria allowing a Chamber to grant leave for an interlocutory appeal filed pursuant to article 82(1)(d) of the *Rome Statute* are clearly defined by the Statute as interpreted by previous decisions of the Court. Thus, when reviewing a similar application, Pre-Trial Chamber II considered that it "must be guided by three principles, namely: (i) the restrictive character of the remedy provided for in article 82, paragraph 1 (d), of the Statute; (ii) the need for the

¹³ See the *Decision on victims' 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, *supra*, footnote 2.

applicant to satisfy the Chamber as to the existence of the specific requirements stipulated by this provision; and (iii) the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal”.¹⁴

16. More specifically, article 82(1)(d) of the *Rome Statute* restricts the possibility of appeal to “[a] decision that involves 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 or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

17. In this respect, the Appeals Chamber has previously stated that “[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.¹⁵ The Appeals Chamber further found that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,¹⁶ and defined the term “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”.¹⁷ The Chamber further considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.¹⁸

18. Lastly, the Single Judge of Pre-Trial Chamber II noted that “examining the impact on the fairness and expeditiousness of the proceedings requires first and

¹⁴ See the *Decision on 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* (Pre-Trial Chamber II), ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision no. ICC-02/04-01/05-52), 19 August 2005, para. 15.

¹⁵ See the *Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal* (Appeals Chamber), ICC-01/04-168, 31 July 2006, para. 8.

¹⁶ *Ibid.*, para. 9.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, para. 10.

foremost a determination of the existence of an ‘issue’ which may qualify as the subject-matter of an appealable decision”.¹⁹

19. The Legal Representative submits, in the alternative, that the Defence Application does not satisfy the criteria of article 82(1)(d) of the *Rome Statute*. Ad Hoc Counsel has not established the existence of appealable issues. Moreover, she has not established that the said issues would significantly affect the fair conduct of the proceedings, nor has she established that an immediate resolution by the Appeals Chamber of the issues raised may “materially advance the proceedings”. With regard to the Prosecution’s Response, the Legal Representative is of the opinion that the Prosecutor’s submissions cannot be considered by the Single Judge because the Defence Application does not satisfy the criteria of article 82(1)(d) of the *Rome Statute*.

B. SPECIFIC SUBMISSIONS REGARDING THE APPLICATION BY AD HOC COUNSEL FOR THE DEFENCE FOR LEAVE TO APPEAL

20. In support of her Application, Ad Hoc Counsel for the Defence submits that, in the Decision, the Single Judge did not consider how and in what manner the personal interests of the applicants are affected by the proceedings. She further submits that the Single Judge did not indicate in what manner victim participation in the proceedings would be appropriate.²⁰ Moreover, she submits that the Single Judge erred in not requiring any proof of the identity of the victim of physical harm or of the link between the applicant and the victim when an applicant claims to have suffered mental harm.²¹ Accordingly, Ad Hoc Counsel is of the opinion that the Decision raises the following issues:

¹⁹ See the *Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ 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* (Pre-Trial Chamber II), ICC-02/04-112, 19 December 2007, para. 19.

²⁰ See the Defence Application, *supra*, footnote 6, para. 15.

²¹ *Ibid.*, para. 37.

Can victims be granted a general right to participate or should it be considered that such participation is only possible if it is established that specific personal interests of the applicant are affected by the proceedings and that such participation is appropriate at the stage of the proceedings?²² ("the First Issue"); and

In order to establish mental harm suffered as a result of physical harm suffered by another person, should the identity of the latter and the relationship of the applicant with the person be required?²³ ("the Second Issue").

The personal interests of the victims are not considered at the pre-trial stage of the case

21. With regard to the First Issue, Ad Hoc Counsel for the Defence contends that the Single Judge did not consider whether and how the personal interests of the applicants were affected when he reviewed their applications for participation in the "pre-trial proceedings stage"; and that he further failed to verify whether their participation at this stage was appropriate.²⁴

22. The Legal Representative notes that the arguments raised by Ad Hoc Counsel for the Defence in support of her assertions seem to apply only to the context of the situation and not to the pre-trial stage of a case. At the pre-trial stage of a case, the Single Judge acknowledged that:

There seems to be little doubt, at least in principle (and unless the Chamber decides otherwise in relation to a specific proceeding), that [the] requirement [of article 68(3) of the Rome Statute] is met whenever a victim (whether a natural person, an organisation or an institution pursuant to rule 85 of the Rules) applies for participation in proceedings following the issuance of a warrant of arrest or of a summons to appear for one or more individuals. These proceedings have a bearing on a case (i.e., one or more incidents during which one or more crimes within the jurisdiction of the Court appear to have been committed by one or more identified suspects) where the said victim was allegedly involved; subject to the need for the Chamber to determine whether the constituent elements of the definition of victim under rule 85 of the Rules are present, the fact that such a victim's personal interests are "affected" by criminal proceedings relating to the event or events in question seems incontrovertible. Indeed, commentators regard the fact "that individuals who suffered harm from a criminal conduct have a personal interest in the criminal process related to that conduct" as a self-evident assumption; accordingly, they consider that reference to "personal interests" as a condition for being allowed to present views in Court under these circumstances does nothing but mirror such assumption.²⁵

²² *Ibid.*, p. 9.

²³ *Ibid.*, p. 14.

²⁴ *Ibid.*, para. 15.

²⁵ See the *Decision on victims' 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, *supra*, footnote 2, para. 9.

23. Furthermore, the Single Judge stated: “That the personal interests of a victim are affected in respect of proceedings relating to the very crime in which that victim was allegedly involved seems entirely in line with the nature of the Court as a judicial institution with a mission to end impunity for the most serious crimes. This was evident throughout the negotiations leading up to the adoption of the Statute, during which most delegates ‘doubtless thought it morally right to provide to persons who have suffered serious violations of humanitarian law, the right to participate in the trial of the perpetrators of those violations and to ensure, during the course of the proceedings, that the Court is fully apprised of their personal sufferings’”.²⁶

24. Accordingly, the Legal Representative submits that, at the pre-trial stage of the case, Ad Hoc Counsel’s arguments are not applicable, and that it must accordingly be concluded that the issue cannot, at this stage of the proceedings, be one which would “significantly affect” the course of the proceedings.

25. The Legal Representative is therefore of the opinion that, since Ad Hoc Counsel has failed to satisfy the first criterion of article 82(1)(d) of the *Rome Statute*, it is not necessary to verify whether the First Issue is one which “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” or for which “an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

26. However, should the Single Judge take the view that the First Issue flows from the Decision, then the Legal Representative would make reference to her submissions in her “Response to the Defence Application for Leave to Appeal the Decision of 14 March 2008 and Observations on the Response of the Prosecutor to such Application”.²⁷

²⁶ *Ibid.*, para. 10.

²⁷ See the “Response of the Legal Representative of Victims to the Defence Application for Leave to Appeal the Decision of 14 March 2008 and Observations on the Response of the Prosecutor to that Application”, ICC-02/04, 11 April 2008.

The alleged need to provide evidence to establish the existence of mental harm as a result of harm suffered by another person

27. In respect of the Second Issue, Ad Hoc Counsel for the Defence argues that, having drawn up a list of documents to establish the identity of an applicant acting on behalf of a victim, the Single Judge appears not to require any proof of the identity of the victim or of the relationship between the victim and the person acting on his or her behalf.²⁸

28. The Legal Representative submits that none of the victims allege having suffered only mental harm, but all allege having suffered mental harm combined with economic and/or physical harm. The victims who allege that they suffered mental harm can be divided into two separate categories: a) victims whose family members were killed or injured²⁹ and b) victims who directly witnessed acts of violence which have resulted in psychological problems.³⁰

29. As regards the first category of victims, the Single Judge has already drawn up a list enabling their identity, or that of their family member, to be established by means of various documents to be submitted in support of the application for participation.³¹

30. As regards the second category of victims, it would be unrealistic, if not impossible, to require them to provide proof of the identity of the person who suffered the harm, or of any link between them. Thus it is obvious that providing proof of identity, or of the link between applicants and the countless numbers of victims of war crimes, or of crimes against humanity, is impossible.

²⁸ See the Defence Application, *supra*, footnote 6, para. 37.

²⁹ See Applications a/0094/06, a/0103/06, a/0120/06 and a/0123/06.

³⁰ See Applications a/0093/06, a/0095/06, a/0117/06, a/0121/06, a/0123/06 and a/0124/06.

³¹ See the Decision, *supra*, footnote 4, para. 6. See also the "Report on the identity documents available in the Ugandan legal and administrative system and other supporting documentation for applications for participation in proceedings in Uganda", ICC-02/04-125-Anx, 17 March 2008, paras. 18, 33, 54 and 56.

31. Moreover, the prevailing circumstances on the territory of Uganda must be borne in mind. According to the report of the Victims Participation and Reparations Section, the applicants themselves “face ‘enormous difficulties’ and ‘often insurmountable logistical, economic and other obstacles’ when they try to obtain identification documents to support their [own] applications”.³²

32. Lastly, Ad Hoc Counsel for the Defence seems to be confusing the procedures for granting victim status to, on the one hand, persons who allege that they suffered mental harm and, on the other, persons acting on behalf of other persons. The obligation to establish kinship by means of specific documents applies only to persons acting on behalf of a specific category of persons, namely children and disabled persons, who are unable to act on their own behalf.³³ In the instant case, the persons concerned do not fall under this category, since they have submitted an application on their own behalf, alleging that they suffered mental harm.

33. Accordingly, the Legal Representative is of the opinion that the Second Issue does not flow from the Decision. The Single Judge has already ruled on the type of documents which must be provided in support of an application for participation of victims whose family members were killed or injured. Furthermore, as regards the

³² See the Decision, *supra*, footnote 4, para. 4.

³³ See rule 89(3) of the *Rules of Procedure and Evidence* and regulation 86(2)(a) and (b) of the *Regulations of the Court*. See also the *Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation* (Pre-Trial Chamber I), ICC-01/04-374, 17 August 2007, para. 12: “The Chamber considers that an application is complete if it contains the following information: (i) the identity of the applicant; (ii) the date of the crime(s); (iii) the location of the crime(s); (iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court; (v) proof of identity; (vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim; (vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship; (viii) a signature or thumb-print of the Applicant on the document, at the very least, on the last page of the application.” See also 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), ICC-02/05-111-Corr, 6 December 2007, para. 36: “There is however no provision that permits applications to be made on behalf of deceased persons. Furthermore, rule 89(3) of the Rules allows the submission of an application on behalf of a person, provided that the person has given his or her consent. The Single Judge notes that such consent is impossible in the case of deceased persons. It is therefore the Single Judge’s view that deceased persons do not fall within the meaning of ‘natural persons’ under rule 85(a) of the Rules”.

victims who directly witnessed acts of violence and suffered resultant psychological problems, in view of the practical impossibility of identifying the persons having suffered those acts of violence, the Legal Representative is bound to conclude that this cannot be an issue which would “significantly affect” the course of the proceedings.

34. Hence, the Legal Representative is of the view that, since Ad Hoc Counsel has not established the first criterion, there is no need to verify whether the Second Issue is one which “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” or for which “an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

35. However, should the Single Judge take the view that the Second Issue does flow from the Decision, the Legal Representative submits that the said issue is not one which would significantly affect the fair and expeditious conduct of the proceedings, and that an immediate resolution of the issue by the Appeals Chamber is unlikely to materially advance the proceedings, since it relates only to purely practical problems, that are beyond its control.

C. SPECIFIC SUBMISSIONS ON THE PROSECUTION’S RESPONSE TO THE APPLICATION BY AD HOC COUNSEL FOR THE DEFENCE

36. The Prosecution does not oppose the Defence Application, on the basis of “its independent examination of the issues raised in the Defence Application in light of the requirements of Article 82(1)(d)”.³⁴

37. The Legal Representative is, however, not in a position to make any observations on the arguments submitted in support of this position, since the Office of the Prosecutor did not see fit to particularise its analysis of the matter, or to explain the legal bases therefor. The Single Judge of Pre-Trial Chamber II is not

³⁴ See the Prosecution's Response *supra*, footnote 8, para. 5.

bound by the decisions taken by the Single Judge of Pre-Trial Chamber I and, moreover, the Prosecutor has failed to establish any similarity between the issues raised before them. Hence, mere references to decisions of other Chambers cannot constitute any form of legal basis.

Accordingly, the Legal Representative respectfully requests, as Main Submission, that the Single Judge declare inadmissible the Application by Ad Hoc Counsel for the Defence for leave to appeal against the *Decision on victims' application for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06* and, **in the Alternative,** that he deny the Application on the grounds that it does not satisfy the criteria of article 82(1)(d) of the *Rome Statute*.

[signed]

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

Dated this 11 April 2008

At The Hague, The Netherlands