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PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single Judge

SITUATION IN UGANDA

Public Document

Request for leave to appeal the Decisions 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 a/0125/07 and Request that the appeal have suspensive effect in accordance with Article 82(3) of the Statute

Source: Michiel Pestman, Ad Hoc Counsel for the Defence

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

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PROCEDURAL BACKGROUND

1. On 22 November 2006, Pre-Trial Chamber II designated Judge Mauro Politi as Single Judge, responsible for all victims' applications for participation in 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").¹
2. On 17 September 2008, in his two decisions 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 ("the Decisions") Judge Politi appointed Mr. Michiel Pestman as (Ad Hoc) Counsel for the Defence ("Counsel"), "entrusted with representing and protecting the interests of the Defence within the context and for the purposes of the proceedings on the Applications in the Situation and in the Case, pursuant to rule 89 of the Rules".²
3. Ad Hoc Counsel for the Defence was granted until 26 September 2008 to submit his observations on the applications for participation in the proceedings.
4. Ad Hoc Counsel for the Defence, on the grounds set forth below, respectfully submits before the Pre-Trial Chamber an application under Article 82(1)(d) of the Statute for leave to appeal the Decisions, since they involve issues that would significantly effect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

THE LAW

5. Under Article 82(1)(d) of the Statute, "[e]ither party may appeal [...] [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

¹ ICC-02/04-01/05-130.

² ICC-02/04-154 and ICC-02-04-01/05-312.

Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

6. Only an issue the resolution of which is essential for the determination of matters arising in the judicial cause under examination is subject to interlocutory appeal. The issue may be legal or factual or a mixed one.³ As Article 82(1)(d) of the Statute suggests, the issue must “significantly affect”, i.e. in a material way, either “the fair and expeditious conduct of the proceedings” or “the outcome of the trial”.⁴ In addition, the issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, “ridding thereby the judicial process of possible mistakes that might taint the fairness of the proceedings or mar the outcome of the trial”.⁵ The object of Article 82(1)(d) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial.
7. In summary, the four criteria for an interlocutory appeal under article 82(1)(d) of the Statute are:
 - (1) an issue which would significantly affect the fair conduct of the proceedings, or
 - (2) an issue which would significantly affect the expeditious conduct of the proceedings;
 - or
 - (3) an issue which would significantly affect the outcome of the trial; and
 - (4) for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

THE ISSUES

8. In the Decisions, Judge Politi appointed Counsel in both the Situation and the Case, entrusting him with representing and protecting the “interests of the Defence”.
9. In the Decisions, Judge Politi failed to take into consideration that, according to Article 14 of the Statute, a situation is an investigation for the purpose of determining whether persons should be charged with the commission of crimes falling within the jurisdiction of

³ ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 9

⁴ *ibidem*, para. 10.

⁵ *Ibidem*, para. 14.

the Court. In a Situation there are no persons, i.e. suspects or accused, whose interests need to be represented and protected.

10. In the Case, four suspects have been identified, i.e. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, against whom warrants of arrest have been issued by Pre-Trial Chamber II in July and September 2005.⁶ These persons no doubt have interests that need representing and protecting, even in the limited procedure envisaged by Rule 89 of the Rules. However, Counsel has not been able to contact the mentioned persons and he has, therefore, received no instructions from them. Counsel does not know whether Kony, Otti, Odhiambo and Ongwen want to be represented by him and if so, what position to take in the matter at hand. In addition, Counsel is unable to establish whether a conflict of interest exists or could arise between the four persons against whom arrest warrants have been issued in the Case.

11. If Counsel were to submit observations on the applications for participation in the Case, he could not do so without violating the Code of Professional Conduct of counsel, applicable to all counsel practising at the Court (“the Code”).⁷ Although the Code appears to provide for representation agreements between counsel and the Chamber, this cannot be interpreted to mean that counsel can act in the absence of any instructions from the suspect or accused. Such an interpretation would contravene Article 14 of the same Code, which prescribes that counsel must abide by the client’s decisions concerning the objectives of his or her representation and, moreover, that all counsel shall consult the client on the means by which the mentioned objectives of his or her representation are to be pursued. Article 14, it is submitted, is the core provision of the Code. Counsel could prejudice the interests of the suspects by conceding legal or factual issues which they would wish to challenge, and is precluded from raising potential challenges to the applications based specifically on their knowledge and strategy.

12. Article 16(1) of the Code stipulates that counsel shall also exercise all care to ensure that no conflict of interest arises. Although it is theoretically possible for counsel to represent more than one suspect or accused in the same case, he or she should take every precaution to avoid conflicts of interest between his or her clients. As a general rule, counsel should not agree to represent more than one person in the same case, without having consulted

⁶ ICC-02/04-01/05-29; ICC-02/04-01/05-13, ICC-02/04-01/05-15, ICC-02/04-01/05-16.

⁷ ICC-ASP/4/Res.1.

with all of these persons, and having established that no conflict exists or is likely to arise between them. Article 16(3) of the Code, in fact, prescribes that Counsel must withdraw from the representation of one or more clients when a conflict of interest arises, unless all potentially affected clients consent in writing for the representation to be continued. Therefore, it is not only contrary to the Code to represent and protect “the interests of the Defence” without having consulted with all four persons concerned, but this course of action may undermine the very interests Counsel was appointed to defend.

13. Under Article 67(1)(d) of the Statute, the defendant has the right to effectively participate in the proceedings against him, and to be heard in relation to any measures which may affect his rights. Pre-Trial Chamber I has held in the Thomas Lubanga Dyilo case that the rights of the accused, as set out in Article 67(1) of the Statute, also apply to suspects.⁸ Counsel submits that the current proceedings under Rule 89 of the Rules affect the rights of the suspects since the victims’ claims may negatively affect their interests, and that they therefore have the right to be present at the current proceedings under Article 67(1)(d). Counsel submits therefore, that for the proceedings to go ahead in the absence of the suspects violates the prohibition on hearings in absentia. This situation is not remedied by the appointment of Counsel, who is not in a position to seek and receive instructions from the persons concerned and who are therefore not effectively participating.

14. In summary, the inability to consult with the suspects leads to the serious risk of Counsel undermining their interests and prevents them from effectively participating in proceedings against them. This would significantly affect the fair conduct of the proceedings. As Pre-Trial Chamber II has held:

“What is essential in determining whether fairness is preserved is that participants be granted a genuine opportunity to present their case and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision.”⁹

15. The issues raised above also significantly affect the expeditiousness of the proceedings. Once the suspects are arrested, they could legitimately seek a reconsideration of the Chamber’s findings concerning victim participation, and challenge whether their rights

⁸ ICC-01/04-01/06-102.

⁹ Decision on Prosecutor’s applications for leave to appeal dated the 15th day of March 2006 and to suspend or stay consideration of leave to appeal dated the 11th day of May 2006, ICC-02/04-01/05-90, ICC-02/04-01/05-135, para. 24.

were defended in an effective manner. This could result in a significantly amount of litigation, and ultimately, would expend unnecessary court-time and resources. In the Blagojevic case, the ICTY in fact acknowledged that the issue of assignment of counsel directly affects not only the fairness of the proceedings, but potentially also there expeditiousness, and that for that reason leave for interlocutory appeal had to be granted:

"CONSIDERING that the issue of assignment of counsel is an issue which affects the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings,"¹⁰

16. With regard to the final criterion for leave to appeal, that immediate resolution of the issue may materially advance the proceedings, it is the impact of such resolution on the current proceedings that is at stake. As Pre-Trial Chamber II has stated:

"In the opinion of the Chamber, the potential impact on future proceedings may at most be invoked as an additional argument in support of the alleged significant impact on the current proceedings, which remains an essential condition to be met for the purpose of the leave to appeal."¹¹

17. The impact of the issues raised on the current proceedings is clear and in the submission of Counsel they need to be immediately resolved in order that the proceedings may advance.

REQUEST

In view of the above, Counsel respectfully requests the Pre-Trial Chamber to grant him leave to appeal the Decisions of 17 September 2008. Counsel also requests that the appeal have suspensive effect in accordance with Article 82(3) of the Statute.

¹⁰ Prosecutor v. Blagojevic, Decision on vidoje blagojevic's request for certification , 23 July 2003, <http://www.un.org/icty/blagojevic/trialc/decision-e/030725.htm>.

¹¹ Decision on Prosecutor's application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrant of arrest under Article 58, ICC-02/04-01/05-20-US-Exp, para 54.



Michiel Pestman, Ad hoc Counsel

Dated this 24 September 2008

At Amsterdam, The Netherlands