Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-02/04**
Date: **20 October 2008**

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single Judge

SITUATION IN UGANDA

Public Document

Submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07

Source: Michiel Pestman, Counsel for the Defence

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

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I. OUTLINE OF THE PROCEDURE

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").

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 ("Decisions of 17 September 2008"), 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".[1] In the Decisions of 17 September 2008, Judge Politi ordered the Registrar to provide the Prosecutor and Counsel with a redacted copy of the victims' Applications by Friday, 26 September 2008, and granted the defence until 10 October 2008 to submit their observations in the proceedings on the Applications for participation in both the Case and the Situation.

3. On 24 September 2008, in both the Situation and the Case, Counsel filed a "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/0125/07" and a "Request that the appeal have suspensive effect in accordance with Article 82(3) of the Statute" ("Requests of 24 September 2008"). Counsel submitted that issues were involved, "that would significantly affect 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."[2]

4. A decision on the Requests of 24 September 2008 was issued on 7 October 2008. In his "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

[1] ICC-02/04-154 and ICC-02/04-01/05-154.
[2] Article 82(1)(d) of the Statute.

to a/0020/07 and a/0076/07 to a/0125/07", filed in both the Situation and the Case ("Decisions of 7 October 2008"), Judge Politi rejected the Requests of 24 September 2008, somewhat enigmatically stating that the appointment of counsel for the defence "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.". Counsel was granted until 20 October 2008 to submit the observations on behalf of the defence.

II. SUMMARY OF THE ARGUMENTS

5. In the past weeks, Counsel made several attempts to contact the persons against whom arrest warrants have been issued in the Case: Mr. Joseph Kony, Mr. Vincent Otti, Mr. Okot Odhiambo and Mr. Dominic Ongwen ("the suspects"). So far, these attempts have been fruitless. Counsel has not been able to obtain instructions from his supposed clients on how to proceed in the current proceedings. Counsel will, therefore, not file any substantive observations now, neither in the Case, nor in the Situation. As explained earlier in the Requests of 24 September 2008, filing observations without specific instructions from the suspects would lead to a violation of the Code of Professional Conduct for counsel (the "ICC Code")[3] and could seriously prejudice the rights of the defence.

6. Granting the applicants referred to in the Decisions of 17 September 2008 the right to participate in the proceedings, without having allowed the suspects to effectively challenge the applications, would be inconsistent with the rights of the suspects, and with a fair and impartial trial, as guaranteed by Article 67(1) of the Statute and other human rights instruments.

7. As the current proceedings clearly illustrate, the role of alleged victims in the pre-trial phase should be very limited. Counsel submits that alleged victims should not be allowed to participate in any of the pre-trial proceedings, except for those proceedings expressly mentioned in the Statute. Participation of alleged victims in the pre-trial phase disrupts the precarious balance between the rights of the parties.

[3] Resolution ICC-ASP/4/Res.1, Adopted on the 3rd plenary meeting on 2 December 2005, by consensus.

III. THE APPLICABLE LAW

8. Rule 85 of the Rules of Procedure and Evidence ("Rules") gives a definition of a victim:

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

9. Article 68(3) of the Statute offers persons who meet the definition of Rule 85 the conditional right to present their "views and concerns" during proceedings:

> 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.

10. Rule 89(1) and (2) of the Rules established the procedure to be followed by alleged victims who want to participate in the proceedings before the Court:

> 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 applications of the Prosecutor or the defence, may reject the applications 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 applications has been rejected may file a new application later in the proceedings.

11. The Pre-Trial and Trial Chambers of the Court have adopted a broad approach to victims' participation, granting them a general right to participate in both the pre-trial and the trial phase of proceedings, while failing to reach agreement on the boundaries of that participation or on the criteria to apply in the proceeding of Rule 89(1) of the Rules.

12. The rights of the accused are laid down in Article 67 of the Statute:

> Rights of the accused
> 1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
> (a) [...]
> (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
> (c) [...]
> (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
> (e) [...] The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
> (f) [...]
> (g) [...]
> (h) [...]
> (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

13. Importantly, Pre-Trial Chamber I has held in the Lubanga Case that the rights of the accused, as set out in Article 67(1) of the Statute, also apply in the pre-trial phase, i.e. not only to accused persons, but also persons against whom only arrest warrants have been issued.[4] This decision of Pre-Trial Chamber I is consistent with well-established jurisprudence of other international courts, such as the European Court of Human Rights.[5]

14. The professional conduct of Counsel is defined by the ICC Code which was adopted at the plenary meeting on 2 December 2005 and, in this particular case, also by the Dutch Code of Conduct of Advocates 1992 ("the Dutch Code"), adopted by the Dutch Bar in 1992,[6] which supplements the ICC Code where this code remains silent. For these procedure the following articles in the ICC Code are relevant:

> Article 4
> Primacy of the Code of Professional Conduct for counsel

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[4] ICC-01/04-01/06-102.
[5] See: Jacobs & White, The European Convention on Human Rights, Fourth Edition, At what stages of criminal proceedings does article 6(1) apply?, pp. 161-3.
[6] http://www.advocatenorde.nl/english/legislation/vademecum.asp

Where there is any inconsistency between this Code and any other code of ethics or professional responsibility which counsel are bound to honour, the terms of this Code shall prevail in respect of the practice and professional ethics of counsel when practising before the Court.

Article 14
Performance in good faith of a representation agreement
(1) The relationship of client and counsel is one of candid exchange and trust, binding counsel to act in good faith when dealing with the client. In discharging that duty, counsel shall act at all times with fairness, integrity and candour towards the client.
(2) When representing a client, counsel shall:
(a) Abide by the client's decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel's duties under the Statute, the Rules of Procedure and Evidence, and this Code: and
(b) Consult the client on the means by which the objectives of his or her representation are to be persued.

Article 16
(1) Counsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put the client's interests before counsel's own interests or those of any other person, organization or State, having due regard to the provisions of the Statute, the Rules of Procedure and Evidence, and this Code.
[...]
(3) Where a conflict of interest arises, counsel shall at once inform all potentially affected clients of the existence of the conflict and either:
(a) Withdraw form the representation of one or more clients with the prior consent of the Chamber; or
(b) Seek the full and informed consent in writing of all potentially affected clients to continue representation.

15. The Dutch Code contains provisions with regard to the relationship between counsel and client, which seem to be consistent with those in the ICC Code, and a special provision for consultation with the client through an intermediary, a situation that is not covered by the ICC Code.

Rule 5
The interest of the client rather than any self-interest of advocates shall determine the manner in which advocates are required to handle cases.

Rule 7
(1) An advocate may not represent the interests of more than one party if such interests are in conflict or if there was a real chance of such conflict.
(2) An advocate who represents the interests of more than one party is generally obliged to withdraw completely from the case as soon as a conflict of interest arises that is incapable of immediate resolution.

Rule 35

> (1) Advocates may only accept engagements from an intermediary not admitted to the bar if they are convinced that the engagement was extended with the agreement of the client and they have in addition reserved the right to communicate directly at any time with that client.

IV. COUNSEL'S FAILED ATTEMPTS TO CONTACT THE SUSPECTS

16. After his appointment Counsel tried to establish contact with the four suspects in the Case and whose interests Counsel is supposed to defend in the current procedure. These attempts have not yet been successful.

17. On 29 September 2008, Counsel send an e-mail to two persons, Dr. David Nyekorach-Matsanga and Ms. Santa Okot, who had visited the Court in The Hague claiming to be representatives of the Lord's Resistance Army ("LRA"). In this e-mail Counsel explained that he had been appointed in the current proceeding to represent the interests of the defence and that he was trying to contact Mr. Joseph Kony and the other suspects in the Case.[7] On the same day, Dr. Matsanga phoned Counsel informing him that Ms. Okot was no longer allowed to represent the LRA in any form and that all attempts to contact her should immediately be aborted, as she had defected to the other party, i.e. the Ugandan Government. Subsequently, Counsel received a letter with LRA letterhead, in which Dr. Matsanga reiterated his concerns with regard to Ms. Okot. In the letter he also stated that he had contacted "General Kony" and that he was waiting for his instructions in the current proceedings.[8] He suggested to organise a "face to face" meeting "to discuss the details [of the instructions] in person so that nothing is twisted". In the mentioned telephone conversation, Dr. Matsanga had indicated that he was willing to travel to The Hague to meet Counsel, if his expenses were reimbursed by the Court.

18. After having received this encouraging letter, Counsel contacted a representative of the Defence Support Section at the Court, who explained that Dr. Matsanga's financial demands could unfortunately not be met, but that the Court would probably reimburse the necessary expenses made by Counsel for a trip to Nairobi, where Dr. Matsanga is based, so that the desired face to face meeting could take place after all. After having informed Dr. Matsanga by e-mail of the position of the Defence Support Section at the Court, Counsel received the following response:[9]

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[7] E-mail from mpestman@bfkw.nl to africastrategy@hotmail.com, 29 September 2008; Annex 1.
[8] Letter from David Nyekorach-Matsanga (PhD.MA.BA (Hons).Dip.Mass Com) to Mr. Michiel Pestman, 29 September 2008; Annex 2.
[9] E-mail from africastrategy@hotmail.com to mpestman@bfkw.nl, 6 October 2008; Annex 3.

"the LRA DOES NOT RECOGNISE THE INDICTMENTS BY THE CHIEF PROSECUTOR BECAUSE THE INVESTIGATIONS WERE FLAWED. WE DO RESPECT THE ICC AS AN INSTITUTION BUT NOT MOREMO OCAMPO AS THE CHIEF PROSECUTOR. THEREFORE THE LRA LOATHES THE ICC BECAUSE OF THE FLAWED INVESTIGATIONS IN THE UGANDA CASE WHERE UPDF CRIMES AGAIST HUMANITY AND THE CASE OF GENOCIDE BY THE GOVERNMENT OF UGANDA HAS NOT BEEN BROUGHT TO THE KNOWLEDGE OF INTERNATIONAL COMMUNITY. THE ICC HAS LOST CREDIBILITY AS AN INSTITUTION OF JUSTICE AND HAS BEEN TURNED INTO A POLITICAL TOOL . THERE FORE LRA DOES NOT SEE ANY JUSTICE FROM THE HAGUE COURT.

2.THE LRA HAS SIGNED A/R DOCUMENT IN FPA WHICH ARE CLEAR THAT THEY WILL HAVE FRESH INVESTIGATIONS IN UGANDA UNDER THE UGANDAN LAW AND IN SPECIAL DIVISIONS COURT OF THE UGANDA HIGH COURT. WHY SHOULD THE LRA BOTHER ABOUT DEFENCE COUNSEL IN THE HAGUE WHEN THERE WILL BE FRESH INVESTIGATIONS WITH FRESH LAWYERS IN UGANDA? T

3. THE LRA NOTES THAT EVERY TIME UGANDANS WANT TO PUSH FOR SIGNING OF THE PEACE AGREEMENT CALLED FPA ICC TRIES TO LINGER AROUND AND HOLD ON NOTHING IN THIS MATTER THERE BY FRUSTRATING ALL EFFORTS OF UGANDANS HAVING PEACE .

IN SHORT THERE ARE NO INSTRUSTIONS FROM GENERAL KONY FOR NOW AND SINCE YOU HAVE DESIGNED YOUR EUROPEAN COURT OF ICC WITH YOUR BIASED PROSECUTOR OCAMPO

A DETAILED LETTER WILL FOLLOW WHERE THE PRESS WILL BE TOLD OF YOUR ICC MOVES ON LRA

BYE"

19. As yet, Counsel had not received the promised letter from Dr. Matsanga, nor has he received any instructions from "GENERAL KONY".

20. One day after Dr. Matsanga's quoted letter, Counsel received an e-mail from Ms. Okot, who introduced herself as a member of the "LRA delegation", explaining that it is very difficult to contact the "chairman of the LRA", as he apparently does not talk to people he does not know.[10] Ms. Okot did, however, confer the message that the "chairman" is "still committed to end the war through peaceful means if the issue of the court is streamlined which is the interest of the majority of the people from the affected areas".

21. Dr. Matsanga and Ms. Okot are public figures in Uganda and not entirely uncontroversial, as Counsel discovered after a cursory search on the internet. The Daily Monitor, one of Uganda's leading newspapers, published various reports in which both Dr. Matsanga and Ms. Okot were mentioned in relation to the LRA and Mr. Kony. In June 2008, an article was published about the "confusion" which had "crept into the ranks of rebel Lord's

[10] E-mail from okotsanta@yahoo.co.uk to mpestman@bfkw.nl, 7 October 2008 ; Annex 4.

Resistance Army (LRA) camp", with two groups claiming to be the "bonafide representatives of rebel leader, Joseph Kony".[11] According to the same article, one of these groups was led by Dr. Matsanga. Shortly afterwards, another article was published announcing that seven members of the LRA delegation, including Ms. Santa Okot, had resigned, accusing Dr. Matsanga of misleading Mr. Kony:

> "Leading the walk out, former Pader Woman MP, Santa Okot and the rebel legal counsel, Caleb Alaka said Matsanga is a self confessed consummate liar, an opportunist, a fraudster an a reckless individual who has somehow conned his way into the Juba Peace Process."[12]

22. In July 2008, reports came out suggesting that Dr. Matsanga had written a letter to Ugandan President Yoweri Museveni in which he allegedly called for the killing of Mr. Kony.[13] According to the report, Dr. Matsanga had written that Mr. Kony should be sent "where he belongs". And finally, on 3 August 2008, an interview was published on the Monitor website with Mr. James Obita, a former LRA peace delegation chairman, who claimed Mr. Matsanga was a "man without shame", who took over the LRA peace delegation and has continued to claim to be the chairman despite there being no independent confirmation from Mr. Kony.[14]

23. Of course, the newspaper articles quoted above cannot be taken at face value, and the various people quoted in the articles no doubt had their reasons for discrediting Dr. Matsanga and the role he claims in the Ugandan peace negotiations as Mr. Kony's sole representative. These media reports do illustrate, however, that in the Ugandan context claims such as Dr. Matsanga's should be handled with caution. Whether Dr. Matsanga is indeed in regular contact with the LRA and Mr. Kony cannot be assumed on the basis of his written or oral statements alone. That so-called representatives of the LRA should be approached with care is confirmed by Dr. Adam Branch, an political scientist from San Diego, who has been studying the conflict in Uganda for years.[15] Dr. Branch contacted Counsel warning him that "at

[11] Monitor Online, Confusion creeps in LRA ranks, 20 June 2008; Annex 5.
[12] Monitor Online, LRA peace negotiators stand down, 27 June 2008; Annex 6.
[13] Monitor Online, Kill Kony, says LRA negotiator, 9 July 2008; Annex 7.
[14] Monitor Online, I fled in 87 when my bank account was seized-Obita, 3 August 2008; Annex 8.
[15] Adam Branch is assistant professor of political science at San Diego State University. He earned a Ph.D. in political science from Columbia University and his undergraduate degree from Harvard University. His work examines the politics of humanitarian intervention into internal armed conflict, with a regional focus on Africa, specifically Uganda. Dr. Branch's work has led him to spend almost two years in northern Uganda since 2001, where he has conducted independent research and has also worked extensively with local human rights organizations. Dr. Branch has published a number of articles on the Ugandan conflict and international intervention in leading American and European political science journals; http://www-rohan.sdsu.edu/~abranch/.

present", as far as he knew, "no one has the ability to contact the accused directly".[16] To this Dr. Branch added:

> "Finally, there is the very basic problem that two of the four accused, namely, Vincent Otti and Okot Odhiambo, may be dead. There has been no definitive verification of their deaths, but reports on their deaths have circulated for several months, and their deaths are generally accepted as fact on the ground in northern Uganda."

24. Counsel cannot know whether the reports about the death of Mr. Otti and Mr. Odhiambo are premature, but they could well be correct, considering the difficulties encountered by Counsel to contact them and the other suspects. Counsel cannot exclude, in fact, that Mr. Kony and Mr. Ongwen have died as well. Without going into potentially controversial religious territory, Counsel submits it is safe to assume that the alleged death of at least two of the suspects has reduced the likelihood that he will ever receive instructions from them.[17]

25. In short, Counsel has not received instructions from the suspects, as he has not been able to contact any of them so far. Counsel did not receive reliable or credible instructions through an intermediary either. As is clear from the above, Dr. Matsanga's ambiguous letter and e-mails to Counsel can in no way be interpreted as containing instructions on how to proceed in the current matter.

26. To conclude this introduction on the attempts made by Counsel to contact the suspects, Counsel would like to note that he finds it difficult to imagine making observations on every single application filed, without having had extensive consultations about these applications with the clients. In order to file useful observations, Counsel would have to forward all applications and their annexes to the clients, which he has thus not been able to do. Counsel is interested to know, as Counsel imagines the Court would be, what comments the suspects have on the accounts given by the individuals who have filed applications with the Registrar. Do the suspects oppose the applications? Do they recognise any of the applicants, despite the redaction of the applications? Are they familiar with the events described by the applicants? Are the applicants who they say they are? Are the suspects in

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[16] Letter from Dr. Adam Branch to Mr. Michiel Pestman, 15 October 2008; Annex 9.

[17] An interesting parallel can be drawn here with a recent judgement of a United States Judge who dismissed a case against God, ruling that because the defendant has no address, legal papers could not be served; http://news.bbc.co.uk/2/hi/americas/7673591.stm.

possession of information that contradicts the accounts given by the applicants? Did the events take place? And if so, did the applicants indeed suffer any harm? Were the alleged crimes actually committed, but by perpetrators not linked to any of the suspects? Do the suspects acknowledge they played a role in these events? Or do the suspects blame each other for the events described by the applicants? Et cetera, et cetera. Counsel acknowledges that these questions can only be fully answered at the trial or in a separate procedure after the termination of the trial, but it is important to emphasise that the suspects can, of course, provide the Court with exculpatory information which may be relevant, even at this early stage of the proceedings, and which could lead to the immediate rejection of one or more applications. Unfortunately, Counsel will not be able to provide the Court with this potentially important information.

27. By way of illustration of the above point, even from the most cursory of glances through the applications currently under consideration, and without instructions, it is clear that being appointed as Counsel for the defence both the Situation and the Case creates an immediate irreconcilable conflict of interest with respect to those applications which attribute blame to the Government army or Uganda Peoples Defence Forces ("UPDF"), rather than the LRA. Whose interests is Counsel supposed to defend: Mr. Kony, the suspects, the LRA, The UPDF, or all of them?

28. As of date, there has been no indication from the Prosecutor that his investigation has been completed in Uganda and as such, it is not impossible that a future case may be brought against the UPDF.

29. Applicant a/0092/07, for example, asserts that the UPDF were the perpetrators of the attack on the "IDP camp" in which she was allegedly residing in 2004. The reasons for her belief of their responsibility are because the attackers were wearing the recognisable uniform of the UPDF, were using firearms usually carried by the UPDF and used bullets manufactured in the same place as those of the UPDF.[18] The applicant also states that the public address given by President Museveni following the attack led her to think it was a Government trick to launch genocide in the North of Uganda. Applicant a/0097/07 holds the same UPDF responsible for two separate incidents described in her applications. Firstly, she was beaten unconscious at her home by UPDF militia in August 2003. As a result of this attack she

[18] a/0092/07 states that bullets found at the scene of the crime were imprinted with the manufacture information of 'Nakasongola' which is allegedly where the UPDF have their weapons made.

moved into an IDP camp, where upon she states that the UPDF attacked the camp in 2004. The applicant again refers to the fact that the attackers were dressed in the UPDF uniform and were well-armed. Reference is again made to the President's speech, which led the applicant to think that they had been tricked by the Government.

30. Although these are the only two applications currently under consideration which attribute direct responsibility to the UPDF for the attack on the IDP camp in question, there are many more applications which lend support to the possibility of a Government-backed attack rather than an attack of the bush rebels.[19]

31. Such a situation presents a double-edged sword for Counsel appointed to represent the defence in the Situation and named suspects in the Case. It is submitted that on one side of the sword, in the absence of direct instructions from the suspects, Counsel is unable to make observations as to whether the participation of such applicants is supported or contested. It is improper for Counsel to hypothesise on what the suspects' strategies may be, but it is certainly not inconceivable that upon proper instructions, the suspects may wish to attribute the responsibility for this particular attack to Government forces, in which case, hypothetically, the victim applications which allude to Government participation may not be contested by the suspects. On the other side of the sword, if the Prosecutor's investigations lead to an eventual case against the UPDF, the failure of Counsel at this stage to protect the UPDF's future rights by opposing the participation of such victim applicants is incapable of remedy.

V. VIOLATIONS OF THE CODES OF CONDUCT FOR COUNSEL

32. Counsel reiterates that if he were to submit observations in the Case or in the Situation, he could not do so without violating the ICC Code. Although the ICC Code appears to provide for representation agreements between counsel and the Chamber, this cannot be interpreted to mean that a counsel can act in the absence of any instructions from the suspect or accused. As explained in the Requests of 24 September 2008, such an interpretation would contravene Article 14 of the ICC Code. Counsel could prejudice the interests of the suspects

[19] a/0076/07, a/0082/07, a/0084/07, a/0085/07, a/0086/07, a/0090/07, a/0091/07, a/0096/07, a/0102/07 all confirm that the attackers were well dressed in UPDF uniform and were well-armed. Some of these applicants refer to there being confusion as to who was attacking, the UPDF or the LRA, as they were being ordered by the militarily dressed attackers to remain in their houses which was precisely what they had been told to do prior to the attack by the forces in charge of their security based at the camp.

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.

33. Article 16(1) of the ICC Code stipulates that a counsel shall also exercise all care to ensure that no conflict of interest arises. Rule 7 of the Dutch Code contains a similar provision. As submitted in the Requests of 24 September 2008, Counsel should take every precaution to avoid conflicts of interest between his clients. As a general rule, counsel should not agree to represent more than one person in the same case, without having consulted with all of these persons, and having established that no conflict exists or is likely to arise between them. Therefore, it is not only contrary to the ICC 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.

34. Contrary to popular belief, codes of conduct for counsel are not designed to provide judges with a convenient tool to reprimand or even punish unruly counsel. Their primary purpose is to protect the interests of clients or defendants by ensuring them effective and fair legal representation. Codes of conduct are, therefore, important if not crucial legal instruments, without which defendants would not be able to fully exercise their right to a fair trial as guaranteed by Article 67(1) of the Statute. Filing observations without specific instructions from the suspects, would therefore not only lead to a violation of the ICC Code, but could also seriously prejudice the rights of the defence.

VI. VIOLATIONS OF THE RIGHTS OF THE SUSPECTS

35. The question which then arises is what the consequences are for the proceedings under Rule 89(1) of the Rules if the defence is unable to file observations. Counsel submits that granting alleged victims the right to participate in the Situation or in the Case, without allowing the persons against whom arrest warrants have been issued, if alive, to effectively oppose or challenge the applications, would be inconsistent with the rights of those persons to a fair and impartial trial. In view of the caveat to Article 68(3) of the Statute, which prescribes that alleged victims can only participate in a procedure if their participation does not prejudice the rights of the defence, the applications should be rejected.

36. Article 67(1) of the Statute lists the various rights of defendants before the Court. Counsel submits that granting the applications at this particular junction of the procedure would violate the right:

- to an impartially conducted hearing (Article 67(1));
- to communicate freely with counsel of the accused's choosing in confidence (Article 67(1)(b));
- to be present at trial to conduct the defence in person or through legal assistance of the accused's choosing (Article 67(1)(d));
- to raise defences and to present other evidence admissible under this Statute (Article 67(1)(e)).

Counsel will discuss the violations of these rights separately underneath.

37. Granting persons the status of victims, whether "procedural" or not, without hearing the persons against whom arrest warrants have been issued, damages the Pre-Trial Chamber's appearance of impartiality. Counsel submits that it is impossible for the Pre-Trial Chamber to judge the applications of the alleged victims, without examining and assessing the substance of their claims. A decision to allow a victim to participate, implicitly acknowledges the credibility of the applicants and the validity of their accounts. This problem is compounded by the narrow definition of victims given in Rule 85 of the Rules. This definition suggests that victims who have been granted that status by the Court have indeed suffered harm as a result of a crime within the jurisdiction of the Court. This definition seems to leave little room for doubt about the real harm suffered and the necessary causal link with the crime which has allegedly been committed by the persons against whom arrest warrants have been issued. The nature of the decision in the current proceedings could thus suggest some pre-judging of a substantive issue which the same Trial Chamber or Judge will be faced with at a later stage.

38. On 13 July 2006, in the Situation in the Democratic Republic of the Congo, the Appeals Chamber ruled in similar vein, warning the Pre-Trial Chamber to give sufficient weight to the interests of the suspect when taking pre-trial decisions:

> "[I]f the Pre-Trial Chamber makes a determination that the case against a suspect is admissible without the suspect participating in the proceedings, and the suspect at a later stage seeks to challenge the admissibility of a case pursuant to article 19 (2) of the Statute, he or she comes before a Pre-Trial Chamber that has already decided the very same issue to his or her detriment. A degree of predetermination is inevitable.".[20]

[20] ICC-01/04-169, para. 50.

39. The question of whether persons have suffered harm as a result of alleged crimes, needs to be answered in a truly adversarial procedure, where evidence is presented in a proper fashion and subjected to the scrutiny of all parties concerned. Counsel submits that the current procedure lacks this essential safeguard for a fair hearing and that a decision to grant the status of victim to any of the applicants will inevitably give rise to legitimate doubts about the Chamber's impartiality in any further proceeding before it in this connection.

40. The second right threatened by this course of action is the right every defendant has to freely communicate with Counsel of his own choosing. As demonstrated above, no communication has taken place in this case between Counsel and any of the suspects. Nor has Counsel been chosen by any of these persons. Allowing these proceedings to go ahead regardless would therefore result in a violation of Article 67(1)(b) of the Statute.

41. Article 67(1)(d) of the Statute guarantees the right of defendants to be present at trial to conduct the defence in person or through legal assistance of his choosing. This right is intended to assure the effective participation of a defendant in the proceedings against him, and that he will be heard in relation to any measures which may affect his rights. Counsel reiterates his statement, expressed in the Requests of 24 September 2008, that for the proceedings to go ahead in the absence of the suspects would violate the prohibition on hearings in absentia. This situation is not remedied by the appointment of Counsel, when the latter is not in a position to seek and receive instructions from the suspects. Those persons have no voice that can be heard in these proceedings; they are thus not effectively participating at all.[21] [22]

21 See, for instance, the judgment of the European Court of Human Rights in Daud v. Portugal, Judgement of 21 April 1998, Application 22600/93, in which the fact that the state-appointed defence counsel had reasonably not been able to visit her client was a main contributing factor to the conclusion that the right to a fair trial had been violated; in similar vein, see: European Court of Human Rights, Goddi v. Italy, Judgement of 9 April 1984, Series A, No. 76; (1984) 6 EHRR.

22 Also: European Court of Human Rights, Ocalan v. Turkey, in which the Court stressed the importance of the right of effective participation, stating that "as a result of the position he occupied in the armed organisation concerned (the PKK), the applicant was one of the people best able to assess the relevance to the Defence of the substantial body of evidence that had been adduced by the prosecution. He was much better placed and better informed than his lawyers to determine who within the PKK bore responsibility for which acts and to what degree. It should be noted that the prosecution attributed to the applicant moral responsibility for several hundred acts of violence that were not physically carried out by him. It is reasonable to suppose that had he been permitted to study the prosecution evidence directly and for sufficient time, he would have been able to identify arguments relevant to his Defence other than those his lawyers had raised themselves without the benefit of his instructions, Application No. 46221/99, 12 March 2003, para. 161.

42. A defendant can, one could argue, waive his right to be heard in proceedings, such as those envisaged in Rule 89(1) of the Rules, but such a waiver has to be established in an unequivocal manner and attended by minimum safeguards in order to be effective.[23] It goes without saying, in Counsel's view, that none of the suspects in the Case have unequivocally waived their right to be present at the impending hearing.

43. The last right listed above, which would be violated if the applicants were granted the right to participate in the proceedings against the suspects, is the right to raise defences and to present evidence in Court (Article 67(1)(e) of the Statute). This right is intricately linked with the other rights mentioned above. Suspects should be granted a genuine opportunity to present their case and comment on the information submitted to the Court.[24] Like the other rights listed above, Article 67(1)(e) of the Statute also applies in the pre-trial phase.[25] The absence of an effective pre-trial defence, either in person or through a legal representative, inevitably affects the fairness of the entire proceedings.[26]

44. For the reasons given above, granting the applicants the right to participate in the proceedings now would violate the rights of the suspects to a fair and impartial hearing. Only a truly adversarial hearing, in the presence of the suspects or a legal representative of their own choosing, would do justice to the defence. As explained, such a hearing cannot take place now. The applications to participate in the proceedings should therefore be rejected.

VII. NO ROLE FOR VICTIMS IN PRE-TRIAL PHASE

45. As the current case clearly illustrates, it is very difficult, if not impossible, to reconcile or properly balance the rights of persons against whom arrest warrants have been issued and those of alleged victims in the pre-trial phase. Counsel, therefore, submits that alleged victims should in principle not be allowed to participate in any of the pre-trial proceedings, except for those proceedings expressly mentioned in the Statute. Extending victims' participation to the

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[23] Jones v. United Kingdom, Application 30900/02, admissibility decision of 9 September 2003; see: Jacobs & White, The European Convention on Human Rights, Fourth Edition, Waiving rights, p. 190.

[24] 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.

[25] ICC-01/04-01/06-102; e.g. Article 67(1)(i) of the Statute, which provides that the defence shall have the right "not to have imposed on him or her any reversal of the burden of proof of any onus of rebuttal". This right is drafted broadly such that it is not limited to allegations adduced by the prosecution, but extends to any issues of proof, including the Chamber's factual assessment as to whether an applicant meets the definition of victim under Rule 85 of the Rules

[26] European Court of Human Rights, Imbrioscia v. Switzerland, Judgement of 24 November 1993, Series A, No. 275: (1994) 17 EHRR 441.

pre-trial phase, as has been the practice of the Court, not only undermines the rights of the defence, but also upsets the balance of roles between the parties to proceedings before the Court.

46. The various Chambers of the Court have continued to endorse a broad approach to the participation of alleged victims to proceedings before the Court, both in situations and in cases, although the Chambers seem to disagree on the criteria to apply to victims' applications to participate and on the modes of participation after permission for participation has been granted.[27] Pre-trial Judges assigned to the Darfur and DRC situations have granted leave to appeal the questions of whether they had rightly applied the Rules when allowing victims to participate in those proceedings, and how applications for participation in the pre-trial stage must be dealt with.[28] These appeals, the outcome of which will be crucial to the current proceedings as well, are pending.

47. There are a number of strong arguments against allowing alleged victims to participate in pre-trial proceedings, many of them raised in previous cases. In the past, both Prosecutor and counsel for the defence have strongly opposed the granting of more or less general rights to participate in investigations. Counsel agrees with the arguments raised by both parties in the past in support of this proposition and, with all due respect, would like to make them his own.

48. From its first submissions on this issue to Pre-Trial Chamber I in 2005, the Prosecutor contended that whether applicants' personal interests were affected, within the meaning of Article 68(3) of the Statute, could not be determined except in reference to a "proceeding", which in turn could not be equated to an investigation.[29] The investigation of a situation is a phase which does not form part of the concept of proceedings as defined in the mentioned Article, which is firmly embedded in Part VI of the Statute which exclusive deals with "The trial" and not with the preceding "Investigation and prosecution" of Part V. The Prosecutor has taken the position on numerous past occasions that participation by victims in the pre-trial phase is only permissible when specifically provided for by the Statute or the Rules.[30] Granting a general right to participate would make those specific provisions in the Statute and

[27] For an exhaustive overview of the jurisprudence of the Court on victims' participation, see: Christine H. Chung, Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?, in Northwestern Journal of International Human Rights, Volume 6, Issue 3 (Spring 2008).
[28] ICC-02/05-118, ICC-01/04-438.
[29] See : ICC-01/04-84, paras. 11-17 and ICC-, para. 22.
[30] See e.g. Articles 15(3), 19(3) and 53 of the Statute; Rule 92(2) of the Rules.

Rules redundant. According to the Prosecutor in 2006, ill-defined participation during the pre-trial phase undermines the independence of the Prosecutor, the objectivity of its own investigation, and ultimately the efficiency of the Court.[31] As the Prosecutor rightly maintained, permitting general participation in the investigation, or the "procedural status of victim", also undermined the fairness and integrity of proceedings before the Court. In support of this proposition, the Prosecutor has more than once relied on arguments which strongly resemble arguments raised by Counsel in this brief. Granting alleged victims the ability to participate in investigations, would prejudice the defence, according to the Prosecutor, as the participation of alleged victims is not subjected to safeguards that apply to the Prosecution, such as the obligation to investigate and disclose exonerating circumstances.[32] The Prosecutor in addition shared Counsel's concerns with regard to the impartiality of the Chamber, who in the Prosecutor's view has no authority to rule upon the existence of crimes within the jurisdiction of the Court, and of victims of those crimes, before any defendant is present or the Prosecutor has been able to present any evidence.[33]

49. In past proceedings, other Counsel for the defence and the Office of Public Counsel for the Defence ("OPCD") have objected to the participation of alleged victims in the pre-trial phase on the basis of arguments related to the ones raised by the Prosecution. Participation of alleged victims in proceedings before the charges are confirmed would, in the view of defence submissions, prejudice the defence. In the Luganga Case, for example, Counsel argued that the Pre-Trial Chamber's appearance of impartiality would be undermined if it were to rule on applications for participations and would find that certain applicants had indeed suffered harm as a result of the crimes allegedly committed by Mr. Lubanga.[34] The OPCD also argued that the interests of the defence would be better served and protected, as well as the impartiality of the Chamber, if views and concerns of victims during the investigation were directed to the Prosecutor, which is charged with statutory obligations to seek the truth, to investigate exonerating circumstances, and to disclose exculpatory information.[35]

50. As mentioned above, Counsel wishes to subscribe to the arguments raised in other procedures by Prosecution and defence in support of the proposition that in principle alleged victims have no role to play in the pre-trial phase, and that, if they were allowed to participate, this participation would inevitably prejudice the defence.

[31] ICC-01/04-103, paras. 5, 13-19, 31; ICC-02/04-85, paras. 32-3 ; ICC-02/04-103, paras. 13-4.
[32] ICC-01/04-103, paras. 10, 13-22; ICC-02/04-103, paras. 13-4.
[33] ICC-01/04-103, paras. 14, 16, 26-7 ; ICC-02/04-85, paras. 35-7. ICC-01/04-103, paras. 10, 13-22
[34] ICC-01/04-01/06-386 , paras. 50-53.
[35] ICC-02/05-119, paras. 37-48.

51. Although the records show that alleged victims who have been allowed to participate in proceedings have generally failed to contribute to those proceedings in a meaningful manner,[36] it is, in Counsel's view, hard to overestimate the importance of a decision allowing an alleged victim to participate in proceedings before the Court. This is largely due to the fact that little is certain about the extent of the participation of these alleged victims at future trials. On the basis of the scarce jurisprudence of the Court on the role of alleged victims during trials it is, however, safe to assume that alleged victims will be granted more rights and leeway at trial than originally envisaged. Trial Chamber I, for example, has contemplated permitting victims to introduce evidence at trial and expressed the view that that the extent of victims' participation was bound to alter the content and length of the case, while also conceding that, at least theoretically, victims' participation could lead to the shifting of the burden of proof at trial, to the detriment of the accused.[37] The future consequences of a decision granting alleged victims the right to participate are thus difficult to predict. However, these consequences could be far reaching, as it is unlikely that alleged victims who have been allowed to participate in the pre-trial stage will not be granted any participatory rights in the subsequent trial phase. Once the rights of the defence have been prejudiced, Counsel submits, it is very difficult, if not impossible, to undo the harm done.

VIII. REQUEST

52. In view of the above, Counsel respectfully requests the Pre-Trial Chamber to reject applications a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07.

Michiel Pestman, Ad hoc Counsel

Dated 20 October 2008

At Amsterdam, The Netherlands

[36] see: Christine H. Chung, Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?, in Northwestern Journal of International Human Rights, Volume 6, Issue 3 (Spring 2008), paras. 74-81.
[37] ICC-01/04-01/06-1191, paras. 33, 42.