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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 Decision on victims' applications for participation
a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07**

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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 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 ("Situation") and in the case of the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen ("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, Judge Politi appointed Mr. Michiel Pestman as (Ad Hoc) counsel for the defence ("Counsel").

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". A decision on the Requests of 24 September 2008, issued on 7 October 2008, and filed in both the Situation and the Case, Judge Politi rejected the Requests of 24 September 2008.

4. Counsel submitted his "Submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07" ("Observations") on 20 October 2008, in the Situation and the Case. On 21 November 2008, Judge Politi rendered his "Decision on victims' applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07" ("Decisions of 21 November 2008").

5. Counsel, on the grounds set forth below, submits before the Pre-Trial Chamber an application under Article 82(1)(d) of the Statute for leave to appeal the mentioned Decisions of 21 November 2008.

¹ ICC-02/04-01/05-130.

II. THE LAW

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

7. 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.² 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”.³ In addition, the issue must be such that its immediate resolution by the Appeals Chamber, will rid “the judicial process of possible mistakes that might taint the fairness of the proceedings or mar the outcome of the trial”.⁴ 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.

8. 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.

² 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

³ *ibidem*, para. 10.

⁴ *Ibidem*, para. 14.

III. THE ISSUES

9. There are, in Counsel's view, two issues that need review by the Appeals Chamber. Firstly, Judge Politi failed to respond to any of the points raised by the defence in the Observations. The Decisions of 21 November 2008, therefore, lack sufficient reasoning. Secondly, Judge Politi granted the status of victim to a number of applicants, in spite of the fact that the role of alleged victims in the pre-trial phase of the proceedings should be limited to those situations expressly envisaged in the Statute.

10. In the Observations, Counsel made a number of arguments which can best be summarised as follows.

11. Firstly, Counsel submitted that he had not been able to obtain instructions from his supposed clients on how to proceed in the current proceedings and that he could, therefore, not file any substantive observations in the Case or the Situation. Filing observations without specific instructions from the supposed clients would have led to a violation of the Code of Professional Conduct for counsel⁵ and could have seriously prejudiced the rights of the defence. Granting the applicants 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.

12. Secondly, Counsel argued that the proceedings clearly illustrated that the role of alleged victims in the pre-trial phase should be very limited. 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, Counsel submitted in his observations, disrupts the precarious balance between the rights of the parties.

13. Although Judge Politi acknowledged receipt of the Observations in his Decisions of 21 November 2008,⁶ he did not address any of the arguments summarised above, not even in a cursory manner. Counsel cannot escape the impression, which he sincerely hopes is false,

⁵ Resolution ICC-ASP/4/Res.1, Adopted on the 3rd plenary meeting on 2 December 2005, by consensus.

⁶ Decisions of 21 November 2008, para. 6.

that the Decisions were drafted before the submission of the Observations on 20 October 2008.

14. Counsel submits that the Decisions of 21 November 2008 are erroneous as they lack sufficient reasoning in relation to the arguments summarised above. Decisions of a (Pre-Trial) Chamber should always be supported by sufficient reasoning. It is essential, according to the Appeals Chamber, that the reasoning “indicates with sufficient clarity the basis of the decision”.⁷ A decision which fails to address any of the arguments raised by the defence clearly lacks the necessary clarity. A judicial decision must identify which facts the Court found to be relevant in coming to its conclusion.⁸

15. The right to a reasoned decision is inextricably linked to the right to a fair trial,⁹ as has been established on numerous occasions by, for example, the European Court of Human Rights (“ECHR”) in Strasbourg and the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”).¹⁰ Only on the basis of a reasoned decision a suspect, charged person or accused can usefully exercise the rights of appeal available to him.

16. The second issue is the extent of the role of victims in the initial proceedings before the Court. In his Observations, Counsel argued that victims’ participation should not be extended to the pre-trial phase, as this would undermine the rights of the defence and also upset the precarious balance of roles between the parties to proceedings before the Court. This point has been raised before by other Counsel, in other cases, and has resulted in two closely linked appellate procedures. Pre-trial Judges assigned to the Darfur and DRC situations have granted leave to appeal the question of whether they had rightly applied the Rules when allowing victims to participate in the pre-trial phase of the proceedings, and how applications for participation in the pre-trial stage must be dealt with. These appeals are pending.¹¹

⁷ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006, ICC-01/04-01/06-774, para. 30.

⁸ “The Statute and the Rules of Procedure and Evidence emphasise in various places the importance of sufficient reasoning (by way of example, see, in the context of evidentiary matters, rule 64 (2) of the Rules of Procedure and Evidence, which requires a Chamber to ‘give reasons for any rulings it makes’)”, *ibidem*.

⁹ Article 67(1) of the Statute also applies in the pre-trial phase; see e.g. ICC-01/04-01/06-102.

¹⁰ See e.g.: ECHR, *Hadjianastassiou v. Greece*, Application 12945/87, 16 December 1992, para. 30 and ICTY, Appeals Chamber, *Momir Nikolic*, Judgment on Sentencing Appeal, 8 March 2006, IT-02-60/1-A, para. 96.

¹¹ Decision on Request for leave to appeal the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”, 23 January 2008, ICC-02/05-118; Decision on Request for leave to appeal the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”, 23 January 2008, ICC-01/04-438.

17. In Counsel's view, the example of the pre-trial judges in the Darfur and DRC situations should be followed, and leave to appeal in this case should be granted as well, so that the appeal in this procedure can be joined to the others.

IV. CRITERIA FOR INTERLOCUTORY APPEAL

18. Both of the issues raised above satisfy the criteria for interlocutory appeal under Article 82(1)(d) of the Statute.

19. As explained above, there is a close correlation between the right to a reasoned decision and the principle of a fair trial. The unexplained failure to address well-founded arguments and defences therefore affects the fair conduct of the proceedings.

20. The first issue also significantly affects the expeditious (and fair) conduct of the proceedings. While it may be tempting for a Court to simply ignore reasoned arguments in the interests of saving time, such attempts at judicial economy will in fact result in more lengthy—and ultimately less fair—proceedings. Unaddressed arguments are unresolved ones, and the defence will be forced to revisit them every time the opportunity or necessity arises. A court's failure to take on an appropriately raised argument does not dispose of it, rather it simply defers resolution to another time or venue. Unreasoned decisions, therefore, could result in a significant amount of unnecessary litigation. Moreover, they suggest a court's unwillingness or, worse, its inability to grapple with issues in the deliberative and transparent manner required of a tribunal seeking to establish its legitimacy.

21. In addition, the immediate resolution of the first issue by the Appeals Chamber may materially advance the proceedings. With regard to this final criterion, it must be emphasised that it is the impact of such resolution on the current proceedings that is primarily at stake, not the possible impact on future proceedings. 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.”¹²

¹² 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.

22. The impact of the first issue on the current proceedings is clear and, in the submission of Counsel, must be immediately resolved in order that the proceedings may advance.

23. With regard to the second issue raised in this brief, Counsel reiterates that this issue has already been referred to the Appeals Chamber on two different occasions. It is worth quoting the considerations in the decisions mentioned above, rendered by the Pre-Trial Judges in the Darfur and DRC situations, as those considerations also apply in the current case:

“CONSIDERING that in the view of the Single Judge the issue would significantly affect the expeditiousness of proceedings because of the risk of consecutive multiple applications under rule 89 of the Rules and regulation 86 of the ¹³Regulations, which would lead to a resource-intensive process for the parties as well as hamper the efficient and effective operation of the Court as a whole;

CONSIDERING further that the Decision, the 10 August 2007 Pre-Trial Chamber II Decision and the 18 January 2008 Trial Chamber Decision interpret the relevant provisions of the Statute, the Rules and the Regulations in a significantly different manner; and that a number of applications for the granting of procedural status of victim are currently pending before Pre-Trial Chamber I in the proceedings relating to the investigation into the DRC situation;

CONSIDERING therefore that an immediate resolution of this issue would provide legal certainty; that an "authoritative determination" by the Appeals Chamber which "map[s] a course of action along the right lines" on the issue will move the proceedings forward and "ensure that the proceedings follow the right course"; and that, therefore, the Single Judge is of the view that an immediate resolution by the Appeals Chamber of the issue raised by the OPCD may materially advance the proceedings;”

24. For the reasons quoted here the Pre-Trial Judges in the Darfur and DRC situations granted leave to appeal in relation to the issue whether victims should play a role in the pre-trial phase of the proceedings and, if so, to what extent. As the same issue is raised in this case, these precedents should be followed.

V. REQUEST

25. In view of the above, Counsel requests the Pre-Trial Chamber to grant him leave to appeal the Decisions of 21 November 2008.



Michiel Pestman, Ad hoc Counsel

Dated this 1 December 2008

At Amsterdam, The Netherlands