



Original: **French**

No.: **ICC-02/04**

Date: 10 April 2007

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

Public Document

Defence Response to the Observations of the Public Counsel for Victims (“OPCV”) on the Victims’ Applications 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 in the Uganda situation and in the case The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
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Ad Hoc Counsel for the Defence

Ms Michelyne C. St-Laurent

INTRODUCTION

Ad Hoc Counsel for the Defence respectfully submits that she objects to the proceedings entitled “OPCV’s Observations on the Victims’ Applications 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 to participate in the Uganda situation and in the case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen*.¹ Ad Hoc Counsel for the Defence respectfully submits that the Observations of the Public Counsel for Victims (OPCV – BCPV) are without legal basis and exceed the mandate granted by the Single Judge in his decision dated 1 February 2007 entitled “*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*”. Ad Hoc Counsel for the Defence requests the Honourable Single Judge to reject the Observations of the Public Counsel for Victims (OPCV – BCPV) on the following grounds.

PROCEDURAL BACKGROUND

1. On 22 November 2006, Pre-Trial Chamber II appointed the Honourable Judge Mauro Politi, Single Judge, responsible for all victims’ applications for participation in the situation in Uganda and in the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen*.
2. On 1 February 2007, the Honourable Judge Politi of Chamber II, Single Judge, issued 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*” (hereinafter the “Decision of 1 February 2007”).

¹ ICC-02/04-01/05-232 and ICC-02/04-89, 26 March 2007.

3. On 21 February 2007, Ad Hoc Counsel for the Defence applied for extension of time in order to submit her observations on the victim's applications for participation. On 23 February 2007, the Honourable Judge Mauro Politi granted an extension of time up to 28 February 2007 for the Prosecutor and 6 March 2007 for the Defence.
4. For the purposes of her Response to the Observations of 26 March 2007, Ad Hoc Counsel for the Defence does not consider it necessary to list all the proceedings.

ROLE OF THE OFFICE OF PUBLIC COUNSEL FOR VICTIMS (OPCV)

5. Counsel for the Defence respectfully submits that she relies specifically on paragraphs 17 to 20 of the Prosecutor's Response to the Observations, dated 3 April 2007.
6. Furthermore, Ad Hoc Counsel for the Defence respectfully submits that the Observations of the Office of Public Counsel for Victims of 26 March 2007 are without legal mandate and ultra vires.
7. The Decision of 1 February 2007 dealt only with:
 - a) whether the appointment of one or more legal representatives for the victims before deciding on their applications is necessary and/or appropriate;
 - b) whether counsel for the defence should be appointed at this stage;
 - c) whether there is a need to order any protective measures for the victims and, in the affirmative, of which nature.

8. The Decision of 1 February 2007 is clear and unambiguous with regard to the request that legal representatives be appointed for the victims. The Decision clearly states that “[w]hile the Single Judge reserves his right to appoint one or more legal representatives whenever the requirement of the interests of justice is met, he considers that such a scenario does not occur under the present circumstances, particularly in light of the fact that none of the Applicants is assisted by a legal representative.”²
9. With regard to the role of the Office of Public Counsel for Victims, the Honourable Judge states that it is unnecessary, at this stage, to appoint a legal representative in the person of a staff member of the Office of Public Counsel for Victims (OPCV – BCPV). He points out that regulation 81, sub-regulation 4 of the *Regulations of the Court* provides that the OPCV “shall provide support and assistance to the legal representative for victims and to victims, including, where appropriate: a) legal research and advice; and b) appearing before a Chamber in respect of specific issues”.³
10. Counsel for the Defence respectfully submits that the Decision of 1 February 2007 clearly states that the OPCV has no legal mandate to represent the Victims. It can only provide support and assistance.
11. Ad Hoc Counsel for the Defence submits that the Decision of 1 February 2007 does not grant the OPCV any *proprio motu* right to act before the Chamber without a specific order from the Court.
12. Counsel for the Defence points out that the OPCV’s mandate is similar to that of the OPCD. The Office of Public Counsel for the Defence provides support and assistance to the accused or their lawyer. Under no circumstances can it

² ICC-02/04-01/05-134, page 10, para. 12.

³ ICC-02/04-01/05-134, page 11, para. 13.

initiate proceedings or make observations on their behalf without consent and a specific mandate.

13. The Principal Counsel of the OPCV went on mission to Uganda to provide assistance and legal advice to the applicants (victims).⁴
14. Counsel for the Defence respectfully submits that the Principal Counsel of the OPCV only fulfilled the obligations set forth in the *Rules of Procedure and Evidence* of the Court (regulation 81(4)). In addition, Counsel for the Defence notes that there is no indication that Principal Counsel consulted and obtained the consent of the applicants (victims), or obtained a specific mandate from the said victims in relation to the Observations of the OPCV.
15. Accordingly, without an order from the Court and/or a specific mandate from the Victims, Counsel for the Defence respectfully submits that the legal Observations submitted *proprio motu* by the OPCV are ultra vires.

ALTERNATIVE SUBMISSIONS CONCERNING THE OBSERVATIONS

16. Furthermore, the Observations of the OPCV⁵ are based primarily on the proposals put forward by France during the preparatory work on the Rome Statute, and on a not altogether abundant national jurisprudence, that is, a handful of common-law and civil-law States.
17. Counsel for the Defence respectfully submits to the Single Judge that France's proposals during the preparatory work cannot serve as a basis and as a general principle for interpreting the Statute. As a number of France's proposals were rejected, it would, at the very least, be incongruous for these

⁴ ICC-02/04-01/05-134, fr, pages 15 and 16, para. 20.

⁵ ICC-02/04-01/05-134, fr, paras. 27 - 25.

proposals to be afforded significant probative value in the absence of other interpretive material.

18. Counsel for the Defence submits to the Honourable Single Judge that the legal observations of the OPCV are based almost exclusively on national principles of law and jurisprudence.
19. In this regard, Counsel for the Defence requests the Single Judge to follow the jurisprudence of the ICTY in the case of the *Prosecutor v. Furundžija* of 10 December 1998. This judgment states at paragraph 178:

Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since "international trials exhibit a number of features that differentiate them from national criminal proceedings", account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.⁶

20. Lastly, Counsel for the Defence respectfully submits that article 21(1)(c) of the Statute provides for the application of the laws of the country that would exercise jurisdiction over the crime: in the present case, Uganda.
21. Counsel for the Defence submits that the Criminal Code of Uganda does not consider Victims as a third or independent party; they may only participate as witnesses or give testimony under oath.⁷ In due course, the Court may decide whether to grant them compensation.⁸

⁶ *Prosecutor v. Furundžija*, Trial Judgement of 10 December 1998, para. 178.

⁷ Part V.

⁸ Part IX, subsections 126(1) and 126(2).

RELIEF SOUGHT

Ad Hoc Counsel for the Defence respectfully requests:

- that the Observations of the OPCV and the annexes dated 26 March 2007 be rejected.

Respectfully,

[*signed*]

Michelyne C. St-Laurent
Ad Hoc Counsel for the Defence

Dated this 10 April 2007

At Québec City