Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/04**
Date: **10 February 2009**

PRE-TRIAL CHAMBER II

Before: **Judge Mauro Politi, Single Judge**

SITUATION IN UGANDA

Public document

Decision on the Defence Request for leave to appeal the 21 November 2008 Decision

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

The Office of the Prosecutor
Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence
Mr Michiel Pestman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda
Ms Sarah Pellet

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I, Judge Mauro Politi, judge at the International Criminal Court (the "Court");

1. **NOTING** the "Decision designating a Single Judge on victims' issues", dated 22 November 2006,[1] whereby Pre-Trial Chamber II (the "Chamber") designated Judge Mauro Politi as Single Judge responsible for all issues arising in connection with victims' participation in the proceedings in respect of 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. **NOTING** the Single Judge's "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", dated 1 February 2007 (the "1 February 2007 Decision"), stating *inter alia* that the appointment of counsel for the defence was needed for the purpose of allowing the proper development of the procedure enshrined in rule 89(1) of the Rules of Procedure and Evidence (the "Rules"), irrespective of the fact that none of the warrants of arrest issued in the Situation had yet been executed;[2]

3. **NOTING** the Single Judge's decisions in the Situation[3] and in the Case[4] "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" dated 17 September 2008 (the "Decisions"), whereby Mr Michiel Pestman was appointed as counsel for the Defence, entrusted with representing and protecting the interests of the Defence within the context

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[1] ICC 02/04-01/05-130.
[2] ICC-02/04-01/05-134, paragraph 15.
[3] ICC 02/04-154.
[4] ICC-02/04-01/05-312.

and for the purposes of the proceedings on the applications for participation in the Situation and in the Case addressed by the Decisions;

4. **NOTING** the "Request for leave to appeal the Decision on 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 Request that the appeal have suspensive effect in accordance with Article 82(3) of the Statute" filed by the Defence on 24 September 2008 (the "Request for Leave to Appeal dated 24 September 2008");[5]

5. **NOTING** the Single Judge's "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/0014/07 to a/0020/07 and a/0076/07 to a/0125/07" in the Situation[6] and in the Case[7] dated 7 October 2008 (the "7 October 2008 Decision"), rejecting *inter alia* the Defence Request for Leave to Appeal dated 24 September 2008;

6. **NOTING** the Defence's "Submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07" in the Situation[8] and in the Case[9] dated 20 October 2008 (the "20 October 2008 Observations");

7. **NOTING** the Single Judge's "Decision on victims' applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07" in the

[5] ICC-02/04-01/05-313.
[6] ICC-02/04-158.
[7] ICC-02/04-01/05-316.
[8] ICC-02/04-160.
[9] ICC-02/04-01/05-318.

Situation[10] and in the Case[11] dated 21 November 2008 (the "21 November 2008 Decision"), whereby *inter alia* (i) Applicants a/0076/07, a/0077/07, a/0078/07, a/0081/07, a/0082/07, a/0084/07, a/0085/07, a/0090/07, a/0091/07, a/0092/07, a/0093/07, a/0094/07, a/0095/07, a/0096/07, a/0097/07, a/0098/07, a/0099/07, a/0100/07, a/0101/07, a/0102/07, a/0103/07, a/0105/07, a/0106/07, a/0107/07, a/0112/07 and a/0123/07 were granted the status of victim of the Case; (ii) Applicants a/0108/07, a/0115/07, a/0117/07 and a/0118/07 were granted the status of victim in the context of the Situation; and (iii) Applicant a/0108/07 was granted the status of victim both of the Case and in the context of the Situation;

8. **NOTING** the Defence's "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" filed by the Defence on 1 December 2008 in the Situation[12] and in the Case[13] (the "Defence Request for Leave to Appeal");

9. **CONSIDERING** that the Defence appears to seek leave to appeal the following two issues, which in its view affect the fairness and the expeditiousness of the proceedings:

   i. the fact that the Single Judge allegedly "failed to respond to any of the points" raised by the Defence in its 20 October 2008 Observations (the "First Issue"); and

   ii. the fact that the 21 November 2008 Decision granted the status of victim to a number of applicants, "in spite of the fact that the role of the alleged victims in the pre-trial phase of the proceedings should be limited to those situations expressly envisaged in the Statute" (the "Second Issue");

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[10] ICC-02/04-171-Conf-Exp; ICC-02/04-172.
[11] ICC-02/04-01/05-355-Conf-Exp; ICC-02/04-01/05-356.
[12] ICC-02/04-174.
[13] ICC-02/04-01/05-359.

10. **NOTING** article 82(1) (d) of the Statute of the Court (the "Statute"), rule 155(1) and 155 (2) of the Rules;

11. **CONSIDERING** that article 82(1)(d) of the Statute restricts the possibility of leave to appeal to decisions "that involve 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";

12. **CONSIDERING** that in its decision dated 19 August 2005 Pre-Trial Chamber II held that, when dealing with an application for leave to appeal, the Chamber must be guided by three principles: (a) the restrictive character of the remedy provided for in article 82(1)(d) of the Statute; (b) the need for the applicant to satisfy the Chamber as to the existence of the requirements enshrined in this provision; and (c) the irrelevance or non-necessity for the Chamber to address arguments relating to the merits or substance of the appeal[14];

13. **CONSIDERING** further the judgment dated 13 July 2006, in which the Appeals Chamber stated *inter alia* that "only an 'issue' may form the subject-matter of an appealable decision" and defined an 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", also clarifying that "an issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination"[15];

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[14] ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, paragraph 15.
[15] *Ibid.*, paragraph 9.

14. **CONSIDERING,** as regards the First Issue, that the arguments by the Defence to which the Single Judge allegedly failed to respond revolve around the Defence's view that submitting observations under rule 89 of the Rules of Procedure and Evidence (the "Rules") in the absence of instructions from the persons whose arrest is sought by the Court in the Situation would lead to a violation of the Code of Professional Conduct for Counsel and could seriously prejudice the rights of the Defence, this being inconsistent with the right to a fair and impartial trial;

15. **CONSIDERING** that such arguments, however in part otherwise phrased, were also raised by the Defence in its Request for Leave to Appeal dated 24 September 2008;

16. **CONSIDERING** that, far from failing to respond to those arguments, the Single Judge had extensively and exhaustively addressed them in the 7 October 2008 Decision, in particular by pointing out the following:

    i. that the role given to counsel for the defence within the context of proceedings under rule 89 of the Rules was to be read as instrumental to such proceedings;

    ii. that there were instances in which the absence of contact between counsel and the person represented did not *per se* prevent the former from being able to make a point and thus contribute to the overall fairness of the proceedings;

    iii. that the view taken by the Defence would result in the defence being deprived of the right to voice its concerns at the situation stage, or anytime an arrest warrant had been issued but the person sought remained at large, thus *inter alia* depriving provisions like article 56 of the Statute, rule 89 of the Rules and regulations 76 and 77 of the Regulations of the Court (the "Regulations") of any meaningful content;

iv. that, accordingly, the appointment of counsel for the defence in respect of both the Situation and the Case irrespective of the specific circumstances of the persons whose arrest was sought, far from affecting the fairness of the proceedings, was meant to ensure that none of such circumstances would result in the interests of the defence being neglected;

17. **CONSIDERING** that, in view of the above, the subject-matter of the First Issue raised by the Defense no longer "requires a decision for its resolution" and therefore does not qualify as an "issue" for the purposes of article 82(1)(d) of the Statute, as construed by the Appeals Chamber in the 13 July 2006 Decision;

18. **CONSIDERING**, as regards the Second Issue, that the way such issue is phrased by the Defence makes it clear that the latter is *de facto* challenging the legal treatment of victims' rights to participate at the pre-trial stage of proceedings, in respect of which he seems to hold a view other than the one taken by the Single Judge;

19. **CONSIDERING** that, as already highlighted by the Single Judge in his decision dated 19 December 2007[16], this amounts to a "disagreement" or "conflict of opinion" in relation to the interpretation of the provisions of the statutory texts of the Court regulating victims' participation;

20. **CONSIDERING** that, as stated by the Appeals Chamber, such disagreement or conflict of opinion "does not define an appealable subject";

[16] ICC-02/04-112, paragraph 24.

21. **CONSIDERING** further that so far no victim has submitted an application to participate in a specific activity in the proceedings, in particular in relation to articles 56 and 57(3) (c) of the Statute;

22. **CONSIDERING** that, accordingly, the subject-matter underlying the second alleged issue appears hypothetical and its resolution not "essential for the determination of matters arising in the judicial cause under examination", a further requirement set forth by the Appeals Chamber for an "issue" to form the subject-matter of an appealable decision;

23. **CONSIDERING** that, accordingly, neither of the subject-matters raised by the Defence qualify as an "issue" within the meaning of article 82(1)(d) of the Statute as construed by the Appeals Chamber in its 13 July 2006 Decision;

24. **NOTING** also that the Defence refers to the leave to appeal granted by Pre-Trial Chamber I in the situation in the Democratic Republic of the Congo[17] (as well as in the situation in Darfur[18]), purporting that the issue at stake therein is the same as the one raised in the Defence Request for Leave to Appeal;

25. **NOTING** that the Appeals Chamber decided the appeals lodged in the situation in the Democratic Republic of the Congo by judgment dated 19 December 2008 (the "19 December 2008 Decision")[19];

26. **NOTING** that the issue addressed by the 19 December 2008 Decision, as identified by the Appeals Chamber, consisted exclusively in determining whether it was "possible to acknowledge to victims general participatory

[17] ICC-01/04-438.
[18] ICC-02/05-118.
[19] ICC-01/04-556.

rights in the investigation of crimes committed in a situation referred to the Court"[20];

27. **CONSIDERING** that, accordingly, the Appeals Chamber was not seized of the issue as to whether victims' participation should only be possible in respect of specific scenarios envisaged in the Statute;

28. **CONSIDERING** that the issue addressed by the Appeals Chamber appears other than and preliminary to the one raised by the Defence Request for Leave to Appeal;

29. **CONSIDERING** that, accordingly, the precedents resorted to by the Defence appear irrelevant to the determination of the Defence Request for Leave to Appeal;

30. **CONSIDERING** that failure by the Defence to identify an appealable issue *per se* exempts the Chamber from the need to assess the other requirements under article 82(1)(d) of the Statute[21];

31. **NOTING** the "Request for leave to file a response to the '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'" filed by the Office of Public Counsel for Victims (the "OPCV") in the Situation[22] and in the Case[23] on 2 December 2008 (the "OPCV's Request");

32. **CONSIDERING** that, in light of the nature of the submissions of the Defence, the Single Judge is of the view that he has all the necessary elements in order to decide on the Request for leave to appeal;

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[20] ICC-01/04-556, paragraph 36.
[21] ICC-02/04-01/05-90, para. 38; ICC-01/04-135-tEN, paras. 28, 61.
[22] ICC-02/04-175.
[23] ICC-02/04-01/05-360.

33. **CONSIDERING** that, accordingly, the paramount principle of ensuring the expeditiousness of the proceedings makes it appropriate to reject the OPCV's request;

FOR THESE REASONS, HEREBY

REJECT the OPCV's Request;

REJECT the Defence request for leave to appeal the 21 November 2008 Decision.

Done in both English and French, the English version being authoritative.

Mauro Politi

Judge Mauro Politi
Single Judge

Dated this Tuesday, 10 February 2009

At The Hague, The Netherlands