

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/05
Date: 1 February 2007

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single Judge

Registrar: Mr Bruno Cathala

**SITUATION IN UGANDA
IN THE CASE OF
THE PROSECUTOR
*vs. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO, RASKA LUKWIYA,
DOMINIC ONGWEN***

Public Document

**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**

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Ms Christine Chung, Senior Trial Lawyer

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

NOTING the “Decision designating a Single Judge for 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 and of the case *The Prosecutor vs. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen*;

NOTING the victims’ applications for participation in the proceedings filed by the Registrar in the record of the situation in Uganda on 19 June 2006² and 17 August 2006;³ and in the record of the case *The Prosecutor vs. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen* on 21 August 2006;⁴

¹ ICC-02/04-01/05-130.

² Application to participate in the proceedings: a/0010/06 (ICC-02/04-22-Conf-Exp).

³ Application for participation in proceedings number a/0064/06 (ICC-02/04-23-Conf-Exp); Application for participation in proceedings number a/0065/06 (ICC-02/04-24-Conf-Exp); Application for participation in proceedings number a/0066/06 (ICC-02/04-25-Conf-Exp); Application for participation in proceedings number a/0067/06 (ICC-02/04-26-Conf-Exp); Application for participation in proceedings number a/0068/06 (ICC-02/04-27-Conf-Exp); Application for participation in proceedings number a/0069/06 (ICC-02/04-28-Conf-Exp); Application for participation in proceedings number a/0070/06 (ICC-02/04-29-Conf-Exp).

⁴ Application for participation in proceedings number a/0010/06 (ICC-02/04-01/05-98-Conf-Exp); Application for participation in proceedings number a/0064/06 (ICC-02/04-01/05-99-Conf-Exp); Application for participation in proceedings number a/0065/06 (ICC-02/04-01/05-100-Conf-Exp); Application for participation in proceedings number a/0066/06 (ICC-02/04-01/05-101-Conf-Exp); Application for participation in proceedings number a/0067/06 (ICC-02/04-01/05-102-Conf-Exp); Application for participation in proceedings number a/0068/06 (ICC-02/04-01/05-103-Conf-Exp); Application for participation in proceedings number a/0069/06 (ICC-02/04-01/05-104-Conf-Exp); Application for participation in proceedings number a/0070/06 (ICC-02/04-01/05-105-Conf-Exp).

NOTING the reports filed *ex parte* by the Registrar in accordance with rule 89, sub-rule 1, of the Rules of Procedure and Evidence (“the Rules”) and regulation 86, sub-regulation 5, of the Regulations of the Court (“the Regulations”) in the situation in Uganda on 16 October 2006,⁵ 23 October 2006⁶ and 16 November 2006;⁷ and in the case *The Prosecutor vs. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen* on 4 September 2006,⁸ 16 October 2006,⁹ 26 October 2006¹⁰ and 16 November 2006¹¹ (“the Registrar’s Reports”), as well as the victims’ applications for participation annexed thereto;

NOTING articles 57, paragraph 3(c) and 68, paragraph 3, of the Statute of the Court (“the Statute”); rules 89, sub-rule 1, 90, 91, 92 and 93 of the Rules; regulations 76, sub-regulation 1, 80, sub-regulation 1, and 81, sub-regulation 4, of the Regulations;

HEREBY RENDER THIS DECISION.

Procedural history and main features of the applications

⁵ Report to Pre-Trial Chamber II on applications a/0010/06, a/0064/06 to a/0070/06 in accordance with Rule 89 paragraph 1 of the Rules of Procedure and Evidence, and Regulation 86, paragraph 5 of the Regulations of the Court (ICC-02/04-30-Conf-Exp).

⁶ Report to Pre-Trial Chamber II on applications a/0081/06 to a/0104/06 in accordance with Rule 89 paragraph 1 of the Rules of Procedure and Evidence, and Regulation 86, paragraph 5 of the Regulations of the Court (ICC-02/04-32-Conf-Exp).

⁷ Report to Pre-Trial Chamber II on applications a/0111/06 to a/0127/06 in accordance with Rule 89 paragraph 1 of the Rules of Procedure and Evidence, and Regulation 86, paragraph 5 of the Regulations of the Court (ICC-02/04-33-Conf-Exp).

⁸ Report to Pre-Trial Chamber II on application a/0010/06 in accordance with Rule 89 paragraph 1 of the Rules of Procedure and Evidence, and Regulation 86, paragraph 5 of the Regulations of the Court (ICC-02/04-01/05-109-Conf-Exp).

⁹ Report to Pre-Trial Chamber II on applications a/0064/06 to a/0070/06 in accordance with Rule 89 paragraph 1 of the RPE, and Regulation 86 paragraph 5 of the Regulations of the Court (ICC-02/04-01/05-120-Conf-Exp).

¹⁰ Report to Pre-Trial Chamber II on applications a/0081/06 to a/0104/06 in accordance with Rule 89 paragraph 1 of the RPE, and Regulation 86 paragraph 5 of the Regulations of the Court (ICC-02/04-01/05-123-Conf-Exp).

¹¹ Report to Pre-Trial Chamber II on applications a/0111/06 to a/0127/06 in accordance with Rule 89 paragraph 1 of the RPE, and Regulation 86 paragraph 5 of the Regulations of the Court (ICC-02/04-01/05-128-Conf-Exp).

1. As of 1 February 2007, 49 applications for participation in the situation in Uganda¹² and in the case *The Prosecutor vs. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen*¹³ (hereinafter, collectively, “the Applications”) have been filed on a confidential basis with the Chamber,

¹² a/0010/06 (ICC-02/04-22-Conf-Exp); a/0064/06 (ICC-02/04-23-Conf-Exp); a/0065/06 (ICC-02/04-24-Conf-Exp); a/0066/06 (ICC-02/04-25-Conf-Exp); a/0067/06 (ICC-02/04-26-Conf-Exp); a/0068/06 (ICC-02/04-27-Conf-Exp); a/0069/06 (ICC-02/04-28-Conf-Exp); a/0070/06 (ICC-02/04-29-Conf-Exp); a/0081/06 (ICC-02/04-32-Conf-Exp-Anx1); a/0082/06 (ICC-02/04-32-Conf-Exp-Anx2); a/0083/06 (ICC-02/04-32-Conf-Exp-Anx3); a/0084/06 (ICC-02/04-32-Conf-Exp-Anx4); a/0085/06 (ICC-02/04-32-Conf-Exp-Anx5); a/0086/06 (ICC-02/04-32-Conf-Exp-Anx6); a/0087/06 (ICC-02/04-32-Conf-Exp-Anx7); a/0088/06 (ICC-02/04-32-Conf-Exp-Anx8); a/0089/06 (ICC-02/04-32-Conf-Exp-Anx9); a/0090/06 (ICC-02/04-32-Conf-Exp-Anx10); a/0091/06 (ICC-02/04-32-Conf-Exp-Anx11); a/0092/06 (ICC-02/04-32-Conf-Exp-Anx12); a/0093/06 (ICC-02/04-32-Conf-Exp-Anx13); a/0094/06 (ICC-02/04-32-Conf-Exp-Anx14); a/0095/06 (ICC-02/04-32-Conf-Exp-Anx15); a/0096/06 (ICC-02/04-32-Conf-Exp-Anx16); a/0097/06 (ICC-02/04-32-Conf-Exp-Anx17); a/0098/06 (ICC-02/04-32-Conf-Exp-Anx18); a/0099/06 (ICC-02/04-32-Conf-Exp-Anx19); a/0100/06 (ICC-02/04-32-Conf-Exp-Anx20); a/0101/06 (ICC-02/04-32-Conf-Exp-Anx21); a/0102/06 (ICC-02/04-32-Conf-Exp-Anx22); a/0103/06 (ICC-02/04-32-Conf-Exp-Anx23); a/0104/06 (ICC-02/04-32-Conf-Exp-Anx24); a/0111/06 (ICC-02/04-33-Conf-Exp-Anx1); a/0112/06 (ICC-02/04-33-Conf-Exp-Anx2); a/0113/06 (ICC-02/04-33-Conf-Exp-Anx3); a/0114/06 (ICC-02/04-33-Conf-Exp-Anx4); a/0115/06 (ICC-02/04-33-Conf-Exp-Anx5); a/0116/06 (ICC-02/04-33-Conf-Exp-Anx6); a/0117/06 (ICC-02/04-33-Conf-Exp-Anx7); a/0118/06 (ICC-02/04-33-Conf-Exp-Anx8); a/0119/06 (ICC-02/04-33-Conf-Exp-Anx9); a/0120/06 (ICC-02/04-33-Conf-Exp-Anx10); a/0121/06 (ICC-02/04-33-Conf-Exp-Anx11); a/0122/06 (ICC-02/04-33-Conf-Exp-Anx12); a/0123/06 (ICC-02/04-33-Conf-Exp-Anx13); a/0124/06 (ICC-02/04-33-Conf-Exp-Anx14); a/0125/06 (ICC-02/04-33-Conf-Exp-Anx15); a/0126/06 (ICC-02/04-33-Conf-Exp-Anx16); a/0127/06 (ICC-02/04-33-Conf-Exp-Anx17).

¹³ a/0010/06 (ICC-02/04-01/05-98-Conf-Exp); a/0064/06 (ICC-02/04-01/05-99-Conf-Exp); a/0065/06 (ICC-02/04-01/05-100-Conf-Exp); a/0066/06 (ICC-02/04-01/05-101-Conf-Exp); a/0067/06 (ICC-02/04-01/05-102-Conf-Exp); a/0068/06 (ICC-02/04-01/05-103-Conf-Exp); a/0069/06 (ICC-02/04-01/05-104-Conf-Exp); a/0070/06 (ICC-02/04-01/05-105-Conf-Exp); a/0081/06 (ICC-02/04-01/05-123-Conf-Exp-Anx1); a/0082/06 (ICC-02/04-01/05-123-Conf-Exp-Anx2); a/0083/06 (ICC-02/04-01/05-123-Conf-Exp-Anx3); a/0084/06 (ICC-02/04-01/05-123-Conf-Exp-Anx4); a/0085/06 (ICC-02/04-01/05-123-Conf-Exp-Anx5); a/0086/06 (ICC-02/04-01/05-123-Conf-Exp-Anx6); a/0087/06 (ICC-02/04-01/05-123-Conf-Exp-Anx7); a/0088/06 (ICC-02/04-01/05-123-Conf-Exp-Anx8); a/0089/06 (ICC-02/04-01/05-123-Conf-Exp-Anx9); a/0090/06 (ICC-02/04-01/05-123-Conf-Exp-Anx10); a/0091/06 (ICC-02/04-01/05-123-Conf-Exp-Anx11); a/0092/06 (ICC-02/04-01/05-123-Conf-Exp-Anx12); a/0093/06 (ICC-02/04-01/05-123-Conf-Exp-Anx13); a/0094/06 (ICC-02/04-01/05-123-Conf-Exp-Anx14); a/0095/06 (ICC-02/04-01/05-123-Conf-Exp-Anx15); a/0096/06 (ICC-02/04-01/05-123-Conf-Exp-Anx16); a/0097/06 (ICC-02/04-01/05-123-Conf-Exp-Anx17); a/0098/06 (ICC-02/04-01/05-123-Conf-Exp-Anx18); a/0099/06 (ICC-02/04-01/05-123-Conf-Exp-Anx19); a/0100/06 (ICC-02/04-01/05-123-Conf-Exp-Anx20); a/0101/06 (ICC-02/04-01/05-123-Conf-Exp-Anx21); a/0102/06 (ICC-02/04-01/05-123-Conf-Exp-Anx22); a/0103/06 (ICC-02/04-01/05-123-Conf-Exp-Anx23); a/0104/06 (ICC-02/04-01/05-123-Conf-Exp-Anx24); a/0111/06 (ICC-02/04-01/05-128-Conf-Exp-Anx1); a/0112/06 (ICC-02/04-01/05-128-Conf-Exp-Anx2); a/0113/06 (ICC-02/04-01/05-128-Conf-Exp-Anx3); a/0114/06 (ICC-02/04-01/05-128-Conf-Exp-Anx4); a/0115/06 (ICC-02/04-01/05-128-Conf-Exp-Anx5); a/0116/06 (ICC-02/04-01/05-128-Conf-Exp-Anx6); a/0117/06 (ICC-02/04-01/05-128-Conf-Exp-Anx7); a/0118/06 (ICC-02/04-01/05-128-Conf-Exp-Anx8); a/0119/06 (ICC-02/04-01/05-128-Conf-Exp-Anx9); a/0120/06 (ICC-02/04-01/05-128-Conf-Exp-Anx10); a/0121/06 (ICC-02/04-01/05-128-Conf-Exp-Anx11); a/0122/06 (ICC-02/04-01/05-128-Conf-Exp-Anx12); a/0123/06 (ICC-02/04-01/05-128-Conf-Exp-Anx13); a/0124/06 (ICC-02/04-01/05-128-Conf-Exp-Anx14); a/0125/06 (ICC-02/04-01/05-128-Conf-Exp-Anx15); a/0126/06 (ICC-02/04-01/05-128-Conf-Exp-Anx16); a/0127/06 (ICC-02/04-01/05-128-Conf-Exp-Anx17).

whether as stand-alone documents or as annexes to the Registrar's Reports. All of the applicants ("the Applicants") request that their status of victim be recognised with a view to participating in the "*preliminary examination; pre-trial, trial and appeals*" stages. Without prejudice to the decision on their substance and merit, the Single Judge would emphasise that all the Applications share the following features: (i) they have been filed by natural persons; (ii) the Applicants are not assisted by a legal representative; (iii) the Applicants request that the Court provide assistance in securing their legal representation. In addition, most of the Applicants request that the Court prevent their identity from being disclosed, whether to the general public or to one or more of the participants in the proceedings. Bearing in mind the main features of the proceedings leading to the recognition of applicant victims as participants, there is a need for the Single Judge to determine (i) whether the appointment of one or more legal representatives is, prior to the decision on the merits of the Applications, necessary and/or appropriate; (ii) whether counsel for the defence should be appointed at this stage; (iii) whether there is a need to order any protective measures and, in the affirmative, of which nature.

Whether there is a need to appoint a legal representative (individual or common) at this stage of the proceedings

2. Prior to the Applications being forwarded to the Prosecutor and the defence in accordance with rule 89, sub-rule 1, of the Rules, there is a need to determine whether the Applicants are entitled to rely on a legal representative at this stage of the proceedings (i.e., the time between the filing of the application and the Chamber's assessment of its merits), or whether the decision on the assignment of legal representation should be deferred until a determination on the merits of the Applications has been rendered. The statutory instruments of the Court fail to address this issue specifically; accordingly, the

solution to this issue requires a general assessment of the system of victim participation in the proceedings.

3. The statutory framework provides several elements supporting the view that a victim whose application has been granted by the Court may participate in proceedings with or without the assistance of a legal representative. This seems to flow first and foremost from article 68, paragraph 3, of the Statute, which provides that *“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”*. This provision also states that such views and concerns *“may be presented by the legal representatives of the victims when the Court considers it appropriate”*. Two elements are relevant in this context. First, the choice of the term *“may”*, when referring to the role of the legal representative, entails that a victim’s right to present his or her *“views and concerns”* is independent from that victim being or not being able to rely on a legal representative. Second, the very role of the legal representative, far from being presented as mandatory and inevitable, is made conditional upon a determination of its appropriateness, which determination is entrusted to the Court.
4. The view that legal representation is *per se* not necessary in order for victims to participate in Court’s proceedings appears further supported by the Rules. Rule 89, sub-rule 1, refers to the application filed by the victim and the decision by the Chamber rejecting or granting the application and, in the latter case, specifying the proceedings and manner of participation (*“which may include opening and closing statements”*), without mentioning a legal representative. As a result, it seems that participation (at least) in the form of *“opening and closing statements”* can be granted to a victim whether or not that victim is assisted by a legal representative. Similarly, rule 89, sub-rule 2, refers to the right of the victim whose application has been rejected by the Chamber to file a new application, again without mentioning a legal representative.

5. Equally significant indicia are to be found in the rules specifically devoted to the legal representation of victims. Rule 90, sub-rule 1, refers to the victim being “free” to choose a legal representative. While the provision seems to imply a right of every victim to choose his or her own legal representative, it does not go so far as to make it compulsory for the victim to make such a choice. Moreover, despite the heading of rule 90 (referring to “*legal representatives of victims*”), sub-rules 2, 3, 4 and 5 make no mention of *individual* legal representative(s) and focus instead on the issue of *common* legal representative(s). In this respect, it appears relevant that the Chamber retains the option (and is not under an obligation) to request the victims or particular groups of victims to choose a common legal representative or representatives, “*where there are a number of victims*” and “*for the purposes of ensuring the effectiveness of the proceedings*” (rule 90, sub-rule 2). Rule 90, sub-rule 3, clarifies that a power to *impose* legal representation, whenever the victims are unable to make the choice, is bestowed on the Chamber in respect of a common legal representative. *A contrario*, as regards an individual legal representative, no such power seems vested in the Chamber under this provision. Accordingly, a victim’s “freedom” to choose a legal representative includes the right not to proceed to such a choice and to exercise his or her right to participate on his or her own.
6. It may also be noted that, throughout the *travaux préparatoires*, common legal representation was envisaged as a technical device making it feasible for participation rights to be granted to large number of victims, while at the same time preserving the need to ensure expeditious proceedings.¹⁴ Far from being a pre-requisite for victim participation, legal representation is conceived as an option, recourse to which will be necessary under specific circumstances only.
7. The optional nature of the role of the legal representative (whether individual or common) is also apparent in light of rule 91, which specifically addresses

¹⁴ Bitti, Friman, *Participation of Victims in the Proceedings*, in Lee (ed.), *The International Criminal Court - Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, 2001, pp. 461-462.

the methods of participation by legal representatives of victims. According to this rule, only victims assisted by legal representatives may be allowed to participate in the proceedings in a way which includes attending and participating in hearings and, subject to the Chamber's decision, may go so far as to entail the right to question a witness, an expert or the accused. Unlike other provisions¹⁵, which envisage an alternative between the act being performed by the victim or by his or her legal representative, rule 91 states that acts such as the participation in hearings and the questioning of a party or witness shall be performed only by a legal representative. Therefore, victims acting on their own are precluded from performing those acts. As a result, it may be argued that, whilst victims as such are entitled to participate in the proceedings before the Court, "enhanced" rights of participation are vested exclusively in victims acting *via* legal representatives. Pursuant to rule 90, sub-rule 6, victims' legal representatives "*shall have the qualifications set forth in rule 22, sub-rule 1*", i.e. the qualifications required for counsel for the defence. This makes it clear that the legal representative can only be a person with satisfactory legal knowledge and background, with a view to shielding the Chamber from the risk that such participation might result in excessively disruptive effects on the overall conduct of proceedings. According to some commentators, the provision mirrors the need to create "incentives" for victims' participation *via* legal representation.¹⁶

8. Finally, the idea of victims being able to participate either with or without a legal representative further emerges from rules 92 and 93. In its relevant part, rule 92, sub-rule 2, provides for notification of relevant decisions or documents to either victims or their legal representatives. Similarly, rule 93 enables the Chamber to seek the views of either victims or their legal representatives.

¹⁵ See below, under paragraph 8.

¹⁶ See Bitti, Friman, *op cit*, pp. 462-463, fn. 1.

9. The foregoing remarks appear to be further supported by the *travaux préparatoires*. The need to spell out the specific ways in which legal representatives of victims would be involved in the proceedings was already highlighted in the initial drafts of the provisions which were to become rules 90 and 91.¹⁷ As early as April 1999, the fundamental tenets of the system now mirrored in rules 89 through 93 were proposed for the delegates' consideration.¹⁸ Elements such as failure to mention the need for a legal representative in connection with the filing of the application for participation,¹⁹ the nexus between the common legal representative and the presence of "*a number of victims*"²⁰ and the limitation of the performance of certain procedural activities (namely, participating in hearings and questioning the accused, witnesses and experts) to legal representatives²¹ were already mentioned in the 1999 *Report on the international seminar on victims' access to the International Criminal Court*.²²
10. In light of the above, the following twofold conclusion seems warranted: (i) first, a victim's participation in the proceedings is not conditional upon him or her being assisted by a legal representative, even after his or her application has been granted; (ii) second, there are at least two categories of victims entitled to some forms of participation in Court's proceedings:
- a. victims admitted to the proceedings and assisted by a legal representative, enjoying "enhanced" procedural rights under rule 91;
 - b. victims admitted to the proceedings but not assisted by a legal representative, enjoying more limited rights of participation, in any

¹⁷ Preparatory Commission for the International Criminal Court, Proposal submitted by Australia-Draft Rules of procedure and evidence of the International Criminal Court (PCNICC/1999/DP.1, 26 January 1999, page 47).

¹⁸ Preparatory Commission for the International Criminal Court, Report on the international seminar on victims' access to the International Criminal Court (PCNICC/1999/WGRPE/INF.2, 6 July 1999).

¹⁹ PCNICC/1999/WGRPE/INF.2, 6 July 1999, Rule A, page 4.

²⁰ PCNICC/1999/WGRPE/INF.2, 6 July 1999, Rule B, page 4.

²¹ PCNICC/1999/WGRPE/INF.2, 6 July 1999, Rule C, page 4.

²² Preparatory Commission for the International Criminal Court, Report on the international seminar on victims' access to the International Criminal Court (PCNICC/1999/WGRPE/INF.2, 6 July 1999).

event entitled to present their “*views and concerns*”, possibly in the form of “*opening and closing statements*”.

11. Since the role of the legal representative is optional even after a decision allowing a victim to participate in the proceedings has been rendered, it appears *a fortiori* that applicant victims cannot claim to have an absolute and unconditional right to be provided with the assistance of a legal representative in respect of the phase preceding the Chamber’s decision on the merits of the application.
12. However, determining that the appointment of a legal representative is *per se* not necessary for a victim to be able to participate in the proceedings or, prior thereto, for that victim’s application to be considered by the Chamber, is not tantamount to saying that the Chamber may never make such an appointment. Regulation 80, sub-regulation 1, of the Regulations allows the Chamber to appoint a legal representative of victims where “*the interests of justice so require*”. Whilst not mandated *per se*, the appointment of a legal representative may thus be required, under this regulation, by considerations of “*the interests of justice*”. In light of the general terms in which regulation 80, sub-regulation 1, is formulated, the Single Judge acknowledges that the “interests of justice” may recur also in the phase between the filing of the application and the decision on its merits. While 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. Therefore, no issue of unequal treatment of the Applicants arises at this stage in terms of their opportunity of being considered a victim under the relevant provisions of the Statute and the Rules.

The role of the Office of Public Counsel for Victims

13. The foregoing remarks on the system of victim participation in the proceedings make it unnecessary to determine at this stage whether a legal representative should be appointed in the person of a staff member of the *Office of Public Counsel for Victims* ("the OPCV"). Nevertheless, the Single Judge would point out that the mandate vested in the OPCV by the Regulations also encompasses forms and methods of assistance to victims which fall short of legal representation. In particular, regulation 81, sub-regulation 4, of the Regulations 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*". The Single Judge holds that, under the present circumstances, whereby none of the Applicants can rely on a legal representative, considerations of fairness make it appropriate for the victims to benefit from the support and assistance which may be offered by the OPCV. Accordingly, the Single Judge instructs the Registrar to transmit the Applications to the OPCV, with a view to allowing it to provide the Applicants with any support and assistance which may be necessary or appropriate at this stage of the proceedings.

Whether there is a need to appoint counsel for the defence at this stage

14. Transmission of victims' applications to both the Prosecutor and the defence is envisaged by rule 89, sub-rule 1, of the Rules as one of the first acts of the proceedings leading to the Chamber's decision on whether a victim's application for participation in the proceedings is to be granted and, in the affirmative, the determination of the manner in which such participation is considered appropriate. Both the Prosecutor and the defence are entitled to submit observations on the applications within a time-limit to be set by the Chamber.
15. Regulation 76, sub-regulation 1, of the Regulations provides that "*a Chamber, following consultation with the Registrar, may appoint counsel in the circumstances*

specified in the Statute and the Rules or where the interests of justice so require". It is the view of the Single Judge that the present circumstances, whereby none of the warrants of arrest issued in the situation²³ has yet been executed, amount to a scenario requiring the appointment of a counsel for the defence for the purpose of allowing the proper development of the procedure enshrined in rule 89, paragraph 1 of the Rules and preserving the overall fairness of the proceedings. Moreover, since the same individuals are applying to be recognised as victims participating in the preliminary examination, pre-trial, trial and appeals stages, the Single Judge deems it appropriate that at this time one counsel for the defence be appointed and entrusted with responsibility for all aspects relating to the Applications. Given the purpose of this appointment, the functions and powers of the appointed counsel will be restricted to those which may be necessary and appropriate within the context of the proceedings relating to the Applications, including in particular the right to receive a copy of the Applications and to submit observations thereon within the time-limit indicated by the Single Judge. Having considered the list of counsel and upon consultations with the Registrar, the Single Judge hereby appoints Ms. Michelyne C. St-Laurent as counsel for the defence, pursuant to regulation 76 of the Regulations.

Whether there is a need to adopt any protective measures and, in the affirmative, of which nature

16. Rule 89 of the Rules sets forth the specific procedure governing the submission and the Chamber's assessment of the applications to participate as victims in the proceedings. As indicated above, rule 89, sub-rule 1, bestows on both the Prosecutor and the defence the right to reply to any application for participation in the proceedings within the time-limit set by the Chamber. As

²³ Warrant of arrest for Joseph Kony (ICC -02/04-01/05-28-US-Exp.); Warrant of arrest for Vincent Otti (ICC -02/04-01/05-4-US-Exp.); Warrant of arrest for Raska Lukwiya (ICC -02/04-01/05-6-US-Exp.); Warrant of arrest for Okot Odhiambo (ICC -02/04-01/05-8-US-Exp.); Warrant of arrest for Dominic Ongwen (ICC -02/04-01/05-10-US-Exp).

stated by Pre-Trial Chamber I,²⁴ “in order to place them in a position to effectively exercise this right”, it is provided that the Registrar shall transmit a copy of the applications to both parties.

17. However, the same rule makes transmission of a copy of the applications to the Prosecutor and the defence “subject to the provisions of the Statute, in particular article 68, paragraph 1”. This provision mandates the Court to take “appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”, provided that such measures “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. Furthermore, article 57, paragraph 3(c), of the Statute vests the Chamber with the function to provide, “where necessary”, for the protection and privacy of victims and witnesses.
18. Most of the Applicants requested that the Court ensure that their identity and other information relating to the incident affecting them not be revealed – whether to the Prosecutor, the defence, a State, other participants or the general public. They claim that disseminating that information would result in their life or the lives of their family members being put at risk.
19. Several factors contribute to the Single Judge’s being satisfied that, should the fact that they have applied to participate in proceedings before the Court become known, the Applicants might face security risks justifying their request for and the granting of protective measures. First and foremost, at the time the warrants of arrest in the situation in Uganda were issued, Pre-Trial Chamber II held that arrest was necessary *inter alia* in view of the fact that commanders of the Lord’s Resistance Army (“the LRA”) are allegedly inclined to launch retaliatory strikes. Since all the persons whose arrest is being sought by the Court remain at large, the Single Judge considers that those security

²⁴ PTC I, Decision Appointing ad hoc counsel and establishing a deadline for the prosecution and the ad hoc counsel to submit observations on the applications of Applicants a/0001/06 to a/0003/06 (ICC-01/04-147) page 2; PTC I, Décision autorisant le depot d’observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06 (ICC-01/04-228), page 4; PTC I, Decision Establishing a deadline for the Prosecution and the Defence to submit observations on the Applications of Applicants a/0001/06 to a/0003/06 (ICC-01/04-01/06-107), page 2.

concerns still exist. Second, the security situation in Northern Uganda continues to be highly unstable. In 2006 the United Nations ("the UN") repeatedly denounced the persisting *"insecurity of the humanitarian situation throughout the Great Lakes region"* due *inter alia* to the activities of militias and armed groups such as the LRA, which *"continue to attack civilians"* and *"commit human rights abuses against local populations"*.²⁵ In April 2006, the Minister of Defence of Uganda voiced his concern before the Security Council that the LRA might be rebuilding its capacity while allegedly based in the Democratic Republic of the Congo.²⁶ In June 2006 the UN Secretary-General submitted to the Security Council a report ("the Report") warning that, whilst its forces might have diminished, the LRA remained active in the border regions between the Democratic Republic of the Congo, Uganda and southern Sudan, presented *"a real threat to the rule of law"* and added *"to the existing security problems"* of the region.²⁷ In addition, the Report cautioned that the LRA *"remains a violent criminal group with a severe disruptive capacity against the civilian population within its reach"*.²⁸ In September 2006, the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Mr Jan Egeland, pointed out that the LRA had not yet honoured its humanitarian commitment to release all women and children²⁹ and that there was a need to ensure that the LRA fighters comply with the ceasefire agreement rather than *"go back to Northern Uganda and start the whole indiscriminate attack on the civilian population again"*;³⁰ participants in the ensuing debate pointed out that the

²⁵ Security Council Resolution 1653 (2006) (S/RES/1653(2006)). See also SC Resolution 1663 (2006) (S/RES/1663(2006)).

²⁶ Briefings by the Minister for Foreign Affairs and the Minister of Defence of Uganda, 19 April 2006 (S/PV.5415), page 5.

²⁷ Report of the Secretary General pursuant to resolutions 1653 (2006) and 1663 (2006) (S/2006/478) paragraph 5.

²⁸ Report of the Secretary General pursuant to resolutions 1653 (2006) and 1663 (2006) (S/2006/478) paragraph 7.

²⁹ Security Council Briefing by the Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator, Mr. Jan Egeland (S/PV.5525), 15 September 2006.

³⁰ Ibidem.

situation on the ground in Uganda “*changes by the day*”.³¹ In addition, recent reports³² seem to question the LRA’s genuine commitment to the cessation of hostilities agreement signed between the LRA and the Government of Uganda in August 2006, thus casting a shadow over the optimism which seemed to prevail immediately after its signature. As recently as 18 January 2007, the Ugandan press reported ambushes allegedly carried out by LRA members and voiced fears of the local population that violence might resume.³³

20. In light of the above, the Single Judge would stress the need not to underestimate the threats still posed by the LRA and to proceed with the utmost caution, especially in light of the allegation that neither the Government of Uganda nor the communities and families would be in a position to protect their children and themselves against a resurgence of violence.³⁴ For the purposes of the present proceedings (i.e., the determination of whether victims may be admitted to participate and, in the affirmative, in what manner), the Single Judge points out that the only feasible and appropriate protective measures at this stage are redactions of the Applications “*allowing*” - as stated by Pre-Trial Chamber I – “*the applicants to make an application for participation whilst protecting their security and well-being*”.³⁵ The appropriateness of the chosen measure should be appreciated in light of the fact that the preliminary assessment of the merits of the Applications may lead to some of them being rejected and result in the Applicants not being granted the status of participants in the proceedings. Given the practical and financial obstacles necessarily associated with

³¹ Sir Emir Jones Parry, Security Council Briefing by the Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator, Mr. Jan Egeland (S/PV.5525), 15 September 2006, page 13.

³² “Uganda LRA withdraws from peace talks over alleged killings” (Agence France Press, 29 November 2006).

³³ “LRA threats cause panic in N.Uganda” (New Vision, 18 January 2007).

³⁴ Report of the Secretary General pursuant to resolutions 1653 (2006) and 1663 (2006) (S/2006/478), paragraph 15.

³⁵ PTCL, Decision on the Defence request for leave to appeal regarding the transmission of applications for victim participation (ICC-01/04-01/06-672-tEN), p. 7. In the original French version, « permettant aux demandeurs de faire une demande de participation tout en préservant leur sécurité et leur bien-être » (PTCL, Décision sur la demande d’autorisation d’appel de la Défense relative à la transmission des Demandes de participation des victimes - ICC-01/04-01/06/672, p. 7).

measures other than redactions (in particular, measures in the field or relocation), the Single Judge observes that the adoption of any measures other than redactions would exceed the scope of the present proceedings and would therefore be unjustified.

21. The paramount principle governing redactions is the need to prevent the identification of the Applicants. Accordingly, redactions cover, in particular, any information on the applicants' identity, including the following: name; name of parents; place of birth; date of birth (unless the age of the applicant may be relevant either to the type or extent of criminal responsibility); tribe or ethnic group; occupation; marital status; number of dependents; type of proof of identity provided; current address and place of origin (but not country); phone number and email address; languages spoken; name of victims or of witnesses to same incident; specific features of the injury, loss or harm allegedly suffered; name and contact details of the intermediary assisting the victim in filing the application.
22. The principle stated above also requires that any other information otherwise suitable to lead to the applicants' identification be redacted. Accordingly, redactions are extended to cover any detail of the alleged incident which might lead to the identification of the victim, whether due to its specificity or the uniqueness of a fact. Whilst such particulars change on a case-by-case basis, features within this category typically include the name of the alleged commander of the incident; specific locations; indications of distances covered; number of other individuals involved; type of treatment received. Furthermore, in light of the gravity of the security concerns highlighted above, the Single Judge takes the view that such measures must be applied irrespective of the existence of a specific request to this effect by the Applicants.
23. Additional considerations are necessary in order to determine whether the identity of the Applicants, as well as any other information which might lead to their identification, should be released to the Prosecutor and to the Defence,

in particular in light of their right to submit observations on victims' applications. Pre-Trial Chamber I has already held that *"when the security situation of an applicant so requires, the Pre-Trial Chamber may instruct the Registrar to transmit to the Prosecutor and the Defence a redacted copy of his or her application for participation having expunged any information that could lead to his or her identification"*.³⁶ At the same time, it clarified however that *"the scope of the redactions cannot exceed what is strictly necessary in light of the applicant's security situation and must allow for a meaningful exercise by the Prosecution and the Defence of their right to reply to the application for participation"*.³⁷

24. Several factors are relevant to a decision on this specific point. Rule 89, sub-rule 1, of the Rules makes it clear that transmission of applications for participation is *"subject to the provisions of the Statute, in particular article 68, paragraph 1"*. Article 68, paragraph 1, clarifies that measures of protection *"shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial"*. As stated by the Appeals Chamber, this provision encompasses the *"principle of proportionality"*³⁸; accordingly, protective measures should restrict the rights of the suspect or accused only as far as necessary. As highlighted above, preventing the identity of the applicants from being known is necessary, due to the instability of the security situation in Uganda; by the same token, it appears to be the only feasible and appropriate measure, since the limited scope of the present phase of the proceedings would not justify the adoption of more stringent and targeted security measures. Moreover, the

³⁶ PTC I, Decision Appointing ad hoc counsel and establishing a deadline for the prosecution and the ad hoc counsel to submit observations on the applications of Applicants a/0001/06 to a/0003/06 (ICC-01/04-147) page 3; PTC I, Décision autorisant le depot d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06 (ICC-01/04-228), page 4-5; PTC I, Decision Establishing a deadline for the Prosecution and the Defence to submit observations on the Applications of Applicants a/0001/06 to a/0003/6 (ICC-01/04-01/06-107), page 3.

³⁷ PTC I, Decision Appointing ad hoc counsel and establishing a deadline for the prosecution and the ad hoc counsel to submit observations on the applications of Applicants a/0001/06 to a/0003/06 (ICC-01/04-147) page 3; PTC I, Décision autorisant le depot d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06 (ICC-01/04-228), page 4-5; PTC I, Decision Establishing a deadline for the Prosecution and the Defence to submit observations on the Applications of Applicants a/0001/06 to a/0003/6 (ICC-01/04-01/06-107), page 3.

³⁸ Decision of 14 December 2006 (ICC-01/04-01/06-773), paragraph 34.

principle of proportionality requires taking into account the nature and purpose of the proceedings at stake. In this specific phase, where no decision as to the actual participation of the Applicants has been taken, no impact on the position of the defence can be detected yet. Therefore, the Single Judge holds that redacting the Applications as explained above will entail no unnecessary restriction of the rights of the defence, without prejudice to his power and duty to review the appropriateness of the protective measures once the applicant victims will be admitted to and be called upon playing a more significant role in the proceedings.

25. In light of these different elements, the Single Judge also takes the view that all the Applications must be transmitted to both parties (the Prosecutor and the Defence) in redacted form, whereby any information which may lead to the identification of the Applicants will have been expunged, in accordance with paragraphs 21 and 22 of this decision. This conclusion (namely, that any redactions which may be necessary and/or appropriate must be equally made on the copies of the Applications to be transmitted to the Defence and on the copies to be transmitted to the Prosecutor) results, in the first place, from the serious security concerns arising from the situation in the field, as highlighted above, and requires a particularly restrictive approach. Second, it results from fundamental considerations of fairness (namely, the need to preserve the equality of arms), which require that both parties be placed on an equal footing in respect of the exercise of a right which is bestowed on them both by the statutory texts. For the same reasons, the redacted copies of the Applications shall be transmitted to the Prosecutor and the Defence at the same time and both parties shall have the same time-limit for submitting their observations.

HAVING REGARD THERETO AND FOR THESE REASONS

ORDER the Registrar to transmit the Applications to the OPCV by Wednesday 7 February 2007, for the purposes of support and assistance as set out in paragraph 13;

APPOINT Ms Michelyne C. St-Laurent as counsel for the Defence, entrusted with representing and protecting the interests of the defence within the context and for the purposes of the proceedings on the Applications for participation in the situation in Uganda and in the case *The Prosecutor vs. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen*, pursuant to rule 89 of the Rules;

ORDER the Registrar to provide the Prosecutor and the counsel for the Defence, by Monday 12 February 2007, with a redacted copy of the Applications, in accordance with paragraphs 21 and 22 of this decision;

GRANT the Prosecutor and the Defence until Monday 26 February 2007 to submit their observations on the Applications.

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



Judge Mauro Politi
Single Judge

Dated this 1 February 2007

At The Hague, The Netherlands.