

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-02/04-01/05
Date: 31 October 2008

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Presiding Judge
Judge Hans-Peter Kaul
Judge Ekaterina Trendafilova

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

**Public Document
URGENT**

Decision on Defence Counsel's "Request for conditional stay of proceedings"

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 Jens Dieckmann

Ms Michelyne C. St Laurent

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

**The Office of Public Counsel for the
Defence**

States Representatives

The Government of the Republic of
Uganda

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

The Judges of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”);

NOTING the “Decision assigning the situation in Uganda” to Pre-Trial Chamber II issued by the Presidency on 5 July 2004¹;

NOTING the “Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence” dated 21 October 2008, whereby the Chamber decided to initiate proceedings under article 19(1) of the Statute, appointed Mr Jens Dieckmann as counsel for the Defence within the context and for the purposes of such proceedings and invited the Republic of Uganda, the Prosecutor, the counsel for the Defence and victims having already communicated with the Court with respect to the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (“the Case”), or their legal representatives, to submit their observations on the admissibility of the Case by 10 November 2008;²

NOTING the “Request for conditional stay of proceedings” addressed to the Chamber (the “Defence’s Request to the Chamber”)³, as well as the “Request for review of Counsel’s appointment by the Registrar in accordance with Pre-Trial Chamber’s decision of 21 October 2008 and request for conditional stay/suspension of the proceedings”⁴ addressed to the Presidency of the Court (the “Defence’s Request to the Presidency”), both filed by the Counsel for the Defence (the “Defence”) on 28 October 2008;

NOTING that, in its Request to the Chamber, the Defence requested “that the Pre-Trial Chamber stay or suspend the proceedings concerning admissibility, pending the outcome of the Presidency’s review” or that, should such request for stay or

¹ ICC-02/04-1.

² ICC-02/04-01/05-320.

³ ICC-02/04-01/05-325.

⁴ ICC-02/04-01/05-326.

suspension be rejected, the Chamber either lift the *ex parte* classification or order the disclosure of a redacted version of a number of documents allegedly relevant to the preparation of the observations in the proceedings by the Defence;

NOTING rule 21(3) of the Rules of Procedure and Evidence of the Court (the "Rules");

NOTING that, without prejudice to the merits of the Defence's Request to the Presidency, neither rule 21(3) of the Rules, nor any other statutory text of the Court provide for a suspensive effect of a request under rule 21(3) on the proceedings where such request is filed;

NOTING the Defence's alternate request that access be granted to a number of documents, or to a redacted version thereof;

NOTING that, as a general rule, the Defence is granted access to all documents of the record which are not classified *ex parte*;

NOTING that one of the requested documents is currently classified as public⁵ and as such accessible;

NOTING that another one of the requested documents⁶ is currently available in redacted form;

NOTING that the mandate of the Defence in the current proceedings is strictly confined to the submission of observations on the admissibility of the Case;

⁵ ICC-02/04-13 (Decision to hold a hearing on the protection of victims and witnesses in connection with the Prosecutor's application for warrants of arrest and the Prosecutor's application dated 13 June 2005).

⁶ ICC-02/04-01/05-136 (Application for Unsealing of Warrants of Arrest Issued on 8 July 2005, and Other Related Relief).

NOTING that there are sections of some documents requested by the Defence which might be of immediate relevance to the task assigned to the Defence in the current proceedings;

NOTING that, in particular, that seems to be the case for paragraphs 1 to 3 (Section II, Background of the investigation) of the “Prosecutor’s amended application for warrants of arrest under article 58”, as well as for Exhibits A, B and C annexed thereto;⁷

NOTING that, accordingly, it is necessary that the Defence be granted prompt access to the aforementioned documents;

NOTING that the Defence also requests access to the transcripts of the hearings held in closed session before the Chamber on 16 June 2005, 21 June 2005, 3 October 2005, 6 October 2005 and 13 January 2006;

NOTING that the hearings held in closed session before the Chamber on 16 June 2005 and 21 June 2005 (the “June 2005 Hearings”) addressed issues relating to the protection of victims and witnesses;

NOTING that the transcripts of the June 2005 Hearings are classified as “confidential *ex parte*”⁸;

NOTING that the hearings held in closed session before the Chamber on 3 October 2005 and 6 October 2005 (the “October 2005 Hearings”) also addressed issues relating to the protection of victims and witnesses;

⁷ ICC-02/04-8-US-Exp; ICC-02/04-8-US-Exp-AnxA; ICC-02/04-8-US-Exp-AnxB; ICC-02/04-8-US-Exp-AnxC.

⁸ Transcript of the hearing held on 16 June 2005 (ICC-02/04-T-2-Conf-Exp); Transcript of the hearing held on 21 June 2005 (ICC-02/04-T-3-Conf-Exp).

NOTING that the transcripts of the October 2005 Hearings are currently classified as confidential⁹;

NOTING article 68(1) of the Statute of the Court (the "Statute");

CONSIDERING that granting the Defence unrestricted access to the transcripts of the October 2005 Hearings might result in jeopardizing the safety and security of victims and witnesses;

CONSIDERING that, accordingly, the transcripts of the October 2005 Hearings should be reclassified as "confidential *ex parte*" on an urgent basis;

CONSIDERING, however, that for the purposes of the fairness of the proceedings, it is appropriate that the Defence be provided with a redacted version of the transcripts of the June 2005 and the October 2005 Hearings, as well as of the other documents requested (in particular, the "Prosecutor's Submission of Proposed Forms of Warrants of Arrest and notification of amendment to application for warrants of arrest", dated 13 May 2005¹⁰; the "Prosecutor's Proposed redacted version of amended application for warrants of arrest under article 58", dated 18 May 2005¹¹ and the "Prosecutor's amended application for warrants of arrest under article 58", dated 18 May 2005¹²; collectively, the "Other Documents requested by the Defence"), from which all information which might be sensitive for the security and safety of victims and witnesses will have to be expunged;

NOTING that, in the context of the ongoing process of unsealing of the documents of the record of the situation in Uganda and of the Case, the Prosecutor has at

⁹ Transcript of the hearing held on 3 October 2005 (ICC-02/04-01/05-T-1-CONF-EN); Transcript of the hearing held on 6 October 2005 (ICC-02/04-01/05-T-2-CONF-EN).

¹⁰ ICC-02/04-5-US-Exp

¹¹ ICC-02/04-9-US-Exp

¹² ICC-02/04-8-US-Exp

different stages forwarded proposals for redactions to the transcripts of the June and the October Hearings and to the Other Documents requested by the Defence;

NOTING that, in the view of the Chamber, it is appropriate to provide the Prosecutor with an additional opportunity to forward a final proposal for redaction of the transcripts of the June and the October Hearings, as well as of the Other Documents requested by the Defence, in the light of the fact that the Defence is now involved in the proceedings, for review by the Chamber;

CONSIDERING that the aforementioned steps will ensure the fairness of the proceedings *vis-à-vis* the Defence;

NOTING the Defence submission that “a conditional stay or suspension is necessary in the present proceedings in order to firstly ensure that Counsel’s actions (in particular, the filing of observations concerning admissibility) do not irreversibly prejudice the ability of any of the four defendants to exercise their right to effectively challenge the admissibility at a later stage of the proceedings”;

CONSIDERING that the current proceedings were initiated by the Chamber on its own motion and, accordingly, are without prejudice to the rights of the accused to challenge the admissibility pursuant to article 19(2)(a) of the Statute;

CONSIDERING that, accordingly, a stay of the current proceedings is neither required nor appropriate under the present circumstances;

NOTING the Defence request that the Chamber “confirm” that the Defence is entitled to file a response to the observations of the Prosecutor and the victims under regulation 24(1) of the Regulations of the Court;

CONSIDERING that both the Prosecutor and the victims have yet to file their observations and that, accordingly, the request of the Defence is at this stage hypothetical;

NOTING that, in view of the above, the Chamber deems it appropriate to extend the deadline originally set for the submission of observations by all participants in the proceedings;

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Defence's request for stay or suspension of the proceedings;

DECIDES to re-classify the following documents as "confidential *ex parte*" on an urgent basis:

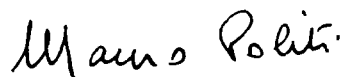
1. Transcript of the hearing held on 3 October 2005 (ICC-02/04-01/05-T-1-CONF-EN);
2. Transcript of the hearing held on 6 October 2005 (ICC-02/04-01/05-T-2-CONF-EN).

ORDERS the disclosure to the Defence of paragraphs 1 to 3 of the Prosecutor's application for Warrants of Arrest and of Exhibits A, B and C thereto and, accordingly, **ORDERS** the Prosecutor to file a document classified as confidential containing paragraphs 1 to 3 of his Amended Application for Warrants as well as Exhibits A, B and C annexed thereto, no later than Monday, 3 November 2008 at 12h00;

ORDERS the Prosecutor to submit, as a confidential *ex parte* Prosecutor document, final proposals for redaction of transcripts of the June and the October 2005 Hearings and of the Other Documents requested by the Defence no later than Friday, 7 November 2008;

GRANTS the Republic of Uganda, the Prosecutor, the Defence and the victims having communicated with the Court with respect to the Case until Tuesday, 18 November 2008 to submit observations in the proceedings.


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



Judge Mauro Politi
Presiding Judge



Judge Hans-Peter Kaul



Judge Ekaterina Trendafilova

Dated this Friday, 31 October 2008

At The Hague, The Netherlands.